MUNICIPAL SECURITIES
Cases and Materials

Supplemental Text
(2004 – 2005 Cases)

Office of Municipal Securities
Division of Market Regulation

U.S. Securities and Exchange Commission
Washington, DC

April 2006

Martha Haines
Office Chief

Mary Simpkins
Senior Special Counsel

This compilation was prepared by the Office of Municipal Securities in the Division of Market Regulation of the Securities and Exchange Commission and supplements the Municipal Securities Cases and Materials Text that was issued in December 2003. It contains the full text of certain Commission orders/opinions, administrative law judge decisions, and litigation releases, as well as federal court decisions, involving participants in municipal securities transactions. In some instances, the document is a determination of fact and law following a hearing; in others, findings made by the Commission in a settled proceeding in which the named party has neither admitted nor denied the findings, but consented to entry of the order. In still other instances, such as a complaint, the document may consist of allegations.

The compilation organizes enforcement actions by relevant participants to municipal securities transactions or topics. However, inclusion under a particular heading does not limit in any manner the relevance of the document to other participants or topics. While this compilation provides an extensive review of Commission activity in the municipal securities market, it does not purport to be exhaustive. It also does not include actions by private parties under the federal securities laws arising from municipal securities transactions, or Commission and private actions under the antifraud and other sections of the federal securities law arising from transactions not involving municipal securities. Such materials may also be useful to the reader.

The reader is encouraged to consult the web site maintained by the Commission at http://www.sec.gov for future releases.

Municipal Bond Participants

TABLE OF CONTENTS

ACCOUNTANTS/AUDITORS 166

SALES PRACTICES 172

ISSUERS

COMMISSION ORDERS – SETTLED ADMINISTRATIVE PROCEEDINGS

In the Matter of Neshannock Township School District, Securities Act Release No. 8411, Securities Exchange Act Release No. 49600, A.P. File No. 3-11461 (April 22, 2004).

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") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Neshannock Township School District (the "School District" or "Respondent").

II.

In anticipation of the institution of these proceedings, the School District 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, the School District consents to the entry of this Order Instituting Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

Respondent

1. The Neshannock Township School District ("School District") is a school district duly organized under the Pennsylvania School Code of 1949, as amended, and located in Lawrence County, Pennsylvania. The School District is governed by a board ("School Board") comprised of nine unpaid elected school directors. In June 2000, the School District conducted an offering of its $9,600,000 aggregate principal amount General Obligation Notes, Series of 2000 dated May 15, 2000 and maturing May 15, 2003 (the "Notes").

Summary

2. This matter involves the issuance of the Notes in June 2000 by the School District. The Notes were offered and sold based upon an opinion from counsel experienced in municipal finance matters ("Note Counsel") to the effect that interest on the Notes would be excluded from gross income for federal income tax purposes. However, a School District official executed an inaccurate certificate concerning the School District's plans

to expend Note proceeds. Moreover, the School District's disclosure document (the "Official Statement"), which referenced the certificate, did not disclose that the School District's proposed capital projects were in the exploratory stage, and did not disclose any resulting risk to the Notes' purported tax-exempt status. Consequently, the School District made untrue statements of material fact and omitted to state material facts in connection with the offer and sale of the Notes.

Facts

3. In early 2000, representatives of a broker-dealer located in Pittsburgh, Pennsylvania ("Underwriter") approached the School District and proposed that the School District issue up to $10 million of purportedly tax-exempt three year notes. According to the Underwriter, given then-current market conditions, if the School District issued $9.6 million of tax-exempt three year notes, and reinvested the proceeds in U.S. Treasury obligations, $225,000 would be available for capital improvements at closing, an amount equal to the excess investment earnings, net of costs of issuance. The School District employed Note Counsel to advise it on the issuance of the proposed Notes.

4. Although various School Board members perceived a general need to either renovate or add to an existing school building, the School Board had not conducted the demographic study needed to justify the project, had not formally hired an architect, and had not resolved amongst themselves issues such as whether renovating existing classrooms or constructing new classrooms would be more appropriate. Some School Board members were initially skeptical about the financing proposal, and raised questions with Note Counsel and the Underwriter. After discussions with both Note Counsel and the Underwriter, the School Board voted unanimously to issue the Notes.

5. As of the date of closing on the Notes, a School District official executed an inaccurate non-arbitrage certificate, drafted by Note Counsel, to the effect that, among other matters, the School District reasonably expected (i) within six months to enter into a binding obligation to expend at least five percent of the Note proceeds on the costs of capital projects, and (ii) within three years to expend eighty-five percent of the Note proceeds on capital projects. In fact, although the School District did intend at some point to proceed with the capital projects, the School District was not certain when it would enter into any binding obligations and had not planned to spend a significant portion of the Note proceeds within three years.

6. The School District offered its Notes to potential investors through its Official Statement, signed by a representative of the School District. The Official Statement represented that the net proceeds from the sale of the Notes would be used to provide funds for capital improvement projects of the School District. In fact, shortly after the closing on the Notes and upon the advice of the Underwriter, the School District invested the net Note proceeds in a Federal Home Loan Bank obligation maturing within sixty days of the maturity date for the Notes. Moreover, in a separate section entitled "Not Arbitrage Notes," the Official Statement highlighted the existence of the inaccurate non-arbitrage certificate described above. According to the Official Statement, the School

District would issue its certificate to the effect that the proceeds of the Notes would not be used in a manner that would cause the Notes to be or become "arbitrage notes," as described in Section 148 of the tax code. The Notes were offered at interest rates commensurate with their purported tax-exempt status. The Official Statement did not accurately describe the use of the Note proceeds, and did not disclose the resulting risk to the Notes' purported tax-exempt status.

7. The School District did not enter into any formal commitment to expend any portion of the Note proceeds within the six month time period, nor did it expend any portion of the net Note proceeds on any capital project. In November 2000, the Internal Revenue Service ("IRS") commenced an examination of the Notes. Shortly thereafter, the School District decided to redeem the Notes on May 15, 2001, the first call date. The redemption price for the Notes was paid from the proceeds of the Notes. In September 2001, the IRS issued a preliminary determination that the Notes were taxable arbitrage notes. In the IRS's view, the School District had issued the Notes without any reasonable expectation to expend the proceeds on capital projects. The School District and the IRS entered into a closing agreement that, among other things, provides for a payment by the School District to the IRS and preserves the tax-exempt status of the Notes. The closing agreement also provides that it is not to be construed as an admission by the School District that it acted wrongly with respect to the Notes.

Legal Discussion

8. The relevant tax code sections and Treasury regulations generally prohibit entities issuing tax-exempt securities from taking undue advantage of the resulting artificially low cost of capital. See IRC §148. In particular, absent an exemption from the general rule, issuers are not permitted to invest the proceeds of the offering at yields greater than the yield on the relevant tax-exempt debt, thereby generating what is known as arbitrage profit. Although entities that issue $10 million or less in securities a year in order to finance construction projects for public schools may be eligible for such an exemption, the issuer must reasonably expect, on the date of issuance of the tax-exempt securities, to: (i) incur within six months of the date of issuance a substantial binding obligation to a third party to expend at least five percent of the net sale proceeds on the capital project; (ii) proceed with due diligence to completion of the capital project; and (iii) expend at least eighty-five percent of the net sale proceeds on the capital project within three years of the date of issuance. Under the tax code, if these preconditions are not satisfied, and the issuer nevertheless earns arbitrage, then the securities are taxable retroactive to the date of issuance. When statements by issuers regarding reasonable expectations with respect to the amount and use of proceeds are not made in good faith, the relevant securities are deemed to be taxable arbitrage bonds. See Revenue Ruling 85-182, 1985-2 C.B. 39. A determination that purportedly tax-exempt securities were in fact taxable would significantly reduce the market value of those securities.

9. Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, prohibit misrepresentations or omissions of material facts in the offer or sale of securities and in connection with the purchase or sale of securities. Violations

of these provisions of the securities laws may be established by showing reckless conduct.

10. The Notes issued by the School District are securities under Section 2(1) of the Securities Act and Section 3(a)(10) of the Exchange Act. A substantial risk to the tax-exempt status of securities which have been sold as tax-exempt is a material item. *See In re County of Orange, California; Orange County Flood Control Dist.; and County of Orange, California Board of Supervisors, Exchange Act Release No. 36760*, 61 S.E.C. Docket 395 (January 24, 1996). The Official Statement for the Notes did not accurately describe the use of the Note proceeds, and did not disclose the resulting risk to the purported tax-exempt status of the Notes.

11. The School District was reckless in making misrepresentations of material facts and omitting to state material facts in the Official Statement concerning the use of the Note proceeds and the resulting risk to the purported tax-exempt status of the Notes.

12. As a result of the conduct described above, the Commission finds that the School District committed violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in the offer and sale of, and in connection with the purchase or sale of, the Notes.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions specified in the School District's Offer.
Accordingly, it is hereby ORDERED:

A. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, that the School District 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

B. IT IS FURTHERED ORDERED that the School District shall, within ten days of the entry of this Order, pay disgorgement and prejudgment interest in the total amount of $28,904.00 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, Stop 0-3, VA 22312; and (D) submitted under cover letter that identifies Neshannock Township School District as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Arthur Gabinet, District Administrator, Philadelphia District Office, Securities and Exchange Commission, Mellon Independence Center, Suite 2000, 701 Market Street, Philadelphia, PA 19106.

By the Commission.
Jonathan G. Katz
Secretary

In the Matter of Dauphin County General Authority, Securities Act Release No. 8415, A.P. File No. 3-11466 (April 26, 2004).

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 Dauphin County General Authority ("the Authority" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") that the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act ("Order"), as set forth below.

III.

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

Respondent

1. The Authority was incorporated in 1984 under the provisions of the Pennsylvania Municipality Authorities Act, and is based in Harrisburg, Pennsylvania. The Authority's five board members are appointed by the Dauphin County Commissioners.

Facts

2. The Authority publicly offered and sold $75.35 million of tax-exempt municipal securities in July 1998, consisting of $72.25 million Office and Parking Revenue Bonds, Series A of 1998, and $3.1 million Subordinated Office and Parking Revenue Bonds, Series B of 1998 (collectively, the "Bonds"), to finance the acquisition by the Authority of the Forum Place building in Harrisburg, Pennsylvania. The Bonds were not secured by a mortgage, and the sole source of funds to repay the Bonds were revenues derived from Forum Place office space or parking leases.

3. In connection with the Authority's offering of the Bonds, the Authority retained a financial advisor, bond counsel and underwriter. The Authority also had available to it a solicitor who provided legal advice to the Authority on this transaction, as well as other business matters conducted by the Authority.

4. The Authority offered the Bonds through a disclosure document known as the Official Statement, which, among other things, contained a description of the Bonds, Forum Place, and the existing Forum Place office space and parking leases. The Authority was responsible for the contents of the Official Statement.

5. The Authority received copies of a Preliminary Official Statement at the Authority's public meeting on July 8, 1998. At that meeting, the Authority members voted to approve the content of the Preliminary Official Statement and authorize the distribution of the final Official Statement. However, the Authority members read little, if any, of the Preliminary Official Statement prior to their vote.

6. The Official Statement was finalized by July 17, 1998. By the closing on July 31, 1998, retail investors had purchased over $1 million of the Bonds. Two hundred copies of the Authority's final Official Statement were printed for distribution to investors.

7. The Authority trusted its professional advisors, including its financial advisor, to use their professional knowledge and expertise in ensuring that the Bond transaction was properly structured, and that all documents, including the Official Statement, were complete, accurate, and contained all necessary disclosures.

8. At the July 8, 1998 meeting, the Authority sold $75.35 million of the Bonds to the underwriter. In addition, the Authority sold on that date $10,900,192.80 Subordinated Office and Parking Revenue Bonds, Series C of 1998 back to the seller of the Forum Place building.

Omission of Tenant Move

9. Prior to 1995, employees of the Pennsylvania Department of Transportation ("PennDOT") were located in the state-owned Transportation and Safety building ("T&S building"). The T&S building was partially destroyed in a 1994 fire, forcing the State to find alternative space for PennDOT employees until the T&S building could be either renovated or replaced. In 1995, the State entered into a lease for 299,000 square feet of space at Forum Place to house PennDOT's administrative offices. This lease expired in November 2001, and also contained a one-year renewal option.

10. In January 1996, the State announced plans to demolish the T&S building and construct a new building, known as the Keystone building, in its place for use by PennDOT, as well as other State agencies. The target date for completion of the Keystone building was late 2001. The State awarded contracts for demolition, construction management and building design for the Keystone building in September 1996. Site

preparation and demolition activities began at the T&S building in January 1997, and the building was imploded on August 1, 1998, the day after the Forum Place transaction closed.

11. When the Authority issued the Bonds in July 1998, over 90% of Forum Place was leased to various State agencies. At that time, PennDOT occupied over 80% of the office space at Forum Place and was responsible for approximately 60% of the building's total lease revenues. PennDOT's lease was specifically designed to permit PennDOT to move to the Keystone building as soon as that building was completed.

12. Various Authority Board members and professional advisors expressed concerns about the future use of PennDOT's space once it was vacated. In an effort to address the concerns, the financial advisor, the Authority's executive director and others met with the Secretary of the Pennsylvania Department of General Services ("DGS") on June 30, 1998, to determine the State's plans for continued use of Forum Place after PennDOT's departure. While the DGS Secretary conveyed to the group that he personally could see using Forum Place to accommodate displaced State employees in the event other aging state-owned buildings were renovated in the future, at that time no such renovation projects had been funded. The DGS Secretary stated that he could not commit to the State's future use of office space at Forum Place.

13. Despite the lack of any oral or written commitment from the DGS Secretary or any other State official, the financial advisor told the Authority at its July 8, 1998, meeting that the DGS Secretary could see using Forum Place for 20 years. None of the professional advisors to the Authority, including the financial advisor, solicitor and bond counsel, discussed with the Authority at any other time the need to disclose to investors in the Official Statement PennDOT's scheduled departure from Forum Place or that the Official Statement failed to make any such disclosure. The financial advisor reassured Authority board members shortly after the closing that Bondholders were taking the risk that the building would remain full.

14. Prior to the Authority's vote on July 8, 1998 on the content of the Official Statement, the Authority members knew that the State planned to construct the Keystone building and that PennDOT would leave Forum Place in 2001 for relocation to the Keystone building. The Preliminary Official Statement and the Official Statement failed to disclose PennDOT's move to the Keystone building. To the contrary, the Official Statement stated "[t]he office leases are scheduled to expire prior to the maturity of the Series 1998 Bonds; there is no commitment, requirement or guarantee that the Commonwealth will renew or extend any of the office leases," implying that there was at least a possibility that the State would renew or extend the leases.

15. PennDOT's move from Forum Place at or near the end of its lease was material to potential bondholders. Among other matters, PennDOT was responsible for more than 60% of the building's total revenues used to repay the Bonds. The State made no guarantee of continued use of Forum Place for any of the space occupied by PennDOT.

16. The Authority was limited in the tenants it could obtain to fill PennDOT's vacated space at Forum Place. In order to maintain the tax-exempt status of the Bonds, only 10% of the space at Forum Place could be leased to entities other than state or local government units or charitable organizations. Following PennDOT's move in November 2000 from Forum Place to the Keystone building, the Authority has been able to fill only a small portion of the vacated space.

17. Prospective investors generally were unaware of PennDOT's scheduled move to the Keystone building, and believed that PennDOT was likely to remain at Forum Place beyond the expiration of its lease. One original investor learned in September 1998 of PennDOT's planned move to the Keystone building in 2001 and, upon concluding that such information was material to the risk that the Bonds would be repaid, promptly sold its entire position.

18. The Authority has defaulted on payment of the Series B Bonds, has technically defaulted on the Series A Bonds, and has drawn down money from the debt service reserve fund to meet its scheduled debt service payments on those Bonds. Some institutional investors have valued the Series A Bonds at fifty cents on the dollar.

19. None of the current Authority board members served on the Authority at the time of the Bond offering in July 1998. The Authority has also replaced its financial advisor and solicitor.

20. Sections 17(a)(2) and (3) of the Securities Act prohibit misrepresentations or omissions of material facts in the offer or sale of any security. Scienter is not required to provide violations of Section 17(a)(2) or (3). Issuers of municipal securities are primarily responsible for the content of their disclosure documents. City of Miami, 2003, Securities Act Release No. 8213, SEC LEXIS 676, at *25 (March 21, 2003). Executing offering documents without first reading the documents to ascertain whether they were accurate may be reckless. City of Carthage, MS, et al., Securities Act Release No. 7554, 1998 SEC LEXIS 1431 (July 13, 1998).

21. As a result of the conduct described above, the Authority violated Sections 17(a)(2) and (3) of the Securities Act, which prohibit fraudulent conduct in the offer or sale of securities.

The Authority's Remedial Efforts

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

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanction specified in Respondent's Offer.

Accordingly, it is hereby ORDERED pursuant to Section 8A of the Securities Act, that the Respondent Authority cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and (3) of the Securities Act.

By the Commission.
Jonathan G. Katz
Secretary

Endnotes

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

In the Matter of Utah Educational Savings Plan Trust, Securities Act Release No. 8601, A.P. File No. 3-12004 (August 4, 2005).

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 Utah Educational Savings Plan Trust ("UESP" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 ("Order"), as set forth below.

III.

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

A. The UESP is an agency of the State of Utah organized to provide residents of Utah and other states the ability to participate in an educational savings plan pursuant to Section 529 of the Internal Revenue Code ("529 Plan"). The UESP is administered by the Utah State Board of Regents, acting in its capacity as the Utah Higher Education Assistance Authority. The UESP is not registered with the Commission and provides 529 Plan services under exemptions from registration pursuant to Section 3(a)(2) of the

Securities Act, Section 202(b) of the Investment Advisers Act of 1940 and Section 2(b) of the Investment Company Act of 1940.

B. The UESP provides 529 Plan services to persons who enter into participation agreements with it ("participants"). Those services include establishing and maintaining participant accounts, taking receipt of participant funds, and investing and making distributions of participant funds at the direction of participants.

C. The UESP charges participants administrative fees for the services it provides. The maximum fees the UESP may charge participants are established by Utah law.

D. The UESP's 529 Plan offers participants the ability to select among several investment options for the investment of their participant funds. Participants select the investment options according to personal preference, and the UESP effects investments on behalf of the participants in accordance with their selections.

E. The UESP invests participant funds by pooling those funds in omnibus accounts the UESP has established with outside fund managers ("Fund Managers"). The UESP invests pooled participant funds in various investment funds provided by the Fund Managers, according to the direction of the participants.

F. The UESP developed and maintains a separate, in-house database to record and account for individual participant account activity within the UESP system ("UESP System"). The UESP issues account statements to participants reflecting transactions and events in their individual accounts through the UESP System.

G. The UESP System which records activity in individual participant accounts is separate from the system which tracks the underlying investments made in the omnibus accounts established with the Fund Managers. Since at least 2002, when changes were made to the UESP System, additions to or withdrawals from the individual participant accounts have been recorded in the UESP System at least one day, and frequently more than one day, prior to the date funds were actually added to or withdrawn from the omnibus accounts. This timing difference resulted in gains and losses from month to month which, due to favorable market conditions, resulted in a net accumulation of $505,976 in gains in the omnibus accounts which were not allocated to specific participant accounts (the "Unallocated Gains").

H. At least by 2002, Dale C. Hatch ("Hatch'), the former director of the UESP, became aware of the existence of the Unallocated Gains. Hatch concealed this information from others at UESP. From in or about 2002 through July 2004, Hatch transferred the $505,976 in Unallocated Gains from the omnibus accounts into approximately 49 UESP participant accounts which he owned or controlled. Between December 2002 and May 2004, Hatch caused $85,500 to be disbursed to him from those accounts. When the UESP discovered Hatch's activity, his employment with the UESP was terminated and the Utah State Auditor conducted an investigation into Hatch's misappropriation, which was completed on September 24, 2004.

I. Hatch's misappropriation was made possible by weaknesses in UESP's system of internal controls, which he had implemented. Those weaknesses included: (1) providing certain UESP personnel unrestricted access to most functions on the UESP System; (2) inadequate separation of duties among personnel with access to the UESP System; (3) inadequate review of entries in the UESP System; and (4) flaws in the UESP System that allowed UESP personnel to alter prior transactions in the UESP System without an audit trail and to characterize transactions in the UESP System in a manner inconsistent with their actual nature.

J. Neither the timing discrepancies nor the existence of unallocated funds in the omnibus accounts was disclosed to participants or potential participants in UESP's marketing materials until February 1, 2005. The UESP "Fact Book", the 529 Plan's primary disclosure document, stated that "One-hundred percent of the earnings earned by the pool will be credited to individual participant accounts." The Unallocated Gains should thus be considered "earnings earned by the pool."

K. The UESP did not notify participants and prospective participants in the 529 Plan that the Fact Book should not be relied upon until January 4, 2005. The Fact Book remained on the UESP's Internet website until that date, when the UESP announced it was in the process of revising the Fact Book.

L. On July 7, 2004, the UESP issued a press release announcing Hatch's dismissal. That release stated "… an internal audit has uncovered some 'questionable transactions' by the Director of the Utah Educational Savings Plan Trust (UESP) involving administrative funds of the agency." In fact, the funds involved in Hatch's misappropriation were the Unallocated Gains contained in the omnibus accounts, and therefore, were funds of participants.

M. On September 24, 2004, another press release was issued, this time regarding the Utah State Auditor's report of investigation. Among other statements, that release stated: "As we announced on July 7, none of the money deposited by individual investors was misappropriated – no investors were harmed." In fact, based upon representations in the UESP's Fact Book, all of the funds Hatch had misappropriated were "earnings earned by the pool," and were therefore funds that should have been allocated to participant accounts. That press release also announced changes to UESP's internal controls designed to prevent a recurrence of Hatch's conduct by other UESP employees.

UESP's Misstatements and Omissions

N. In the offer and sale of interests in its 529 Plan, and to provide information to participants in its 529 Plan, the UESP has made statements of material fact to participants and prospective participants in the 529 Plan. These representations were made through offering materials, on its Internet website and in press releases.

O. While making statements described above, the UESP made untrue statements of material fact and omitted to state material facts. Those untrue statements and omissions include:

> 1. A representation that one hundred percent of the earnings earned by the UESP's investment pools would be credited to individual participant accounts;
>
> 2. A failure to disclose that participants could be liable for losses resulting from the manner by which the UESP transacts participant funds and accounts for participant transactions (or resulting from trades in the omnibus accounts);
>
> 3. A failure to disclose the manner by which participant transactions are effected and accounted for;
>
> 4. A failure to disclose the known and ongoing internal control weaknesses discovered when Hatch's conduct was investigated; and
>
> 5. A representation that the funds misappropriated by Hatch were "administrative funds" when in fact those funds should have been allocated to participant accounts.

P. As a result of the conduct described above, the UESP violated Section 17(a)(2) of the Securities Act, which makes it unlawful for any person in the offer or sale of any securities to: make untrue statements of a material fact or omit 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.

UESP's Remedial Efforts

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

IV.

Undertakings

Respondent has undertaken to:

A. Restore to the UESP omnibus accounts an amount equal to all funds known to have been misappropriated by Hatch;

B. Ensure that all unallocated funds will be distributed on a pro rata basis to participant account owners of record as of March 31, 2005;

C. Make changes to the UESP's disclosure documents to accurately and fully state the manner in which the UESP effects and accounts for participant transactions;

D. Retain an Independent Consultant who will assist the UESP in establishing internal controls that will address the weaknesses in the UESP System, the UESP's accounting and other procedures discussed above, and the UESP's disclosure; and

E. Provide written certification to the Commission that it has complied with the undertakings set forth above within fifteen (15) days after the issuance of this Order.

V.

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

Accordingly, it is hereby ORDERED that**:**

A. Respondent UESP cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act;

B. Respondent shall comply with the undertakings enumerated in Section IV above.

By the Commission.
Jonathan G. Katz
Secretary

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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.

PUBLIC OFFICIALS

INJUNCTIVE PROCEEDINGS

SEC v. Dale C. Hatch, Case Number: 2:05CV00654 PGC (C.D. Utah) (August 4, 2005) (complaint).

On August 4, 2005, the Securities and Exchange Commission filed a Complaint in the United States District Court for the District of Utah, against Dale C. Hatch (Hatch), the former director of the Utah Educational Savings Plan. The Complaint alleges that Hatch violated the securities laws by misappropriating funds that should have been allocated to the accounts of participants who had placed their money with the UESP. The Complaint also alleges that Hatch established secret accounts and transferred over $500,000 in unallocated participant funds into Hatch's nominee accounts. Finally, the Complaint alleges that Hatch transferred approximately $85,000 from the secret nominee accounts into personal bank accounts for his own use.

The Complaint alleges that Hatch violated the antifraud provisions of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. The Commission seeks an injunction from future antifraud violations and civil money penalties.

OBLIGATED PERSONS

INJUNCTIVE PROCEEDINGS

SEC v. Robert A. Kasirer, et al., Civ. Action No. 04-C-4340 (N.D. Ill.), Litigation Release No. 18774 (July 1, 2004) (complaint).

The United States Securities and Exchange Commission ("Commission") announced that it filed a complaint in the United States District Court for the Northern District of Illinois on June 29 against Robert A. Kasirer, Jerold V. Goldstein, Joel T. Boehm, James E. Iverson and Victor P. Dhooge. The Complaint alleges that the Defendants, acting in concert, fraudulently offered and sold over $131 million of municipal revenue bonds to members of the public.

The SEC's Complaint alleges that the Defendants offered and sold the bonds in question through a series of eleven offerings underwritten by the now-defunct, Minnesota firm of Miller & Schroeder Financial, Inc. ("Miller & Schroeder"). The Complaint alleges that the Defendants sold the bonds to more than 1,800 investors residing in thirty-six states. The Complaint alleges that the purported purpose of each bond offering was to finance the development of a specified healthcare facility by Heritage Housing Development, Inc., a company effectively controlled by Defendant Kasirer ("Heritage"). The Complaint alleges that all together, there were ten Heritage facilities located in the states of Texas, Florida, Illinois and California. The Complaint alleges that the Defendants represented in offering documents that the proceeds from each bond offering would be used to finance one specific healthcare facility. The Complaint alleges that in fact, however, the costs of developing the Heritage facilities, including payments to Defendant Kasirer and some of his family members, outstripped the proceeds from the facilities' respective bond offering. The Complaint alleges that the Defendants covered the resulting cash shortfalls by operating a type of Ponzi scheme, commingling bond proceeds and diverting bond proceeds from more recent offerings to pay the expenses of earlier projects. The Complaint alleges that this diversion of bond proceeds from one project to another went on for three years. The Complaint alleges that beginning in February 2000, the Heritage facilities ran out of money and defaulted on their obligations to bondholders. Presently, all the Heritage facilities are in default on their bonds.

The Complaint alleges that Defendants Kasirer and Goldstein controlled Heritage and personally directed the commingling and misapplication of bond proceeds and that

Defendants Iverson and Dhooge, representatives of Miller & Schroeder, managed the underwriting of the various bond offerings, despite their knowledge that bond proceeds were being wrongfully commingled and diverted. The Complaint alleges that Defendant Boehm, an attorney who acted as counsel for Miller & Schroeder in the bond offerings, issued favorable legal opinions despite his knowledge that bond proceeds were being wrongfully commingled and diverted.

The Commission seeks the entry of permanent injunctions, disgorgement of any ill-gotten gains plus prejudgment interest and civil penalties against Kasirer, Goldstein, Boehm, Iverson and Dhooge.

SEC v. Mojave Valley Resort, Inc. and Mark A. Temple, Case No. ED CV 04-1061 VAP (C.D. Cal.), Litigation Release No. 18852 (August 25, 2004).

The Securities and Exchange Commission today announced that it has brought settled fraud charges against Palm Springs developer Mojave Valley Resort, Inc. ("MVRI") and co-owner Mark A. Temple, stemming from a municipal bond offering conducted to finance a housing and casino project in Nevada. The complaint alleges that MVRI and Temple defrauded investors by falsely claiming that the bonds were protected by a security interest in the property being developed, when in fact no such security interest existed. Without admitting or denying the allegations, MVRI and Temple have agreed to settle the enforcement proceeding by paying $40,001 in disgorgement and penalties and by consenting to a permanent injunction against future securities law violations.

According to the Commission's civil complaint, MVRI is the developer of a casino and housing project on Indian land owned by the Fort Mojave Indian Tribe near Laughlin, Nevada. MVRI financed the development project through a $12.75 million bond offering in late 1999. The Commission charges that MVRI and Temple falsely stated in the offering materials that the bonds being issued to investors were secured by deeds of trust on the Tribal property. In actuality, MVRI's lease with the Tribe provided that no such security interest could be given absent approval from the Tribe and the United States Bureau of Indian Affairs. MVRI and Temple had failed to obtain such authorization, and, as a result, the offering materials were false and investors had no security interest for the bonds. MVRI subsequently defaulted on the bonds, and investors are owed approximately $11 million.

The Commission's lawsuit, which is being brought in federal district court in the Central District of California, charges MVRI and Temple with violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933. Under the settlement, MVRI and Temple will be enjoined by the district court from violating these statutory provisions, and will pay disgorgement of $1 and a civil penalty of $40,000.

SEC v. Manoucher Sarbaz, et al., Civ. Action No. CV 03-881 CJC (C.D. Cal.), Litigation Release No. 18898 (September 24, 2004).

The Securities and Exchange Commission announced that on September 23, 2004, United States District Judge Cormac J. Carney in Los Angeles found a Southern California real estate developer and its manager committed securities fraud and ordered them to pay a total of $5.9 million in penalties. The Court found that the developer, Pacific Golf Community Development LLC ("Pacific Golf"), and its manager, Manoucher Sarbaz, misled purchasers of municipal bonds used to finance a portion of the planned Rancho Lucerne housing development and golf course in Lucerne Valley, California.

In a 24-page decision, Judge Carney found that Pacific Golf and Sarbaz knew that land purchased with the bond proceed and pledged as security for repayment was not worth $28,000 per acre — the amount stated in documents offering the bonds to the public. The Court found that various companies controlled by Sarbaz acquired the land for an average price of $1,812 per acre. The Court further found that Pacific Golf and Sarbaz had no reasonable basis for their projections that they could sell hundreds of lots within the development each year. The Court observed that, to date, not a single lot had been sold nor had the golf course been completed. The Court found that more than $53 million in bonds were in default.

The Court entered a judgment ordering Pacific Golf to pay a civil penalty of $4,900,000 and ordering Sarbaz to pay a civil penalty of $980,000. The Court also issued an injunction that ordered both parties to refrain from fraudulent activities in the future. A third defendant in the action, appraiser Lee Andrew Hill, settled with the Commission prior to trial. As part of the settlement, the Court ordered Hill to refrain from future securities fraud.

The case against Pacific Golf and Sarbaz was the second action brought by the Commission concerning municipal bonds sold for the Rancho Lucerne development. In December 2000, the Commission sued the an investment banker, David Fitzgerald, and the underwriter of the Rancho Lucerne bond offerings, Pacific Genesis Group, for misrepresentations to investors purchasing the bonds. Judge Charles Breyer found the defendants liable and ordered Fitzgerald and the firm to refund the proceeds of a $13 million bond offering. Later, the Court entered judgments against Fitzgerald and Pacific Genesis pursuant to settlements. See L.R. 16907, L.R. 17432.

In the case against Pacific Golf and Sarbaz, the Court found violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5.

SEC v. Bruce M. Perry and M. Brooks Turkel, Civ. Action No. 05-21525-CIV-Martinez (S.D. Fla.), Litigation Release No. 19256 (June 8, 2005) (complaint).

The United States Securities and Exchange Commission ("Commission") announced today that it filed a complaint charging Bruce M. Perry ("Perry") and M. Brooks Turkel ("Turkel") with securities fraud in connection with the offer and sale of municipal bonds issued in May 2001, by Mount Sinai Medical Center of Florida, Inc. ("Mount Sinai" or the "hospital"), a hospital based in Miami Beach, Florida. Perry and Turkel were senior officers of Mount Sinai. Specifically, Perry was the hospital's chief executive officer from January 1999 through October 2001, and Turkel was its chief financial officer from December 1999 through July 2001 and then its chief planning officer from July 2001 until October 2001.

The complaint alleges that Perry and Turkel made material misrepresentations and omissions in the Official Statements and other documents disseminated to investors in connection with a series of three bonds issued by Mount Sinai in May 2001, through the City of Miami Beach Health Facilities Authority, totaling approximately $184 million (the "2001 bond offerings"). Specifically, the complaint alleges that Mount Sinai, through Perry and Turkel, made material misrepresentations and omissions in connection with the 2001 bond offerings because it failed to disclose in the Official Statements that the hospital was experiencing a significant deterioration in its cash position, and was in the midst of a severe liquidity problem. Further, the complaint alleges that the Official Statements misrepresented that eight of Mount Sinai's high volume managed care contracts had been renegotiated, and that the renegotiated contracts were expected to contribute approximately $10 million annually of additional revenue for the hospital beginning in 2001. According to the complaint, the Official Statements also contained baseless projections of the hospital's anticipated revenue.

As alleged in the complaint, Perry and Turkel re-iterated the above misrepresentations to institutional investors and bond rating agencies prior to the 2001 bond issue. Moreover, the complaint alleges that Mount Sinai, through Perry and Turkel, made additional misrepresentations and omissions in its second quarter report for the quarter ended June 30, 2001, which was filed with various repositories in accordance with the terms of the bond covenants.

The complaint alleges that, as a result of the foregoing, Perry and Turkel violated Section 17(a) of the Securities Act of 1933 ("Securities Act"), Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 thereunder. The Commission seeks a permanent injunction against Perry and the imposition of civil money penalties against Perry and Turkel. Turkel has consented, without admitting or denying, to the entry of a Final Judgment imposing a civil money penalty of $35,000 against him.
In a separate administrative action, the Commission issued an Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing Cease-and-Desist Order ("Order") against Mount Sinai, Turkel and another former senior officer of Mount Sinai.

The Order, which makes findings based on the same conduct alleged in the Commission's complaint against Perry and Turkel, orders Mount Sinai, Turkel and the other former senior officer to each 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. Mount Sinai, Turkel and the other former senior officer each consented to the issuance of the Order without admitting or denying any of its findings.

COMMISSION ORDERS – SETTLED ADMINISTRATIVE PROCEEDINGS

In the Matter of Mount Sinai Medical Center of Florida, Inc., M. Brooks Turkel and Harvey W. Smith, Securities Act Release No. 8580, Securities Exchange Act Release No. 51797, Accounting and Auditing Enforcement Release No. 2254, A.P. File No. 3-11944 (June 7, 2005).

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") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Mount Sinai Medical Center of Florida, Inc. ("Mount Sinai"), M. Brooks Turkel ("Turkel") and Harvey W. Smith ("Smith") (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, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

Respondents

1. Respondent Mount Sinai is a not-for-profit corporation located in Miami Beach, Florida, which operates a multi-campus hospital, including a 701 bed teaching and research hospital and various satellite outpatient facilities and physician offices.

2. Respondent Turkel, age 40, was Chief Financial Officer ("CFO") of Mount Sinai from January 1999 through mid-July 2001, and served as Mount Sinai's chief planning officer from mid-July 2001 until he was terminated in October 2001.

3. Respondent Smith, age 58, served as chief operating officer ("COO") of Mount Sinai from May 2000 until he was administratively suspended in December 2001 by Mount Sinai and officially terminated in January 2002. Smith, as COO, was responsible for oversight of the CFO in Mt. Sinai's administrative line of authority.

Mount Sinai's 2001 Bond Offering

4. On May 24, 2001, Mount Sinai, through the City of Miami Beach Health Facilities Authority (the "Authority"), issued three series of municipal bonds (Series 2001A, Series 2001B and Series 2001C) totaling approximately $184 million (the "2001 bonds"). The purpose of the issuance was primarily to re-finance Mount Sinai's acquisition of the Miami Heart Institute and Medical Center, purchased by Mount Sinai in June 2000. The 2001 bonds were limited obligations of the Authority payable solely from payments made by Mount Sinai pursuant to a loan agreement between Mount Sinai and the Authority. The bonds were rated "BBB," "Baa3," and "BBB+" by Standard & Poor's ("S&P"), Moody's Investors Service, Inc. ("Moody's") and Fitch, Inc. ("Fitch"), respectively.

5. The Official Statements to the bond offerings contained Mount Sinai's audited financial statements for the years 1999 and 2000. The Official Statements also included Mount Sinai's forecasted financial statements, as of March 30, 2001, for the years 2001 through 2003. The forecasted financial statements projected operating losses totaling $7.5 million for fiscal year 2001, losses totaling $2.6 million for fiscal year 2002, and operating income of $2.5 million for fiscal year 2003.

6. The Official Statements contained an anti-fraud certificate, signed by Mount Sinai's former Chief Executive Officer ("CEO"), wherein the CEO certified on behalf of Mount Sinai that: (i) the statements and information contained in the Official Statement were true, correct and complete in all material respects; (ii) the Official Statement did not contain any untrue or incorrect statements or omissions of material fact; and (iii) Mount Sinai's financial condition had not materially or adversely changed since December 31, 2000.

7. In addition, the Official Statements contained another certificate, executed by Turkel, in which he certified to Mount Sinai's bond counsel that the Official Statements did not contain any untrue statements or omissions of a material fact.

8. The terms of the bond covenants required Mount Sinai to file quarterly reports with various repositories, which would then be available for review by current and prospective investors. Accordingly, on August 24, 2001, Mount Sinai filed its second quarter report for the quarter ended June 30, 2001. The second quarter report was signed by Turkel.

Misrepresentations and Omissions in the Official Statement

9. Mount Sinai, through Turkel, Smith and other former senior management, failed to disclose the hospital's deteriorating financial condition at the time of the offering. Specifically, Mount Sinai failed to disclose in the Official Statements that the hospital was experiencing a significant deterioration in its cash position and was in the midst of a severe liquidity problem. Indeed, Mount Sinai's financial condition began to materially decline after it underwent a computer conversion in December 2000 to update its patient accounting system within its business office. The computer conversion gave rise to major problems that substantially impacted Mount Sinai's billing and collection process. For example, Mount Sinai experienced substantial delays in billings and a significant rise in failed billings to third party payors. In addition, the hospital's patient accounts receivable grew substantially -- increasing from approximately $70 million at the end of December 2000 to over $90 million by June 30, 2001. As a direct result of its billing and collections problems, Mount Sinai's cash position began to materially worsen after December 2000 and continued to worsen through at least the time of the issuance of the 2001 bonds in May.

10. In addition, Mount Sinai, at the direction of Turkel and other former senior management, falsely represented in the Official Statements that eight of its high volume managed care contracts had been renegotiated, and that the renegotiated contracts were expected to contribute approximately $10 million of additional revenue for the hospital on an annual basis beginning in 2001. In fact, at the time of the issuance of the 2001 bonds, only three of the eight major contracts had actually been renegotiated as claimed.

11. Moreover, the financial statements forecasting the hospital's anticipated revenue through the end of 2003, which were included in the Official Statements, were fraudulent. The forecasted financial statements projected operating losses for 2001 and 2002 totaling $7.5 million and $2.6 million, respectively, and a relatively small surplus in 2003. The forecasted financials included net patient service revenue and accounts receivable projections that were calculated using Mount Sinai's 2001 contractual deduction rate.[2]

That contractual deduction rate, however, was fraudulent because it was partly based on the false notion that Mount Sinai had renegotiated all of its eight largest managed care contracts.

12. Given the facts known by Mount Sinai's former senior management, the representations made by its CEO and Turkel in the anti-fraud certificates accompanying the Official Statements were false and misleading. The representations in the anti-fraud certificates that the Official Statements did not contain any untrue statements or omissions of a material fact, and that Mount Sinai's financial condition had not materially or adversely changed since fiscal year 2000, were clearly contradicted by Mount Sinai's deteriorating financial situation, the false statements made regarding the renegotiation of the managed care contracts and the false projections included in the forecasted financial statements.

False and Misleading Statements to Institutional Investors and Bond Rating Agencies

13. Mount Sinai, through Turkel, Smith and other former senior management, made materially false and misleading statements during a presentation given to prospective institutional bond investors on April 30, 2001. During that presentation, Mount Sinai represented that it had been successful in renegotiating all eight of its largest managed care contracts and that the renegotiated rates would result in a $10 million improvement to revenue beginning in 2001. In fact, as mentioned above, only three of the contracts had been renegotiated. Mount Sinai, also provided institutional investors with baseless projections concerning the hospital's net patient service revenue and accounts receivable.

14. In March and April 2001, Mount Sinai, through Turkel, Smith and other former senior management, gave similar presentations to certain bond rating agencies during which Mount Sinai again falsely represented that it had renegotiated all eight of its largest managed care contracts resulting in an annual improvement in revenues of $10 million.

Misrepresentations and Omissions in Mount Sinai's Second Quarter Report for the Period Ended June 30, 2001

15. Mount Sinai's second quarter report for the period ended June 30, 2001, reflected a $5 million write-off in accounts receivable Mount Sinai recorded in June 2001. Although the second quarter report discussed the $5 million write-off, Mount Sinai failed to adequately disclose in the report the circumstances requiring the write-off. By the time of the filing of the second quarter report, Turkel, Smith and other senior management at Mount Sinai knew that the managed care contracts had not been renegotiated and that Mount Sinai may have been using a contractual deduction rate for recording net patient service revenue that was too low. Mount Sinai nevertheless failed to disclose this information to investors in its second quarter report.

16. Mount Sinai also failed to disclose in the second quarter report that by the time of the filing of that report, Turkel, Smith and other senior management knew additional writeoffs of accounts receivable would be necessary, and that those write-offs could be as high as $20 million. Mount Sinai ultimately recorded a $21 million reduction in net patient service revenue and accounts receivable in September 2001, which was mostly the result of the improper contractual deduction rate used by Mount Sinai for the first nine months of 2001.

17. Additionally, Mount Sinai failed to disclose in the second quarterly report that, at the time of its filing, Mount Sinai continued to struggle with its cash flow situation. Finally, the report failed to disclose the fact that an accounting firm began running Mount Sinai's business office because of the problems with its billing and collection process.

Knowledge of Mount Sinai's Former Senior Management

18. Turkel, Smith and other former senior management at Mount Sinai were aware that Mount Sinai's cash position had materially declined prior to the bond offering, and that the cash situation at the hospital continued to be a major concern up until the date of the bond offering. They nevertheless failed to disclose this cash crisis or update its financial information. To the contrary, Mount Sinai's CEO falsely certified that Mount Sinai's financial condition had not materially or adversely changed since December 31, 2000. As Mount Sinai's CFO, Turkel further falsely certified to bond counsel that the Official Statement did not contain any untrue statements or omissions of a material fact. In light of the severe cash crisis and growing accounts receivable problem that they knew the hospital was experiencing before the bond offering, these certifications were plainly false.

19. Additionally, Turkel, Smith and other former senior management knew, or were reckless in not knowing, that prior to the bond offering Mount Sinai had only renegotiated three of its major managed care contracts and that the hospital would not receive an additional $10 million in revenue for fiscal year 2001. They also knew, or were reckless in not knowing, that the net patient service revenue and accounts receivable projections contained in the Official Statement and provided to investors and bond rating agencies during presentations were baseless because they were based on a false contractual deduction rate.

20. Moreover, by the time Mount Sinai's second quarter report was filed in August 2001, Turkel, Smith and other former senior management also knew, or were reckless in not knowing, that Mount Sinai was using an improper contractual deduction rate for recording net patient service revenue, and that substantial write-offs – far in excess of the $5 million recorded in the second quarter report – would be necessary. Yet Mount Sinai failed to disclose any of this information in its second quarter report.

Violations

21. As a result of the conduct described above, Mount Sinai violated Section 17(a) of the Securities Act, which prohibits fraudulent conduct in the offer or sale of securities.

22. Also as a result of the conduct described above, Mount Sinai violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities.

23. As a result of the conduct described above, Turkel violated, and caused Mount Sinai's violations of, Section 17(a) of the Securities Act, which prohibits fraudulent conduct in the offer or sale of securities.

24. As a result of the conduct described above, Turkel violated, and caused

Mount Sinai's violations of, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities.

25. As a result of the conduct described above, Smith violated, and caused Mount Sinai's violations of, Section 17(a) of the Securities Act, which prohibits fraudulent conduct in the offer or sale of securities.

26. As a result of the conduct described above, Smith violated, and caused Mount Sinai's violations of, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities.

IV.

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

Accordingly, it is hereby ORDERED that**:**

A. Respondent Mount Sinai cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder.

B. Respondent Turkel cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder.

C. Respondent Smith cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder.

By the Commission.
Jonathan G. Katz
Secretary

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

[2] Contractual deductions are an estimate of the deductions that the hospital expects will not be paid based on contracts or other arrangements with its third party payors. Mount Sinai recorded net patient service revenue based on a percentage number that reflected the average of all of the hospital's contractual deductions with its third party payors. This percentage is called the "contractual deduction rate."

UNDERWRITERS

INJUNCTIVE PROCEEDINGS

SEC v. Robert A. Kasirer, et al., Civ. Action No. 04-C-4340 (N.D. Ill.), Litigation Release No. 18774 (July 1, 2004) (complaint).
See "OBLIGATED PERSONS" section.

SEC v. Robert Kasirer, et al., Civ. Action No. 04-CV-04340 (N.D. Ill.), Litigation Release No. 19131 (March 11, 2005).

The Securities and Exchange Commission (Commission) announced that on March 3, 2005, the Honorable Matthew F. Kennelly, Judge in the United States District Court for the Northern District of Illinois, issued final judgments against Defendants Joel T. Boehm (Boehm), James E. Iverson (Iverson) and Victor P. Dhooge (Dhooge), which: (1) permanently enjoin Boehm, Iverson and Dhooge from violating Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder; (2) order Boehm to pay disgorgement in the amount of $152,500, plus prejudgment interest thereon in the amount of $62,902.64, and do not impose a civil penalty and waive payment of all but $24,167.99 of the disgorgement and prejudgment interest ordered based on Boehm's representations to the Commission regarding his financial condition; (3) order Iverson to pay disgorgement in the amount of $109,000, plus prejudgment interest thereon in the amount of $41,941.09, impose a civil penalty of $75,000, and do not require payment of the $150,941.09 of disgorgement and prejudgment interest ordered against Iverson because that obligation is considered satisfied by payments exceeding $150,941.09 that Iverson has previously made from his own funds to settle related investor actions; and (4) order Dhooge to pay disgorgement in the amount of $295,194, plus prejudgment interest thereon in the amount of $132,212.02, for a total of $427,406.02, and find this obligation to have been satisfied in part by payments totaling $140,000.00 that Dhooge has previously made from his own funds to settle related investor actions, leaving $287,406.02 of the disgorgement and prejudgment interest ordered against Dhooge unsatisfied, and do not impose a civil penalty and waive payment of all but $120,000 of the remaining disgorgement and prejudgment interest amount against Dhooge based on his representations to the Commission regarding his financial condition. Boehm, Iverson and Dhooge consented to the entry of the final judgments without admitting or denying the allegations contained in the Commission's Complaint.

The Commission's Complaint alleged that from February 1996 through August 1999, Boehm, Iverson, Dhooge and others (Defendants), acting in concert, fraudulently offered and sold over $131 million of municipal revenue bonds to members of the public to finance the development of specified healthcare facilities by Heritage Housing Development, Inc. The Defendants offered and sold the bonds in question through a series of eleven offerings underwritten by the now-defunct Minnesota broker-dealer firm of Miller & Schroeder Financial, Inc. (Miller & Schroeder). The Defendants sold the bonds to more than 1,800 investors residing in 36 States. According to the Complaint, Iverson and Dhooge, registered representatives of Miller & Schroeder, managed the underwriting of the various bond offerings, despite their knowledge that bond proceeds were being wrongfully commingled and diverted. Boehm, an attorney who acted as counsel for Miller & Schroeder in the bond offerings, issued favorable legal opinions despite his knowledge that bond proceeds were being wrongfully commingled and diverted. The Complaint alleged that Boehm, Iverson and Dhooge, acting knowingly or with a reckless disregard for the truth, all took part in writing, reviewing, or disseminating bond prospectuses which misled investors and that all the Defendants personally profited from the scheme.

This case is still pending against Defendants Robert A. Kasirer and Jerold V. Goldstein and several relief defendants.

ADMINISTRATIVE PROCEEDINGS – COMMISSION DECISIONS

In the Matter of Public Finance Consultants, Inc., Robert D. Fowler, Dolphin and Bradbury, Incorporated, and Robert J. Bradbury, A.P. File No. 3-11465, Initial Decision Release No. 274 (February 25, 2005) (initial decision of administrative law judge).

The Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) on April 26, 2004, pursuant to Section 8A of the Securities Act of 1933 (Securities Act) and Sections 15(b), 15B, and 21C of the Securities Exchange Act of 1934 (Exchange Act).

The proceeding arises out of the issuance of $75.35 million in long-term, non-taxable municipal bonds by the Dauphin County General Authority (DCGA or Authority), a non-party, to finance the purchase of Forum Place, an office building and parking lot complex in Harrisburg, Pennsylvania, in July 1998. According to the OIP, the Official Statement (OS) and the financial projections used to market the bonds to prospective investors were misleading and omitted to state material facts about Forum Place, specifically, the departure of a major tenant.

Public Finance Consultants, Inc. (PFC), of Harrisburg, Robert D. Fowler (Fowler), PFC's President, Dolphin and Bradbury, Inc. (D&B), a broker and dealer located in Philadelphia, Pennsylvania, and Robert J. Bradbury (Bradbury), D&B's chief executive officer, are named as Respondents. PFC and Fowler served as financial advisors to DCGA, and D&B and Bradbury served as the underwriter for the Forum Place bond transaction.

The OIP alleges that the Authority violated, and PFC and Fowler caused the Authority's violations of, Sections 17(a)(2) and 17(a)(3) of the Securities Act.[1] The OIP also asserts that D&B and Bradbury willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and Municipal Securities Rulemaking Board Rule G-17 (MSRB Rule G-17). Finally, the OIP claims that D&B

willfully violated, and Bradbury willfully aided and abetted and caused D&B's violations of, Section 15B(c)(1) of the Exchange Act.

The Commission's Division of Enforcement (Division) seeks the imposition of cease-and-desist orders, disgorgement of ill-gotten gains, and prejudgment interest against all Respondents. In addition, the Division requests civil monetary penalties against D&B and Bradbury. Respondents maintain that all charges should be dismissed.

I held a seven-day hearing in Philadelphia during August 2004.[2] The parties have filed post-hearing pleadings and the matter is ready for decision.[3] I base my findings and conclusions on the entire record and on the demeanor of the witnesses who testified at the hearing. I have applied "preponderance of the evidence" as the standard of proof. *See Steadman v. SEC*, 450 U.S. 91, 97-104 (1981). I have considered and rejected all arguments, proposed findings, and proposed conclusions that are inconsistent with this decision.

FINDINGS OF FACT

A. Background.

Respondents

PFC is a financial advisory business incorporated in Pennsylvania in 1986 (PFC Answer). The firm is not registered with the Commission in any capacity (PFC Answer). PFC was a financial advisor on approximately two-thirds of DCGA's bond transactions between 1986 and June 1, 2000 (PFC Answer; Tr. 879; DX 1). DCGA did not use a financial advisor on some of the remaining one-third of its bond transactions (Tr. 879). PFC served as a financial advisor to DCGA in connection with the Forum Place bond transaction in 1998 (PFC Answer). The relationship between PFC and DCGA was based on a handshake (Tr. 973).

Fowler, age fifty-one, is a founder and President of PFC (PFC Answer; DX 2). He earned a B.A. degree in Economics from the University of Virginia in 1974 and has worked in the financial services industry for twenty-eight years (PFC Answer; Tr. 864). In addition to owning PFC, Fowler operates a second firm, Program Administration Services, Inc. (PASI), which performs program administration services for municipal bond issuers (Tr. 864-65). Before starting his own firms, Fowler worked as an investment banker for approximately ten years (Tr. 866). Fowler resides in Hummelstown, Pennsylvania (Tr. 864).

D&B is an investment banking firm located in Philadelphia (D&B Answer; Tr. 801-02). It specializes in the origination and distribution of non-taxable bonds issued by municipalities and municipal authorities within the Commonwealth of Pennsylvania (Commonwealth) (D&B Answer; RX 28). D&B has fourteen employees (Tr. 802). It has been registered with the Commission as a broker and dealer since 1986 (D&B Answer). Before 1986, D&B operated as a partnership (RX 28). D&B had worked closely with DCGA since 1989 as underwriter on several successful bond issuances (D&B Answer;

Tr. 745). DCGA retained D&B in 1998 to underwrite the bond issue for the purchase of Forum Place (D&B Answer).

Bradbury, age fifty-six, owns 38% of D&B and serves as the firm's chief executive officer (D&B Answer; Tr. 665, 667). He has been licensed by the National Association of Securities Dealers since 1969 (D&B Answer). Bradbury has approximately thirty-five years of experience in underwriting municipal bonds and performing related broker-dealer activities (D&B Answer). He earned a B.S. degree from La Salle University in 1969 and resides in Chadds Ford, Pennsylvania (Tr. 661).

Dauphin County, Pennsylvania

Dauphin County is located in south-central Pennsylvania. It has a population of 251,798 (2000 census). Dauphin County is governed by a three-member Board of Commissioners (Tr. 1303). The largest employer in Dauphin County is the Commonwealth (DX 4 at PW 248, 252-54). Harrisburg is the county seat of Dauphin County and the capital of Pennsylvania (DX 4 at PW 248). Harrisburg has a population of 48,950 (2000 census). *See Pennsylvania State Data Center*, http://pasdc.hbg.psu.edu.

DCGA

DCGA is a municipal authority organized under the Municipality Authorities Act of 1945.[4] It was incorporated in 1984 and its office is in Harrisburg (DX 16 at 14). The governing body of DCGA is a Board consisting of five members appointed by the Commissioners of Dauphin County to five-year staggered terms (Tr. 826-27; DX 16 at 14). During 1998, DCGA employed a full-time executive director, an administrative assistant/secretary, and a bookkeeper (Tr. 13). Gregory J. Ricci (Ricci) was chairman of DCGA's Board and Sidney A. Reese (Reese) was DCGA's executive director while the Forum Place offering was under consideration (DX 16 at 15).

DCGA was an active issuer of municipal bonds (Tr. 933, 1516-17; DX 1). It was especially aggressive during 1997 and 1998, when interest rates were low (Tr. 937-38; DX 1). The Authority met on a monthly basis from 1986 to 1996, and on a weekly basis during 1997 and 1998 (Tr. 11-12, 49-50; DX 16 at 14, DX 18 at 12). DCGA was the second largest bond issuer in Pennsylvania during 1997, ranking only behind the Commonwealth itself (RX 44, Minutes of Mar. 17, 1998, Meeting at 3) (discussing Daniel Kruger, "1997 Was A Very Good Year for the Region's Large Issuers," 323 *Bond Buyer* 26 (Feb. 9, 1998)). DCGA continued to be an active issuer until 2000 (RX 41 ¶¶ 181, 536).

Fowler and the Authority shared an expansive understanding of the Municipality Authorities Act: project financing for public purposes was permissible if it benefited any residents of the Commonwealth; the project did not necessarily have to be located in Dauphin County or even benefit the residents of Dauphin County (Tr. 10, 881-84, 928, 1306, 1401). As a result, several of DCGA's bond issues involved financing for projects outside of Dauphin County (DX 1).[5] These included a $64 million offering for a Hyatt

Regency Hotel at Pittsburgh International Airport, issuances for golf courses in other counties, and financing for colleges, hospitals, and nursing homes throughout Pennsylvania (Tr. 884-86, 927-28, 936-37, 1401; DX 1). These project financings were so wide-ranging that the Authority even proposed to change its name to reflect the perceived breadth of its mission (RX 44, Minutes of Aug. 18, 1998, Meeting at 8 (adopting Resolution 19-98 and proposing to change DCGA's name to "General Authority of Pennsylvania"), Minutes of Oct. 20, 1998, Meeting at 6).

DCGA also encouraged Hummelstown, a borough in Dauphin County, to create its own authority to handle bond offerings that DCGA could not (DX 26 at 3; RX 44, Minutes of June 23, 1998, Executive Session at 1, Minutes of July 21, 1998, Meeting at 7-8, Minutes of Aug. 18, 1998, Meeting at 9). Under this proposal, DCGA would provide administrative staff and services to the Hummelstown General Authority, and it also agreed to pay for any start-up expenses the Hummelstown General Authority incurred (RX 44, Minutes of June 23, 1998, Executive Session at 1, Minutes of July 8, 1998, Meeting at 7 (short version)). Hummelstown's population is 4,360 (2000 census). DCGA issued revenue bonds to finance two major projects in Dauphin County during 1998: Forum Place, the $75.35 million transaction that is the subject of the OIP, and Riverfront Office Center, the $45.4 million transaction that served as a model for the Forum Place disclosure document.

In mid-1998, the Dauphin County Commissioners began to rein in the Authority. In July 1998, the Commissioners instructed the Authority to "get out of the golf business" (DX 26 at 3). In the autumn of 1998, shortly after the closings on Riverfront Office Center and Forum Place, the Commissioners summoned DCGA's Board to a public meeting, at which the Commissioners expressed the views that certain projects undertaken by DCGA did not comply with the purpose the Commissioners believed DCGA should serve (RX 44, Minutes of Sept. 22, 1998, Meeting at 1-2, Minutes of Sept. 22, 1998, Executive Session, Minutes of Oct. 5, 1998, Special Meeting at 1-3). The Commissioners subsequently adopted Ordinances that significantly curtailed DCGA's powers (RX 44, Minutes of Oct. 20, 1998, Meeting at 6).[6]

The Capitol Associates Project, Riverfront Office Center, and Forum Place

There were three bond offerings during 1998 in which public authorities acquired privately owned office buildings in Harrisburg for use by Commonwealth agencies and other governmental bodies. These transactions did not utilize general obligation bonds, backed by the full faith and credit of the issuer. Rather, they involved revenue bonds and repayment was limited to the stream of revenue generated by the buildings themselves. The transactions were based on negotiated sales, not competitive bids. Bradbury and Fowler were involved in all three transactions (DX 16, DX 18, DX 19).

An important issue in these transactions was the negotiation of a voluntary payment-in-lieu-of-taxation (PILOT), by which the acquiring authority would enter into a municipal services agreement with the host jurisdiction(s) (Tr. 749, 1305-06; RX 16 at 55, 58, 98, 120, 130). The PILOT agreements with respect to the Riverfront Office Center and

Forum Place capped the Authority's annual payments to the host jurisdictions and subordinated the payments to operating expenses and debt service to bondholders (DX 16 at 14, DX 18 at 12). The absence of a PILOT agreement involving the Capitol Associates Project proved to be quite contentious.

Capitol Associates Project. Bradbury, like Fowler, shared an expansive understanding of the Municipality Authorities Act. The Capitol Associates Project illustrates how Bradbury generated demand for his underwriting services by promoting competition among local authorities.

Capitol Associates, a group of private developers, owned a 3.7 acre tract of land in Harrisburg (DX 19). The tract contains two three-story office buildings and a seven-story parking garage (DX 19). The office buildings house a variety of Commonwealth agencies (DX 19).

New Garden Township is located in Chester County, Pennsylvania (Tr. 673). It is near the Pennsylvania-Delaware border, approximately seventy-three miles from Harrisburg, and has a population of 9,083 (Mapquest; 2000 census). In 1997, Bradbury encouraged New Garden Township to form its own municipal authority, the New Garden General Authority, to purchase the Capitol Associates property in Harrisburg (Tr. 674).

However, the transaction did not occur. Once the Mayor of Harrisburg learned of New Garden General Authority's plan to acquire a commercial property in his city and remove it from the tax rolls, he denounced the scheme as a raid on his city's tax base by a sister jurisdiction (Tr. 675-77). Under the spotlight of adverse publicity, New Garden General Authority chose not to proceed (Tr. 675-76). In a defensive maneuver, the Mayor of Harrisburg then arranged for his own local authority, the Harrisburg Authority, to purchase the Capitol Associates Project from its private-sector owners (Tr. 677; DX 19; RX 16 at 24-25).

The Harrisburg Authority purchased the Capitol Associates Project in June 1998 for $19.1 million and financed the purchase by issuing unrated, non-taxable revenue bonds (DX 19). As part of the purchase, the Harrisburg Authority agreed to pay a PILOT, to be split among three taxing jurisdictions: the City of Harrisburg, the Harrisburg School District, and Dauphin County (DX 19 at 13).

If New Garden General Authority had completed the purchase of the Capitol Associates Project, Bradbury expected that he would be the underwriter and Fowler would be the financial advisor (Tr. 674, 676-77). When the Harrisburg Authority purchased the Capitol Associates Project, Bradbury was co-underwriter and Fowler was co-financial advisor (Tr. 877-78; DX 19 at 3). The political tempest surrounding New Garden's unsuccessful effort to acquire the Capitol Associates Project created a stampede mentality at DCGA. Members of DCGA began to think: if we do not finance a project, some other authority will finance it and deny Dauphin County a PILOT (Tr. 51, 672-73, 1303-06).

Riverfront Office Center. In June 1998, DCGA purchased Riverfront Office Center from a private owner (DX 18). Riverfront Office Center consists of 19.11 acres of land in Harrisburg, a five-story office building with 365,000 square feet of space, and parking for 1,230 vehicles (DX 18). Before the purchase, the private owner had negotiated leases for office space with the Commonwealth. At closing, the seller assigned the leases to the Authority. DCGA intended to operate the Riverfront Office Center for the public purpose of leasing space to departments and agencies of the Commonwealth or other governmental units (DX 18). DCGA financed the purchase through the public offer and sale of $45.3 million in unrated, non-taxable revenue bonds.

Forum Place. In July 1998, DCGA purchased Forum Place from another private owner, John O. Vartan (Vartan), trustee of the Musalair Trust (Tr. 84; DX 16 at 6; RX 31). Forum Place consists of approximately 2.2 acres of land with a nine-story office building and two below-grade parking levels at Fifth and Walnut Streets in Harrisburg (DX 4 at PW 179, 189, DX 16 at 6). The building contains approximately 376,000 square feet of net leasable office space and a parking garage for approximately 1,090 vehicles (DX 4 at PW 189, DX 16 at 6). Forum Place is located in downtown Harrisburg and is adjacent to the Capitol Complex (DX 4 at PW 187). The location is very convenient and desirable for Commonwealth agencies.

Vartan is a well-known builder, owner, and property manager in the Harrisburg area. He completed construction of Forum Place in 1996 (Tr. 1460). He also negotiated several leases for office space at Forum Place with the Commonwealth and the United States Social Security Administration (DX 16 at 13). By mid-1998, approximately 375,500 square feet of the total net leasable space in the office building was occupied (DX 16 at 13). Terms of the current office leases ran from two to ten years, with various renewal options (DX 16 at 13). Terms of the current parking leases ran from three to eight years (DX 16 at 13). The anchor tenant at Forum Place was the Commonwealth's Department of Transportation (PennDOT) (DX 16, Appendix C).

As with the Riverfront Office Center, DCGA intended to operate Forum Place for the public purpose of leasing space to departments and agencies of the Commonwealth or other governmental units (DX 16). DCGA financed the purchase through the public offer and sale of unrated, non-taxable revenue bonds. The Forum Place offering consisted of $72.25 million Office and Parking Revenue Bonds, Series A of 1998, and $3.1 million Subordinated Office and Parking Revenue Bonds, Series B of 1998. The offering also included $10.9 million of Subordinated Office and Parking Revenue Bonds, Series C of 1998. However, the Series C bonds were not sold publicly and are not the subject of this proceeding.

DCGA's purposes were not entirely altruistic. The Authority stood to earn a fee of $125,000 upon closing the Forum Place transaction (DX 13 at 2, DX 24 at 4-5). In addition, Fowler expected the cash flow at Forum Place to generate an annual surplus of up to $250,000, which would accrue to the Authority (DX 13 at 8, DX 24 at 5). Under the Municipality Authorities Act, an authority has the express power to acquire, hold, and lease “buildings to be devoted wholly or partially for public uses . . . and for revenue-producing purposes.” 53 P.S. § 306A(a)(2).

B. The Demand for Leased Office Space in Harrisburg by Qualified Tenants.

Because Interest on the Forum Place Bonds Is Not Taxable, Only the Demand From Qualified Tenants Is Relevant Here

Section 103(a) of the Internal Revenue Code (Code) excludes from a taxpayer’s gross income interest received on state or local bonds. The general rule in Section 103(a) of the Code is subject to several exceptions listed in Section 103(b), including an exception for private activity bonds, as defined in Section 141 of the Code.

The Forum Place bonds initially qualified as non-taxable under Section 103 of the Code (DX 16 at 16-17, DX 28). DCGA pledged to preserve the non-taxable status of interest on the bonds throughout the life of the bonds (DX 16 at 17). This, in turn, required that at least 90% of Forum Place be leased exclusively by state or local governmental entities. Under the common terms of public finance, at least 90% of Forum Place’s value had to be “good use,” *i.e.*, use by state and local government entities, and not more than 10% could be “bad use,” *i.e.*, use by any other entities or individuals. Use by the federal government, individuals, private for-profit entities, and private not-for-profit entities would all be “bad use” that could cause the retroactive loss of the bonds’ non-taxable status if it collectively exceeded the 10% cap (DX 94 ¶ 9; RX 44, Minutes of June 19, 1998, Meeting at 4-5).

Thus, if the Forum Place bondholders were to receive tax-free interest payments over the life of the bonds, the tenants of 90% of the space would have to be state or local government entities. In attracting such tenants, Forum Place would face competition from other commercial office buildings in Harrisburg. However, the Authority could not lease more than a small amount of space at Forum Place to entities other than state and local governments without threatening the non-taxable status of the bonds (DX 94 ¶¶ 10, 51.c, 58).

Dauphin County Had Already Satisfied Its Own Demand for Leased Office Space

Fowler suggested that Dauphin County needed additional office space in 1998, and that Forum Place might satisfy that need (Tr. 930, 1009-1011). This suggestion lacks record support. There is no evidence that Dauphin County had a large number of employees (DX 4 at PW 252, 254). Moreover, by February 1998, Dauphin County had announced that it would acquire another office building in Harrisburg, known as 100 Chestnut Street (RX 22). In September 1998, DCGA finalized the purchase of 100 Chestnut Street (DX 1; RX 44, Minutes of May 19, 1998, Meeting at 15, Minutes of June 19, 1998, Meeting at 4-5). Dauphin County expected to use 70% to 75% of the space at 100 Chestnut Street for its own employees by 2000 or 2001 (RX 44, Minutes of June 19, 1998, Meeting at 4-5, Minutes of Sept. 10, 1998, Meeting at 2). I find as a fact that Dauphin County had no need to lease a significant amount of additional office space in 1998 or later.

Realistically, the only qualified tenant that might lease a large block of office space at Forum Place was the Commonwealth.

How the Commonwealth Leases Office Space

At all relevant times, the Commonwealth leased a greater proportion of its office space than many other state governments (DX 91 at 23). As of August 1998, the Commonwealth satisfied 54% of its demand for office space in the Harrisburg area with leased space (DX 91 at 16).

The Commonwealth's Department of General Services (DGS) serves as the leasing agent, real estate agent, or tenant representative for most of the Commonwealth's agencies (Tr. 171, 915, 1606). When an agency determines that it needs additional office space in a building not owned by the Commonwealth, it advises DGS of its needs and the agency and DGS jointly prepare a requirements statement (Tr. 157, 1606). DGS then issues a Request for Proposals (RFP) and advertises it to the public (Tr. 157, 170, 1606; RX 16 at 40). Thereafter, DGS reviews the responses to the RFP (Tr. 1606). DGS's Bureau of Real Estate analyzes the economic aspects of the proposals received from bidders and creates a short list of the proposals that offer acceptable rental rates (Tr. 1606-07). DGS then forwards the short list of bidders to the requesting agency, and that agency determines which submission to accept (Tr. 1607-08).

After the requesting agency makes its selection, DGS prepares a lease and the Secretary of DGS executes it on behalf of the Commonwealth (Tr. 1607, 1610-11, 1629; DX 92 at 19). The lease is then submitted for approval to the Board of Commissioners of Public Grounds and Buildings, comprised of the Governor and the Treasurer (Tr. 157; DX 92 at 19; RX 16 at 40-41).[7]

If an agency vacates a leased space with time remaining on the lease, DGS tries to find another Commonwealth entity to replace it (Tr. 1611). As a general matter, the Commonwealth does not enter into leases lasting more than ten years (Tr. 912; DX 94 ¶ 8).

Gary Crowell (Crowell) served as Secretary of DGS from January 1995 to July 2001 (Tr. 155, 169). In that position, he was responsible for renovating Commonwealth-owned buildings and leasing real estate not owned by the Commonwealth (DX 65 ¶ 3). Crowell reported directly to then-Governor Thomas Ridge (Tr. 124, 169, 202).

PennDOT's Demand for Office Space in Harrisburg: 1995 to 1998

Until the mid-1990s, most of PennDOT's employees in Harrisburg maintained offices in the Commonwealth-owned Transportation & Safety (T&S) Building (Tr. 156). In 1994, a fire destroyed several floors at the T&S Building (Tr. 156-57). The fire, coupled with ongoing environmental problems (asbestos, PCBs, dioxins), resulted in a decision by Crowell, the then-Secretary of DGS, and Brad Mallory, the then-Secretary of

Transportation, to remove PennDOT's employees from the T&S Building and find them suitable facilities elsewhere (Tr. 156-57).

In 1995, DGS issued an RFP for temporary facilities for the occupants of the T&S Building (Tr. 157). At the time of the RFP, the Commonwealth had not yet decided whether to reconstruct the damaged T&S Building, or to tear it down and replace it with a new building (RX 16 at 47-48). By January 1996, however, DGS made a public announcement that the damaged T&S Building would be gutted, demolished, and replaced with a new structure, to be named the Keystone Building (Tr. 179, 187-89).[8]
In October 1995, the Commonwealth and Vartan signed a lease for 284,142 net usable square feet of office space at Forum Place for some of PennDOT's administrative employees (Tr. 171; DX 92). At the time, Forum Place was still under construction. The term of the lease was sixty-one and one-half months and the Commonwealth had an option to renew for one additional year (Tr. 158, 192; DX 92). The Commonwealth always intended to move PennDOT's employees out of Forum Place once renovations to or replacement of the T&S Building could be completed (Tr. 158, 192, 908; RX 16 at 47-49). Vartan needed one year to complete the construction of Forum Place, and PennDOT's administrative employees moved in during October 1996 (Tr. 157-58; DX 16, Appendix C; RX 16 at 47). The Commonwealth's five-year lease on space for PennDOT thus expired in November 2001 (DX 16, Appendix C).

In June 1996, the Commonwealth also leased 226,104 net usable square feet of office space at Riverfront Office Center for PennDOT's Department of Motor Vehicles and Licenses (Tr. 184; DX 18, Appendix C). In contrast to the Forum Place lease, the term of the lease at Riverfront was ten years with two five-year options for renewal (Tr. 159, 908; DX 18, Appendix C). The Commonwealth had no plans to move any PennDOT employees from Riverfront to the Keystone Building (Tr. 105, 159-60, 924).
By July 1998, PennDOT occupied 299,000 square feet of office space at Forum Place (DX 16, Appendix C). This lease accounted for approximately 79% of the office space in Forum Place and generated approximately 60% of Forum Place's total lease revenues (DX 16, Appendix C, DX 57).

Crowell's Early Representations About the Commonwealth's Demand for "Swing Space" at Forum Place

Before Vartan leased office space to the Commonwealth in October 1995, he wanted to determine if Forum Place would remain on a sound financial footing after PennDOT moved out (RX 16 at 44-45). Crowell and George Manakos (Manakos), then-Director of DGS's Bureau of Real Estate, informed Vartan that the Commonwealth had embarked on a renovation program of all the buildings in the Capitol Complex (RX 16 at 39-40, 42-43, 48). Crowell and Manakos told Vartan that the Commonwealth would utilize all of the PennDOT space at Forum Place as "swing space" for other agencies during the renovation program (RX 16 at 48, 50-52).[9] As evidence of the Commonwealth's intentions, Crowell and Manakos advised Vartan that DGS would leave office furniture in Forum Place once PennDOT left, so that the vacant space would be ready for immediate occupancy by the next agency (RX 16 at 51). Vartan never received anything in writing from Crowell or Manakos, but he believed them (RX 16 at 51-52).

Approximately two and one-half years later, Crowell was reported to have made similar statements to the media. *See* Jack Sherzer, "State Lease Study Spurs City Fears," *Harrisburg Patriot News* at B1 (Feb. 15, 1998) (RX 22). According to the newspaper article, the Commonwealth had commissioned a Master Space Plan that would, among other things, study whether the Commonwealth should change the way it leased office space around Harrisburg. Some local officials were concerned that the Commonwealth might "abandon or not renew leases for office space in privately owned buildings in the city" (RX 22). As an illustration, the article noted that the planned Keystone Building would be owned by the Commonwealth. However, comments that the article attributed to Crowell dampened some of these concerns. In relevant part, the article stated:

> After the PennDOT offices leave Forum Place, Crowell said, the state will still likely use that building as "swing space" to house a variety of agencies that will be temporarily dislocated as the state continues to renovate Capitol Complex buildings.
>
> In fact, [Crowell] said, the study also will examine whether the state should ask developer John O. Vartan, owner of Forum Place, to add space to that building.
>
> The article went on to observe that the Mayor of Harrisburg would also encourage the Commonwealth to "increase its use of Forum Place" (RX 22).

At the hearing, Crowell intimated that he might have been misquoted in the newspaper article (Tr. 182). I reject this suggestion. First, neither Crowell nor his press secretary complained to the newspaper at the time of publication (Tr. 215-16). Second, the comments attributed to Crowell in the February 1998 article are quite similar to those that Vartan attributed to Crowell in 1995. However, I find that Crowell never committed to using "swing space" at Forum Place for a fixed period of time, either in 1995 or in February 1998.

PennDOT's Intent to Move to The Keystone Building

A critical issue in this proceeding is what was known in June and July 1998 about PennDOT's eventual move to the Keystone Building. The OIP repeatedly refers to PennDOT's "scheduled move" (OIP ¶¶ III.E.4, E.6, E.11, E.12). The date of the move was not, in fact, "scheduled" as of July 1998. The Commonwealth's intent to move PennDOT involved a planned action on an uncertain date to an unconstructed building. It is more appropriate to refer to PennDOT's "anticipated move" or "intended move."

As noted, the fire-damaged T&S Building had environmental problems (Tr. 156-57, 190). Therefore, the original demolition/construction schedule was unexpectedly and substantially delayed while the building was depleted of asbestos and PCBs. An environmental lawsuit then further delayed the Keystone Building project. By July 1998, the T&S Building was still standing and site preparation had not even begun for the new Keystone Building (Tr. 156, 190-92). Bradbury knew that there was a construction schedule for the Keystone Building, but he did not inquire into the status of that schedule while he was marketing the Forum Place bonds (Tr. 689-90).[10]

On August 1, 1998, the T&S Building was imploded (Tr. 107, 192, 1497-98, 1571). Plans for the implosion were well publicized in the Harrisburg area for months in advance (Tr. 188-89, 925).

The Keystone Building was constructed on a fast track (Tr. 161-62, 192).[11] PennDOT moved most of its administrative personnel from Forum Place to the Keystone Building in late 2000 (Tr. 158-59, 213). PennDOT vacated 257,140 net usable square feet of space at Forum Place, but left behind some of its computer operations (DX 91 at 5; RX 25 at 15, RX 37 at 11). PennDOT also left behind its furniture, fixtures, and equipment for the next agency expected to move into Forum Place (Tr. 201, 215, 786).[12]

The Commonwealth continued to make lease payments to Forum Place for the vacated PennDOT space through November 15, 2001, the end of the five-year lease (Tr. 213). The Commonwealth's plan to move PennDOT's employees from Forum Place to the new Keystone Building, once that building was ready to be occupied, was publicly available information in the Harrisburg area in mid-1998 (Tr. 32-33, 44-45, 93, 111-12, 146, 179, 189, 218-19, 786, 789, 1410-11; DX 24 at 4-5, DX 101). The information was not widely known outside the Harrisburg area at the time (Tr. 225, 309, 1204-05, 1233, 1468; DX 68, DX 69, DX 101).

C. The Sell Side of the Forum Place Bond Offering.

1. Chronology of the Transaction.
    a. Origins of DCGA's Purchase of Forum Place From Vartan

In March 1998, the Authority and Vartan began to discuss the purchase of Forum Place. There is conflicting evidence about which side initiated the transaction. However, it is undisputed that discussions began approximately two weeks after publication of the February 15, 1998, article in the Harrisburg Patriot News (RX 22).

According to Fowler, Vartan initiated the transaction (Tr. 890). By early March 1998, "word had gotten out" that the Harrisburg Authority was going to purchase the Capitol Associates Project (Tr. 887; DX 3). Once Vartan learned that the private owners of Capitol Associates were selling their buildings, he asked Fowler if DCGA would be interested in buying Forum Place (Tr. 887-90). Fowler maintained that Vartan was unwilling to approach the Harrisburg Authority for political reasons (Tr. 888). Fowler relayed Vartan's overture to Ricci and Reese, who were willing to explore the matter with Vartan (Tr. 888-89, 1304; DX 3).

According to Vartan, DCGA initiated the transaction (RX 16 at 53-56). Reese, the Authority's executive director, contacted Vartan to inform him that the Harrisburg

Authority was going to purchase the Capitol Associates Project. Reese also told Vartan that DCGA did not want Vartan to sell Forum Place to the Harrisburg Authority. Reese encouraged Vartan to sell Forum Place to DCGA, so that Dauphin County, not the City of Harrisburg, could control the PILOT (RX 16 at 56, 58, 120, 130). Reese asked Vartan to contact Fowler, who was "putting the numbers together" for DCGA (RX 16 at 56).

To the extent that these two accounts cannot be harmonized, I accept Vartan's explanation as the more complete. Before March 1998, Vartan had not spoken with Fowler in years and had never conducted business with DCGA (RX 16 at 31-32, 56). Vartan did not need to sell Forum Place (RX 16 at 74). Moreover, if Vartan were to sell Forum Place, he did not care who the buyer was, as long as the buyer met his asking price (RX 16 at 59, 120, 128-29). Kristin Milke (Milke) and Ricci, both members of DCGA in 1998, agreed with Bradbury that keeping control of the PILOT was a factor in the Authority's decision to proceed (Tr. 51, 673, 1305-06).

Fowler, Ricci, Reese, and others met with Vartan to discuss Forum Place throughout March and April 1998 (Tr. 889; DX 3; RX 16 at 57-59). Fowler presented his preliminary findings to the Authority on April 3 and April 21, 1998, and received permission to continue with his evaluation (Tr. 889, 892-96; DX 3, DX 5).

As early as April 1998, the Authority and Fowler were concerned about what would happen to Forum Place once PennDOT moved out (Tr. 908-09). At that time, Fowler recognized the issue as a hurdle for the prospective bondholders, as well as the Authority (Tr. 910-11).

The Finance Team

Fowler recommended the underwriter and bond counsel to the Authority (Tr. 14-15, 1408). Bradbury was not involved in negotiating the purchase price of Forum Place with Vartan or in presenting the purchase proposal to the Authority (Tr. 677-78, 720, 729, 976-78). He first learned of the Forum Place project from Fowler, after the Authority had decided to proceed (Tr. 753, 977-78). In their first discussion, Fowler asked Bradbury preliminary questions about likely interest rates, debt service, reserve requirements, and the probable cost of issuing the bonds (Tr. 901-02).

DCGA retained Pepper Hamilton LLP (Pepper Hamilton) as its bond counsel on the Forum Place transaction (Tr. 15; DX 16 at 3, DX 24 at 8). David W. Sweet (Sweet), a former Pennsylvania state legislator and a partner in Pepper Hamilton's Harrisburg office, served as the lead attorney (Tr. 53-54, 62-63, 66-67; RX 16 at 37). Pepper Hamilton, through Sweet and others, had also been involved in the late stages of negotiations between DCGA and Vartan over the purchase price of Forum Place and related real estate issues (Tr. 15, 898, 902-04, 906; RX 16 at 57, 59-60, 64-65, 72-74, RX 30). Sweet, whose practice also involved lobbying activities, offered to act as a liaison with the Commonwealth (Tr. 54, 345, 368, 687, 943, 956-57). Sweet also drafted some of the language in the offering document and signed Pepper Hamilton's supplemental opinion letter at closing (Tr. 69-70, 113; DX 28).

D&B retained Lamb, Windle & McErlane, P.C. (LWM), a law firm in West Chester, Pennsylvania, to serve as underwriter's counsel (Tr. 338, 373-74, 1275; DX 16 at 3, DX 20). LWM concentrates its practice in municipal finance (Tr. 1271, 1274). Thomas J. O'Neill (O'Neill) served as the principal lawyer at LWM with respect to the Forum Place transaction (Tr. 1275-76). O'Neill wrote the bond purchase agreement and prepared drafts of the Preliminary Offering Statement (POS) and OS (Tr. 355, 375-76). James McErlane (McErlane), O'Neill's law partner, served as a reviewer and took over the assignment while O'Neill was on his summer vacation (Tr. 358, 385, 1276; DX 30, DX 40).

These members of the finance team were well acquainted with each other. D&B had extensive experience in underwriting bond offerings for DCGA (Tr. 744-45). Bradbury had known Fowler since the early 1980s and he first did business with PFC in 1989 (Tr. 710-11, 753). Bradbury had known O'Neill for a long time, as well (Tr. 756). Sweet had known Fowler since approximately 1990 and had worked on several transactions with PFC (Tr. 63-65). Sweet had known Bradbury for several years and Pepper Hamilton had done business with Bradbury for even longer (Tr. 109-10). Sweet and O'Neill had been law partners at one time and were also social friends (Tr. 79-80, 342, 1281). O'Neill had known Fowler for thirty years (Tr. 342). He had worked on more than one hundred transactions with D&B, one dozen transactions with PFC, and three or four transactions with DCGA (Tr. 343). McErlane has known Bradbury as a client and a friend for more than twenty-five years (Tr. 756, 1272-73).

The final member of the finance team was Neil Hendershot (Hendershot), an attorney with the Harrisburg law firm of Goldberg, Katzman & Shipman, P.C. (GKS) (Tr. 26-27, 83, 780, 1645). GKS, through Hendershot, served as the Authority's solicitor from 1984 to February 2000 (Tr. 1645). Hendershot or another representative of GKS regularly attended the Authority's meetings (Tr. 1646; DX 24-DX 26). Hendershot signed an opinion letter from GKS to the underwriter and bond counsel at closing, as required by the bond purchase agreement (Tr. 798-99; RX 31 at 5-6).

O'Neill's First Draft of the POS

Pepper Hamilton was serving as underwriter's counsel to D&B on the Riverfront Office Center project in June 1998 (DX 18 at 3). LWM was not involved in that transaction. On June 16, 1998, Sweet sent O'Neill a computer disc containing the Riverfront POS and related documents to use as a guide for the Forum Place POS (Tr. 73-75, 113-14, 374-75, 1275-76; DX 30).

On June 22, 1998, Bradbury, Sweet, and O'Neill discussed the Forum Place offering by telephone (Tr. 344, 756-58; DX 20). At the hearing, Sweet and O'Neill claimed that they could not recall the specifics of this conversation (Tr. 79, 346-47, 349). During his investigative testimony, O'Neill's recollection was considerably more precise. O'Neill's investigative testimony explained that he learned that Forum Place was the third transaction of its type (after Riverfront and Capitol Associates) and that Bradbury had already lined up interested buyers for the Forum Place bonds (Tr. 344-47) ("it was described to me as sort of a done deal"). During his investigative testimony, O'Neill also recalled that the computer disc came with an explanation that the Forum Place project had "a tight time frame," that "they needed a [draft POS] quickly," and that using the Riverfront POS "would save a lot of time" (Tr. 347, 349). Bradbury did not remember saying that Forum Place was a "done deal," but otherwise he did not contradict O'Neill's investigative testimony (Tr. 727-28). I credit O'Neill's investigative testimony and I give little weight to the hearing testimony of Sweet and Bradbury on these points.

At O'Neill's request, Fowler provided O'Neill with copies of the Forum Place tenant leases (Tr. 367, 954, 1011). O'Neill may have had other conversations with Fowler, but he could not remember the subjects discussed (Tr. 366, 390).

O'Neill used the Riverfront POS as a model for drafting the Forum Place POS. He did not know if there were any distinctions between the two transactions and he assumed that there were none (Tr. 395-96).[13] As a result, the disclosure portions of the Forum Place POS are almost identical to the comparable portions of the Riverfront offering document (Tr. 381, 384; DX 18, DX 33, DX 40, DX 87).

On or about June 26, O'Neill circulated a first draft of the POS for comments (Tr. 357).[14] Bradbury and Sweet reviewed the draft and offered suggestions (Tr. 114, 704-05, 759, 784; DX 31). Fowler knew that the Authority was relying on him to review the OS (Tr. 920). He was aggravated that he had to read a facsimile copy (Tr. 917). He considered the Forum Place POS to be a "knockoff" of the Riverfront POS and "didn't read it line-by-line" (Tr. 918). I find little record support for the allegation that "Fowler substantially participated in drafting the [OS]" (OIP ¶ III.D.4).

Fowler, Sweet, and Reese Meet with Crowell on June 30, 1998

On June 30, 1998, Fowler, Sweet, and Reese met with Crowell (Tr. 123, 126-27, 929-30, 958; DX 3).[15] Fowler, Sweet, and Crowell agreed that the primary purpose of the meeting was to discuss the Commonwealth's long-range plans for leasing office space in Harrisburg, and specifically, to ascertain the Commonwealth's plans for leasing space at Forum Place after PennDOT moved to the Keystone Building (Tr. 95-96, 99, 126, 161, 194, 931; DX 65 ¶ 5). Fowler and Sweet testified that another purpose of the meeting was to determine if the Commonwealth was satisfied with Vartan's management of Forum Place (Tr. 95-96, 125-26, 931; DX 3). Fowler testified that the meeting also presented an opportunity to confirm the expense figures that Vartan had provided for Forum Place, and to make sure that the Commonwealth's demand for leased space had not changed in the four months after publication of the February 15, 1998, newspaper article (Tr. 931, 958). As of June 30, the Authority had not yet purchased Forum Place, and it still had time to withdraw from the transaction if circumstances warranted (Tr. 933).

The participants in the meeting agreed that Crowell gave his best judgment about what the future would bring and shared his knowledge about pending projects (Tr. 96-97; DX 65 ¶ 5). It is undisputed that Crowell never offered any commitments, assurances, or guarantees that the Commonwealth would continue to lease space at Forum Place after PennDOT's departure (Tr. 97, 128-29, 915; DX 65 ¶ 5). Nor is there a dispute that Crowell was reasonably happy with Vartan's management of Forum Place (Tr. 96-97, 125-26). Beyond these basic points, the participants' accounts of the meeting diverge widely on the specifics.

According to Fowler, Crowell outlined "a whole litany" of "all the buildings in the Capitol Complex" that needed renovation, explained that such renovations would be phased in over time, and estimated that it would take the Commonwealth three to four years per building (Tr. 932-33). Fowler quoted Crowell as saying that the Commonwealth would continue to use Forum Place as swing space for the next fifteen to twenty years (Tr. 932). Fowler took "a tremendous amount of comfort" from Crowell's words and concluded that there was a "reasonable likelihood" that the Commonwealth would continue to use Forum Place (Tr. 930, 959).

Before the meeting, Fowler had made a note to obtain a letter from Crowell about the Commonwealth's plans, if any, to use Forum Place after PennDOT's departure (DX 6). Crowell never provided such a letter (Tr. 939-42, 944). I do not agree with the Division that there is significance to this point. Vartan never received anything in writing from Crowell in 1995.

Sweet testified that Crowell described a series of "fairly extensive" renovation projects in Commonwealth-owned office buildings that would last five to ten years (Tr. 129). Sweet said that Crowell described the Commonwealth's need for swing space during this period of renovation, repair, and upgrading (Tr. 96). According to Sweet, Crowell stated that Forum Place would be ideal for such swing space, because of its very convenient location (Tr. 128). Finally, Sweet quoted Crowell as stating that the Commonwealth was still in a "growth mode," in terms of its demand for office space (Tr. 96). When Sweet left the meeting, he took "some comfort" from the fact that Crowell had not identified any "huge negative" to proceeding with the bond offering (Tr. 128).

Crowell's testimony left the impression that he was much vaguer at the meeting about the Commonwealth's intent to use Forum Place as swing space. According to Crowell, the Commonwealth had already completed a significant number of capital improvements in the Capitol Complex and was actually retracting from the marketplace for leased office space in the summer of 1998 (Tr. 162, 165). The only remaining renovations under consideration at the time involved two buildings, the Finance Building and the Forum Building. Neither of those was a high priority (Tr. 162, 186; DX 65). Crowell also testified that, if the Commonwealth did need swing space during a period of renovation and repair, it would look first to buildings it already owned and second to privately owned buildings (Tr. 163-64).

Crowell scoffed at the notion that it would take the Commonwealth fifteen to twenty years to renovate the Finance Building and the Forum Building (Tr. 200). He could see the possibility of using Forum Place as swing space for the remainder of the original term of the PennDOT lease, as well as for the additional one-year option period (Tr. 164-65, 196-97). Otherwise, the Commonwealth would have to issue a new RFP for swing space (Tr. 164-65). Crowell confirmed that PennDOT would leave behind desks, chairs, and partitions when it vacated Forum Place (Tr. 201, 215).

Crowell testified that he also discussed PennDOT's long-term plans for space leased in the Riverfront Office Building during the June 30 meeting (Tr. 159, 161). He noted that, if the Commonwealth exercised one or both of its options under the Riverfront lease, PennDOT could occupy the Riverfront Office Building for another fifteen to twenty years (Tr. 159, 161). In contrast, Fowler could not recall whether the subject of Riverfront ever came up at the meeting (Tr. 939).

The record is inconclusive as to what really happened at this meeting. There are no notes or written summaries. Fowler gave the broadest possible interpretation to Crowell's words, while Crowell gave the narrowest possible interpretation. Sweet was somewhere in the middle. However, I find that Fowler and Sweet understood that the Commonwealth could choose not to continue to lease space at Forum Place under future leases.

July 1-July 7, 1998

Fowler purportedly told Bradbury about the results of the June 30 meeting (Tr. 680, 694, 786, 964). However, Bradbury did not know how long the swing space program would last (Tr. 716). No member of the finance team told O'Neill or McErlane about the June 30 meeting or about PennDOT's plan to move out of Forum Place once the Keystone Building was completed (Tr. 116, 353-54, 368, 378, 920, 1014, 1282).

On July 7, O'Neill sent the first half of the revised POS and a draft purchase contract to Sweet for distribution to the Authority at its July 8 meeting (Tr. 358-59; DX 40).

July 8, 1998, DCGA Meeting

On July 8, the Authority conducted a public meeting that was attended by the Authority's members, Reese, Fowler, Sweet, and a lawyer from Hendershot's office (DX 24, DX 25).[16] Agenda items that day included approval of the Authority's purchase of Forum Place from Vartan, approval of the bond purchase contract with D&B, approval of the POS, and other related matters (DX 24 at 4-8, DX 25 at 3-6, DX 26 at 1-2).

At the meeting, there was a discussion that PennDOT would be leaving Forum Place and moving into the Keystone Building, once it was completed (Tr. 21-22; DX 24 at 5). Fowler also advised the Authority that he, Sweet, and Reese recently met with Crowell and that Crowell told them that the Commonwealth might use Forum Place as swing space for fifteen or twenty years (Tr. 20-22, 34, 961-63; DX 24 at 5, DX 26 at 1). Both Sweet and Reese remained silent as Fowler described to the Authority what had happened at the meeting with Crowell (Tr. 960, 962-63). Disclosure of PennDOT's intended move in the POS was not addressed during the July 8 meeting (Tr. 920, 954).[17]

PFC also prepared financial projections of anticipated tenant revenues at Forum Place through 2008 (Tr. 948-50; DX 13). Fowler presented these projections to the Authority to assure it that the future cash flow at Forum Place would be sufficient to service the debt and eventually retire the bonds (Tr. 948-50). Fowler further advised the Authority that D&B had sold all but $13 million of the bonds as of July 8 (DX 24 at 6).[18]

The Authority voted to approve the purchase of Forum Place and proceed with the bond offering (DX 24, DX 25) (Resolution 15-98). It reaffirmed the appointment of bond counsel and the financial advisor, and approved the appointment of the other professionals involved with the project (DX 24 at 8). The Authority also approved the content of the POS and authorized its distribution (DX 24, DX 25).
The members of the Authority did not actually read the POS page-by-page (Tr. 22-23, 946-47). Rather, they relied on the solicitor, bond counsel, and the financial advisor to review it for them (Tr. 22-23, 25-26, 36-37, 1408-09). There is no evidence that the Authority voted to approve the distribution of the financial projections to prospective investors.

There are two versions of the minutes of the July 8 meeting: DX 24 (long version, unsigned) and DX 25 (short version, signed). The differences between the versions are of two sorts. First, DX 24 shows Sweet as an active participant, making several comments during the meeting. In contrast, DX 25 omits most of Sweet's comments.[19] Second, DX 24 provides an extensive summary of Fowler's comments regarding PennDOT's anticipated move and the information Fowler, Sweet, and Reese purportedly gained from their June 30 meeting with Crowell. DX 25 omits all of Fowler's comments on these subjects.

An Authority member and a memorandum prepared by a lawyer in Hendershot's office confirm that Fowler's discussion occurred at the July 8 meeting (Tr. 28, 41-42; DX 26 at 1-2). I find as a fact that the more complete and accurate minutes of what actually took place at the July 8 meeting is DX 24 (the unsigned long version) and not DX 25 (the signed short version).

After the July 8 meeting, McErlane finalized the OS. He added a more detailed summary of the tenant leases, including their expiration dates, to Appendix C (Tr. 384-86, 1277-80; DX 15, DX 16). The final version of the OS is dated July 17, 1998 (DX 16).

July 31, 1998, Closing

Closing on the Forum Place transaction took place on July 31, 1998. D&B purchased the Series A and Series B bonds from the Authority at a 1% discount from par value, or $753,500 (D&B Answer; Tr. 851; DX 13 at 1). PFC received a financial advisory fee of $80,000 from the Authority (Tr. 1008; DX 1, DX 13 at 2).

LWM, as underwriter's counsel, provided an opinion letter to D&B concerning compliance with Exchange Act Rule 15c2-12 (Tr. 363-66, 799, 1550-51; DX 27). LWM also informed D&B in negative terms ("nothing has come to our attention") that it was satisfied that the disclosure in the OS was adequate (RX 41 ¶¶ 79-89, 685). Pepper Hamilton, as bond counsel, provided a supplemental opinion letter to D&B, stating that certain sections of the OS fairly described the matters they discussed and that the tax matters discussed in the OS accurately reflected its opinion (Tr. 135-36, 795-99; DX 28; RX 31). GKS, as the Authority's solicitor, wrote an opinion letter to D&B and Pepper Hamilton affirming the Authority's power to issue the bonds and consummate the transaction (Tr. 799; RX 31 at 5-6). GKS's opinion letter also stated that the OS did not contain any untrue statement of a material fact with respect to the Authority (RX 31 at 5). Some of the key participants in the Forum Place transaction were not in Pennsylvania for parts of the relevant period. Bradbury was in Georgia for several days as part of a long July 4 weekend (Tr. 682-84, 761-63, 782, 814-15, 1227). His vacation began on July 2 and continued at least through July 7 (Tr. 761; DX 40). Although Bradbury was not in his office during this period, he was accessible by cellular telephone and facsimile, and participated in a telephone conversation about the offering on July 6. O'Neill was on vacation from July 12 through July 26 (DX 40). McErlane covered for him during this period (DX 20, DX 40). Vartan was in Europe from mid-July through July 31 (Tr. 989; RX 16 at 8, 75). The parties pushed to complete the necessary documents so that Vartan could review them before he left on his trip (Tr. 989; DX 24 at 6). Hendershot did not attend the Authority's meeting on July 8 because his wife required emergency surgery (Tr. 1646). An associate from GKS attended the meeting in place of Hendershot (Tr. 1015, 1648; DX 26). Hendershot also did not attend the Authority's August 18 meeting because he was on vacation (Tr. 1648, 1653). The Authority withheld approval of the minutes of its July 8 meeting until Hendershot returned on September 10 (Tr. 1653, 1664-66; RX 44, Minutes of Aug. 18, 1998, Meeting at 1, Minutes of Sept. 10, 1998, Meeting at 1).

2. Disclosure to Prospective Investors.

Late in June 1998, sales agents for D&B started contacting institutional investors to determine their level of interest in financing the purchase of Forum Place (Tr. 1450-51). Some of these institutional investors immediately declined when they learned of the "short-term lease vs. long-term bond" risk (Tr. 1186-87, 1450). Others expressed an interest and D&B assembled and distributed an information package to them. The package included the Authority's POS, the trust indenture, the existing Forum Place leases, an environmental report, the financial projections prepared by Fowler, and a building appraisal from March 1997 (Tr. 438, 485, 1188-90, 1219-20; DX 52). The OIP charges that the Authority's POS and OS, as well as Fowler's financial projections and the March 1997 appraisal, were materially misleading or omitted material information (OIP ¶ III.E).

The Purpose of the POS and OS

An official statement is a document or set of documents prepared by an issuer of municipal securities or its representative that is complete as of the date it is delivered to the participating underwriter. Exchange Act Rule 15c2-12(f)(3). As relevant to this proceeding, an official statement sets forth information material to an evaluation of the offering. In short, it describes the risks that an investor will take in purchasing the security (DX 94 ¶ 6). A preliminary official statement is an official statement prepared by or for an issuer of municipal securities for dissemination to potential customers prior to the availability of the final official statement. Exchange Act Rule 15c2-12(f)(6).

A participating underwriter must obtain and review a near-final official statement before it bids for, purchases, offers, or sells municipal securities in an offering. Exchange Act Rule 15c2-12(b)(1). After a participating underwriter has reached an understanding with an issuer of municipal securities that it will become a participating underwriter in an offering, and until a final official statement is available, the participating underwriter must promptly send to any potential customer, on request, a copy of the most recent preliminary official statement. Exchange Act Rule 15c2-12(b)(2).

The record in this proceeding contains an undated draft POS (DX 33); a POS, dated July 1, 1998 (DX 40, DX 87); a POS, dated July 8, 1998 (DX 15); and the OS, dated July 17, 1998 (DX 16). The Division alleges that the same material omissions occurred in every version of the POS and OS used here (Tr. 656; Div. Br. at 9 n.5, Div. Reply to PFC at 6 n.6, 15-16).

An offering document should be a "four-corner pronouncement" of all the information necessary for an investor to make an informed decision concerning whether or not to purchase a particular security (Tr. 276, 360-61, 1151, 1487; DX 94 ¶ 33). Investors, including institutional investors, should be able to rely on the assumption that the offering document contains all the information necessary to make an investment decision (Tr. 598-99, 1151-52). Pope, the Division's expert witness, opined that an offering document must provide complete disclosure to any reasonable and intelligent reader, regardless of where the reader lives and with the assumption that the reader has no knowledge of any particular facts and circumstances not disclosed in the offering document (Tr. 1135; DX 94 ¶ 33).

Limiting Language in the POS and OS

The Authority cautioned prospective investors on page 4 of its POS and OS: "No dealer, broker, salesman or other person has been authorized to give information or to make any representation not contained in this [OS] and, if given or made, such other information or representation must not be relied upon" (DX 15 at 4, DX 16 at 4).

The POS and OS also explained that the Authority had retained PFC as its financial advisor in connection with the preparation, authorization, and issuance of the Forum Place bonds (DX 15 at 18, DX 16 at 20, DX 33 at 18, DX 40 at 18, DX 87 at 18). The Authority then stated that the scope of the financial advisor's engagement was limited:

> The Financial Advisor is not obligated to undertake, and has not undertaken to make, an independent verification or to assume responsibility for the accuracy, completeness, or fairness of the information contained in this Official Statement. The Financial Advisor is an independent advisory firm and is not engaged in the

> business of underwriting, trading or distributing municipal securities or other public securities.

The POS and OS Disclosed That the Forum Place Offering Involved Long-Term Bonds Secured by Short-Term Leases

The POS and OS clearly describe that the Forum Place bonds are limited obligations of the Authority. These documents also explain that the bonds are secured solely by the receipts and revenues received by the Authority from payment on various leases for space in the office building and parking facilities. The POS and OS make clear that neither the general credit of the Authority nor the credit or taxing power of Dauphin County is pledged as payment of the principal and interest on the Forum Place bonds (DX 16 at 1). The OS conspicuously warned on the cover and on pages 11-13 that the Pennsylvania General Assembly was not required to appropriate the funds necessary to make the rental payments due under the current office or parking leases. The OS also explicitly cautioned that the Commonwealth's leases were scheduled to expire prior to the stated maturity of the 1998 Series A bonds, with page 13 repeating the warning that the leases would expire and that the Commonwealth did not have to extend or renew their terms. Page 13 of the OS identified the office leases by each Commonwealth agency tenant, including PennDOT, and directed the reader to Appendix C for a breakdown of the terms of each lease. Appendix C to the OS listed the leases and their expiration dates, including the PennDOT lease term ending on November 15, 2001, and its optional extension to November 15, 2002. Appendix C, read in conjunction with the remainder of the OS, reflects that the Commonwealth's lease for PennDOT's space expired at least two years before any of the bonds matured and twenty-four years before most of the bonds matured. Many of these warnings were emphasized by the use of bold fonts and capital letters. The POS and OS clearly stated:

> THE OFFICE LEASES ARE SCHEDULED TO EXPIRE PRIOR TO THE MATURITY OF THE 1998 BONDS; THERE IS NO COMMITMENT, REQUIREMENT OR GUARANTEE THAT THE COMMONWEALTH WILL RENEW OR EXTEND ANY OF THE OFFICE LEASES.

These warnings proved sufficient to dissuade several prospective investors (Tr. 544-45, 565, 1187, 1450, 1466).

The POS and OS Did Not Disclose PennDOT'S Intent to Move to the Keystone Building, Once It Was Ready

No version of the POS or OS disclosed PennDOT's plan to vacate Forum Place once the Keystone Building was constructed (DX 15, DX 16, DX 33, DX 40, DX 87).

Under the Division's theory of the case, this information was important to prospective investors because there was no certainty that PennDOT would remain at Forum Place and there was near certainty that PennDOT would vacate Forum Place in two or three years. Every investor representative to testify at the hearing considered such information important because the loss of the anchor tenant could impair future debt service on the bonds (Tr. 225, 270-71, 310-11, 336, 423, 487, 534, 548, 578-79). As a credit analyst for one purchaser explained: “[W]hile the bond documents highlighted the fact that the leases expired prior to the term of the bonds, from a credit perspective, there’s a big difference between facing the potential loss of your biggest tenant and actually knowing that you’ll have to replace your major tenant within three years” (Tr. 611).

Bradbury, Fowler, Sweet, O’Neill, and McErlane offered several *post hoc* rationalizations as to why PennDOT’s planned move from Forum Place to the Keystone Building was omitted from the POS and OS: the contemplated move to an unconstructed building on an indeterminate date was speculative, not a known fact; construction on the Keystone Building had not yet started; and disclosure of PennDOT’s planned move was already subsumed in the cautionary language about short-term leases with no guarantee of renewal (Tr. 104-05, 115-17, 122-23, 393-94, 404-05, 689, 739-40, 789-90, 1282-83). Fowler, Sweet, and Bradbury each testified that: (1) the finance team knew in July 1998 that the POS and OS did not discuss PennDOT’s planned move; and (2) they never discussed (or, at least, could not remember discussing) among themselves revision of the POS and OS to include such information. Fowler, Sweet, and O’Neill testified that, if they had to do it all over again, they would still omit any disclosure of PennDOT’s planned move (Tr. 102, 104-05, 115-23, 135, 367-68, 393-95, 404-05, 411, 919-20, 952-54, 973-75).

Fowler’s Financial Projections

Fowler prepared financial projections of the revenues and expenses at Forum Place that took existing leases and occupants and extrapolated these data for a period of ten years (1998-2008), regardless of the actual lease expiration dates (Tr. 729; DX 13). He presented his projections to the Authority on July 8, 1998, to demonstrate that the cash flow at Forum Place would be sufficient to service the debt and eventually retire the bonds (Tr. 948-50; DX 13 at 8-9). Although Fowler maintained that he prepared the financial projections only for distribution to the Authority, PFC also sent the projections to prospective investors (Tr. 501, 529-30, 942, 985; DX 57).

Fowler did not prepare a written explanation of the assumptions underlying his cash flow analysis, including the assumption that the existing occupants would extend without interruption or be immediately replaced by other qualified tenants at similar rates (DX 94 ¶¶ 12, 64).

Bradbury asked Fowler about the assumptions underlying the financial projections, concluded that the assumptions were reasonable, and added explanatory footnotes (Tr. 806, 853-55). As relevant to this proceeding, footnote 1 to the financial projections states: “Revenues based on actual Commonwealth of Pennsylvania, U.S. Government, and other leases now in effect at the time of Closing and assumes all leases will continue to specific date or renew on similar terms (see Lease Terms and Options on page 5)” (Tr. 451; DX 53 at 4). D&B then circulated the financial projections with footnotes to prospective investors (Tr. 450, 629, 1116).

Neither version of the financial projections was included in the POS or OS (DX 94 ¶ 14). Neither version contained any disclaimer about whether Fowler's assumptions were realistic. Neither version provided any information about circumstances that might prevent the achievement of the forecasted results. Neither version explained that the Commonwealth was unlikely to renew or extend the lease for the PennDOT space (DX 94 ¶¶ 13, 53).

I find as a fact that DCGA never authorized distribution of Fowler's financial projections to prospective investors (DX 24-DX 26). O'Neill did not know that D&B was distributing financial projections to prospective investors (Tr. 360-61). Consequently, O'Neill never reviewed the financial projections (Tr. 363).
Based on the footnoted financial projections that D&B sent to investors, Keith Lowe (Lowe), a representative of Evergreen Fund, assumed that "there was a possibility" that PennDOT could continue to remain at Forum Place through 2008 (Tr. 449-52). Representatives of two other institutional investors did not make the same assumption as Lowe (Tr. 507-09, 630-31). In the judgment of the expert witness for D&B and Bradbury, it was not unreasonable for Lowe to draw the conclusion that he did (Tr. 1561-62).

1997 Appraisal of Forum Place

Early in 1997, a bank owned by Vartan engaged an independent appraiser to determine the present day fair market value of Forum Place (DX 4; RX 16 at 108-09). Vartan sought the appraisal in connection with a mortgage loan application (Tr. 975-76; RX 16 at 105-06, 109-10). Among other things, the appraiser determined that occupancy rates for Class A office space in Harrisburg's Central Business District were 97% to 99% (DX 4 at 42).[20] In June and July 1998, D&B distributed the appraisal to prospective investors in the Forum Place bonds. By then, of course, the appraisal was fifteen months old. According to the OIP, the vacancy rate information in the appraisal, together with the misleading OS and financial projections, misled prospective investors into concluding that PennDOT would not leave Forum Place because there was no single block of available office space in downtown Harrisburg large enough to accommodate its needs (OIP ¶ III.E.11).[21]

Lowe testified that page 42 of the appraisal was important to him as he considered the credit worthiness of the bond offering (Tr. 417-19). Susan McCormack (McCormack), a credit analyst for Putnam Investments, thought there was very little office space available in Harrisburg (Tr. 492). She received the appraisal and her notes reflect that she learned of the 1% vacancy rate for Class A space (Tr. 485; DX 55). David Gilliand (Gilliand), a high yield bond analyst at PaineWebber, based PaineWebber's credit summary, in part, on information he drew from the appraisal (Tr. 610-11, 640-41, 644; DX 36).

D. The Buy Side of the Forum Place Transaction.

D&B sold Series A bonds to four institutions: Putnam Investments purchased $27 million of the bonds on July 10; Evergreen Funds purchased $26.7 million of the bonds on July

10; PaineWebber purchased $13 million of the bonds on July 10; and Merrill Lynch purchased $5.6 million of the bonds on July 14 (DX 21-DX 23). These were conditional trade dates. The bonds were a "when-issued" transaction, and did not actually settle until the closing on July 31, 1998.[22]

D&B sold about two-thirds of the subordinated Series B bonds to Wilmington Trust Bank (DX 22). D&B sold the remainder of the Series B bonds to close friends of Bradbury or retained them for its own account (Tr. 819-20).

As a part of its sales solicitation, D&B arranged for prospective investors to tour Forum Place (Tr. 420-21, 453-56, 1191, 1309-10, 1454). Vartan conducted two tours on July 7. The tours were comprehensive and lasted one to two hours each (Tr. 454, 511-12, 1192). No subject was "off limits" to prospective investors (Tr. 455, 515-16). Representatives of Putnam Investments and Evergreen Funds, the institutions that purchased the largest quantity of bonds, took a tour (Tr. 454-56, 490, 520, 1309-10). Representatives of Merrill Lynch and PaineWebber, the institutions that purchased the smallest quantity of bonds, did not (Tr. 281, 610).

Institutional Investors vs. "Retail Customers"

The Forum Place offering was a public offering. The bonds were in small denominations ($5,000) and there were no restrictions barring their sale or resale to the public at large (Tr. 87-88, 728-29, 852-53, 1156-57; DX 16, DX 59, DX 94 ¶ 45). A commercial printer billed DCGA for 200 copies of the OS (Tr. 731-32; DX 89).

D&B thought the institutions that bought the Class A bonds were doing so for the mutual funds they managed (Tr. 801, 806, 1225). With the exception of PaineWebber, D&B was correct (Tr. 221, 269, 307, 547, 580; DX 49). The institutions in question were highly sophisticated investors (Tr. 807-08, 1182, 1445). They were represented by analysts or supervisors with advanced business degrees (Tr. 299, 415, 482, 541-42, 568, 600-01, 1182, 1216). Because interest rates were low during 1998, such institutions were very receptive to unrated, high-yield bond offerings (Tr. 1185-86, 1216, 1223, 1449).

The OIP alleges that one of the institutions that purchased Forum Place bonds from D&B "promptly" resold the bonds to its retail customers (OIP ¶ III.D.6). It is unclear if the intended reference is to PaineWebber or Wilmington Trust Bank. According to the charging document, by the closing on July 31, 1998, "retail investors located across the nation had purchased over $1 million of the bonds" (OIP ¶ III.D.6). There is no evidence in the record to quantify the sale of Forum Place bonds to "retail investors" before July 31, 1998.

There is some evidence that PaineWebber resold an unspecified quantity of the Series A bonds to its retail clients on unknown dates (Tr. 646, 652). Likewise, Wilmington Trust Bank eventually may have resold its Series B bonds to its high net worth clients, although there is no evidence of that in the record (Tr. 819-20).

Putnam Investments

With one exception, the institutional investors that purchased Series A bonds from D&B did not know of PennDOT's anticipated move when they made their investment decisions (Tr. 578-79). The exception, Putnam Investments, had actual knowledge of PennDOT's intended move to the Keystone Building and nevertheless became the single largest purchaser of the Forum Place bonds (Tr. 529, 531). McCormack learned of PennDOT's plans to leave Forum Place. Although she could not initially remember whether this information came from Fowler or Bradbury, I find that it most likely came from Bradbury (Tr. 486-87, 523-26, 859-60; DX 54 at 3, DX 55). McCormack also learned from either Fowler or Bradbury that the Commonwealth might use Forum Place for its swing space program, although there was no guarantee that it would do so (Tr. 487-90, 492-93, 518, 525-27, 531, 1079-81). McCormack's report and notes reflect that the Commonwealth's swing space program was tentative: "[T]here is no assurance that the Department of Finance will indeed move into Forum Place" (DX 54, DX 55).

Putnam Investments enlisted its outside counsel, a law firm in Boston, Massachusetts, to review the draft POS and the draft trust indenture for Forum Place (Tr. 496-98, 521-23, 532-33; DX 56, DX 90). The law firm recommended certain language changes to the draft trust indenture (DX 90). However, neither Putnam Investments nor its outside counsel recommended any language additions to the POS concerning PennDOT's anticipated move to the Keystone Building.

Merrill Lynch

Steven Syfert (Syfert), a sales agent at D&B, solicited a Merrill Lynch portfolio manager to purchase Forum Place bonds during the initial offering (Tr. 275-76, 1450).

James Loffredo (Loffredo) is the director of research for Merrill Lynch's Municipal Products Group (Tr. 301). In July 1998, the Merrill Lynch portfolio manager asked Loffredo to evaluate the Forum Place bond offering (Tr. 301-03). Loffredo assigned the task to Christopher Fornal (Fornal), a junior analyst-in-training (Tr. 302-03). Loffredo handed Fornal a copy of the POS and told him to prepare a credit worthiness report (Tr. 221, 301-03). Merrill Lynch policy required such a report before a bond purchase could be considered (Tr. 225, 302).

Fornal never spoke with anyone at D&B or toured Forum Place (Tr. 222-23). Although Loffredo edited Fornal's report, Loffredo could not recall if he personally read the POS. He testified that, "most likely," he did review parts of it (Tr. 304). Neither Fornal nor Loffredo knew of PennDOT's intended move when they wrote the report (Tr. 225, 309). Paragraph III.E.12 of the OIP asserts that Merrill Lynch learned "in September 1998" of PennDOT's planned move to the Keystone Building and "promptly" sold its entire position of Forum Place bonds in the secondary market.

There is a considerable degree of embellishment here. Merrill Lynch learned of PennDOT's planned move early in August 1998 (Tr. 270-71, 282-86, 296). Merrill Lynch then investigated the matter thoroughly (Tr. 270-71, 288, 309-10; DX 71). James Schwartz (Schwartz), a Merrill Lynch senior research analyst, telephoned Crowell, who immediately confirmed PennDOT's intent to move (Tr. 268, 288-89). Schwartz then purportedly complained to Syfert about the omission of PennDOT's anticipated move from the OS (Tr. 291-92). Syfert did not remember such a conversation and I credit his testimony over that of Schwartz (Tr. 1461-62). Fornal and Loffredo next made several revisions to the credit worthiness report that they had written in July 1998 (Tr. 223-24, 228-29, 238-39, 306; DX 49). In the process of revising their original report, Fornal and Loffredo used language that tracked, without attribution, the February 1998 newspaper article discussing PennDOT's intended move from Forum Place (Tr. 247-48; RX 22). In addition, Fornal and Loffredo either omitted or deleted the date of the report's revision (Tr. 238-39; DX 49).

In mid-September 1998, Merrill Lynch sold its entire inventory of Forum Place bonds to PaineWebber and Maxcor Financial (Tr. 252-55, 292-95; DX 50). Merrill Lynch, which had purchased the bonds for $99.625 per $100 of par value two months earlier, sold them at prices ranging from $99.71 to $100.261 per $100 of par value (DX 21, DX 50). Merrill Lynch found that it was "pretty easy" to sell the bonds (Tr. 331-32). The timing of Merrill Lynch's sales cannot fairly be described as prompt (Tr. 270-71, 292).

PaineWebber: Undisclosed Dealer

Gilliand learned of the Forum Place offering from a colleague who worked for PFC (Tr. 602-03, 649). The colleague encouraged D&B to contact Gilliand, which it did (Tr. 604-06, 1216; DX 32, DX 51). D&B had conducted business with PaineWebber before July 1998, but it had dealt with another individual who purchased credits for PaineWebber's high-yield municipal bond fund (Tr. 816). Gilliand was new to PaineWebber, having joined the firm in March 1998 (Tr. 617).

PaineWebber moved quickly. Gilliand's first contact with D&B occurred on July 7. By July 10, PaineWebber had taken all the Forum Place bonds that were available (Tr. 1221-24; DX 23, DX 32, DX 51). By July 13, Gilliand had authored PaineWebber's credit report on the Forum Place bonds (DX 36).

D&B denied knowing that PaineWebber was buying Forum Place bonds to resell them to others (Tr. 815-16, 862, 1225). The POS and OS did not identify PaineWebber as a participating underwriter or dealer in the distribution of the bonds. PaineWebber did not seek or receive a dealer's concession on the bonds it purchased from D&B (Tr. 817, 1225, 1461). In fact, PaineWebber paid D&B the same price for the bonds as did Putnam, Evergreen, and Merrill Lynch (DX 21, DX 22, DX 23). PaineWebber's profits on Forum Place bonds came from mark-ups on the resale (DX 60, DX 61). Such markups reduced the yield to investors (RX 41 ¶ 230).

D&B paid its sales agent, Wendy Bradbury Armstrong (Armstrong), a commission on the bonds she sold to PaineWebber (Tr. 1225-26, 1234-35). If PaineWebber had identified itself as a dealer and received a dealer's concession, Armstrong would not have earned a commission (Tr. 817-18, 1225-26).

According to Gilliand, Bradbury told him "there [were] several institutions that [D&B] did not want [PaineWebber] to approach," ostensibly because D&B already had orders from those institutions (Tr. 614). If true, Gilliand's testimony would completely undercut Bradbury's claim that he never knew PaineWebber would be acting as a dealer. Gilliand specifically identified Putnam Investments and Delaware Investments as two institutions that D&B did not want PaineWebber to approach (Tr. 614). Both Bradbury and Armstrong denied making any such statements to PaineWebber (Tr. 815, 1226). Gilliand's identification of Delaware Investments as a firm that had already placed an order with D&B is puzzling. Delaware Investments did not receive an allotment in the Forum Place bond offering and only purchased Forum Place bonds later in the secondary market (Tr. 775; DX 21, DX 22; RX 41 ¶ 225). In these circumstances, I credit the testimony of Bradbury and Armstrong and reject the contrary testimony of Gilliand.

Van Kampen Investments

Barnett Sherman (Sherman), a senior municipal analyst with Van Kampen Investments, was responsible for reviewing potential bond investments and making recommendations to the portfolio managers of Van Kampen's mutual funds (Tr. 543). Dan Kluger (Kluger), a sales agent for D&B, sent Sherman a POS and some supporting documents on the Forum Place transaction (Tr. 543, 550). Sherman reviewed the POS, asked questions of Kluger and Bradbury, and ultimately informed D&B that Van Kampen was not interested in purchasing Forum Place bonds (Tr. 543-45, 559-61, 565). Sherman then went on vacation.

Unknown to Sherman at the time, Van Kampen bought $4 million in Forum Place bonds from PaineWebber on July 28 and July 29, 1998 (Tr. 569-72, 586; DX 60, DX 61). Wayne Godlin (Godlin), a portfolio manager for Van Kampen's high-yield municipal bond fund and Sherman's supervisor, decided to purchase the bonds that his subordinate had rejected (Tr. 547, 566, 568, 572). Godlin did not speak with Sherman before buying the bonds (Tr. 566, 583-84).

Godlin learned of the Forum Place offering from PaineWebber (Tr. 569-71). Gilliand sent Godlin a copy of PaineWebber's credit report on Forum Place and discussed the transaction with Godlin "at length" (Tr. 570-71; DX 59). Godlin then requested and reviewed the POS or OS, although he could not remember which one (Tr. 570, 573, 581). Godlin also requested "any other pertinent documentation" or "additional documentation" about the transaction (Tr. 570-71, 576). However, there is no credible evidence that Godlin ever saw Fowler's financial projections or the 1997 appraisal.

Godlin had spoken with Kluger, D&B's sales representative, in connection with some previous bond offerings. However, neither Godlin nor Kluger could remember speaking to each other about the Forum Place transaction (Tr. 571, 588-89, 1199-1201). I find as a fact that Godlin and Kluger did not speak to each other about Forum Place. Godlin did not speak to Fowler (Tr. 595). There is no evidence that Godlin spoke to Bradbury, either.

In deciding to buy the bonds, Godlin relied, in part, on the credit report that Gilliand had authored for PaineWebber (Tr. 569-70, 580-81, 586; DX 36, DX 59). The credit report makes several representations about the Forum Place bonds that do not appear in any documents authored, reviewed, or distributed by D&B. In addition, the credit report contains several inaccuracies (RX 41 ¶¶ 33, 232, 246, 481). Godlin possessed a great deal of misinformation about the Forum Place bond offering. He believed that PennDOT had an AA credit rating, that PennDOT was responsible for repaying the bonds, and that PennDOT had invested a considerable amount of money in improvements to Forum Place (Tr. 577-78, 590-92). There is no evidence that this misinformation came from the POS, OS, or anyone at D&B.

E. Developments After Closing.

August 1998-December 1999

On August 1, 1998, one day after the Forum Place bond closing, the T&S Building was imploded (Tr. 107, 192, 1497-98, 1571).

Late in August 1998, Fowler received $20,150 from IMAGE for advisory and analytical services regarding the investment of certain proceeds of the Forum Place bonds (PFC Answer; Tr. 1008).[23] To the extent that the OIP alleges that this payment came "from the Authority," it is in error (OIP ¶ III.D.7).

Reese, DCGA's long-time executive director, retired at the end of September 1998 (Tr. 1299, 1319; RX 44, Minutes of June 23, 1998, Executive Session at 2, Minutes of Aug. 18, 1998, Executive Session at 2, Minutes of Sept. 10, 1998, Meeting at 9). Ricci resigned as the Authority's chairman and succeeded Reese as executive director on October 1, 1998 (Tr. 1299-1300, 1319).

For the remainder of 1998 and through 1999, there were no problems filling Forum Place with Commonwealth agency tenants (Tr. 1325). DGS increased the square footage of one lease and extended the term of the lease for two years (Tr. 202-03; RX 23). Vartan, as property manager, was also able to replace one departing government tenant with another government tenant (Tr. 1324-25).

January 2000-December 2000

Members of the Authority serve at the pleasure of the Dauphin County Commissioners (Tr. 31, 826-27, 1303). November 1999 produced a sea change in the composition of the Dauphin County Commission, as two sitting Commissioners retired and two new Commissioners were elected (Tr. 1328). After the election, the newly constituted Commission demanded that the sitting Authority members (with one exception) resign, which they did (Tr. 1328-29). The new Commissioners then appointed their own people to the Authority (RX 16 at 88).

Respondents contend that the eventual bond default was, in significant part, a result of the decision of certain new DCGA members to change Authority policies after the closing of the Forum Place bond transaction (RX 41 ¶¶ 162-66, 485-514, 542-54).

The newly constituted Authority fired Vartan as the manager of Forum Place early in 2000 (Tr. 1325-27; RX 16 at 83-87).[24] The Authority had no one of equal competence to replace Vartan (RX 16 at 86). As a result, the Authority itself assumed management of Forum Place, despite the fact that its staff lacked experience in property management (Tr. 823-24, 1331-32). This proved unsettling, because Vartan, Bradbury, and DCGA (as constituted in July 1998) expected that Vartan (the Series C bondholder) would continue to manage Forum Place and work to ensure that it was occupied by Commonwealth agency tenants (Tr. 37, 39-40, 753-55, 823-24, 1318-19; DX 24 at 5; RX 16 at 84). The bondholders also assumed that Vartan or someone of equal competence would continue to manage Forum Place and they were disappointed when he was dismissed (Tr. 454, 457, 860-61, 1201; DX 54 at 7; RX 26).[25] As grounds for its decision to fire Vartan, the new Authority Board asserted that Vartan's management fee of $180,000 per year was excessive (Tr. 1268; RX 16 at 84, 100-01). However, the Authority's management fee was 5% of gross revenues, a larger amount (Tr. 1355; RX 32 at 13-14, RX 38 at 2, RX 41 ¶¶ 495, 514).

On September 22, 2000, the Commonwealth released its Master Space Plan (DX 91; RX 25). In relevant part, the document characterized Forum Place as "available, flexible, [and] conveniently located" (DX 91 at iv; RX 25 at iv). The Master Space Plan "strongly recommended" Forum Place as "the best swing space location" while the Finance Building was being renovated (DX 91 at iv; RX 25 at iv). Among its Long Term Recommendations, the Master Space Plan counseled against continuing the Commonwealth's practice of leasing small blocks of office space (RX 25 at 69) ("Forum Place illustrates the value of large blocks of space. . . . [I]t was usable by [PennDOT] and other groups and now, it can be appropriately re-used as swing space—or as permanent space—by other Commonwealth functions.").

PennDot vacated most of its space in Forum Place late in 2000 and moved into the newly completed Keystone Building (Tr. 158-59, 213).

2001-2002

Paragraph III.A of the OIP alleges that the Authority has been "unable" to replace PennDOT as a tenant. Respondents contend that this is a half-truth, and that it would be more accurate to say that the new Authority Board has been unwilling to replace PennDOT (RX 41 ¶¶ 162-66, 485-514, 542-54). In their posthearing pleadings, Respondents contend that the new Authority Board "directly caused" the default of the bonds and any resulting loss to the bondholders (D&B Br. at 33, PFC Br. at 30).

The Commonwealth continued to pay rent on the vacant PennDOT space until the lease expired on November 15, 2001 (Tr. 213, 1334).

By November 2001, the market for leasing office space in Harrisburg to the Commonwealth was “very soft” (Tr. 1613-14; DX 100). DGS anticipated that the Commonwealth would not have any large-block office space needs in the Harrisburg area, *i.e.*, requests to lease space in blocks at and above 35,000 to 50,000 square feet (Tr. 1615-16; DX 100). Rather, DGS expected that it would issue only three or four RFPs per year for office leases, and that those RFPs would be in the range of 10,000 to 20,000 square feet each (Tr. 1615-17; DX 100). At about the same time as PennDOT vacated its space in Forum Place, the rates the Commonwealth paid for leasing office space in Harrisburg began to fall (Tr. 1617-18; DX 100). By December 2001, Forum Place was 55% empty (RX 37 at 17).

There is conflicting evidence as to whether DCGA diligently competed for new government tenants at Forum Place. Michael Adams (Adams), Director of DGS’s Bureau of Real Estate after January 1998, was not aware of any significant RFPs for leased space that DCGA failed to pursue (Tr. 1603-04, 1619). However, Adams candidly acknowledged that he did not make a practice of checking on DCGA’s responses to RFPs (Tr. 1619). In contrast, Fowler and Bradbury observed that the Commonwealth’s Housing and Finance Agency was looking for 160,000 square feet of space, and that DCGA did not even know of that fact until Fowler brought it to the Authority’s attention (Tr. 826, 988-89; RX 41 ¶ 505). Fowler’s and Bradbury’s testimony about DCGA’s passive approach to finding new tenants for Forum Place is corroborated by Vartan (RX 16 at 97-98). I credit Fowler’s and Bradbury’s testimony on this point over Adams’s more generalized recollection.

DGS issued and then withdrew a RFP for approximately 50,000 square feet of office space for the Commonwealth’s Department of State in 2001 (Tr. 1621-23). Forum Place had been the successful bidder on this RFP, and a final lease had been presented for DCGA’s approval. Instead of leasing space at Forum Place, however, the Department of State moved into Commonwealth-owned space in the North Office Building (Tr. 1620-22).

Respondents argue that DCGA’s dilatory conduct allowed negotiations over space for the Department of State to collapse. The Authority twice sent Ricci back to renegotiate the terms of the Department of State lease, but DGS refused to renegotiate (RX 32 at 9-12, 15, RX 33 at 22, 27-28, RX 34 at 1, 4, 8, 12-13, RX 35 at 1, 5-6, RX 37 at 12). Ricci and others cautioned the Authority that its hard-nosed approach to reopening negotiations might prompt DGS to debar it from bidding on future Commonwealth lease proposals (RX 34 at 1, 8).

Some members of the new Authority Board wanted to lease Forum Place at higher “market rates” and not at rates similar to those in place in July 1998. Ricci, the former Authority Board chairman and current executive director, expressed an obligation to bondholders to lease space in the building at lower rates that would at least permit bondholder debt service (Tr. 1341-47; RX 32, RX 34, RX 37).

At public meetings during 2001, members of the Authority expressed the view that perhaps defaulting on the Forum Place bonds, so as to force a sale of the property, might be the best way to proceed (Tr. 1382-83; DX 32 at 13-14, DX 34 at 5-6, DX 37 at 13-14, 18). One member of the Authority and the Authority's new solicitor engaged in a discussion suggesting that the financial advisor and the underwriter could be held accountable in the event of a default (Tr. 1386-87; RX 37 at 19).

In September 2001, the Authority forced Ricci to resign as executive director and appointed William Hawk (Hawk) as his successor (Tr. 1330, 1387-88, 1394-95, 1397; RX 38 at 9). Hawk sought, and eventually obtained, a letter from Adams stating that DCGA and DGS's Bureau of Real Estate enjoyed a good working relationship (Tr. 1619-20, 1633-34; DX 100). Upon close questioning, Adams acknowledged that "there were issues" between DGS and DCGA and that Hawk "wrote down . . . what he wanted to see" in the letter (Tr. 1620, 1634). I find as a fact that the working relationship between DCGA and DGS was not good at the time, and that Adams's letter, drafted in relevant part by Hawk, did not accurately reflect the reality of the situation.

In 2002, after the Pennsylvania legislature enacted a law that increased the size of the Department of State, DGS issued a new RFP for bids on 70,000 square feet of leased space for that agency (Tr. 1623). Ten or eleven bids were submitted in response to the RFP (Tr. 1623-24). DGS then narrowed the responsive proposals to three and submitted those three to the Department of State for evaluation (Tr. 1623-24). Forum Place was one of the final contenders (Tr. 1624).

Although Forum Place's proposal was extremely competitive, the Department of State chose the competing proposal of a new building on the site of the former Polyclinic Hospital (Polyclinic) (Tr. 1625, 1639-40). Consultants on the Commonwealth's Master Space Plan had recommended that the Department of State's consolidated site should be located away from the Capitol Complex (DX 91 at 70). Polyclinic is ten to twelve blocks from the Capitol Complex (Tr. 1640).

The Series A bonds have been in technical default since July 2002. In violation of the trust indenture, DCGA has tapped the debt service reserve fund to make payments of interest and principal to the Series A bondholders (Tr. 424, 473-74; DX 16, Appendix A). The Series B bonds are in default. DCGA has not paid interest or principal on the Series B bonds since July 2002 (D&B Answer; Tr. 424; DX 3).

2003-2004

The bondholders eventually forced Forum Place into receivership (Tr. 425, 473). *See Manufacturers and Traders Trust Co., Trustee, v. Dauphin Co. Gen. Auth.*, Dauphin County Court of Common Pleas, Equity Action No. 2003-EQ-0040 (official notice). On July 21, 2003, the Dauphin County Court of Common Pleas appointed Robert E.

Chernicoff (Chernicoff) as the receiver for Forum Place. On August 1, 2003, Chernicoff engaged Vartan Management, Inc. (Vartan Management), to resume management of Forum Place (Tr. 1247-48, 1260).

Vartan Management inspected the property and identified several problems (Tr. 1248-54). These included out-of-date fire extinguishers, deficient sprinkler heads, non-functioning smoke and heat detectors, and a disabled alarm system. The inspection also determined that painting, sanding, and general cleaning had been deferred during the two and one-half years that DCGA had managed the property. After addressing these health, safety, and cleanliness issues, Vartan Management began a marketing campaign to attract eligible tenants to Forum Place (Tr. 1255-57).

Since August 1, 2003, Vartan Management has had some success in filling Forum Place's vacant office space with new tenants and in persuading existing tenants to renew their leases (Tr. 1255-59). In 2004, for example, Vartan Management successfully negotiated a ten-year lease for the use of 32,000 square feet by the Commonwealth's Department of Labor & Industry and another ten-year lease for the use of 35,000 square feet by DGS's Procurement Division (Tr. 1257-58). In addition, Vartan Management persuaded an existing tenant, the Pennsylvania Local Government Commission, to renew for ten years its lease of 5,000 square feet (Tr. 1257).

At the time of the hearing, the occupancy rate for Forum Place was about 55% and the Series A bonds traded at approximately half of their par value (Tr. 424, 426; DX 21).

F. The Hearing Record.

Exhibits

The minutes of the Authority's meetings were transcribed from tapes (Tr. 1336-39, 1390-91, 1647-50). With the exception of DX 25, which I have previously discussed, I consider these detailed minutes to be extremely reliable exhibits (DX 5, DX 24; RX 32-RX 40, RX 43-RX 45). I also consider McCormack's report and notes to be very reliable (DX 54, DX 55). DX 20 is LWM's bill to D&B for $13,425. Undisputed testimony establishes that Bradbury paid LWM triple that amount to compensate for prior transactions that had collapsed (Tr. 675, 1283-84).

Witnesses

It was almost four years from the bond closing to the commencement of the Division's investigation and more than six years from the bond closing to the start of the hearing. For that reason, there was a considerable amount of "I don't remember" or "I don't recall" testimony by various witnesses. This vague testimony was not confined to witnesses who might have an incentive to "forget" (O'Neill, Sweet). It also came from witnesses with no real stake in the outcome (Milke). Bradbury could not remember certain exculpatory details, even after the exhibits and the testimony of other witnesses had established them as facts (Tr. 782, 811-13).

Adams, Milke, McErlane, and Yingling were generally credible witnesses. Pope and Robert W. Doty (Doty), the expert witnesses for the Division and D&B, respectively, were extremely well qualified. It was dismaying to hear that Pope gave little regard to the allegations in the OIP as he drafted his direct testimony (Tr. 1087, 1091, 1133-34). Instead, he concentrated on issues identified by the Division in private conversations (Tr. 1091, 1133). His report opines on several matters that were not specifically identified as grounds for liability in the OIP. That has needlessly confused the issues that are a proper basis for a decision. Doty frequently drew legal conclusions on ultimate issues, and I have not relied on those aspects of his report in reaching my decision.

I have evaluated the investor testimony with a mild degree of skepticism. First, with the exception of Godlin, the investor representatives who testified were not the portfolio managers who decided to purchase the bonds. Rather, they were the credit analysts who made recommendations to the portfolio managers. As a group, the institutional investors were quite aggressive in snapping up the riskier bond offerings during 1998, a period of low interest rates. Second, some of the institutional investors are now involved in litigation against the Authority, through their bondholder committee. Such investors stand to benefit financially if this proceeding results in an order requiring the payment of substantial civil penalties, disgorgement, and prejudgment interest to an investor fund. Third, there is at least a touch of scapegoating here. To the extent that the investor witnesses can exculpate themselves of responsibility for an ill-advised purchase, they will have less to explain to their supervisors and their supervisors will have less to explain to the shareholders of the mutual funds they advise.

I was troubled by the testimony of the Merrill Lynch witnesses (Fornal, Schwartz, and Loffredo). They left the impression that a Merrill Lynch portfolio manager had tentatively decided to buy Forum Place bonds, but, because of a Merrill Lynch internal policy, needed Loffredo and Fornal to “paper the transaction” by preparing a credit worthiness report. I am persuaded that Merrill Lynch later engaged in a deliberate effort to “muddy the trail” by revising Loffredo and Fornal’s report after learning of PennDOT’s intended move. It then sold its Forum Place bonds at a profit.
The Division failed to address two facts arising from Godlin’s testimony: first, PaineWebber, not D&B, solicited Godlin; and second, Godlin’s decision to buy Forum Place bonds was based in part on misinformation that the Division could not attribute to D&B.

Among the investor witnesses, I found McCormack and Sherman to be very credible. Lowe was generally credible. Gilliand, Fornal, Schwartz, Loffredo, and Godlin were only marginally credible.

Kluger and Syfert, D&B’s sales agents, were generally credible. There are gaps in the record concerning what happened during conversations between Armstrong and Gilliand, and then between Bradbury and Gilliand. The Division has devoted very little of its posthearing pleadings to explaining this aspect of its case. In July 1998, Armstrong had just become a registered representative. Forum Place was her first bond sale and she was thrilled to earn a big commission. However, these facts hardly warrant an inference that she was incredible.

Ricci offered a partisan view of his dealings with the newly constituted Authority after the November 1999 election. In general, he portrayed himself as a responsible official who advocated for the bondholders' interest, and he depicted the new members of the Authority as irresponsible officials who changed the Authority's policies to the detriment of the bondholders. According to Ricci, the new members also micromanaged his actions because they did not trust him (Tr. 1351 ("it was like pulling teeth with this Board"), Tr. 1395 ("they thought I couldn't negotiate my way out of a paper bag")). I have evaluated Ricci's testimony with these factors in mind. Ricci was generally credible in discussing events before November 1999.

Vartan did not testify in person. He was ill with throat cancer and had a limited ability to travel. The cancer makes it difficult for Vartan to speak above a whisper and, thus, difficult for listeners to understand him (Tr. 1244). The Division did not object to the introduction of Vartan's investigative testimony (Tr. 1245). The Division also said it was prepared to cross-examine Yingling, president of Vartan Management, as a substitute witness (Tr. 1246-47). In these circumstances, I give little regard to the Division insinuation that Vartan was a malingerer (Div. Prop. Find. # 15). Because I did not observe Vartan, I make no demeanor-based credibility findings. However, I have relied on Vartan's investigative testimony to the extent that I find it logical, persuasive, and corroborative of the testimony of others.

Crowell was a reliable witness on matters concerning the T&S Building, the Commonwealth's RFP process, and the leasing of space at Riverfront and Forum Place in 1995-96. He was only marginally reliable as to the events of June 30, 1998, and the swing space program. My general impression is that Crowell attempted to ingratiate himself to whomever he was addressing at a given moment, whether it was Vartan in 1995; a newspaper reporter in February 1998; Fowler, Reese, and Sweet on June 30, 1998; or the Division at the hearing. When Crowell was telling the press about the swing space program in February 1998, the program was growing. According to Crowell's hearing testimony, the swing space program was nearly completed by June 30, 1998. The lack of funding is not a satisfactory explanation for these discrepancies.

Crowell's hearing testimony about the events of June 30 makes it difficult to distinguish between what he now knows to be true (with the benefit of hindsight) and what he told Fowler, Reese, and Sweet at the time (as he looked into the future). Accordingly, I do not accept the Division's argument that Crowell's hearing testimony was a more accurate summary of the June 30 meeting than the accounts offered by Fowler and Sweet. As previously noted, the record is inconclusive as to what actually happened at this meeting. The Division did not take Crowell's testimony under oath during its investigation. Rather, it took notes, for which it now claims privilege, and then sculpted an affidavit that Crowell signed without change (Supplement to Division's Withheld Document List, dated May 27, 2004, items 7k, 7l, 7o, 7s; Tr. 214-15; DX 65). While this is certainly permissible, *see United States v. Lieberman*, 608 F.2d 889, 897 (1st Cir. 1979), it suggests that the Division may have had some concerns about the credibility of this important witness and was not anxious to create materials that Respondents could use to impeach him at the hearing.

O'Neill's poor memory at the hearing was refreshed and/or impeached by references to his investigative testimony. To the extent that the conflicts were not resolved, I have given more weight to O'Neill's investigative testimony. There were also conflicts between Bradbury's hearing testimony and his investigative testimony, but I do not agree with the Division that Bradbury's investigative testimony should always trump his hearing testimony. For example, during the hearing, Bradbury testified that he added footnotes to Fowler's financial projections (Tr. 806, 853). During the investigation, he could not remember doing so. I find Bradbury's hearing testimony on this point to be more reliable. I have considered Bradbury's and Fowler's testimony throughout this decision, and noted when I find it incredible.

Sweet's poor memory at the hearing cannot be explained by the age of the case alone. Sweet purportedly could not remember who arranged the June 30 meeting with Crowell (Tr. 99, 147), although he knew Crowell well, considered himself a lobbyist, and volunteered to act as the finance team's liaison with the Commonwealth. There is little doubt that Sweet arranged the meeting. Sweet also portrayed himself as more of a bystander than a participant in the June 30 meeting and could not remember the precise conversation at that meeting about PennDOT's plans to vacate Forum Place (Tr. 95). He could not remember his June 22 telephone conversation with Bradbury and O'Neill (Tr. 79) or telling Bradbury about the June 30 meeting with Crowell (Tr. 132). As to the July 8 meeting of the Authority, Sweet did not remember if the Crowell meeting was discussed (Tr. 103-04, 139), the specifics of Fowler's presentation (Tr. 131, 139), or even if he personally made extensive remarks that day (Tr. 104). Finally, Sweet did not remember talking with the Boston law firm representing Putnam Investments about revising the trust indenture (Tr. 133-34, 148). I consider this witness to be thoroughly disingenuous.

Hendershot was a minor witness, but he, too, was generally unreliable. The Division called Hendershot to rebut the contention that he had revised the minutes of the Authority's July 8 meeting. The Division suggested that Fowler shortened the minutes (Div. Prop. Find. ## 191-92), while Fowler argued that Hendershot was the culprit (PFC Prop. Find. ## 18, 146).

Hendershot's efforts to distance himself from the minutes of the July 8 meeting were unrelenting (Tr. 1652 ("I had nothing to do with either set of these minutes"), Tr. 1660 (purging his partner's handwritten notes of the July 8 meeting from GKS's files), Tr. 1665-66 (disavowing the significance of his own handwritten note, showing approval of the July 8 minutes), Tr. 1667 ("I don't know if I was present . . . I often came . . . late. I'm not sure I was in the room when that motion was adopted."), Tr. 1670 ("Steve's limitation is that he was never really schooled in municipal finance. . . . It could be inaccurate. It could be incomplete.")). I agree with Fowler that the longer version of the minutes helps him, and I see no motive for Fowler to have acted as the Division alleges he did. Beyond that, I express no view as to who made the revisions.

The Division urges me to find that Bradbury, Fowler, and Sweet were not testifying truthfully when they claimed that the finance team never discussed the need to disclose PennDOT's anticipated move (Div. Br. at 27). This is a major request, because it would fundamentally change the character of the case. If I were to make such an adverse group credibility finding, Bradbury's scienter and Fowler's role in reviewing the disclosure language in the POS could almost be assumed. Such a finding would also imply that Bradbury, Fowler, and Sweet conspired during the investigation to cover up the true extent of their discussions. Such an adverse group credibility finding, if sustained on appeal to the Commission and the court of appeals, would virtually guarantee the Division a back-door victory. If the Division had evidence of such a conspiracy, it should have alleged it in the OIP and proven it at the hearing. I decline to make the requested adverse group credibility finding.

Inappropriate Argument in Posthearing Pleadings

PFC's Brief addresses several documents that are not part of the record, including the minutes of five Authority meetings (December 1999 through March 2001) and various newspaper articles (PFC Br. at 36-38, 48). The Division objects to any consideration of these documents. I agree with the Division.

The Division also strays beyond the record at times. During the hearing, the Division read into the record a passage of investigative testimony to test the validity of Doty's opinions (Tr. 1502-05). It was entirely proper for the Division to use the investigative testimony for this limited purpose. *Cf.* Fed. R. Evid. 105, 703. However, in its posthearing pleadings, the Division now treats the investigative testimony as if it had been given at the hearing, and as if it were admissible as substantive evidence for all purposes (Div. Prop. Find. ## 105, 252). This is inappropriate. *Cf.* Fed. R. Evid. 105, 703. The Division cites Pope's report as support for certain proposed factual findings (Div. Prop. Find. ## 4-5). This is also inappropriate. Pope based his opinions on his understanding of the facts, as developed during the Division's investigation (DX 94 ¶ 4 and Exhibit C). However, Pope's report never identified the specific facts upon which it was based (Tr. 1047-48). The Division cannot assume that the "facts" from the investigation are the facts adjudicated at the hearing.

The Division's Reply to PFC's Brief also raises several new factual allegations that lack record support and presents argument on matters that are beyond the scope of the OIP. For example, the OIP does not allege that PFC and Fowler directly violated Sections 17(a)(2) and 17(a)(3) of the Securities Act. It only alleges that they caused the Authority's violations of these provisions. When the Commission wants to charge an individual as both a direct violator and as a cause of the violation of another actor, it knows how to do so. *See* Paragraph II.F of the OIP in Admin. Pro. No. 3-11462, *Ira Weiss* (Apr. 22, 2004). Accordingly, the Division's arguments of direct liability by PFC and Fowler will not be considered further.

DISCUSSION AND CONCLUSIONS

A. Applicable Legal Standards.

Congress exempted offerings of municipal securities from the registration requirements and civil liability provisions of the Securities Act and the periodic reporting requirements of the Exchange Act. *See* Section 3(a)(2) of the Securities Act; Section 3(a)(12) of the Exchange Act. However, Congress did not exempt municipal securities transactions from the antifraud provisions of those statutes.

In 1975, Congress enacted the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (1975). The 1975 Amendments created the MSRB and provided a system of regulation for both municipal securities professionals and the municipal securities markets.

In 1988, the Commission sought comments on a proposal to prevent fraud by enhancing the timely access of underwriters, public investors, and other interested persons to municipal official statements. *See Municipal Securities Disclosure*, 41 SEC Docket 1402 (Sept. 22, 1988). At the same time, the Commission published its interpretation of an underwriter's obligation to have a reasonable basis for its implied recommendation of any municipal securities that it underwrites. *Id.* at 1411-15 (1988 Interpretive Statement). The Commission also invited comments on its interpretation. *Id.* at 1414.

In 1989, the Commission adopted Exchange Act Rule 15c2-12, which requires underwriters to obtain and review a municipal issuer's official statement prior to selling bonds, and to provide official statements to investors and potential investors. *Municipal Securities Disclosure*, 43 SEC Docket 2245 (June 28, 1989). At the same time, the Commission modified, in limited respects, its previously published interpretation of the legal obligations of municipal securities underwriters under the antifraud provisions of the federal securities laws. *Id.* at 2257-58 (1989 Interpretive Statement).

In March 1994, the Commission issued another interpretation. *Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others*, 56 SEC Docket 596, 597 (Mar. 9, 1994) (1994 Interpretive Statement). As relevant to this proceeding, the Commission stated that increased attention needed to be directed at disclosure of the risks of the securities being offered. In November 1994, the Commission adopted amendments to Rule 15c2-12 to prohibit the underwriting of municipal issues unless continuing information covenants are provided by the issuer. *Municipal Securities Disclosure*, 57 SEC Docket 2993 (Nov. 10, 1994).

Primary Violations of the Antifraud Provisions

Paragraph III.F.1 of the OIP alleges that the Authority violated Sections 17(a)(2) and 17(a)(3) of the Securities Act. Paragraph III.F.3 of the OIP alleges that D&B and Bradbury willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder.[26]

Section 17(a) of the Securities Act proscribes fraudulent conduct in the offer or sale of securities and Section 10(b) of the Exchange Act and Rule 10b-5 proscribe fraudulent conduct in connection with the purchase or sale of securities. These provisions prohibit essentially the same type of conduct. *See United States v. Naftalin*, 441 U.S. 768, 773 n.4, 777-78 (1979). To prevail under Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5, the Division must show: (1) misstatements or omissions of material facts or other fraudulent devices; (2) made in connection with the offer, sale, or purchase of securities; and (3) that respondents acted with scienter. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). No scienter requirement exists for violations of Sections 17(a)(2) or 17(a)(3) of the Securities Act; negligence alone is sufficient. *Aaron v. SEC*, 446 U.S. 680, 701-02 (1980); *Pagel, Inc. v. SEC*, 803 F.2d 942, 946 (8th Cir. 1986).

Scienter is defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Hochfelder*, 425 U.S. at 193 n.12. It may be established by a showing of recklessness. *David Disner*, 52 S.E.C. 1217, 1222 & n.20 (1997) (citing *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-69 (9th Cir. 1990) (*en banc*)). The *en banc* Ninth Circuit adopted the standard of recklessness articulated by the Seventh Circuit in *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1044-45 (7th Cir. 1977): "[A] highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." Scienter is a question of fact and can be proved by circumstantial evidence. *SEC v. Hasho*, 784 F. Supp. 1059, 1107 (S.D.N.Y. 1992) (collecting cases).

An omission is material if there is a substantial likelihood that a reasonable investor would have considered the omitted fact important in making an investment decision and disclosure of the omitted fact would have significantly altered the total mix of information available. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1466 (2d Cir. 1996). Materiality presents a mixed question of law and fact. *TSC Indus.*, 426 U.S. at 450.

Willfulness is shown where a person intends to commit an act that constitutes a violation. There is no requirement that the actor must also be aware that he is violating any statutes or regulations. *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000); *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965).

The jurisdictional requirements of the antifraud provisions are interpreted broadly, and are satisfied by intrastate telephone calls and even the most ancillary mailings. *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 865 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 1348 (2d Cir. 1998). There is no dispute that the jurisdictional requirements have been satisfied in this proceeding.

Causing Violations of
Sections 17(a)(2) and 17(a)(3)

Paragraph III.F.2 of the OIP alleges that PFC and Fowler caused the Authority's violations of Section 17(a)(2) and 17(a)(3) of the Exchange Act.

The Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (1990) (Remedies Act), created a distinct class of secondary liability, causing liability, and made it subject to a new administrative remedy, a cease-and-desist order. As here relevant, Section 8A of the Securities Act and Section 21C(a) of the Exchange Act specify that a respondent is a cause of another's violation if the respondent knew or should have known that his or her act or omission would contribute to such violation.

The Commission has determined that causing liability under these statutory provisions requires findings that: (1) a primary violation occurred; (2) an act or omission by the respondent caused the violation; and (3) the respondent knew, or should have known, that his or her conduct would contribute to the violation. *See Robert M. Fuller*, 80 SEC Docket 3539, 3545 (Aug. 25, 2003), *pet. denied*, 2004 U.S. App. LEXIS 12893 (D.C. Cir. Apr. 23, 2004); *Erik W. Chan*, 77 SEC Docket 851, 859-60 (Apr. 4, 2002).

Negligence is sufficient to establish liability for causing a primary violation that does not require scienter. *Howard v. SEC*, 376 F.3d 1136, 1141 (D.C. Cir. 2004); *KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1175 (2001), *recon. denied*, 74 SEC Docket 1351 (Mar. 8, 2001), *pet. denied*, 289 F.3d 109 (D.C. Cir. 2002). Negligence is the failure to exercise reasonable care or competence. *Byron G. Borgardt*, 80 SEC Docket 3559, 3577 & n.35 (Aug. 25, 2003).

The Commission has yet to announce the criteria it will use in deciding whether a secondary actor should have known that specific acts or omissions "would contribute to" a primary violation for purposes of Section 8A(a) of the Securities Act or Section 21C(a) of the Exchange Act. However, a proceeding involving this issue is now pending on the Commission's docket. *See Jeffrey M. Steinberg*, 76 SEC Docket 1538, 1582-89 (Dec. 20, 2001) (Initial Decision) (rejecting the Division's argument that any act that contributes to a primary violation is a cause of that violation for purposes of Section 21C(a) of the Exchange Act; and also requiring the Division to establish "a sufficient nexus between the respondents' alleged conduct and the underlying violation"), *review granted*; *see also* Simon M. Lorne & W. Hardy Callcott, *Administrative Actions Against Lawyers Before the SEC*, 50 Bus. Law. 1293, 1308 (Aug. 1995) ("'Causing' liability under the Remedies Act poses several questions that the SEC has not yet finally resolved. . . . [One question] is the issue of how close a nexus must there be between the 'cause' and the underlying violation.").

Primary Violations of MSRB Rule G-17
and Section 15B(c)(1) of the Exchange Act

Paragraph III.F.5 of the OIP alleges that D&B and Bradbury willfully violated MSRB Rule G-17.[27] The applicable version of that provision requires that, in the conduct of its municipal securities business, "each broker, dealer, and municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice."

The state of mind necessary to establish a violation of MSRB Rule G-17 presents an open question. *See Wheat*, 80 SEC Docket at 3425 & n.42 ("We believe that Rule G-17 requires a showing of *at least* negligence to establish an unfair practice violation.") (emphasis added). The Commission determined that, even if proof of scienter were required, the respondents had acted with scienter. *Id.*

In *SEC v. GLT Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001), the court observed that the parties before it did not dispute that negligence was the standard by which MSRB Rule G-17 liability should be evaluated. The court also cited a settled administrative proceeding, *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 SEC Docket 2487, 2501-02 (Aug. 24, 1998), which identified negligence as the appropriate standard. The present OIP covers all the bases: it alleges that D&B and Bradbury willfully violated MSRB Rule G-17 by knowing, reckless, or negligent conduct (OIP ¶ III.F.5). The parties disagree about the applicable legal standard (Div. Prehearing Br. at 17; D&B Br. at 7-9; Div. Reply to D&B at 23). Because *Wheat* leaves the issue unresolved, I will make a determination under both the negligence and scienter standards.

Paragraph III.F.4 of the OIP alleges that D&B willfully violated Section 15B(c)(1) of the Exchange Act. Section 15B(c)(1) prohibits any broker, dealer, or municipal securities dealer from using the mails or interstate commerce "to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in contravention of any rule" of the MSRB, including MSRB Rule G-17. Negligence is sufficient to violate Section 15B(c)(1). *See SEC v. Fitzgerald*, 135 F. Supp. 2d 992, 1027 nn.11-12 (N.D. Cal. 2001).

Aiding and Abetting Violations of Section
15B(c)(1) of the Exchange Act

Paragraph III.F.4 of the OIP alleges that Bradbury willfully aided and abetted D&B's violations of Section 15B(c)(1) of the Exchange Act.[28] To show that one respondent willfully aided and abetted the violation of another, the Commission requires the Division to establish three elements: (1) another party has committed a securities law violation; (2) the accused aider and abetter has a general awareness that his role was part of an overall activity that was improper or illegal; and (3) the accused aider and abetter knowingly and substantially assisted the principal violation. *See Orlando Joseph Jett*, 82 SEC Docket 1211, 1256 n.46 (Mar. 5, 2004); *Abraham & Sons*, 75 SEC Docket at 1492 (citing

Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000)); *Donald T. Sheldon*, 51 S.E.C. 59, 66 (1992), *aff'd*, 45 F.3d 1515 (11th Cir. 1995).

The Commission has held that a showing of recklessness will satisfy the "substantial assistance" prong of the aiding and abetting test. *See Graham*, 53 S.E.C. at 1084-85 & n.33; *Russo Sec's., Inc.*, 53 S.E.C. 271, 278-79 & n.16 (1997); *but see Howard*, 376 F.3d at 1143 (holding that "extreme recklessness" may support aiding and abetting liability, but concluding that "aiding and abetting liability cannot rest on the proposition that the person 'should have known' that he was assisting violations of the securities laws."). Irrespective of the level of proof required to establish the primary violation, the Commission has made clear that the accused aider and abetter must have acted with scienter. *See Zion Capital Mgmt. LLC*, 81 SEC Docket 3063, 3076-77 & n.35 (Dec. 11, 2003); *Terence Michael Coxon*, 80 SEC Docket 3288, 3300 n.32 (Aug. 21, 2003), *appeal pending*, No. 03-73732 (9th Cir. filed Oct. 13, 2003); *Kingsley, Jennison, McNulty & Morse, Inc.*, 51 S.E.C. 904, 911 & n.28 (1993).

B. Preliminary Issues.

D&B and Bradbury assert that they are the victims of selective prosecution. They claim unfairness in the fact that the Commission has charged them with misconduct, even though it brought no charges against the Authority's solicitor, bond counsel, or the underwriter's counsel. They also argue that the Commission "merely slapped the Authority's wrist in a sweetheart consent order" despite the Authority's truly disturbing record of reckless behavior between November 1999 and July 2003 (D&B Br. at 6). They further contend that there is no apparent basis for such discriminatory enforcement action.

To prevail on a claim of improper selective prosecution, Respondents must establish that they were singled out for enforcement action while others similarly situated were not, and that their prosecution was motivated by arbitrary and unjust considerations. *See United States v. Huff*, 959 F.2d 731, 735 (8th Cir. 1992); *Barry C. Wilson*, 52 S.E.C. 1070, 1074 (1996); *Richard J. Puccio*, 52 S.E.C. 1041, 1046 (1996).

In accepting the Authority's settlement offer, the Commission identified the turnover in the membership of the Authority, the replacement of the Authority's financial advisor and solicitor, the Authority's prompt remedial actions, and the cooperation the Authority afforded the Commission's staff as factors it had considered. *See Dauphin Co. Gen. Auth.*, 82 SEC Docket at 2887-88. The Division views the Authority as less culpable because its members were inexperienced and relied on their professionals (Tr. 1031; Div. Br. at 36-37). Doty opined that the Commission approaches municipal securities regulation in important respects through underwriters, due to statutory limits and "considerations of intergovernmental comity and the political process" (RX 41 ¶ 197). The Division believes that O'Neill and Hendershot had limited engagements in the Forum Place transaction (Tr. 364-65, 1296; Div. Prop. Find. ## 58, 93, 300). Conversely, the Division contends that the Authority relied heavily on Sweet, as well as Respondents, to ensure that the OS was complete, accurate, and contained all necessary disclosures

(Div. Prop. Find. # 246).[29] Respondents included Sweet's Wells Submission on their list of proposed exhibits, but elected not to offer that document into evidence. The Wells Submission might have shed light on why the Commission did not bring charges against Sweet. I find that Respondents have not met their burden as to the second prong of the test for showing improper selective prosecution.

PFC and Fowler argue that the Authority is not a "person" within the meaning of Section 17(a) of the Securities Act. However, Section 2(a)(2) of the Securities Act defines the term "person" as including "a corporation" and "a government or political subdivision thereof." The record demonstrates that the Authority is both a public corporation engaged in the civil administration of government and a political subdivision of the Commonwealth. Accordingly, the Authority is subject to Section 17(a) of the Securities Act.

PFC and Fowler also argue that the Division cannot satisfy Section 17(a)'s requirement that misconduct occur "in the offer or sale of any securities." They contend that they had nothing to do with the actual offer or sale of the bonds. A similar argument was raised by the financial advisors in another proceeding, but the Chief Administrative Law Judge rejected it. *See County of Nevada*, 70 SEC Docket 3303, 3321-22 (Oct. 29, 1999), *final*, 71 SEC Docket 519 (Dec. 2, 1999). I see no reason to reach a different conclusion here. The relevant statutory language should be construed broadly, consistent with the remedial purposes of the antifraud provisions of the federal securities laws. *See SEC v. Zandford*, 535 U.S. 813, 820-25 (2002); *Naftalin*, 441 U.S. at 773. PFC and Fowler played a major role in the Forum Place bond offering. Furthermore, PFC and Fowler have been charged with causing the Authority's primary violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act. As the issuer of the bonds, the Authority's conduct occurred in the offer or sale of a security.

C. Materiality of the Omissions and the Need to Disclose Them.

The function of the materiality requirement is to weed out claims based on trivial or tangential omissions. An analysis of materiality should include an evaluation of both the meaning of the information that allegedly should have been disclosed and the "total mix of information made available" to the reasonable investor.

In conducting this analysis, it is irrelevant that Respondents were marketing the bonds to sophisticated institutional investors. The antifraud provisions of the federal securities laws apply with equal force to all investors, including those who are experienced and sophisticated. *See Brian A. Schmidt*, 76 SEC Docket 2255, 2271 & n.40 (Jan. 24, 2002); *Jay Houston Meadows*, 52 S.E.C. 778, 785 (1996).

The Forum Place bonds represented only the third public offering of securities of their type in the central Pennsylvania region. They required a long-term investment in a specialized office building project. The financial success of the project would be directly dependent on the issuer's ability over many years to keep the project substantially full under short-term and intermediate-term leases with the Commonwealth. Pope and Doty had never previously encountered a bond offering of this sort (Tr. 1059, 1155, 1534; DX 94 ¶¶ 11, 27). I agree with Pope that there was a need for careful disclosure of unusual risks in these circumstances (DX 94 ¶¶ 11, 27-28).

1. Material Omissions Identified in the OIP as Grounds for Liability.

The OIP alleges that the POS and OS should have disclosed PennDOT's anticipated move to the Keystone Building. It also asserts that Fowler's financial projections were misleading, even after Bradbury had added explanatory footnotes. Finally, the OIP contends that the appraisal was misleading, insofar as it discussed a 1% vacancy rate for Class A office space in Harrisburg's downtown business district.

As to PennDOT's anticipated move, the disclosure provided in the POS and OS was inadequate because it told only half the story. There is a significant difference between stating that there is no guarantee that any lease would be extended or renewed and stating that the agency occupying 79% of the space and generating 60% of the total lease revenues was nearly certain to leave within two or three years. The PennDOT information was known to Respondents before the offering. It should have been disclosed explicitly in the POS and OS. *See Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 192-93 (3d Cir. 2001) (discussing omissions that made affirmative representations misleading); *cf. Swickard v. A.G. Edwards & Sons*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,522 at 30,275 (Mar. 7, 1985) (holding that half of the truth may amount to a lie if it is understood to be the whole).

Similarly, the footnoted financial projections set forth anticipated revenues for ten years, without identifying PennDOT's intended move and without evaluating the likelihood that PennDOT would be replaced immediately by another eligible tenant paying comparable rates. The evidence supporting the misleading nature of the footnoted financial projections is not nearly as strong as the evidence concerning PennDOT's anticipated move. It depends on the less-than-forceful testimony of one investor ("there was a possibility") and a concession by D&B's expert ("not unreasonable"). Nonetheless, I find it sufficient. Respondents do not dispute that the first two omissions identified above involved information that would have been important to a reasonable investor. On that basis, and after considering the record, I conclude that both of these omissions were material.

PennDOT's Proposed Move to the Keystone
Building Was Not Publicly Available Information

When allegedly undisclosed material information is readily accessible in the public domain, a respondent may not be held liable for failing to disclose it. *See In re Keyspan Corp. Sec's. Litig.*, 2003 U.S. Dist LEXIS 20746, at *49-51 (E.D.N.Y. Mar. 18, 2003) (collecting cases). "It is pointless and costly to compel firms to reprint information already in the public domain." *Weilgos v. Comm. Edison Co.*, 892 F.2d 509, 517 (7th Cir. 1989). "Although the underlying philosophy of federal securities regulations is that of full disclosure, . . . there is no duty to disclose information to one who reasonably should already be aware of it." *Seibert v. Sperry Rand Corp.*, 586 F.2d 949, 952 (2d Cir. 1978). Respondents argue that PennDOT's anticipated move to the Keystone Building was publicly available information during June and July 1998 because it had been reported in certain Pennsylvania newspapers, discussed at the Authority's public meeting on July 8, 1998, and was freely shared by DGS with anyone who asked (D&B Br. at 15, 26-28; PFC Br. at 47-50). As to the newspaper articles, I reject this argument because the publications in question were not widely available outside of central Pennsylvania (DX 68, DX 69, DX 101).[30] *See In re Apple Computer Sec's. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989) ("Even in a fraud on the market case, corporate insiders are not relieved of their duty to disclose material information where that information has received only brief mention in a few poorly-circulated . . . publications."); *Seibert*, 586 F.2d at 952 (holding that information was a matter of general public knowledge because it was reported nationwide in the press, on radio, and on television, was discussed in Congress, and was analyzed in published administrative and judicial opinions); *United Paperworkers Int'l Union v. Int'l Paper Co.*, 801 F. Supp. 1134, 1142 (S.D.N.Y. 1992) ("[T]horough and intensive news reporting . . . is required for media coverage to be included in the 'total mix' of information available to shareholders."), *aff'd*, 985 F.2d 1190 (2d Cir. 1993).

Respondents' alternative arguments also lack merit. I decline to hold that prospective investors had a duty to attend the Authority's public meeting or to contact Crowell to obtain information that properly belonged in the POS and OS distributed at about the same time.

The "Bespeaks Caution" Doctrine
Is Inapplicable Here

D&B and Bradbury contend that the cautionary statements in the POS and OS related to the precise topic the Division claims should have been disclosed—namely, that the PennDOT lease would not be renewed. They invoke the "bespeaks caution" doctrine to argue that further disclosures would not have been material (D&B Br. at 25-26). The Division counters that the "bespeaks caution" doctrine applies only to forward-looking statements, and does not excuse the failure to disclose known material facts (Div. Reply to D&B at 10-13).

The "bespeaks caution" doctrine recognizes that the text of an offering document must be read in context. *In re Donald J. Trump Casino Sec's. Litig.*, 7 F.3d 357, 371 (3d Cir. 1993). The doctrine is equally applicable to allegations of both affirmative misrepresentations and omissions of "soft information."[31] *Id*.

When an offering document's forecasts, projections, or opinions are accompanied by cautionary statements that are substantive and tailored to the soft information allegedly misrepresented or omitted, the alleged misrepresentations or omissions are rendered immaterial as a matter or law. *In re Adams Golf, Inc., Sec's. Litig.*, 381 F.2d 267, 279 (3d Cir. 2004); *Trump*, 7 F.3d at 371. A vague or boilerplate/blanket disclaimer that merely warns the reader that the investment has risks will ordinarily be inadequate to prevent the document from being misleading. *Trump*, 7 F.3d at 371.

The Forum Place POS and OS did not disclose PennDOT's plan to vacate Forum Place upon completion of the Keystone Building. Although the timing of this move was uncertain as of July 1998, the issue is intent, not timing. The Commonwealth was quite likely to move PennDOT within two or three years. In short, PennDOT's plan to vacate was a then-present factual condition during July 1998 (Tr. 1571-72). *See Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1213 (1st Cir. 1996) (finding statement of company's current intent to be representation of present fact); *Harden v. Raffensperger*, 65 F.3d 1392, 1405-06 (7th Cir. 1994) (concluding that company's statement of "plans to restore profitability" to be statement of present existing fact and not the type of "soft information" to which the "bespeaks caution" doctrine applies); *see also* 1994 Interpretive Statement, 56 SEC Docket at 601 & n.59.

Accordingly, I conclude that PennDOT's intended move was an undisclosed fact, and not undisclosed "soft information" covered by the "bespeaks caution" doctrine. As such, the doctrine is inapplicable to the omissions at issue here and therefore does not shield D&B and Bradbury from liability. *See EP Medsystems, Inc. v. Echocath, Inc.*, 235 F.3d 865, 874, 876 (3d Cir. 2000); *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1123 (10th Cir. 1997); *Shaw*, 82 F.3d at 1213.

The Appraisal Was Not Materially Misleading,
Either by Itself or When Considered as
Part of the Total Mix of Information Available

The parties vigorously dispute the importance of the appraisal to a reasonable investor (Div. Br. at 6, 19; D&B Reply at 15-16; PFC Reply at 9).

The OIP alleges that the Class A vacancy rate information in the appraisal, when considered along with the OS and financial projections, misled investors into believing that PennDOT might renew its lease at Forum Place because there was no other office space available in downtown Harrisburg (OIP ¶ III.E.11). With respect to the appraisal, this is the only issue properly before me.[32]

The concept of "Class A, B, or C" office space is loose terminology in the real estate market. Such classifications are based on vague and subjective evaluations (Tr. 1264-65). The record does not show that everyone who used the term "Class A office space" in this proceeding shared a common understanding of what it meant. For example, some witnesses considered Forum Place to be Class A space, while the Division believed it was Class B or B+ (Tr. 419, 1265-66; RX 16 at 115-16). Indeed, the Division missed no opportunity to disparage Forum Place (Div. Br. at 3 (characterizing Forum Place as a parking garage that had been temporarily converted into an office building), 7 (asserting that Forum Place is at a competitive disadvantage because it is a converted parking garage and located in congested downtown Harrisburg)). The Division cannot have it both ways.

On a more fundamental level, the Division has not even shown that the vacancy rate for the Class A market has any bearing on the demand for office space by the Commonwealth or other eligible tenants. Fowler explained that the Commonwealth did not typically lease Class A office space (Tr. 1003-04). Although the Commonwealth was "trading up" and moving from substandard space into better space during 1998, some of these moves were from Class C to Class B space (Tr. 1003-05). The Division's assumption that Commonwealth agencies, including PennDOT, require nothing less sumptuous than Class A office space lacks record support.

The Division never asked Fornal, Gilliand, Lowe, McCormack, or Doty to explain their understanding of Class A office space. Nor did the Division explore with the witnesses its assumption that the Harrisburg market for Class A office space was relevant to the demand for office space by eligible tenants. For these reasons, I give little regard to the testimony on this subject.

2. Material Omissions Not Identified in the OIP as Grounds for Liability.

The Division's theories of liability have evolved and expanded since the proceeding began. *See supra* notes 21, 32. The Division's current position is that there are three other material omissions that would have been important to a reasonable investor and should have been disclosed in the POS and OS: (1) the vagueness of the Commonwealth's swing space program; (2) the limited number of eligible tenants in the Harrisburg area; and (3) the risks that might jeopardize the non-taxable status of the bonds. The OIP recited facts about the first two of these omissions, but it did not separately charge that the failure to disclose such facts could result in a finding of liability. In this regard, the Division has created a predicament similar to the one it created in *Borgardt*, 80 SEC Docket at 3567-70.

With the benefit of hindsight, it is easy to understand how this situation developed. At the first prehearing conference, I told the Division that its expert testimony should be "specifically targeted to the offenses alleged in the OIP" (Prehearing Conference of May 26, 2004, at 18). I then ordered the Division to identify its expert and provide the information required by Rules 222(a) and (b) of the Commission's Rules of Practice (Scheduling Order of May 27, 2004, at 2). The Division asked me to "clarify" and "provide guidance" on whether it had to provide a brief summary of its expert's expected testimony, as required by Rule 222(a)(4) (Letter of June 7, 2004, from Division counsel to ALJ). The Division stated that it had not contemplated summarizing its expert's opinion so soon. I found this letter highly unusual, but provided the requested clarification in an attempt to focus attention on the issues in dispute. My Order of June 8, 2004, at 2, stated (emphasis in original):

As to Rule 222(a)(4), I do not expect the parties to summarize the expected testimony and the expected conclusions of their experts. However, the parties must identify the specific *issues* their experts will address. For example, if the Division states on June 14 that its expert will offer opinion testimony on Issues A, B, and C, then Respondents may rely on that statement in choosing their expert and preparing their defense. I would not expect the Division's expert to address Issues D, E, and F when that expert submits his testimony on July 19.

This turned out to be a poor choice of words on my part. Instead of saying "Issues A, B, and C," I should have said "Material Omissions A, B, and C." When the Division identified the subjects its expert would address, it stated only that the expert would opine on "[w]hether the [POS and OS] omitted information that would have been important to the reasonable investor" (Declaration of Division counsel, dated June 14, 2004, at 1-2). Respondents did not react to this lack of specificity at the time, and neither did I. Four weeks before the start of the hearing, the Division filed the report of its expert witness (DX 94). Pope developed a broad list of information that, in his judgment, should have been disclosed in the POS and OS (Tr. 1065-66, 1105-06, 1133-34, 1142-43). His report roamed well beyond the grounds for liability identified in the OIP, perhaps because he prepared his report without consulting the OIP more than once or twice (Tr. 1087, 1091, 1133-34).

Rule 200(d)(1) of the Commission's Rules of Practice provides that the Commission may amend an OIP at any time to include new matters of fact or law. Rule 200(d)(2) of the Commission's Rules of Practice provides that an Administrative Law Judge may amend an OIP at any time before filing an Initial Decision to include new matters of fact or law that are within the scope of the original OIP. In both instances, a motion by a party is required. The Division prudently moved to amend the OIP in *Borgardt*, which resolved the problem in that proceeding. The Division has not moved to amend the OIP here. D&B and Bradbury argued that reliance on Pope's extraneous opinions would be unfair and a violation of due process (Tr. 1157-58). I denied their motion to strike, without prejudice to renewal in the posthearing pleadings (Tr. 1158). D&B and Bradbury have not renewed their motion to strike.

The rules of practice of several federal agencies provide that, when issues not raised by the pleadings are tried by the express or implied consent of the parties, the issues shall be treated in all respects as if they had been raised in the pleadings.[33] The SEC's Rules of Practice have no comparable provision. However, the Commission determined in *Wheat*, 80 SEC Docket at 3424, that due process is satisfied where the party against whom a proceeding is brought understands the issues and has an opportunity to meet the charges. The Commission reasoned that the question on review is not solely the adequacy of the particular pleading, but the fairness of the entire proceeding.[34] *Id.*

Respondents have not suffered substantial prejudice here. They received Pope's report well in advance of the hearing. Respondents have defended on the theory that PennDOT's anticipated move was immaterial *because* of the Commonwealth's swing space intentions (D&B Prehearing Br. at 25; D&B Br. at 16; D&B Reply Br. at 2; PFC Prehearing Br. at 24; PFC Reply Br. at 5). Doty spent a considerable amount of time parsing the OIP to determine what was being alleged (Tr. 1581-83). He ultimately arrived at a definition of "subject information" that was quite broad and included the matters set forth above (RX 41 ¶ 67.KKK). Doty then assumed that all of the "subject information" would have been important to a reasonable investor (Tr. 1483-84). In short, he conceded this information was material and focused his attention on whether D&B and Bradbury had acted reasonably in deciding not to disclose it (Tr. 1484). Doty's approach does not bind PFC and Fowler, but those two Respondents have remained silent on the "lack of fair notice" issue.

I conclude that these three omissions involved matters that were important to reasonable investors, and should have been disclosed in the POS and OS.

D. Liability of D&B and Bradbury.

The Underwriter's Responsibility
for Reviewing a POS and OS

Under the Commission's 1989 and 1994 Interpretive Statements, an issuer is primarily responsible for the content of its disclosure document, while an underwriter is a reviewer of that document with affirmative investigatory responsibilities. The underwriter is thus a crucial element in the municipal securities disclosure process.

Underwriters purchase municipal securities from issuers and resell them to public investors. The Commission considers such underwriters to be recommending to the investing public the municipal securities they offer and sell, and it requires them to have a reasonable basis for their recommendations. Under Rule 15c2-12, underwriters of municipal securities are required to review in a professional manner the issuer's OS for possible inaccuracies and omissions. Underwriters are required to conduct an affirmative investigation or inquiry that is sufficient to form a reasonable basis for belief in the accuracy and completeness of the "key representations" in the OS.[35] In offering and selling municipal securities, underwriters cannot merely accept at face value the issuer's key representations. In addition, underwriters of municipal securities have a responsibility to disclose material information of which they are aware (RX 41 ¶¶ 21, 74).

Bradbury is a very experienced underwriter of municipal bonds. By 1998, he had worked as a public finance investment banker for approximately thirty years (Tr. 662-63). D&B was one of the leading underwriters of municipal securities in Pennsylvania (Tr. 838-39; RX 28). In addition, Bradbury was a driving force behind the concept of having municipal authorities acquire office buildings that lease space to qualified tenants on short-term and intermediate-term leases, and then financing the acquisition through long-term non-taxable bonds. By June 1998, having just underwritten the Capitol Associates and Riverfront transactions, Bradbury had particular knowledge of the risks involved in issuing long-term bonds secured by short-term and intermediate-term leases. He also knew what potential investors considered important information in evaluating those risks (Tr. 709). Finally, Bradbury knew of PennDOT's anticipated move from Forum Place to the Keystone Building.

Bradbury Has Not Presented Credible
Evidence of Good Faith Reliance on Counsel

As underwriter for the bonds, D&B did not obtain from the Authority or any other source a general representation as to the accuracy and completeness of the OS taken as a whole (DX 94 ¶¶ 56, 69.f). To compensate for that, Bradbury argues that he was entitled to "rely upon, or certainly take into account" the fact that no member of the finance team ever discussed with him whether PennDOT's anticipated move should be disclosed in the POS or OS (D&B Br. at 15-18). He maintains that his lack of scienter is demonstrated by the fact that Sweet thought about the need to disclose PennDOT's anticipated move, concluded that it need not be disclosed, and proceeded with the transaction.[36] Bradbury also offers a broad reading of bond counsel's supplemental opinion letter, and contends that he took that letter into consideration, as well.

In considering assertions of reliance on the advice of counsel, the Commission looks to see whether four factors have been established: (1) a request to counsel for advice on the legality of a proposed action, (2) full disclosure to counsel of the relevant facts, (3) receipt of advice that the action to be taken will be legal, and (4) reliance in good faith on counsel's advice. *Borgardt*, 80 SEC Docket at 3578 & n.37. "[R]eliance on the advice of counsel need not be a formal defense; it is simply evidence of good faith, a relevant consideration in evaluating a defendant's scienter." *Howard*, 376 F.3d at 1147.

Doty attempted to distinguish between "relying on" the opinion of counsel and "taking into consideration" the opinion of counsel (RX 41 ¶¶ 637-39, 642). He suggested that "taking into account" the opinion of counsel "may be a more useful measure" for evaluating a respondent's alleged recklessness than "relying on" the opinion of counsel (RX 41 ¶ 642). I disagree. Adopting Doty's distinction would completely eviscerate the Commission's existing test, because the Commission considers reliance on counsel evidence only when the underlying violation involves scienter. *See McLaughlin, Piven, Vogel, Sec., Inc.*, 52 S.E.C. 1164, 1168 n.14 (1996); *David M. Haber*, 52 S.E.C. 201, 206 (1995). If D&B and Bradbury believe that "reliance lite" should be the proper standard, they must present their argument to the Commission.

Pepper Hamilton, through Sweet, was bond counsel for the Authority. The Division goes too far when it argues that Bradbury could not in good faith rely on the advice of someone else's attorney. As Pope acknowledged, Sweet had just finished serving as underwriter's counsel for D&B in the Riverfront transaction and it would have been appropriate for Bradbury to consider Sweet's conduct and opinions in the Forum Place transaction (Tr. 1152). Instead of resting my decision on this basis, I reject D&B's argument on narrower grounds.

The record does not show that Sweet ever gave Bradbury any legal advice about the facts omitted from disclosure. Sweet could not recall sharing his views on whether the OS should disclose PennDOT's anticipated move with any member of the finance team (Tr. 102, 104-05, 116-18, 690-93). Doty assumes that Bradbury learned of Sweet's views indirectly, but his reasoning is strained (Tr. 1545).

Sweet and Pope disputed Bradbury's and Doty's broad reading of the supplemental bond counsel opinion letter (Tr. 70-72, 1111, 1143-44, 1540-43, 1547-49; DX 28; RX 41 ¶¶ 94, 130, 368, 375-94, 719-56). At issue is the language of the last paragraph of the supplemental opinion letter. Pepper Hamilton's role as bond counsel required Sweet to make fair and accurate summaries of the documentation (Tr. 397). The customary purpose of the language in the supplemental opinion letter is to provide comfort that the summaries or descriptions of the document provisions governing the security were adequate and fair (Tr. 1108). It is not to provide an opinion that there is no information relating to those provisions that should be the subject of disclosure (Tr. 1108). Bradbury's and Doty's reading of the supplemental opinion letter is unreasonable. I conclude that Bradbury could not, in good faith, have relied on the legal advice purportedly given to him by Sweet.

Bradbury Acted Recklessly

There is no evidence that D&B or Bradbury attempted to restrict the free flow of information to prospective investors. On the contrary, if D&B did not have the information an investor needed, the firm referred the investor to Fowler, Sweet, and/or Crowell. D&B also arranged tours of Forum Place and invited prospective investors to speak freely with Vartan. Bradbury orally informed Putnam Investments, the single largest purchaser of the bonds, about PennDOT's anticipated move from Forum Place. It is not plausible to conclude that, if other investors had asked, he would have intentionally withheld the same information from them.

The POS and OS disclosed the short-term nature of the leases, the fact that the leases expired before the bonds matured, and the fact that there was no commitment, requirement or guarantee that the Commonwealth would renew or extend any of its leases. In conveying this disclosure, the POS and OS used bold fonts and capital letters. Although this Initial Decision finds that the disclosure was incomplete, this was not a situation where there was no disclosure at all. Likewise, Bradbury added explanatory footnotes to Fowler's financial projections before circulating them to prospective investors. I agree with the Division that the footnote disclosure should have been more extensive. Nevertheless, Bradbury did not take Fowler's document and attempt to make it more deceptive. The fact that Bradbury supplemented Fowler's document is entitled to some weight in negating scienter.

There is no evidence that Bradbury consciously rejected a suggestion from other members of the finance team to disclose material information in the POS or OS. Finally, it is counterintuitive to think that Bradbury would intentionally defraud his best customers or that he would knowingly involve his daughter, who had just earned her securities licenses, in a scheme to defraud.

D&B bought subordinated Series B bonds for its own portfolio. The Series B bonds carried greater risk than the Series A bonds sold to the investors who testified at the hearing. Respondents argue that it is highly unlikely that Bradbury would have made this purchase if he had been engaged in a scheme to defraud. I would agree if D&B had retained these bonds in its portfolio; however, it sold them a few months later in the secondary market (Tr. 820-21). The Series B bond purchase is entitled to limited weight in evaluating Bradbury's state of mind.

The Division is not required to show that a respondent acted knowingly or intentionally in order to prevail. A lesser showing of recklessness is sufficient. The weight of the evidence persuades me that Bradbury acted recklessly.

Bradbury was reckless in failing to inform O'Neill, the lawyer he hired to draft the disclosure document, about PennDOT's anticipated move to the Keystone Building and the near certainty that PennDOT would not renew its lease at Forum Place. He was reckless in allowing O'Neill to draft the POS without correcting two of O'Neill's assumptions: first, that the short-term leases at Forum Place would not be a problem because "that's the way business is done in Harrisburg;" and second, that institutional investors were already satisfied with the transaction before they read a POS with appropriate disclosure (Tr. 351).

Bradbury claims to have been told by Fowler that the June 30 meeting with Crowell resulted in no guarantees as to Forum Place's future use as swing space (Tr. 719-20). Bradbury never knew for how long the Commonwealth might use Forum Place as swing space (Tr. 716). Bradbury did not attempt to verify Fowler's report. He did not discuss the swing space program directly with Crowell to determine what could be fairly said about it to investors, or even to understand the scope of the program, the likelihood of funding, or the period of time for which it would produce demand for space at Forum Place (DX 94 ¶ 42). In my judgment, this was reckless. Bradbury was also reckless in telling a prospective investor that there would generally be a lot of demand at Forum Place and that departing government agencies would be quickly replaced (Tr. 545-46). Bradbury did not organize or participate in any substantial discussions with the finance team to analyze the accuracy or completeness of the POS. He did not conduct a page-by-page review of the POS as a device to raise questions and promote full and complete disclosure. Such a detailed review is customary in the industry (DX 94 ¶¶ 23-24, 44). Bradbury's review of the POS was cursory, at best.

The single most important date in this proceeding was August 1, 1998. It is no coincidence that the Forum Place transaction closed one day before the T&S Building was imploded. I credit testimony that the Forum Place offering was somewhat rushed, and pushed to closing by July 31, 1998 (Tr. 23-24, 347-49, 1275). I give significant weight to the fact that Bradbury failed to inquire about the construction schedule for the Keystone Building while he was marketing the bonds to public investors (Tr. 689-90). I find that Bradbury's failure to inquire about the construction schedule was deliberate—he simply did not want to know this readily available information. Before the implosion of the T&S Building and without actual knowledge of the construction schedule for the Keystone Building, Bradbury could plausibly maintain that PennDOT's anticipated move to the Keystone Building was still uncertain. If the bond offering had closed after August

1, 1998, or if Bradbury had actual knowledge of the construction schedule, he could not have done so.

Bradbury's professed readiness to disclose material information if an investor asked the right questions cannot excuse the failure to disclose such information in the POS and OS. "Readiness and willingness to disclose are not equivalent to disclosure." *Hughes v. SEC,* 174 F.2d 969, 976 (D.C. Cir. 1949). McCormack learned of PennDOT's anticipated move only because she dug for the information in what she characterized as "an iterative process" (Tr. 486). I am persuaded that Bradbury's commitment to full disclosure in the POS and OS was grudging. In essence, Bradbury's approach was: If a prospective investor asks a direct question, I will answer it truthfully; however, there is no need to volunteer information if the prospective investor does not ask. On the whole, I find that Bradbury was reckless.

Bradbury's recklessness may be imputed to D&B. *See In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326, 1340 (S.D. Fla. 1999); *SEC v. Blinder, Robinson & Co.*, 542 F. Supp. 468, 476 n.3 (D. Colo. 1982).

D&B's and Bradbury's Violations

I conclude that D&B and Bradbury willfully violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, in that they recklessly offered and sold Forum Place bonds to investors on the basis of a materially misleading POS, OS, and financial projections.

I also conclude that D&B and Bradbury willfully violated MSRB Rule G-17 by failing to deal fairly with all persons and by engaging in a deceptive, dishonest, or unfair practice, namely, failing to disclose all material facts concerning a municipal securities transaction. I conclude that they failed to exercise reasonable care and competence, and thus were negligent. I further conclude that they were reckless within the meaning of *Sundstrand*.

Finally, I conclude that D&B willfully violated Section 15B(c)(1) of the Exchange Act by inducing the purchase and sale of Forum Place bonds in contravention of MSRB Rule G-17. D&B's conduct was at least negligent. In addition, Bradbury knowingly and substantially participated in D&B's violation of Section 15B(c)(1) through conduct that was extremely reckless within the meaning of *Howard*. Accordingly, I conclude that Bradbury willfully aided and abetted and caused D&B's violation of Section 15B(c)(1).

E. Liability of PFC and Fowler.

The Authority Committed Primary Violations of
Sections 17(a)(2) and 17(a)(3) of the Securities Act

The Commission has explained that municipal securities "issuers are primarily responsible for the content of their disclosure documents and may be held liable under the federal securities laws for misleading disclosure." 1989 Interpretive Statement, 43 SEC Docket at 2257 n.84. Here, the Authority negligently omitted to state material information in its POS and OS for the Forum Place bonds.

On July 8, 1998, the Authority met to discuss the Forum Place transaction, approve the issuance and sale of the bonds to D&B, ratify the content of the POS, and authorize the distribution of the POS and OS. The Authority had actual knowledge of PennDOT's anticipated move and was aware of the potential effect of that move on the viability of the bond offering. Nonetheless, the Authority never discussed whether prospective investors should be advised of PennDOT's anticipated move. The Authority approved the distribution of the POS and OS without taking steps to ensure that those documents were not misleading and contained all the necessary disclosures of material information.[37] Accordingly, I conclude that the Authority negligently violated Sections 17(a)(2) and 17(a)(3) of the Securities Act.

PFC's and Fowler's Liability for
Causing the Authority's Violations

OIP ¶ III.D.4 alleges that Fowler had a fiduciary relationship, or a similar relationship of trust and confidence, with the Authority. It further asserts that the Authority members "trusted and relied upon PFC and Fowler to ensure that . . . all documents, including the [OS], were complete, accurate, and contained all necessary disclosures." OIP ¶ III.E.9 claims that Fowler did not discuss with the Authority at the July 8 meeting or at any other time "that the [OS] was misleading and required disclosure of PennDOT's scheduled move to the Keystone Building." It also charges that Fowler, who is not an attorney, "did not inform the Authority of its potential liability for failing to disclose the existence of the Keystone Building or PennDOT's scheduled move."

It Is Not Enough for the Division to
Argue that Fowler Was a Fiduciary

The term "financial advisor" is not defined in the federal securities laws. While MSRB Rule G-23(b) defines a "financial advisory relationship" for brokers, dealers, and municipal securities dealers, the MSRB Rules are not applicable to financial advisors who are not brokers, dealers, or municipal securities dealers.[38] The plain language of Exchange Act Rule 15c2-12 applies to underwriters of municipal securities, but it does not extend to financial advisors. The Commission's Interpretive Statements do not address the question of whether financial advisors in negotiated offerings have obligations to review issuer disclosure.[39]

The Division appears to assume that it will prevail against PFC and Fowler if it simply labels them as fiduciaries. It further assumes that, if PFC and Fowler were fiduciaries for any purpose and at any time, they must have been fiduciaries for all purposes and at all times. However, the Restatements of the law and judicial opinions applying them clearly require more.

“An agent is a fiduciary with respect to matters within the scope of his agency.” *Restatement (Second) of Agency* § 13 (1957). “An agent is not . . . in a fiduciary relation with the principal as to matters in which he is not employed.” *Id.* § 390, comment d at 211; *cf. Restatement (Second) of Trusts* § 2, comment b (1959) (“A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation.”).

“[T]o say that a man is a fiduciary only begins the analysis, it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary?” *SEC v. Chenery*, 318 U.S. 80, 85-86 (1943). “[A]fter establishing that a fiduciary relationship exists, it is still necessary to determine whether the conduct at issue falls within the scope of that relationship and whether the conduct is inconsistent with fiduciary obligations arising from that relationship.” *E.F. Hutton & Co.*, 49 S.E.C. 829, 837 n.10 (1988) (Chairman Ruder, concurring). “Nothing . . . in the general principles of agency law indicates that an agent’s fiduciary obligations extend to matters not included in the agent’s employment or contractual relationship.” *Productive Automated Sys. Corp. v. CPI Sys., Inc.*, 61 F.3d 620, 622 (8th Cir. 1995). “A fiduciary duty . . . cannot be defined by asking the jury to determine simply whether the principal reposed ‘trust and confidence’ in the agent. The jury should have been instructed to decide first what [the purported agent] had agreed to do for [the purported principal] and then to determine whether [the purported agent] executed those tasks properly.” *Hill v. Bache Halsey Stuart Shields, Inc.*, 790 F. 2d 817, 824 (10th Cir. 1986).

The Scope of the Typical Financial Advisor’s Relationship to the Typical Municipal Issuer

The general rule is that the “existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made.” *Restatement (Second) of Agency* § 376 (1957).

The testimony in this proceeding was consistent with the general rule. Pope opined that the precise role of a financial advisor in a municipal securities offering “varies widely” and is effectively determined by the agreement or other understanding between the advisor and the issuer that retains the advisor (DX 94 ¶ 19). The issuer may look to the advisor to participate in all aspects of a transaction, including the production of disclosure, or the issuer instead may employ the advisor for a limited purpose (DX 94 ¶ 19).

Pope further opined that financial advisors frequently play “a particularly large and important role” in serving special purpose authorities (DX 94 ¶ 20). He explained that such authorities “frequently rely extensively and sometimes exclusively on financial advisors for a wide range of issues” (DX 94 ¶ 20). Such tasks “frequently include . . . reviewing disclosure language for offering documents” (DX 94 ¶ 20). When asked if authorities typically look to their financial advisors for financial advice and their legal advisors for legal advice, Pope responded: “Yes. There’s a lot of overlap there, but yes, I agree with that” (Tr. 1136-37).

Fowler’s Course of Dealing with the Authority and Other Issuers

In 1998, Fowler was an experienced financial advisor who had worked as a public finance investment banker, held himself out as an expert in the structuring of municipal bond issues, and provided assistance to special governmental authorities. He had a long-standing relationship with the Authority, which looked to him for advice on matters relating to structuring and issuing bonds. Earlier in his career, Fowler had written offering documents. Fowler typically reviewed the financial terms in offering documents and informed the issuers whether they were reasonable (Tr. 874-75).

Fowler explained that PFC’s role as a financial advisor varies from transaction to transaction, and “depends upon . . . what we’re asked of by the issuer” (Tr. 873). Sometimes, PFC would earn an advisory fee of $1,000 or less; on other occasions, its advisory fee would be as high as $200,000 or $220,000 (DX 1). Fowler explained that PFC had no typical role in advising the Authority (Tr. 926). On some transactions, the Authority would ask PFC to take a quick look at one or two documents (Tr. 926). On other transactions, PFC was heavily involved in structuring and document review (Tr. 926-27).

Over the years, the Authority relied on Fowler to perform a wide range of duties. At one time or another, these duties included soliciting potential bond transactions, reviewing potential bond transactions identified by others, ensuring that the transactions were properly structured, making the necessary contacts with interested parties, developing and collecting information, calculating debt service coverage, recommending the underwriter and bond counsel, and assessing the viability of the transactions. However, the record does not support a finding that Fowler performed each of these duties on each transaction for which PFC served as financial advisor to the Authority.

The Scope of Fowler’s Engagement with the Authority on the Forum Place Transaction

The issue for decision is whether the Authority relied on Fowler to alert it to inadequate disclosure language in the Forum Place POS and OS and to inform it of its potential liability for inadequate disclosure.

Fowler believed that the Authority was relying on him to review the OS in the Forum Place transaction (Tr. 920). However, just as there is no common understanding in this proceeding as to what “Class A office space” means, there is no common understanding of what “review” of a POS and OS means. The Division assumes that a financial advisor’s duty to “review” the accuracy of an issuer’s disclosure document is just as broad as an underwriter’s duty to “review” it under Exchange Act Rule 15c2-12 and the Commission’s Interpretive Statements.[40]

Fowler did not read the POS line-by-line. Instead, he looked at the description of the Authority in the POS to ensure that names were spelled correctly. He verified that the numbers were correct (Tr. 918). He also determined that the POS had the same type of disclosure information that appeared in the earlier Capitol Associates and Riverfront disclosure documents (Tr. 918-20). During his review of the POS, Fowler was aware that PennDOT's anticipated move to the Keystone Building was not disclosed (Tr. 919-20). He did not discuss with the Authority the fact that the POS did not include any reference to PennDOT's proposed move (Tr. 920).

The Terms of the Agreement Between Fowler and the Authority. The first point to consider is the terms negotiated between the Authority and Fowler. Although Fowler's relationship with the Authority was based on a handshake, one aspect of the Forum Place engagement agreement was memorialized by a contemporaneous writing. In its POS and OS, the Authority stated unequivocally that PFC "is not obligated to undertake, and has not undertaken to make, an independent verification or to assume responsibility for the accuracy, completeness, or fairness of the information contained in this [POS and OS]" (DX 15 at 18, DX 16 at 20). The Division and PFC did not develop the record as to whether this language was routinely a part of the Authority's offering documents or if it was highly unusual. Nor did they develop the record as to whether the language was originally crafted by the Authority or by PFC, or as to what sort of negotiations (if any) may have preceded its inclusion in the POS and OS.

Fowler believes that this language is strong evidence that the scope of his engagement was limited. He has raised this argument throughout the proceeding (PFC Answer; PFC Prehearing Br. at 2-3; PFC Br. at 8, 27, 32-35; PFC Reply Br. at 6-8). Unfortunately, Pope ignored this language in his report, and the Division devoted only two sentences to the issue in its posthearing pleadings (Div. Reply to PFC at 17). Neither of the Division's arguments is persuasive.[41]

The Commission encountered similar language limiting the responsibilities of the financial advisors to a municipal bond issuer in *City of Miami*, 79 SEC Docket 3362, 3379-80 n.45 (Mar. 21, 2003). However, it did not reach the issue of whether the financial advisors in that proceeding fulfilled their responsibilities with respect to the offerings. *Id.*

In *County of Nevada,* 70 SEC Docket at 3328, the OS stated that it should not be considered a representation of the financial advisor. However, in that proceeding, the financial advisor and the issuer executed a written contract that required the financial advisor to prepare the POS and OS. *Id.* at 3310-11. In effect, the financial advisor assumed the underwriter's responsibilities under Exchange Act Rule 15c2-12. Under those circumstances, the Chief Administrative Law Judge was not persuaded by the limiting language in the OS.

The Commission has cautioned underwriters not to disclaim responsibility for an issuer's representations in an OS. *See* 1994 Interpretive Statement, 56 SEC Docket at 606 n.103. The Commission's warning did not extend to financial advisors.

I conclude that the language in the POS and OS defined the limits of PFC and Fowler's engagement on the Forum Place transaction in that Fowler was under no duty to speak to the Authority about perceived disclosure deficiencies in the offering document.[42] I further conclude that the limiting language did not operate as a prospective waiver of liability for acts that were within the scope of Fowler's engagement. Accordingly, I do not consider the language to be an exculpatory clause.[43]

Congress has not forbidden such limiting language by statute and the Commission has not forbidden it by regulation, interpretive statement, or adjudicatory opinion.

Accordingly, I conclude that the language in the POS and OS should be treated just like any other negotiated term. The Authority had sufficient financial savvy to become the second largest bond issuer in Pennsylvania. It had enough hubris to attempt to change its name to the "General Authority of Pennsylvania." I conclude that the Authority should have been able to understand the language defining the scope of Fowler's engagement and, if it did not like the language, should have negotiated something different. If the Authority had insisted that Fowler perform a broader range of duties, Fowler could have negotiated a higher fee or withdrawn from the engagement.

There can be no serious argument that Fowler sneaked this language past the Authority on July 8, 1998, when the members of the Authority did not have enough time to consider it. Nor can there be a suggestion that the language originated with O'Neill. Identical language appeared in the Authority's POS for the Riverfront transaction (DX 18 at 19) and in the Harrisburg Authority's OS for the Capitol Associates transaction (DX 19 at 20). There is no evidence that the issuers in these earlier transactions lacked an opportunity to consider carefully the wording of their disclosure documents.

The Surrounding Facts and Circumstances. The second task is to interpret the terms of an agreement in light of the circumstances under which it was made. Here, the inquiry depends on the faded six-year-old memories of Ricci and Milke. It is also restricted by the principle that no one member of the Authority can purport to speak for the Authority as a body.[44]

When Ricci was asked if he relied on Fowler to review the bond offering documents, Ricci explained: "I relied on everybody when it came to documents . . . I looked to everyone in the room and not just Mr. Fowler" (Tr. 1408-09). I did not find this testimony particularly helpful in understanding the scope of Fowler's agency. It was merely another version of Pope's observation that "there's a lot of overlap there." The Division never asked Ricci whether he expected Fowler to review the POS and OS for *all* purposes or for the specific purpose of evaluating the sufficiency of the disclosure language.[45] Ricci also stated that Fowler "probably always asked questions beyond his scope because of his experience in the area" (Tr. 1408). Asking questions is not the same as assuming duties.

Milke had three opportunities to shed light on the scope of Fowler's engagement with the Authority. First, she stated: "We relied on either our solicitor to have reviewed [disclosure in the OS] or bond counsel to know what the material was in there. And *I guess* I would have thought that Mr. Fowler would know that as well" (Tr. 23) (emphasis added). Second, Milke stated: "[W]e relied on our professionals to determine what should be disclosed in the [Forum Place OS], as we would with any other bond issue" (Tr. 25). When asked to identify the professionals, she responded: "Our solicitor, Mr. Hendershot, who should have reviewed the documents on our behalf, our financial advisor, who would have known all of the information, and the bond counsel for the issue" (Tr. 26). However, when Milke was then asked whether the Authority relied on Fowler for legal advice, she answered "no" (Tr. 27).

Milke's testimony that the Authority did not rely on Fowler for legal advice is consistent with anecdotal evidence provided by Fowler. Approximately six or seven months before the Forum Place offering, the Authority engaged PFC to act as its financial advisor on a large health care pool bond transaction (Tr. 879-80, 985-86). Fowler became uncomfortable with the structure of that transaction and advised the Authority not to proceed. According to Fowler, that advice led to a confrontation between PFC and the bond counsel on the offering. The attorney delivered an ultimatum to the Authority: "I guess the Authority is going to have to decide whether [it] take[s its] legal advice from [me] or from [PFC]" (Tr. 986). The Authority chose to proceed with the transaction and PFC resigned as financial advisor (Tr. 879-80, 985-86). In light of that earlier confrontation, Fowler could reasonably expect that the Authority would not rely on him for legal advice on subsequent bond offerings.

The language in the POS and OS describing the limits of Fowler's engagement, coupled with Milke's testimony that the Authority did not rely on Fowler for legal advice, demonstrates the Authority's expectations as to the actual scope of Fowler's responsibilities. Fowler's confrontation with bond counsel and his resignation as financial advisor on a previous transaction demonstrates Fowler's expectations about the actual scope of his responsibilities. PFC and Fowler are entitled to the benefit of the bargain they struck with the Authority limiting the scope of their engagement on Forum Place.

Based on the hearing record, I conclude that it was beyond the scope of PFC's and Fowler's engagement to advise the Authority about the accuracy, completeness, or fairness of the disclosure language in the Forum Place POS and OS.[46] It was also beyond the scope of their engagement to inform the Authority of its potential liability for failing to disclose material information. I further conclude that the weight of the evidence fails to demonstrate that the Authority relied on PFC and Fowler for these purposes, or that PFC and Fowler were fiduciaries for these purposes. Finally, I conclude that Fowler had no duty to speak on disclosure issues on July 8, 1998, or at any other time. The Division has failed to prove a sufficient nexus between Fowler's silence and the Authority's violations.

On that basis, I conclude that PFC and Fowler were not shown to be “a cause” of the Authority’s violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act.

F. The Actions of the Authority, November 1999 to July 2003.

As a final matter, Respondents contend that the Authority mismanaged Forum Place between November 1999 and July 2003. They argue that this mismanagement, and not any disclosure defects in the POS and OS, proximately caused the default of the bonds and the losses sustained by the bondholders (D&B Br. at 33-35, PFC Br. at 35-39).

The question of intervening causation is not relevant to the liability issues in the case: whether the POS, OS, financial projections, and appraisal were materially misleading to prospective investors. The resolution of the liability issues is not changed in any way by events occurring after July 31, 1998.[47]

The question of intervening causation is also irrelevant to the proposed disgorgement of ill-gotten gains. *See SEC v. Bilzerian*, 29 F.3d 689, 697 (D.C. Cir. 1994) (“Whether or not [Respondents’] securities violations injured others is irrelevant to the question of whether disgorgement is appropriate.”).

The question of intervening causation was relevant to the Division’s request for third-tier civil monetary penalties at an earlier stage of the proceeding. At that juncture, the Division based its claim for third-tier penalties solely on the theory that D&B and Bradbury’s antifraud violations “resulted in substantial losses” (Div. Prehearing Br. at 24). However, as the Division now observes, third-tier civil penalties may also be imposed on alternative grounds; namely, that the antifraud violations “created a significant risk of substantial losses to other persons” (Tr. 1253-54; Div. Br. at 41). If an alternative prong of the test is satisfied, *see infra* p. 68, then there is no need to engage in an extended discussion of whether the antifraud violations also may have “resulted in substantial losses.” Thus, the Authority’s alleged mismanagement of Forum Place is no longer a potential barrier to the imposition of third-tier civil penalties.

That does not necessarily end the inquiry, however, because the Division has requested that any civil penalties imposed against D&B and Bradbury be made payable to a distribution fund for the benefit of defrauded investors. The Commission has explained that such funds “must be disbursed to the investors harmed by the securities law violations at issue.” *Adoption of Amendments to the Rules of Practice and Delegation of Authority to the Commission*, 82 SEC Docket 1744, 1746 (Mar. 12, 2004). Arguably, proof that investors were harmed by the securities law violations at issue would require a determination that intervening harm caused by others, such as the newly constituted Authority, should be ruled out. Because this Initial Decision declines to set up the proposed distribution fund, *see infra* p. 70, there is no need to consider whether the Authority’s alleged mismanagement of Forum Place is an intervening and superseding cause of the harm suffered by investors. If the Division presses the Commission to establish such a distribution fund, Respondents may renew their arguments on appeal.

SANCTIONS

The Division seeks the imposition of cease-and-desist orders, disgorgement of ill-gotten gains, and prejudgment interest against all Respondents. In addition, the Division requests third-tier civil monetary penalties against D&B and Bradbury. Although the OIP also identified a registration revocation against D&B and an associational bar against Bradbury as possible sanctions under Sections 15(b) and 15B of the Exchange Act, the Division has never requested such sanctions in its pleadings (OIP ¶ IV.G; Div. Prehearing Br. at 21-25; Div. Prop. Find. at 105-10; Div. Br. at 39-42; Div. Reply to D&B at 24-25). I decline to impose a registration revocation or an associational bar on my own motion.

Cease-and-Desist Orders

Section 8A(a) of the Securities Act and Section 21C(a) of the Exchange Act authorize the Commission to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate" any provision of the Securities Act, the Exchange Act, or the rules and regulations thereunder. The Commission may also impose a cease-and-desist order against any person that "is, was, or would be a cause of [a] violation" due to an act or omission the person "knew or should have known would contribute to such a violation."

The Commission has determined that the five-year limitation period of 28 U.S.C. § 2462 does not apply to cease-and-desist orders. *See Coxon*, 80 SEC Docket at 3314 n.60; *Herbert Moskowitz*, 77 SEC Docket 481, 500-02 (Mar. 21, 2002).
In *KPMG*, 54 S.E.C. at 1183-92, the Commission addressed the standard for issuing cease-and-desist relief. It explained that the Division must show some risk of future violations. However, it also ruled that such a showing should be "significantly less than" that required for an injunction and that, "absent evidence to the contrary," a single past violation ordinarily suffices to raise a sufficient risk of future violations. *Id.* at 1185, 1191.

Along with the risk of future violations, the Commission considers the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the respondent's opportunity to commit future violations. *Id.* at 1192. In addition, the Commission considers whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceeding. *Id.* The Commission weighs these factors in light of the entire record, and no one factor is dispositive.

The U.S. Court of Appeals for the District of Columbia Circuit has insisted that the Commission adhere to the standards it announced in *KPMG*. *See WHX Corp. v. SEC*, 362 F.3d 854, 859-60 (D.C. Cir. 2004) (rejecting the Commission's explanation of the risk of future violations and vacating a cease-and-desist order).

Addressing these factors here, I conclude that the violations were serious and created a substantial risk of loss to investors. D&B and Bradbury acted recklessly. Bradbury has not recognized the wrongful nature of his conduct and he has offered no assurances against future violations. D&B and Bradbury remain active in the industry, and there is both an opportunity for and a risk of future violations. The age and isolated nature of the violations and D&B's and Bradbury's otherwise clean disciplinary record militate against cease-and-desist relief, but overall, I believe these factors are outweighed by the other relevant considerations. I will grant the Division's request for cease-and-desist orders.[48]

Disgorgement

Section 8A(e) of the Securities Act and Section 21C(e) of the Exchange Act provide that the Commission may enter an order requiring disgorgement, including reasonable interest. Disgorgement seeks to deprive the wrongdoer of his ill-gotten gains. *See SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230-32 (D.C. Cir. 1989). It returns the violator to where he would have been absent the violations. An order to disgorge a certain amount need only be a reasonable approximation of the profits causally connected to the violation. *Id.* at 1231.

Once the Division shows that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden of going forward shifts to the respondent to demonstrate clearly that the Division's disgorgement figure is not a reasonable approximation. *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 1996); *SEC v. Patel*, 61 F.3d 137, 140 (2d Cir. 1995). Any risk of uncertainty as to the disgorgement amount falls on the wrongdoer whose illegal conduct created the uncertainty. *First City*, 890 F.2d at 1232. The five-year limitation period of 28 U.S.C. § 2462 does not apply to disgorgement relief. *Johnson v. SEC*, 87 F.3d 484, 489-91 (D.C. Cir. 1996); *Feeley & Willcox Asset Mgmt. Corp.*, 80 SEC Docket 2075, 2101 n.65 (July 10, 2003); *Joseph J. Barbato*, 53 S.E.C. 1259, 1279 & n.27 (1999).

D&B purchased $3.1 million of Series B bonds from the Authority at a 1% discount from par and then resold those bonds at par (Tr. 851). Accordingly, for the Series B bonds, the proper amount of disgorgement by D&B and Bradbury is $3.1 million x .01 = $31,000. D&B also purchased $72.25 million of Series A bonds from the Authority at a 1% discount from par. However, there is no evidence that D&B resold the Series A bonds at par and a great deal of evidence shows that D&B resold them at a discount of 3/8 of 1% from par (Tr. 424, 1239; DX 21-DX 23).[49] The weight of the evidence also shows that the resale price of the Series A bonds was determined by the marketplace in arms-length negotiations between D&B, on the one hand, and four institutional purchasers, on the other hand (Tr. 720-27). Accordingly, for the Series A bonds, the proper methodology for computing disgorgement by D&B and Bradbury is 5/8 of 1%, the difference between the purchase price and the resale price.[50] This equates to $451,562.50 (or $72.25 million x .00625).

I will order D&B and Bradbury to disgorge $482,562.50 (or $31,000 + $451,562.50). Liability is joint and several. I reject the Division's claim that D&B and Bradbury should disgorge a greater amount.

Prejudgment Interest

Section 8A(e) of the Securities Act and Sections 21B(e) and 21C(e) of the Exchange Act provide that the Commission may order disgorgement, "including reasonable interest," in any administrative proceeding in which a cease-and-desist order is sought or a civil monetary penalty could be imposed. These statutory provisions also authorize the Commission to adopt rules and regulations and issue orders concerning rates of interest and periods of accrual. The Commission promulgated Rule 600 of its Rules of Practice, *Interest On Sums Disgorged*, in 1995.

I agree with the Division that the starting date for the computation of prejudgment interest should be August 1, 1998, as to D&B and Bradbury. Because the Division's calculation of the sum to be disgorged must be adjusted downward, it follows that the Division's calculation of prejudgment interest must also be adjusted downward. I will require the Division to file and serve a revised computation of prejudgment interest within seven days after the service of this Initial Decision.

Civil Monetary Penalties

An order of disgorgement (even with prejudgment interest) merely requires the return of wrongfully obtained profits. Disgorgement does not result in any actual economic penalty or act as a financial disincentive to engage in securities fraud. *See SEC v. Morgan*, 944 F. Supp. 286, 296 (S.D.N.Y. 1996) (citing the legislative history of the Remedies Act). The Division therefore argues that substantial monetary penalties, in addition to the disgorgement of illicit profits, is necessary to punish D&B and Bradbury and deter others from engaging in securities law violations that otherwise may provide significant financial returns to the violator.

Under Section 21B(a) of the Exchange Act, the Commission may assess a civil monetary penalty if a respondent has willfully violated or willfully aided and abetted any violations of the Securities Act, the Exchange Act, or the rules or regulations thereunder. The Commission must also find that such a penalty is in the public interest. Six factors are relevant to the public interest determination: (1) fraud, or the deliberate or reckless disregard of a regulatory requirement; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other factors as justice may require. *See* Section 21B(c) of the Exchange Act. Not all factors may be relevant in a given case, and the factors need not all carry equal weight.

Section 21B(b) of the Exchange Act specifies a three-tier system identifying the maximum amount of a penalty. All of the violations in this proceeding occurred after December 9, 1996, and before February 3, 2001.[51] For each such "act or omission" by a corporation, the adjusted maximum amount of a penalty is $55,000 in the first tier;

$275,000 in the second tier; and $550,000 in the third tier. For each such "act or omission" by a natural person, the adjusted maximum amount of a penalty is $5,500 in the first tier; $55,000 in the second tier; and $110,000 in the third tier. A second-tier penalty is permissible if the act or omission involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. A third-tier penalty not only must have involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, but also must have "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission." The proven violations here involved fraud and the reckless disregard of regulatory requirements. I conclude that the "significant risk of substantial losses" prong of the third-tier civil penalty test has been satisfied as well.

The adjusted statutory maximum amount is not an overall limitation, but a limitation per violation. *See Mark David Anderson*, 80 SEC Docket 3250, 3270 (Aug. 15, 2003) (imposing a civil penalty of $1,000 for each of the respondent's ninety-six violations); *cf. United States v. Reader's Digest Ass'n.*, 662 F.2d 955, 966, 970 (3d Cir. 1981) (holding that each individual mailing constitutes a separate violation of an FTC consent order). Because multiple acts and omissions are involved here, the Division's requests for penalties of $550,000 against D&B and $110,000 against Bradbury are well within the statutory ceiling.

The five-year limitation period of 28 U.S.C. § 2462 applies to civil monetary penalties. However, D&B and Bradbury have signed tolling agreements (Declaration of Mark R. Zehner Concerning Tolling Agreements, dated June 1, 2004, Exhibits B-D). Addressing the six factors that guide the public interest analysis under Section 21B, I conclude that the proven violations involved fraud and the reckless disregard of regulatory requirements. They created a significant risk of harm to others. Because I am ordering disgorgement and prejudgment interest, any unjust enrichment will be eliminated. The Division's request for penalties of $550,000 against D&B and $110,000 against Bradbury is excessive. First, the Division has not proven its entire case. The appraisal was not shown to be materially misleading. The evidence that footnoted financial projections were materially misleading, while sufficient to satisfy the preponderance of the evidence test, was not strong. Second, apart from this proceeding, both D&B and Bradbury have enjoyed spotless disciplinary records for decades. That fact is entitled to substantial weight in setting penalties.

I will impose a civil penalty of $82,000 against Bradbury and a civil penalty of $400,000 against D&B. Collectively, these penalties are approximately equal to the amount ordered to be disgorged by these two Respondents, jointly and severally. Penalties at this level will provide appropriate deterrence against misconduct by others.

No Issue of Inability to Pay

Under Section 21B(d) of the Exchange Act, in any case in which the Commission may impose a civil penalty, a respondent may present evidence of the respondent's ability to pay the penalty. The Commission may, in its discretion, consider such evidence in determining whether a civil penalty is in the public interest. Such evidence may relate to the extent of the respondent's ability to continue in business and the collectability of the penalty, taking into account any other claims of the United States or of third parties on the respondent's assets and the amount of the respondent's assets.

Although no statutory requirement addresses inability to pay disgorgement or interest, the Commission may also consider evidence of ability to pay as a factor in determining whether a respondent should be required to pay disgorgement and interest. *See* Rule 630(a) of the Commission's Rules of Practice.

Well before the hearing, I advised Respondents that, if they intended to claim inability to pay disgorgement, interest, or civil penalties, they were required to submit sworn financial statements, as well as supporting income tax returns, at the hearing (Prehearing Conference of May 26, 2004, at 38-40; Order of May 27, 2004). *See* Rule 630 of the Commission's Rules of Practice; *Terry T. Steen*, 53 S.E.C. 618, 626-28 (1998) (holding that an ALJ may require the filing of sworn financial statements). Respondents did not submit sworn financial statements or income tax returns. I conclude that Respondents have waived any claim of inability to pay.

Investor Fund

As a final matter, the Division seeks an order directing that payment of the sums to be disgorged and the civil penalties be made to a distribution fund established for the benefit of defrauded investors (Div. Prehearing Br. at 24-25; Div. Br. at 42). The Division argues that such an order should include a requirement that none of the funds go to pay counsel fees. The Division also urges that all amounts in the fund be paid to the current bond trustee (and any successor) because, now that the bonds are in default, the bond trustee serves as the official representative of the bondholders.[52]

If the Division intended to invoke the Federal Account for Investor Restitution Fund (FAIR Fund) provision in Section 308 of the Sarbanes Oxley Act and Subpart F of the Commission's Rules of Practice, *FAIR Funds and Disgorgement Plans*, 17 C.F.R. §§ 201.1100-06, it should have done so with specificity.[53] If the Division has some other statutory basis for its request, it should so state.

I am not persuaded that the Commission intended for Administrative Law Judges, as distinguished from Commission itself, to order the creation of FAIR Funds. *Accord Steven E. Muth*, Initial Dec. Rel. No. 262 at 42, 2004 SEC Lexis 2320 at *107-08 (Oct. 8, 2004), *review granted*. Therefore, I respectfully defer to the Commission on this issue. I deny the Division's request, without prejudice to the Division's renewing it before the Commission.

So that the Commission may have a more complete record to consider the Division's request, I will require the Division to file and serve a supplemental statement within seven days after the issuance of this Initial Decision, explaining the particulars of its proposal. The Division shall address three matters:

First, the Division shall clarify the statutory basis for its request and explain whether it intends the bond trustee or the receiver to be the custodian of the proposed investor fund. Second, the Division shall state whether the proposed custodian has agreed to perform the role the Division describes, on the terms the Division sets forth (no counsel fees).

Third, the Division shall explain whether any sums deposited in the proposed investor fund will be used to pay only the bondholders who testified at the hearing, *see Barbato*, 53 S.E.C. at 1279-80, or other bondholders as well. If the Division chooses the latter, it shall clarify whether the fund will reimburse those who bought Forum Place bonds in the secondary market, as well as those who bought in the public offering, and whether the Series B bondholders will stand in line behind all the Series A bondholders (including such secondary market Series A bond purchasers as Fowler, Bradbury's mother, and Vartan).

RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on October 18, 2004, as updated on February 25, 2005.

ORDER

Based on the findings and conclusions set forth above:
IT IS ORDERED THAT the proceeding is dismissed as to Public Finance Consultants, Inc., and Robert D. Fowler;

IT IS FURTHER ORDERED THAT, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Dolphin & Bradbury, Inc., and Robert J. Bradbury shall cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933, Sections 10(b) and 15B(c)(1) of the Securities Exchange Act of 1934, including failing to deal fairly with all persons and engaging in any deceptive, dishonest, or unfair practice under Rule G-17 of the Municipal Securities Rulemaking Board, and Exchange Act Rule 10b-5;

IT IS FURTHER ORDERED THAT, pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Dolphin & Bradbury, Inc., and Robert J. Bradbury, jointly and severally, shall disgorge $482,562.50, plus prejudgment interest computed as set forth in Rule 600 of the Commission's Rules of Practice, with prejudgment interest starting to run on August 1, 1998;

IT IS FURTHER ORDERED THAT, pursuant to Section 21B of the Securities Exchange Act of 1934, Dolphin & Bradbury, Inc., shall pay a civil penalty of $400,000 and Robert J. Bradbury shall pay a civil penalty of $82,000;

IT IS FURTHER ORDERED THAT, as to Dolphin & Bradbury, Inc., and Robert J. Bradbury, no sanction shall be imposed pursuant to Sections 15(b) and 15B of the Securities Exchange Act of 1934; and

IT IS FURTHER ORDERED THAT, within seven days after the service of this Initial Decision, the Division of Enforcement of the Securities and Exchange Commission shall file and serve (a) a chart showing its computation of prejudgment interest on the sums to be disgorged and (b) a supplemental statement of its proposal for an investor restitution fund, addressing the issues identified in this Initial Decision.

Payment of the civil penalties, disgorgement, and prejudgment interest shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by wire transfer, certified check, United States Postal money order, bank cashier's check, or bank money order, payable to the Securities and Exchange Commission. The payments, and a cover letter identifying the Respondents and the proceeding designation, shall be delivered to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312. A copy of the cover letter and the instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

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

The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact, or unless the Commission determines on its own initiative to review this Initial Decision as to any party. If any of these events occur, the Initial Decision shall not become final as to that party.

____

James T. Kelly
Administrative Law Judge

Endnotes

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[1] In a separate proceeding, the Authority, without admitting or denying the Commission's allegations, consented to the entry of findings that it violated Sections 17(a)(2) and 17(a)(3) of the Securities Act and to the imposition of a cease-and-desist order. *See Dauphin Co. Gen. Auth.*, 82 SEC Docket 2884 (Apr. 26, 2004) (settled case).

[2] The hearing transcript, as corrected by my Orders of September 23 and October 7, 2004, will be cited as "Tr. ___." The Division's exhibits will be cited as "DX ___." PFC and Fowler's only exhibit will be cited as "RX 16." D&B and Bradbury's exhibits will be cited as "RX ___."

[3] The Division's Proposed Findings of Fact and Conclusions of Law and the Division's Post-Hearing Brief, both dated Oct. 8, 2004, will be cited as "Div. Prop. Find. ___" and "Div. Br. ___," respectively. PFC and Fowler's Post-Hearing Brief, dated Oct. 7, 2004, will be cited as "PFC Br. ___." The Bradbury Respondents' Proposed Findings of Fact and Conclusions of Law and Post-Hearing Legal Memorandum, both dated Oct. 8, 2004, will be cited as "D&B Prop. Find. ___" and "D&B Br. ___," respectively. The parties also submitted reply pleadings, dated Nov. 1, 2004, which will be cited as "Div. Reply to PFC ___," "Div. Reply to D&B ___," "PFC Reply Br. ___," and "D&B Reply Br. ___," respectively.

[4] Act of May 2, 1945, 1945 P.L. 382, *as amended*, 53 P.S. §§ 301-322 (1998). The Municipality Authorities Act was repealed by an Act of June 19, 2001, 2001 P. L. 287, and has been reenacted in codified form as 53 Pa. Cons. Stat. §§ 5601-22 (2001). In this decision, all references to the Municipality Authorities Act will be as it existed during 1998.

[5] In project financing, payment is dependent on the ability of a single project to produce sufficient revenue to provide for maintenance and operation of the project itself while ensuring timely payment of debt service (DX 94 ¶ 8).

[6] *See* Ordinance No. 5-1998 (Oct. 7, 1998) and Ordinance No. 6-1998 (Nov. 4, 1998), *Confirming the Establishment of the Dauphin County General Authority and Identifying the Types of Projects to be Entertained* (official notice). These Ordinances limited the projects that DCGA could entertain to those that would provide a direct benefit to the residents of Dauphin County. They also prohibited transactions involving any individual or any non-public or private sector organization, as well as those projects that would place the Authority in competition with the private sector without substantial spillover benefits to the residents of Dauphin County. The Ordinances permitted the Commissioners to prohibit transactions that would otherwise be authorized. Finally, the Ordinances directed DCGA to inform the Commissioners of all proposed projects on a regular basis, but at least quarterly.

[7] OIP ¶ III.E.1 alleges that "PennDOT entered into a lease" for office space at Forum Place. This is inaccurate. The Commonwealth, not the individual agency, signed the lease (DX 92). Paragraph 1 of the lease clearly set forth that the space at Forum Place was "for use by the Department of Transportation *or other agency* of the Commonwealth" (DX 92 at 1) (emphasis added). Other Commonwealth leases did not contain language identifying alternate occupants (DX 16, Appendix C, Model Lease) ("for use by the Department of Labor & Industry").

[8] The proposed Keystone Building would offer 845,000 square feet of office space, some 105,000 square feet more than its predecessor (Tr. 163-64; RX 22). The Keystone Building was intended to house not only some of PennDOT's employees, but also the employees of several other Commonwealth agencies (DX 91 at 15; RX 22).

[9] As used in this decision, "swing space" refers to flexible, vacant office space available for assignment to Commonwealth agencies or departments in need of temporary relocation.

[10] The Settlement Order in *Dauphin Co. Gen. Auth.*, 82 SEC Docket at 2886, finds that the Commonwealth awarded contracts for demolition, construction management, and building design for the Keystone Building in September 1996, and that site preparation and demolition activities began at the T&S Building in January 1997. There is no such evidence in this record, and the findings in the Settlement Order are not binding on the parties to this proceeding. *Id.* at 2885 n.1.

[11] The OIP alleges that the target date for completion of the Keystone Building was "late 2001" (OIP ¶ III.E.2). A newspaper reporter thought this to be the case (RX 22). However, the free-floating phrase in the newspaper article does not inform the reader as to who, other than the reporter, might have shared the view that "fall 2001" was the "expected completion date." *Cf. Young v. Community Nutrition Inst.*, 476 U.S. 974, 980-81 (1986) ("As enemies of the dangling participle well know, the English language does not always force a writer to specify which of two possible objects is the one to which a modifying phrase relates.").

[12] The parties draw competing inferences from the fact that PennDOT left behind its furniture, fixtures, and equipment. To D&B and Bradbury, this was a significant indicator of the Commonwealth's intent to continue to use space at Forum Place in the future (RX 41 ¶ 269). To the Division, it was a clever tactic on the part of the Commonwealth to avoid paying furniture storage charges (Div. Prop. Find. # 202). Respondents' interpretation finds significant support in Crowell's 1995 representations to Vartan. The Division's interpretation lacks record support.

[13] This assumption was completely unwarranted. PennDOT's motor vehicle and licensing arm intended to stay in the Riverfront Office Center for the long term (Tr. 159-60, 924). For that reason, the Commonwealth signed a ten-year lease with two five-year renewal options at Riverfront. In contrast, PennDOT's administrative personnel intended to stay at Forum Place only until the Keystone Building was completed (Tr. 158). For that reason, the Commonwealth signed a five-year lease with a one-year renewal option at Forum Place (Tr. 158, 192, 908; DX 92).

[14] Robert D. Pope (Pope), the Division's expert witness, explained that lengthy meetings, in which a POS is reviewed page-by-page, are common (DX 94 ¶ 24). Pope characterized the review process here as a highly abbreviated version of the common approach (DX 94 ¶ 23).

[15] Neither Bradbury, the underwriter, nor O'Neill, the underwriter's counsel, attended the June 30, 1998, meeting (Tr. 354, 680).

[16] Bradbury, O'Neill, and Hendershot did not attend the July 8 meeting (Tr. 359, 1646-48; DX 24, DX 25).

[17] At a subsequent meeting, Fowler "indicated" or "represented" that the bondholders were taking the risk that Forum Place would remain full and that the Commonwealth would continue to use the vacated PennDOT space for other agencies as the Commonwealth conducted renovations (Tr. 953-54; RX 44, Minutes of Sept. 22, 1998, Executive Session at 2).

[18] This was an exaggeration, or at least imprecision, on Fowler's part. D&B may have received non-binding indications of interest from prospective investors, but the bonds were not D&B's to sell until the Authority executed the bond purchase agreement on July 8 (RX 31). Even at that juncture, the terms of the sale were generally known, but not final (Tr. 783-84).

[19] At the hearing, Sweet was unable to recall if the July 8 meeting included any discussion of the June 30 meeting with Crowell (Tr. 103-04, 139). He was also unable to recall the specifics of Fowler's presentation to the Authority (Tr. 131). Finally, Sweet was unable to remember the extent of his own remarks at the July 8 meeting (Tr. 104).

[20] The appraisal stated (DX 4 at 42): "Class 'A' occupancy rates increased several percentage points to a 99% occupancy level. . . . The recently constructed Forum Place and the PennDOT facility were recently completed. The bulk of the space in both of these buildings [has] been leased to the Commonwealth of Pennsylvania (a variety of agencies). . . . Both of these two facilities due to their state oriented lease arrangements have not been included in the statistical data associated with the downtown office market analysis." The appraisal's oblique reference to "the PennDOT facility" meant the Riverfront Office Center (Tr. 700, 1565).

[21] The Division attempts to argue that the appraisal was also false and misleading because Fowler and others believed that it overvalued Forum Place (Div. Prop. Find. # 106, Div. Br. at 6 n.2). There is no such allegation in the OIP, as the Division has previously acknowledged (Prehearing Conference of May 26, 2004, at 27-28). The Division also suggests that the appraisal was somehow tainted because Vartan's bank paid for it (Tr. 975-76; Div. Prop. Find. ## 107-08). There is no such allegation in the OIP. *See infra* note 32.

[22] The term "when issued" is a short form of "when, as, and if issued." It refers to a transaction made conditionally because a security, although authorized, has not yet been issued. New issues of bonds are traded on a "when issued" basis. *See Barron's Dictionary of Financial and Investment Terms* 653 (4th ed. 1995).

[23] IMAGE is Investment Management Advisory Group, Inc., of Pottstown, Pennsylvania, a structuring specialist and pricing agent for investments and interest rate management

tools. DCGA's procedure for investing the proceeds of a bond closing is described in the record and summarized here (RX 33 at 6, RX 44, Minutes of July 21, 1998, Meeting at 2, Minutes of Aug. 18, 1998, Meeting at 9).

The Forum Place trust indenture provides that the trustee may invest the proceeds of the bond offering in certain securities (DX 16, Appendix A at 14-15). Once the trustee had funds available for investment, he would ask the Authority for directions on how to proceed. After the Riverfront transaction closed, the Authority delegated PASI and Fowler, as program administrator, to assist the trustee in making a selection (RX 44, Minutes of July 21, 1998, Meeting at 2). Fowler then solicited bids, in consultation with IMAGE. IMAGE received a commission from the successful bidder and shared its commission with PASI. Fowler made appropriate disclosure of PASI's commission to the Authority.

[24] At about the same time, the new DCGA Board replaced GKS and Hendershot as its solicitor (Tr. 1645).

[25] The Division contends that Vartan's continued management of Forum Place could not possibly have been important to the bondholders because it was not specifically mentioned in the POS or OS (Tr. 841-42, 861-62, 1117; Div. Reply to D&B at 20-21). However, the subject appears in the notes of two investor representatives (DX 54; RX 27). Moreover, the trust indenture required the Authority to maintain the premises at Forum Place in good working order at all times (DX 16, Appendix A at 9). It also required the Authority not to take any actions that would impair or diminish the rights of bondholders (DX 16, Appendix A at 7, DX 54 at 4).

[26] Although the Division is primarily concerned with violations of Section 17(a)(1), it also alleges that D&B and Bradbury violated Sections 17(a)(2) and 17(a)(3) (Prehearing Conference of Aug. 5, 2004, at 12-13; Tr. 1031). By invoking Section 17(a) in its entirety, the OIP gave appropriate notice that all subsections would be in issue. I reject D&B and Bradbury's claim of surprise as to the allegations under Sections 17(a)(2) and 17(a)(3).

[27] Bradbury is charged as a primary violator of MSRB Rule G-17 on the theory that MSRB Rule D-11 expressly includes "associated persons" within the definitions of brokers, dealers, and municipal securities dealers for purposes of all other MSRB Rules. *See Wheat, First Sec's, Inc.*, 80 SEC Docket 3406, 3421 n.29 (Aug. 20, 2003).

[28] Paragraph III.F.4 of the OIP also alleges that Bradbury caused D&B's violation of Section 15B(c)(1) of the Exchange Act. In *Dominick & Dominick, Inc.*, 50 S.E.C. 571, 578 n.11 (1991), a settled proceeding, the Commission concluded that one who aids and abets a primary violation is necessarily a cause of the violation. The Commission has subsequently followed that approach in contested cases raising the same issue. *See Abraham & Sons Capital, Inc.*, 75 SEC Docket 1481, 1492 & n.25 (July 31, 2001); *Sharon M. Graham*, 53 S.E.C. 1072, 1085 n.35 (1998), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000); *Adrian C. Havill*, 53 S.E.C. 1060, 1070 n.26 (1998).

[29] In arguing that the Authority relied on Sweet, the Division clashes with the views of its own expert (Tr. 1104) ("I don't think most bond counsel would say that their retention as bond counsel makes them responsible for the [OS]").

[30] The record contains only one newspaper article discussing the proposed Keystone Building (RX 22). Nonetheless, the Division acknowledges that the Harrisburg Patriot News "repeatedly referred" to that subject during the period in question (Div. Br. at 13 n.6). Other Pennsylvania newspapers also covered the Commonwealth's initial announcement of plans to construct the Keystone Building (Tr. 218-19). However, that newspaper coverage occurred more than two years before the Forum Place offering. Doty conceded that an underwriter could not properly assume that a potential investor read the local Harrisburg newspaper (Tr. 1488).

[31] The term "soft information" refers to statements of subjective analysis or extrapolation, such as opinions, motives, and intentions, or forward-looking statements, such as projections, estimates, and forecasts. *Trump*, 7 F.3d at 368 n.11; *see also* Section 27A(i)(1) of the Securities Act (defining forward-looking statements as statements of projections, plans or objectives for future performance, future economic performance, and assumptions underlying or relating to the above).

[32] I decline to consider the Division's belated claims that the appraisal was also misleading because it overvalued Forum Place and did not take into account the limits on "bad use" imposed by the federal tax code (Div. Br. at 6, 19). These specific defects in the appraisal were not identified in the OIP. *See supra* note 21.

[33] Comptroller of the Currency (12 C.F.R. § 19.20(b)); Federal Reserve System (12 C.F.R. § 263.20); Federal Deposit Insurance Corporation (12 C.F.R. § 308.20(b)); Federal Trade Commission (16 C.F.R. § 3.15(a)(2)); Commodity Futures Trading Commission (17 C.F.R. § 10.24(d)).

[34] The Commission also stated that administrative pleadings are "very liberally" construed, and that courts grant agencies considerable latitude in "interpreting" charging documents. I do not understand this to mean that the Division is free to ignore the conventions of "plain English" when it drafts an OIP for the Commission's consideration. Nor do I understand it to mean that the Division is entitled to *Chevron* deference when "interpreting" its inartfully phrased work product.

[35] Rule 15c2-12 governs an underwriter's review of an OS, but it does not extend to Bradbury's review of Fowler's financial projections or the appraisal. Those documents were not a part of the OS (Tr. 1558). Of course, the antifraud provisions of the federal securities laws still apply, but without the gloss provided by Rule 15c2-12 and the Commission's Interpretive Statements.

[36] Bradbury has abandoned any claim that he relied on O'Neill's advice. Bradbury failed to make a complete disclosure of the facts to O'Neill. O'Neill did not know about

PennDOT's anticipated move, the June 30 meeting with Crowell, or D&B's distribution of financial projections to prospective investors (Tr. 354, 360-61, 363). Bradbury has also abandoned any claim that he relied on Hendershot or Fowler.

[37] The Authority did not authorize the distribution of Fowler's financial projections or the March 1997 appraisal to prospective investors, and my conclusions about the Authority's violations do not extend to those two documents. Although an OS may consist of a "set of documents," *see* Exchange Act Rule 15c2-12(f)(3), the Division has not tried this case on the theory that the financial projections and the appraisal should be considered as a part of a set of documents that collectively comprised the OS. The OIP consistently treats these three documents as entirely separate, as does Pope (DX 94 ¶ 14). Moreover, the Authority informed prospective investors that "no . . . person has been authorized to give information or to make any representation not contained in this OS and, if given or made, such other information or representation must not be relied upon" (DX 16 at 4). Because the Authority committed no primary violations as to these two documents, PFC and Fowler cannot be liable for "causing" such violations.

[38] The Division relies on *Wheat*, 80 SEC Docket at 3419 & n.26, which defines a financial advisor's fiduciary duty to a municipal issuer by reference to MSRB Rule G-17 and a settlement order involving a broker-dealer functioning as a financial advisor. The Division improperly ignores other language in *Wheat*, 80 SEC Docket at 3424, which construes MSRB Rule G-17 as applying only to financial advisors who are registered brokers, dealers, and municipal securities dealers, but not to financial advisors who are not so registered.

[39] The Commission recognized that issuers often employ financial advisors to assure the accuracy and completeness of disclosure in competitively bid offerings. *See* 1988 Interpretive Statement, 41 SEC Docket at 4114 n.92. It observed that where such financial advisors participate in drafting the disclosure documents, they will have an obligation under the antifraud provisions, comparable to that of the underwriter, to inquire into the completeness and accuracy of disclosure presented during the bidding process. *Id.* Nothing in the 1988 Interpretive Statement addresses the disclosure role of financial advisors in negotiated transactions, such as Forum Place. Nothing in the Interpretive Statement addresses the role of financial advisors who are not registrants and who do not participate in drafting disclosure documents.

[40] Not all document reviews are equal in intensity. At one time, the Commission's staff used four different levels of review when examining registration statements. *See* Securities Act Rel. No. 5231, *The Division of Corporation Finance's Procedures Designed to Curtail Time in Registration Under the Securities Act of 1933*, 37 F.R. 4327 (Mar. 2, 1972) (describing deferred review, cursory review, summary review, and customary review procedures).

[41] The Division contends that the language applies only to whether PFC and Fowler have any direct responsibility to investors. It is not clear what direct responsibility to investors might entail, inasmuch as there is no implied private right of action under Section 17(a)

of the Securities Act. *See In re Washington Pub. Power Supply Sys.*, 823 F.2d 1349, 1358 (9th Cir. 1987) (*en banc*). The Division also contends that the language is irrelevant to PFC's and Fowler's obligations to the Authority. I consider the language in question to be highly relevant to determining the scope of PFC's and Fowler's obligations to the Authority.

[42] A fiduciary relationship creates a duty to speak. *See Chiarella v. United States*, 445 U.S. 222, 228 (1980). However, to establish the parameters of a fiduciary relationship, the Division must first establish the scope of the underlying principal-agent relationship. Labeling Fowler a fiduciary for the purpose of creating a duty to speak is bootstrapping.

[43] If the Division believed the language to be an exculpatory clause, it might have developed the record and presented argument on whether exculpatory clauses are considered valid and enforceable under Pennsylvania law. *See Keystone Aeronautics Corp. v. R.J. Enstrom Corp.*, 499 F.2d 146, 149-50 (3d Cir. 1974); *Neuchatel Insur. v. ADT Security Sys., Inc.*, 1998 U.S. Dist. LEXIS 17692 at *13-16 (E.D. Pa. Nov. 6, 1998). The Division elected not to do so.

[44] If the negotiated terms memorialized in the POS are considered to be a written contract, there is also a question as to whether Pennsylvania's parol evidence rule applies. In addition, there is a question as to whether any views a federal administrative agency might express about Pennsylvania contract law would receive deference on judicial review. *Cf. Anspacher & Assoc., Inc. v. Henderson*, 854 F.2d 941, 947 n.2 (7th Cir. 1988).

[45] Div. Prop. Find. # 305 asserts that the Authority looked to PFC and Fowler to participate in all aspects of the Forum Place transaction, including the production of disclosure. The transcript page cited by the Division does not support the assertion.

[46] Doty opined that Bradbury lacked scienter because Bradbury relied on Fowler's review of the POS. To support that opinion, Doty quoted passages from Fowler's investigative testimony (RX 41 ¶¶ 445-48). In other tribunals, mutually antagonistic defenses of this sort might entitle PFC and Fowler to a severance. *See United States v. Zafiro*, 506 U.S. 534, 539 (1993) (discussing the danger of reducing the prosecutor's burden by turning a co-defendant into a second prosecutor). Doty's opinion on this subject is no longer an active issue in the case. *See supra* note 36. However, to dispel any confusion, I find that the investigative testimony Doty cited to support his opinion is not properly a part of the hearing record for determining the liability of PFC and Fowler. *Cf.* Fed. R. Evid. 105, 703. All parties were aware that investigative testimony would not be considered as substantive evidence against Respondents unless the individual in question was confronted with his investigative testimony and given an opportunity to explain it. The Division never confronted Fowler with this aspect of his investigative testimony.

[47] Doty opined that relative fault disproves recklessness (RX 41 ¶¶ 38-39, 488). I do not find his reasoning persuasive. Moreover, D&B and Bradbury have abandoned this argument in their posthearing pleadings.

[48] The Commission has not yet addressed the issue of whether an MSRB rule violation can be the basis for a cease-and-desist order under Section 21C of the Exchange Act. *See Wheat*, 80 SEC Docket at 3434-35 n.73. Accordingly, the wording of the cease-and-desist order here will follow the language the Commission used in *Wheat*.

[49] The evidence of resale at $99.625 is persuasive as to the $55.6 million in Series A bonds maturing in 2025 (Tr. 1239; DX 21-DX 23). The evidence of the resale price is somewhat less persuasive as to the $16.65 million in Series A bonds maturing in 2003, 2008, and 2010 (Tr. 424, 726-27).

The issue is which party properly bears the burden of proof. Given the evidence that Evergreen Fund purchased all the Series A bonds of shorter maturities at less than par (Tr. 424, 726-27; DX 21-DX 23), the Division could not simply assume that D&B sold these bonds to Evergreen Fund at par. Accordingly, I conclude that the Division has failed to offer a "reasonable approximation" of the commissions earned on the Series A bonds of shorter maturities.

[50] Par is the nominal face value of the bonds, *i.e.*, the amount at which the Authority promised to redeem the bonds at maturity. As to the Series A bonds, the difference between the purchase price and par was not D&B's profit at closing. *See First Fidelity Secs. Group*, 61 SEC Docket 68, 71 n.2 (Jan. 9, 1996) (settled case) (defining the underwriter's discount as the difference between the purchase price that the underwriter pays to the issuer to buy the bonds and the offering price at which the underwriter resells the bonds to the public).

[51] As required by the Debt Collection Improvement Act of 1996, the Commission increased the maximum penalty amounts for violations occurring after December 9, 1996, and, again, for violations occurring after February 2, 2001. *See* 17 C.F.R. §§ 201.1001, .1002.

[52] In its final pleadings, the Division amended its request, asking that the funds be paid to Chernicoff, the receiver (Div. Reply to D&B at 25, Div. Reply to PFC at 19).

[53] The Part 1100 Rules became effective on April 19, 2004, one week before the Commission issued the OIP in this matter. *See Adoption of Amendments to the Rules of Practice and Delegation of Authority to the Commission*, 82 SEC Docket 1744 (Mar. 12, 2004).

COMMISSION ORDERS – SETTLED ADMINISTRATIVE PROCEEDINGS

In the Matter of Ira Weiss, and L. Andrew Shupe II, Securities Act Release No. 8459, Securities Exchange Act Release No. 50235, A.P File No. 3-11462 (August 24, 2004).

I.

In these proceedings instituted on April 22, 2004, pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Exchange Act, Respondent L. Andrew Shupe II ("Shupe" or "Respondent") has submitted an Offer of Settlement ("Offer") which the Securities and Exchange Commission ("Commission") has determined to accept.

II.

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, Respondent consents to the entry of this Order 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) and 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

Respondent

1. Shupe was the President and Chief Executive Officer of Quaestor Municipal Group, Inc. ("Quaestor"), a registered broker-dealer. In 2000, he also held numerous securities licenses, including a series 52 (municipal securities representative) and series 53 (municipal securities principal) securities license. Shupe had worked as a public finance investment banker for various broker-dealers registered with the Commission since 1984. Shupe, age 61, is a resident of Franklin Park, Pennsylvania.

Other Relevant Individuals and Entities

2. Neshannock Township School District ("School District") is a school district duly organized under the Pennsylvania School Code of 1949, as amended, and located in Lawrence County, Pennsylvania. The School District is governed by a board ('School Board"), comprised of nine unpaid, elected school directors.

3. Quaestor was a small broker-dealer based in Pittsburgh, Pennysylvania, that specialized in underwriting municipal securities. Quaestor was the corporate successor to

Potter, Shupe & Associates, a firm co-founded by Shupe in 1989. In 2000, Quaestor was registered with the Commission as a broker-dealer but voluntarily withdrew its registration in April 2001.

4. Ira Weiss ("Weiss") is an experienced public finance attorney located in Pittsburgh, Pennsylvania. In 2000, Weiss also served as solicitor to numerous school districts, municipalities and authorities in western Pennsylvania. He served as bond counsel to the School District.

Summary

5. This matter involves the fraudulent offer and sale in June 2000 by the School District of $9,600,000 General Obligation Notes, Series of 2000, dated May 15, 2000 and maturing May 15, 2003 (the "Notes"). The Notes were offered and sold to investors based on a legal opinion to the effect that the interest thereon was exempt from federal taxation, and a representation that the note proceeds would be used to fund the School District's capital improvement projects. Both of these statements, set forth in the School District's disclosure document (the "Official Statement"), were materially false and misleading.

6. The tax-exempt status of the Notes was dependent upon, among other matters, the School District reasonably expecting on an objective basis to spend substantially all of the Note proceeds on capital projects within three years of the Notes' issuance. However, the School District had not made any final decisions on its primary capital project of renovating or adding to an existing school building, and it did not want to be locked into undertaking the controversial project by virtue of the financing.

7. Shupe had marketed the issuance of the Notes to the School District as a way to earn $225,000 of interest rate arbitrage profit. Indeed, Shupe's profit calculations were based on the assumption that no net Note proceeds would be spent within three years. Shupe's written financing proposal explicitly listed only the $225,000 arbitrage profit as the amount available for capital improvements. Furthermore, the Official Statement, which Shupe prepared, (1) falsely represented that the purpose of the offering was to "provide funds for capital improvement projects of the School District and to pay all costs and expenses related to the issuance of the Notes…[;]" and (2) recited that the School District's bond counsel had rendered a legal opinion to the effect that the interest on the Notes was exempt from federal income taxation.

8. After the closing on the Notes, the Internal Revenue Service ("IRS") issued a preliminary determination that the Notes were taxable arbitrage notes. The School District and the IRS subsequently entered into a closing agreement that, among other things, preserves the tax-exempt status of the Notes.

Facts

9. In early 2000 Shupe, as a representative of Quaestor, approached the School District and proposed that it issue up to $10 million of purportedly tax-exempt three-year notes. At all relevant times, Shupe advised the School Board that, given then-current market

conditions, if the School District were to issue $9.6 million of tax-exempt three year notes, and to reinvest the proceeds in U.S. Treasury obligations, about $225,000 would be available for capital improvements at closing, an amount equal to the excess investment earnings, net of costs of issuance. Shupe also suggested that the School District retain Weiss as bond counsel.

10. Under the relevant federal tax law provisions, issuers of tax-exempt debt for capital projects must reasonably expect on the date of issuance to satisfy certain "spend-down requirements." These spend-down requirements include (i) within six months of the date of issuance incurring a binding obligation to a third party to expend at least five percent of the net proceeds on the capital project, (ii) proceeding with due diligence on the capital projects until completion, and (iii) expending within three years at least eighty-five percent of the net proceeds of the borrowing on capital projects. Under the relevant IRS regulations, an issuer's expectations are considered reasonable only if a prudent person in the same circumstances as the issuer would have those same expectations, based on all the objective facts and circumstances

11. When Shupe initially approached the School District, it had a general need to either renovate or add to an existing school building. This project, which was estimated to cost about $10 million, was controversial. The School Board had not conducted a demographic study needed to justify an addition, had not formally hired an architect, and had not resolved amongst themselves issues such as whether renovating existing classrooms or constructing new classrooms would be more appropriate. Preliminary cost estimates suggested that the School District also had other, smaller, capital needs totaling $1.5 million, such that in aggregate the School District had about $11.5 million of possible capital expenditures.

12. On or about May 8, 2000, Shupe and Weiss made a joint presentation to the School Board concerning the issuance of the Notes. Shupe submitted a written financing proposal in which he asserted that "school districts have and are borrowing in advance of projects just to invest the proceeds for three years and legally keep the positive investment earnings," and listed $225,000 as the total amount available for capital improvements from the investment of the Note proceeds. Shupe's oral presentation tracked his written proposal.

13. At all relevant times, Shupe knew that his $225,000 estimate of arbitrage profits assumed that the School District would not spend any of the principal of the Note proceeds on capital projects.

14. Quaestor was contractually obligated to prepare the Official Statement for the Notes on behalf of the School District. The Official Statement prepared by Shupe represented that the net proceeds from the sale of the Notes would be used to provide funds for capital improvement projects of the School District. The Official Statement did not accurately describe the use of the Note proceeds, and did not disclose the resulting risk to the Notes' purported tax-exempt status. The Notes were offered and sold by Quaestor to investors at interest rates commensurate with their purported tax-exempt status.

15. At all relevant times, Shupe knew or was reckless in not knowing that the Official Statement failed to disclose the true purpose of the offering which was to gain $225,000 in arbitrage profits.

16. Moreover, at all relevant times Shupe knew, or was reckless in not knowing, that the School Board had yet to resolve whether to proceed with its primary capital project involving renovations and additions to an existing school building, or which of its smaller capital projects had priority.

17. Shortly after the closing on the Notes, the School District, at the suggestion of Shupe, invested the net Note proceeds in a Federal Home Loan Bank obligation maturing within sixty days of the maturity date for the Notes. The School District did not enter into any formal commitment to expend any portion of the Note proceeds within six months, nor did it expend any portion of the net Note proceeds on any capital project within three years.

18. In or about November 2000, the IRS commenced an examination of the Notes. Shortly thereafter, the School District decided to redeem the Notes on May 15, 2001, the first call date. The redemption price for the Notes was paid from the proceeds of the Notes. In September 2001, the IRS issued a preliminary determination that the Notes were taxable arbitrage notes. In the IRS's view, the School District had issued the Notes without any reasonable expectation to expend the proceeds on capital projects. The School District and the IRS entered into a closing agreement that, among other things, provides for a payment by the School District to the IRS and preserves the tax-exempt status of the Notes. The closing agreement also provides that it is not to be construed as an admission by the School District that it acted wrongly with respect to the Notes.

19. While engaged in the foregoing acts Shupe directly or indirectly made use of the mails or the means and instruments of transportation and communication in interstate commerce, or the means and instrumentalities of interstate commerce.

20. As a result of the conduct described above, Shupe 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.

21. As a result of the conduct described above, Shupe willfully aided and abetted and caused the School District's violations of 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.

Disgorgement and Civil Penalties

22. Shupe has submitted a sworn Statement of Financial Condition dated April 1, 2004 and other evidence and has asserted his inability to pay disgorgement plus prejudgment interest or a civil penalty.

IV.

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

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Shupe shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder;

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

C. Any reapplication for association by Shupe 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.

D. Shupe shall pay disgorgement of $15,043.00 plus prejudgment interest. Based upon Shupe's sworn representations in his Statement of Financial Condition dated April 1, 2004 as updated by Shupe's Affidavit as to Financial Condition dated June 3, 2004 and other documents submitted to the Commission, the Commission is waiving Shupe's payment of disgorgement and prejudgment interest, and is not imposing a penalty against Shupe.

E. The Division of Enforcement ("Division") may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider whether Shupe provided accurate and complete financial information at the time such representations were made; and (2) seek an order directing payment of disgorgement, prejudgment interest, and the maximum civil penalty allowable under the law. No other issue shall be considered in connection with this petition other than whether the financial information provided by Respondent was fraudulent, misleading, inaccurate, or incomplete in any material respect. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; (2) assert that payment of disgorgement, interest or a penalty should not be ordered; (3) contest the amount of disgorgement and interest to be ordered; (4) contest the imposition of the maximum penalty allowable under the law; or (5) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.
Jonathan G. Katz
Secretary

In the Matter of CIBC World Markets Corporation, Securities Exchange Act Release No. 52942, A.P. File No. 3-12123 (December 12, 2005).

I.

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

II.

In anticipation of the institution of these proceedings, the Respondent has submitted an Offer of Settlement ("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, the Respondent, without admitting or denying the findings, except as to the Commission's jurisdiction over Respondent and over the subject matter of these proceedings, consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings and Imposing a Cease-and-Desist Order and Remedial Sanctions Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Order").

III.

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

1. CIBC is, and was during the period described below, registered with the Commission as a broker-dealer pursuant to Section 15(b)(1) of the Exchange Act and as a municipal securities dealer pursuant to Section 15B(a)(2) of the Exchange Act. CIBC is a wholly owned indirect subsidiary of the Canadian Imperial Bank of Commerce, a Canadian corporation whose common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange. CIBC's principal executive offices are located in New York, New York.

2. Paul D. Rogers ("Rogers"), age 47, resides in Eastchester, New York. During the relevant period and until his resignation in August 2004, Rogers was the President of CIBC and a Managing Director of its parent company for the U.S. region. As President, Rogers supervised CIBC's U.S. corporate and leveraged finance group, which included investment banking, and its U.S. real estate finance group. Rogers holds Series 7 and 24 licenses.

3. Peter J. Crowley ("Crowley"), age 46, resides in Rye, New York. Crowley is, and was during the relevant period, a Managing Director of CIBC and the head of its healthcare investment banking group. Crowley is a registered representative and holds Series 7, 24 and 63 licenses.

4. Robert J. Dentice ("Dentice"), age 39, resides in New York, New York. From 1999 through July 2002, Dentice was the Business Manager for CIBC's investment banking division. He was not a registered representative during that period. From August 2002 until his termination in July 2004, Dentice was an investment banking associate in CIBC's health care group. Dentice holds a Series 7 license.

5. As described below, CIBC made a $10,000 contribution to the re-election campaign of former California Governor Gray Davis in February 2002. During the two-year period following the contribution, CIBC engaged in municipal securities business with the State of California and thereby violated Rule G-37(b) of the Municipal Securities Rulemaking Board ("MSRB") and Section 15B(c)(1) of the Exchange Act [15 U.S.C. § 78o-4(c)(1)].[2]

The relevant facts are as follows:

a. In February 2002, one of CIBC's investment banking clients solicited Crowley for a $10,000 contribution from CIBC in connection with an event hosted by the client to raise funds for Governor Davis's re-election campaign. With the understanding and expectation that he would be reimbursed by CIBC, Crowley wrote a personal check on February 14, 2002 payable to the "Governor Gray Davis Committee" in the amount of $10,000. CIBC reimbursed Crowley for the full amount on May 9, 2002.

b. Before issuing the check, Crowley enlisted Dentice's assistance in securing corporate funds for the contribution. On February 12, 2002, Crowley sent an email to Dentice in which he stated that the investment banking client had paid CIBC a substantial sum for prior work, and that Crowley's group hoped to receive significantly more business from the client that year. Crowley's email went on to state that the client "wants 10,000 for grey [sic] davis run for gov in cal" and asked "where do I get the money?" Dentice forwarded Crowley's email to a lawyer in CIBC's legal department that same day, asking whether CIBC had "a policy on political donations." Later that day, the lawyer responded to Dentice by email that, according to firm policy and "as a regulatory matter," CIBC was prohibited from making the contribution, but that Crowley himself could lawfully make a political donation in his "personal capacity." Crowley wrote the $10,000 check two days later.

c. As described below, Rogers, Crowley and Dentice caused CIBC to reimburse Crowley for the $10,000. After Crowley wrote the check, Crowley and Dentice exchanged emails discussing how to handle the reimbursement. In one of these emails, Crowley characterized, and suggested treating, the contribution as a "marketing expense." During this period, Dentice and Rogers discussed, at Dentice's initiative, the subject of reimbursing Crowley. Rogers understood from his discussion with Dentice that the $10,000 payment was a political contribution to the Davis campaign, and that it was made at the behest of an investment banking client. Rogers and Dentice also discussed that having CIBC reimburse Crowley for a political contribution would have regulatory implications, and Rogers also understood that firm policy prohibited CIBC from making political contributions. Rogers nevertheless approved the reimbursement at Dentice's request as a purported marketing expense. After obtaining Rogers's approval, Dentice directed a CIBC administrative employee to process Crowley's reimbursement form and approve the request.

d. No one at CIBC took any steps to prevent CIBC from engaging in municipal securities business with the State of California within two years after the contribution.

e. As a result of the contribution, MSRB Rule G-37(b) prohibited CIBC from engaging in any municipal securities business with the State of California for the next two years. Nevertheless, CIBC acted as co-underwriter for ten negotiated underwritings of municipal securities issued by the State of California and related agencies during that period. CIBC received a total of $379,852 in fees from the State of California and its agencies for underwriting these securities, which were sold for a total of more than $26.6 billion.

6. As described below, CIBC also violated MSRB Rules G-8, G-9 and G-37(e) by failing to: (i) make and keep the requisite records of the political contribution discussed above and an additional five unreimbursed political contributions made by CIBC executives that were also within the scope of the foregoing rules; (ii) disclose these six political contributions in the quarterly reports it filed with the MSRB; and (iii) make and keep other required records relating to personnel covered by Rule G-37.[3] The relevant facts are as follows:

a. CIBC did not report its February 2002 contribution to the Gray Davis campaign in its quarterly report to the MSRB dated April 30, 2002 or in any subsequent report, and CIBC did not maintain an accurate record of that contribution. CIBC also failed to report to the MSRB, and had no record of, four political contributions made by Crowley from June 12, 2001 through August 27, 2002. Each of these contributions was made to an individual who was an "official of an issuer" of municipal securities within the meaning of MSRB Rule G-

37(g)(vi). These four contributions totaled $1,750. Crowley was a non-MFP executive officer within the meaning of MSRB Rule G-37(g)(v).

b. In addition, CIBC failed to report to the MSRB, and had no record of, a political contribution made by another senior official at CIBC who was a non-MFP executive officer within the meaning of MSRB Rule G-37(g)(v). This contribution was for $500 and was made on May 15, 2001 to an individual who was an "official of an issuer" of municipal securities within the meaning of MSRB Rule G-37(g)(vi).

c. During the relevant period, CIBC did not make and keep an accurate list of its MFPs or its non-MFP executive officers.

7. As a result of the conduct described above, CIBC willfully[4] violated Section 15B(c)(1) of the Exchange Act and MSRB Rules G-37(b), G-37(e)(i)(A)(2), G-8 and G-9.

8. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by CIBC and cooperation afforded the Commission staff.

IV.

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

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

1. CIBC cease and desist from committing or causing any violations and any future violations of Section 15B(c)(1) of the Exchange Act and MSRB Rules G-37, G-8, and G-9.

2. Respondent shall, within 10 days of the issuance of the Order, disgorge a total of $421,958 to the United States Treasury, consisting of $379,852 in disgorgement and prejudgment interest thereon of $42,106. Such payment shall be: (i) made by United States postal money order, certified check, bank cashier's check or bank money order; (ii) made payable to the Securities and Exchange Commission: (iii) and hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, Stop 0-3, VA 22312; and (iv) submitted under cover letter that identifies CIBC as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to George N. Stepaniuk, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, Three World Financial Center, Room 4300, New York, New York 10281.

3. CIBC shall, within 10 days of the issuance of this Order, pay a civil money penalty in the amount of $75,000 to the United States Treasury. Such payment shall be: (i) made by United States postal money order, certified check, bank cashier's check or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312; and (iv) submitted under cover letter that identifies CIBC as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to George N. Stepaniuk, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, Three World Financial Center, Room 4300, New York, New York 10281.

By the Commission.
Jonathan G. Katz
Secretary

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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.

[2] Section 15B(c)(1) of the Exchange Act prohibits a broker, dealer or municipal securities dealer from using the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in contravention of any rule of the MSRB. Subsection (b) of MSRB Rule G-37 provides that no broker, dealer or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer. The governor is an "official of an issuer" within the meaning of MSRB Rule G-37(g)(vi), which includes anyone who is "directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business" by the state or has authority to appoint the board members of the issuing authority.

[3] MSRB Rule G-37(e)(i)(A) requires broker-dealers and municipal securities dealers to file quarterly reports with the MSRB disclosing political contributions to any official of a municipal securities issuer made by the firm, its municipal finance professionals ("MFPs") and non-MFP executive officers. MSRB Rules G-8(a)(xvi)(E) and (F) and G-9(a)(viii) require such firms to maintain accurate records of all such contributions, and Rules G-8(a)(xvi)(A) and (B) require the firms to make and keep accurate lists of their MFPs and non-MFP executive officers. MSRB Rule G-37(g)(v) defines non-MFP executive officers as including each "associated person in charge of a principal business unit, division or function."

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

In the Matter of Peter J. Crowley, Securities Exchange Act Release No. 52943, A.P. File No. 3-12124 (December 12, 2005).

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Peter J. Crowley ("Crowley" 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, the Respondent, without admitting or denying the findings, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings and Imposing a Cease-and-Desist Order and Remedial Sanctions Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Order").

III.

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

1. CIBC World Markets Corporation ("CIBC"), is, and was during the period described below, registered with the Commission as a broker-dealer pursuant to Section 15(b)(1) of the Exchange Act and as a municipal securities dealer pursuant to Section 15B(a)(2) of the Exchange Act. CIBC is a wholly-owned indirect subsidiary of the Canadian Imperial Bank of Commerce, a Canadian corporation whose common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange. CIBC's principal executive offices are located in New York, New York.

2. Crowley, age 46, resides in Rye, New York. Crowley is, and was during the period described below, a Managing Director of CIBC and the head of its healthcare investment banking group. Crowley is a registered representative and holds Series 7, 24 and 63 licenses.

3. Paul D. Rogers ("Rogers"), age 47, resides in Eastchester, New York. During the relevant period and until his resignation in August 2004, Rogers was the President of CIBC and a Managing Director of its parent company for the U.S. region. As President, Rogers supervised CIBC's U.S. corporate and leveraged finance group, which included

investment banking, and its U.S. real estate finance group. Rogers holds Series 7 and 24 licenses.

4. Robert J. Dentice ("Dentice"), age 39, resides in New York, New York. From 1999 through July 2002, Dentice was the Business Manager for CIBC's investment banking division. He was not a registered representative during that period. From August 2002 until his termination in July 2004, Dentice was an investment banking associate in CIBC's health care group. Dentice holds a Series 7 license.

5. As described below, CIBC made a $10,000 contribution to the re-election campaign of former California Governor Gray Davis in February 2002. During the two-year period following the contribution, CIBC engaged in municipal securities business with the State of California and thereby violated Rule G-37(b) of the Municipal Securities Rulemaking Board ("MSRB") and Section 15B(c)(1) of the Exchange Act [15 U.S.C. § 78o-4(c)(1)].[2] The relevant facts, including Crowley's role, are as follows:

> a. In February 2002, one of CIBC's investment banking clients solicited Crowley for a $10,000 contribution from CIBC in connection with an event hosted by the client to raise funds for Governor Davis's re-election campaign. With the understanding and expectation that he would be reimbursed by CIBC, Crowley wrote a personal check on February 14, 2002 payable to the "Governor Gray Davis Committee" in the amount of $10,000. CIBC reimbursed Crowley for the full amount on May 9, 2002.
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> b. Before issuing the check, Crowley enlisted Dentice's assistance in securing corporate funds for the contribution. On February 12, 2002, Crowley sent an email to Dentice in which he stated that the investment banking client had paid CIBC a substantial sum for prior work, and that Crowley's group hoped to receive significantly more business from the client that year. Crowley's email went on to state that the client "wants 10,000 for grey [sic] davis run for gov in cal" and asked "where do I get the money?" Dentice forwarded Crowley's email to a lawyer in CIBC's legal department that same day, asking whether CIBC had "a policy on political donations." Later that day, the lawyer responded to Dentice by email that, according to firm policy and "as a regulatory matter," CIBC was prohibited from making the contribution, but that Crowley himself could lawfully make a political donation in his "personal capacity." Crowley wrote the $10,000 check two days later.
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> c. As described below, Rogers, Crowley and Dentice caused CIBC to reimburse Crowley for the $10,000. After Crowley wrote the check, Crowley and Dentice exchanged emails discussing how to handle the reimbursement. In one of these emails, Crowley characterized, and suggested treating, the contribution as a "marketing expense." During this period, Dentice and Rogers discussed, at Dentice's initiative, the subject of reimbursing Crowley. Rogers understood from his discussion with Dentice that the $10,000 payment was a political contribution to the Davis campaign, and that it was made at the behest of an investment

banking client. Rogers and Dentice also discussed that having CIBC reimburse Crowley for a political contribution would have regulatory implications, and Rogers also understood that firm policy prohibited CIBC from making political contributions. Rogers nevertheless approved the reimbursement at Dentice's request as a purported marketing expense. After obtaining Rogers's approval, Dentice directed a CIBC administrative employee to process Crowley's reimbursement form and approve the request.

d. No one at CIBC took any steps to prevent CIBC from engaging in municipal securities business with the State of California within two years after the contribution.

e. As a result of the contribution, MSRB Rule G-37(b) prohibited CIBC from engaging in any municipal securities business with the State of California for the next two years. Nevertheless, CIBC acted as co-underwriter for ten negotiated underwritings of municipal securities issued by the State of California and related agencies during that period. CIBC received a total of $379,852 in fees from the State of California and its agencies for underwriting these securities, which were sold for a total of more than $26.6 billion.

6. As a result of the conduct described above, CIBC violated Section 15B(c)(1) of the Exchange Act and MSRB Rule G-37(b), and Crowley was a cause of, and willfully[3] aided and abetted, CIBC's violations of Section 15B(c)(1) of the Exchange Act and MSRB Rule G-37(b).

IV.

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

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

A. Crowley cease and desist from causing any violations and any future violations of Section 15B(c)(1) of the Exchange Act and MSRB Rule G-37.

B. Respondent shall, within 10 days of the issuance of this Order, pay a civil money penalty in the amount of $25,000 to the United States Treasury. Such payment shall be: (i) made by United States postal money order, certified check, bank cashier's check or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312; and (iv) submitted under cover letter that identifies Crowley as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to George N. Stepaniuk, Assistant Regional Director, Division of Enforcement, Securities and

Exchange Commission, Three World Financial Center, Room 4300, New York, New York 10281.

By the Commission.
Jonathan G. Katz
Secretary

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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.

[2] Section 15B(c)(1) of the Exchange Act prohibits a broker, dealer or municipal securities dealer from using the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in contravention of any rule of the MSRB. Subsection (b) of MSRB Rule G-37 provides that no broker, dealer or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer. The governor is an "official of an issuer" within the meaning of MSRB Rule G-37(g)(vi), which includes anyone who is "directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business" by the state or has authority to appoint the board members of the issuing authority.

[3] "Willfully" as used in this Order means knowingly committing the act which constitutes the violation. Cf. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

In the Matter of Robert J. Dentice, Securities Exchange Act Release No. 52944, A.P. File No. 3-12125 (December 12, 2005).

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Robert J. Dentice ("Dentice" or "Respondent").

II.

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

III.

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

1. CIBC World Markets Corporation ("CIBC"), is, and was during the period described below, registered with the Commission as a broker-dealer pursuant to Section 15(b)(1) of the Exchange Act and as a municipal securities dealer pursuant to Section 15B(a)(2) of the Exchange Act. CIBC is a wholly-owned indirect subsidiary of the Canadian Imperial Bank of Commerce, a Canadian corporation whose common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange. CIBC's principal executive offices are located in New York, New York.

2. Dentice, age 39, resides in New York, New York. From 1999 through July 2002, Dentice was the Business Manager for CIBC's investment banking division. He was not a registered representative during that period. From August 2002 until his termination in July 2004, Dentice was an investment banking associate in CIBC's health care group. Dentice holds a Series 7 license.

3. Paul D. Rogers ("Rogers"), age 47, resides in Eastchester, New York. During the relevant period and until his resignation in August 2004, Rogers was the President of CIBC and a Managing Director of its parent company for the U.S. region. As President, Rogers supervised CIBC's U.S. corporate and leveraged finance group, which included investment banking, and its U.S. real estate finance group. Rogers holds Series 7 and 24 licenses.

4. Peter J. Crowley ("Crowley"), age 46, resides in Rye, New York. Crowley is, and was during the relevant period, a Managing Director of CIBC and the head of its healthcare investment banking group. Crowley is a registered representative and holds Series 7, 24 and 63 licenses.

5. As described below, CIBC made a $10,000 contribution to the re-election campaign of former California Governor Gray Davis in February 2002. During the two-year period following the contribution, CIBC engaged in municipal securities business with the State of California and thereby violated Rule G-37(b) of the Municipal Securities Rulemaking Board ("MSRB") and Section 15B(c)(1) of the Exchange Act [15 U.S.C. § 78o-4(c)(1)].[2]

The relevant facts, including Dentice's role, are as follows:

a. In February 2002, one of CIBC's investment banking clients solicited Crowley for a $10,000 contribution from CIBC in connection with an event hosted by the client to raise funds for Governor Davis's re-election campaign. With the understanding and expectation that he would be reimbursed by CIBC, Crowley wrote a personal check on February 14, 2002 payable to the "Governor Gray Davis Committee" in the amount of $10,000. CIBC reimbursed Crowley for the full amount on May 9, 2002.

b. Before issuing the check, Crowley enlisted Dentice's assistance in securing corporate funds for the contribution. On February 12, 2002, Crowley sent an email to Dentice in which he stated that the investment banking client had paid CIBC a substantial sum for prior work, and that Crowley's group hoped to receive significantly more business from the client that year. Crowley's email went on to state that the client "wants 10,000 for grey [sic] davis run for gov in cal" and asked "where do I get the money?" Dentice forwarded Crowley's email to a lawyer in CIBC's legal department that same day, asking whether CIBC had "a policy on political donations." Later that day, the lawyer responded to Dentice by email that, according to firm policy and "as a regulatory matter," CIBC was prohibited from making the contribution, but that Crowley himself could lawfully make a political donation in his "personal capacity." Crowley wrote the $10,000 check two days later.

c. As described below, Rogers, Crowley and Dentice caused CIBC to reimburse Crowley for the $10,000. After Crowley wrote the check, Crowley and Dentice exchanged emails discussing how to handle the reimbursement. In one of these emails, Crowley characterized, and suggested treating, the contribution as a "marketing expense." During this period, Dentice and Rogers discussed, at Dentice's initiative, the subject of reimbursing Crowley. Rogers understood from his discussion with Dentice that the $10,000 payment was a political contribution to the Davis campaign, and that it was made at the behest of an investment banking client. Rogers and Dentice also discussed that having CIBC reimburse Crowley for a political contribution would have regulatory implications, and Rogers also understood that firm policy prohibited CIBC from making political contributions. Rogers nevertheless approved the reimbursement at Dentice's request as a purported marketing expense. After obtaining Rogers's approval, Dentice directed a CIBC administrative employee to process Crowley's reimbursement form and approve the request.

d. No one at CIBC took any steps to prevent CIBC from engaging in municipal securities business with the State of California within two years after the contribution.

e. As a result of the contribution, MSRB Rule G-37(b) prohibited CIBC from engaging in any municipal securities business with the State of California for the next two years. Nevertheless, CIBC acted as co-underwriter for ten negotiated underwritings of municipal securities issued by the State of California and related agencies during that period. CIBC received a total of $379,852 in fees from the State of California and its agencies for underwriting these securities, which were sold for a total of more than $26.6 billion.

6. As a result of the conduct described above, CIBC violated Section 15B(c)(1) of the Exchange Act and MSRB Rule G-37(b), and Dentice was a cause of CIBC's violations of Section 15B(c)(1) of the Exchange Act and MSRB Rule G-37(b).

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanction specified in Dentice's Offer.

ACCORDINGLY, pursuant to Section 21C of the Exchange Act, it is hereby ORDERED that Dentice shall cease and desist from causing any violations and any future violations of MSRB Rule G-37 and Section 15B(c)(1) of the Exchange Act.

By the Commission.
Jonathan G. Katz
Secretary

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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.

[2] Section 15B(c)(1) of the Exchange Act prohibits a broker, dealer or municipal securities dealer from using the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in contravention of any rule of the MSRB. Subsection (b) of MSRB Rule G-37 provides that no broker, dealer or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer. The governor is an "official of an issuer" within the meaning of MSRB Rule G-37(g)(vi), which includes anyone who is "directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker dealer or municipal securities dealer for municipal securities business" by the state or has authority to appoint the board members of the issuing authority.

<u>In the Matter of Paul D. Rogers</u>, Securities Exchange Act Release No. 52941, A.P. File No. 3-12122 (December 12, 2005).

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Paul D. Rogers ("Rogers" 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, the Respondent, consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings and Imposing a Cease-and-Desist Order and Remedial Sanctions Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Order"), as set forth below.

III.

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

1. CIBC World Markets Corporation ("CIBC"), is and was during the period described below, registered with the Commission as a broker-dealer pursuant to Section 15(b)(1) of the Exchange Act and as a municipal securities dealer pursuant to Section 15B(a)(2) of the Exchange Act. CIBC is a wholly-owned indirect subsidiary of the Canadian Imperial Bank of Commerce, a Canadian corporation whose common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and is listed on the New York Stock Exchange. CIBC's principal executive offices are located in New York, New York.

2. Rogers, age 47, resides in Eastchester, New York. During the relevant period and until his resignation in August 2004, Rogers was the President of CIBC and a Managing Director of its parent company for the U.S. region. As President, Rogers supervised CIBC's U.S. corporate and leveraged finance group, which included investment banking, and its U.S. real estate finance group. Rogers holds Series 7 and 24 licenses.

3. Peter J. Crowley ("Crowley"), age 46, resides in Rye, New York. Crowley is, and was during the relevant period, a Managing Director of CIBC and the head of its healthcare investment banking group. Crowley is a registered representative and holds Series 7, 24 and 63 licenses.

4. Robert J. Dentice ("Dentice"), age 39, resides in New York, New York. From 1999 through July 2002, Dentice was the Business Manager for CIBC's investment banking division. He was not a registered representative during that period. From August 2002 until his termination in July 2004, Dentice was an investment banking associate in CIBC's health care group. Dentice holds a Series 7 license.

5. As described below, CIBC made a $10,000 contribution to the re-election campaign of former California Governor Gray Davis in February 2002. During the two-year period following the contribution, CIBC engaged in municipal securities business with the State of California and thereby violated Rule G-37(b) of the Municipal Securities Rulemaking Board ("MSRB") and Section 15B(c)(1) of the Exchange Act [15 U.S.C. § 78o-4(c)(1)].[2]

The relevant facts, including Rogers's role, are as follows:

a. In February 2002, one of CIBC's investment banking clients solicited Crowley for a $10,000 contribution from CIBC in connection with an event hosted by the client to raise funds for Governor Davis's re-election campaign. With the understanding and expectation that he would be reimbursed by CIBC, Crowley wrote a personal check on February 14, 2002 payable to the "Governor Gray Davis Committee" in the amount of $10,000. CIBC reimbursed Crowley for the full amount on May 9, 2002.

b. Before issuing the check, Crowley enlisted Dentice's assistance in securing corporate funds for the contribution. On February 12, 2002, Crowley sent an email to Dentice in which he stated that the investment banking client had paid CIBC a substantial sum for prior work, and that Crowley's group hoped to receive significantly more business from the client that year. Crowley's email went on to state that the client "wants 10,000 for grey [sic] davis run for gov in cal" and asked "where do I get the money?" Dentice forwarded Crowley's email to a lawyer in CIBC's legal department that same day, asking whether CIBC had "a policy on political donations." Later that day, the lawyer responded to Dentice by email that, according to firm policy and "as a regulatory matter," CIBC was prohibited from making the contribution, but that Crowley himself could lawfully make a political donation in his "personal capacity." Crowley wrote the $10,000 check two days later.

c. As described below, Rogers, Crowley and Dentice caused CIBC to reimburse Crowley for the $10,000. After Crowley wrote the check, Crowley and Dentice exchanged emails discussing how to handle the reimbursement. In one of these emails, Crowley characterized, and suggested treating, the contribution as a "marketing expense." During this period, Dentice and Rogers discussed, at Dentice's initiative, the subject of reimbursing Crowley. Rogers understood from his discussion with Dentice that the $10,000 payment was a political contribution to the Davis campaign, and that it was made at the behest of an investment banking client. Rogers and Dentice also discussed that having CIBC reimburse Crowley for a political contribution would have regulatory implications, and Rogers also understood that firm policy prohibited CIBC from making political contributions. Rogers nevertheless approved the reimbursement at Dentice's request as a purported marketing expense. After obtaining Rogers's approval, Dentice directed a CIBC administrative employee to process Crowley's reimbursement form and approve the request.

d. No one at CIBC took any steps to prevent CIBC from engaging in municipal securities business with the State of California within two years after the contribution.

e. As a result of the contribution, MSRB Rule G-37(b) prohibited CIBC from engaging in any municipal securities business with the State of California for the next two years. Nevertheless, CIBC acted as co-underwriter for ten negotiated underwritings of municipal securities issued by the State of California and related agencies during that period. CIBC received a total of $379,852 in fees from the State of

California and its agencies for underwriting these securities, which were sold for a total of more than $26.6 billion.

6. As a result of the conduct described above, CIBC violated Section 15B(c)(1) of the Exchange Act and MSRB Rule G-37(b), and Rogers was a cause of, and willfully[3] aided and abetted, CIBC's violations of Section 15B(c)(1) of the Exchange Act and MSRB Rule G-37(b).

IV.

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

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

A. Rogers cease and desist from causing any violations and any future violations of Section 15B(c)(1) of the Exchange Act and MSRB Rule G-37.

B. Respondent shall, within 10 days of the issuance of this Order, pay a civil money penalty in the amount of $25,000 to the United States Treasury. Such payment shall be: (i) made by United States postal money order, certified check, bank cashier's check or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312; and (iv) submitted under cover letter that identifies Rogers as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to George N. Stepaniuk, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, Three World Financial Center, Room 4300, New York, New York 10281.

By the Commission.
Jonathan G. Katz
Secretary

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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.

[2] Section 15B(c)(1) of the Exchange Act prohibits a broker, dealer or municipal securities dealer from using the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in contravention of any rule of the MSRB. Subsection (b) of MSRB Rule G-37 provides that no broker, dealer or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer. The governor is an "official of an issuer" within the meaning of MSRB Rule G-37(g)(vi), which includes anyone who is "directly or indirectly responsible for, or can influence the

outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business" by the state or has authority to appoint the board members of the issuing authority.

[3] "Willfully" as used in this Order means knowingly committing the act which constitutes the violation. Cf. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

FINANCIAL ADVISORS

ADMINISTRATIVE PROCEEDINGS – COMMISSION DECISIONS

In the Matter of Public Finance Consultants, Inc., Robert D. Fowler, Dolphin and Bradbury, Incorporated, and Robert J. Bradbury, A.P. File No. 3-11465, Initial Decision Release No. 274 (February 25, 2005) (initial decision of administrative law judge). See "UNDERWRITERS" section.

COMMISSION ORDERS – SETTLED ADMINISTRATIVE PROCEEDINGS

In the Matter of Michael S. deVegter, Securities Act Release No. 8645, Securities Exchange Act Release No. 53009, Investment Advisers Act Release No. 2465, Investment Company Act Release No. 27196, A.P. File No. 3-12131 (December 22, 2005).

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), 15B(c)(4), and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") against Michael S. deVegter ("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, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b), 15B(c)(4), and 21C of the Securities Exchange

Act of 1934, Section 203(e) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940 ("Order"), as set forth below.

III.

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

Respondent

1. At all relevant times, Respondent served as a Vice-President in the Public Finance Department of Stephens Inc. ("Stephens"), resident in its Atlanta office. At all relevant times, Respondent was a registered representative associated with Stephens. Respondent now resides in Chatham County, Georgia.

Other Relevant Entities

2. Fulton County, Georgia's governing body is the Board of Commissioners. At all relevant times, the Fulton County Board of Commissioners was empowered to issue bonds and to select underwriters in connection with such bond issuances.

3. Stephens is an Arkansas Corporation with its principal place of business in Arkansas. At all relevant times, Stephens was a broker-dealer, municipal securities dealer, and investment adviser, and was registered with the Commission pursuant to Sections 15(b) and 15B(a) of the Exchange Act, and Section 203(c) of the Advisers Act.

Facts

4. In March 1992, Fulton County commenced a process for selecting new financial advisors by issuing a Request for Proposals for financial advisory services ("Financial Advisory RFP"). In its Financial Advisory RFP, the County stated that the financial advisor it selected would be expected to provide the County with, among other things, "assistance in the selection of investment banking firms" for the underwriting of County bond issues, as well as "independent advice," on a variety of matters, including such selection.

5. On June 3, 1992, Fulton County named Stephens and another firm to provide services in connection with the Financial Advisory RFP. Respondent was the senior investment banker for Stephens, and Stephens' Financial Advisory RFP identified Respondent as the primary banker assigned to the Fulton County financial advisory account.

6. By July 1992, with the assistance of its financial advisors, Fulton County decided to pursue a large bond issue known as the $163,375,000 Fulton County, Georgia, Water and Sewerage Revenue Bonds, Refunding Series 1992 ("Fulton Water & Sewer Refunding"). The securities from this bond issue were ultimately offered and sold to the public.

7. In breach of his duties to his financial advisory client, Respondent agreed to assist and did assist an investment bank that was one of the bidders for the position of senior managing underwriter for the Fulton Water & Sewer Refunding. Fulton County ultimately selected the investment bank as the senior managing underwriter. Respondent knowingly or recklessly failed to disclose his assistance to the investment bank, which was of a material nature.

8. In December 1992, following closing of the Fulton Water & Sewer Refunding, an outside consultant to the investment bank, who had worked previously with Respondent, requested payment from the investment bank of $83,872 for "Governmental Consulting-Business Development/Marketing Services." Subsequently, the investment bank issued a check for $83,872 to the outside consultant.

9. The outside consultant then paid Respondent $41,936, exactly half of this amount. The $41,936 payment to Respondent was never disclosed to the issuer or to investors in the Fulton Water & Sewer Refunding. Respondent knew or was reckless in not knowing that his failure to disclose to Fulton County his relationship with the investment bank and his receipt of this payment was a material omission.[2]

10. As a result of the conduct described above, Respondent willfully violated Section 17(a) of the Securities Act, and 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.

IV.

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

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b), 15B(c)(4) and 21C of the Exchange Act, Section 203(e) of the Advisers Act, and Section 9(b) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent deVegter cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Respondent deVegter be, and hereby is barred from association with any broker, dealer, investment company, investment adviser, or municipal securities dealer, and is prohibited 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. 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.

D. IT IS FURTHER ORDERED that Respondent shall, within 30 days of the entry of this Order, pay disgorgement and prejudgment interest in the total amount of $64,443.69 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, Stop 0-3, VA 22312; and (D) submitted under cover letter that identifies Michael S. deVegter as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Peter H. Bresnan, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549.

By the Commission.
Jonathan G. Katz
Secretary

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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.

[2] Respondent did, however, disclose the payment to the Internal Revenue Service and the Georgia Department of Revenue, and he paid income taxes on it.

ATTORNEYS

INJUNCTIVE PROCEEDINGS

SEC v. Robert A. Kasirer, et al., Civ. Action No. 04-C-4340 (N.D. Ill.), Litigation Release No. 18774 (July 1, 2004) (complaint).
See “OBLIGATED PERSONS” section.

SEC v. Robert Kasirer, et al., Civ. Action No. 04-CV-04340 (N.D. Ill.), Litigation Release No. 19131 (March 11, 2005).
See “UNDERWRITERS” section.

In the Matter of Ira Weiss, and L. Andrew Shupe II, A.P. File No. 3-11462, Initial Decision Release No. 275 (February 25, 2005) (initial decision of administrative law judge).

SUMMARY

This Initial Decision concludes that Respondent Ira Weiss (Weiss) did not violate Section 17(a) of the Securities Act of 1933 (Securities Act), Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), or Rule 10b-5 thereunder. It further concludes that Weiss did not cause the Neshannock Township School District of Lawrence County, Pennsylvania (School District) to violate Section 17(a) of the Securities Act, or Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. This Initial Decision dismisses all charges against Weiss.

PROCEDURAL HISTORY

The Securities and Exchange Commission (Commission) instituted this proceeding on April 22, 2004, pursuant to Section 8A of the Securities Act and Sections 15(b) and 21C of the Exchange Act.[1] Weiss filed a timely Answer. I held a four-day public hearing in Pittsburgh, Pennsylvania, from July 12-15, 2004, at which the Division of Enforcement (Division) called eleven witnesses and Weiss called three witnesses. Forty-one exhibits from the Division and ten exhibits from Weiss were admitted into evidence. The Division and Weiss filed their Post-Hearing Briefs and Proposed Findings of Fact and Conclusions of Law on September 10 and September 9, 2004, respectively. The Division and Weiss filed their Reply Briefs on September 30, 2004.[2]

ISSUES PRESENTED

The Order Instituting Proceedings (OIP) alleges that in June 2000 the School District fraudulently offered and sold $9,600,000 of General Obligation Notes, Series 2000, dated May 15, 2000 and maturing May 15, 2003 (Notes or Note Transaction). The OIP alleges that the Notes were offered and sold to investors based on a legal opinion, issued knowingly or recklessly by Weiss, to the effect that the interest thereon would be exempt from federal taxation, and on a representation that the note proceeds would be used to fund the School District's capital improvement projects. The OIP alleges that both of these statements were materially false and misleading and, additionally, that at the closing for the Notes Weiss knowingly or recklessly rendered another opinion to the effect that nothing had come to his attention that led him to believe that the Official Statement was materially inaccurate or incomplete.

The tax-exempt status of the Notes was dependent upon, among other matters, the School District reasonably expecting, on an objective basis, to spend substantially all of the proceeds of the Notes on capital projects within three years of the Notes' issuance. The OIP alleges that the School District explicitly advised Weiss that it had not made any final decisions on its primary capital projects and that it did not want to be locked into undertaking the controversial project of renovating or adding to an existing school building by virtue of the financing. The OIP charges that Weiss, nevertheless, reassured the School Board members that as long as they "intended" to undertake the aforementioned project, the School District was not actually required to spend the money or to do the project in order to keep the arbitrage profit.

The OIP further charges that thereafter, a School District official executed an inaccurate certificate, prepared by Weiss, that concerned the School District's plans to expend proceeds of the Notes during the three-year period on capital projects. The OIP alleges that, at all relevant times, the School District intended to use the Note proceeds solely to obtain $225,000 of interest rate arbitrage profit, which created significant risk that the interest from the Notes would not be exempt from federal income tax.

As a result of the conduct described above, the OIP alleges that Weiss: (1) violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and; (2) caused the School District to violate Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

If I conclude that the allegations in the OIP are true, I must then determine whether: (1) pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Weiss 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 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and; (2) pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, an order requiring disgorgement, including reasonable interest, should be entered against Weiss.

FINDINGS OF FACT

The findings and conclusions herein are based on the entire record. I applied preponderance of the evidence as the standard of proof for the Division's case. See Steadman v. SEC, 450 U.S. 91, 102 (1981). I have considered and rejected all arguments and proposed findings and conclusions that are inconsistent with this Initial Decision.

The School District

The School District, located in Northern Lawrence County, occupies approximately 17.6 square miles, and is located sixty minutes north of Pittsburgh, Pennsylvania. (Resp. Ex. 5.) It comprises Neshannock Township in Lawrence County, and it became effective before 1900. The superintendent, as chief administrative officer of the School District, has overall responsibility for all aspects of operations, including education, finance, budget, and financial operations. The School District operates an elementary school, and a junior and senior high school. (Resp. Ex. 5.) The elementary school, constructed in 1955, was renovated in 1964 and 1988. The high school, constructed in 1957, was renovated in 1966, 1984, and 1995. (Resp. Ex. 3 at 155.)

The School District is governed by the School Board (Board), made up of nine members who are elected for four-year terms, and who serve without compensation. Approval of an expenditure requires a favorable vote by five of the nine Board members. The Board hires several School District officials who are paid to administer the system; these officials include a superintendent, assistant superintendent, business manager and solicitor. (Resp. Ex. 3 at 146, 155.) The Board has broad powers, including spending, borrowing, and taxing. Revenue for the School District is determined by the rate of taxes levied by the School Board, in accord with Pennsylvania Act 511. For example, the Board's budget for 2001/2002 set tax rates on: real estate, expected to generate nearly $6,000,000; earned income, expected to generate more than $700,000; real estate transfers, expected to generate more than $100,000; per capita, expected to generate $60,000, and; occupational privilege, expected to generate $46,000. (Div. Ex. 28 at 2-3; Resp. Ex. 3 at 116, 143, 160.)

The members of the Board during the bond proposal in the instant case included a number of very sophisticated and experienced citizens. Harry Flannery, the president of the Board (President Flannery), had been a practicing attorney since 1973, when he received a Master of Laws and Taxation. He has been a utility company attorney since 1977. As an uncompensated, elected member of the Board, President Flannery was president of the voluntary Board when the Notes were issued. (Tr. 373-376.) He is also the brother of then-Board solicitor, Richard E. Flannery (Solicitor Flannery), who was the solicitor for the School District from 1978 through June 30, 2000. (Tr. 264.) Other members of the Board in 2000 included an additional attorney, Norman Levine, as well as a dentist, the owner of a printing company, a teacher, and a shopping center developer. (Tr. 392-93.) President Flannery was aware of arbitrage and had even discussed it with a Board member, Hank Forney, in January or February 2000. (Tr. 395-96.)

In 1998, as vice president of the Board, President Flannery participated in bond financing for some of the School District's projects. (Tr. 400-01.) Solicitor Flannery had also worked on prior bond issues for the School District when four bond issues were done for the School District, all between 1995 and 1998. (Tr. 320-21.) For those bond issues, Solicitor Flannery had reviewed documents, written an opinion letter, and attended the closing. (Tr. 267-68.)

Capital Improvement Projects

On August 4, 1998, a report on the elementary school building was sent to then-Superintendent Joseph Scungio (Scungio). Four inspections had been conducted of the electrical and mechanical systems, roofs, and other structures. Engineers, designers, and architects associated with several professional companies performed the evaluation. (Div. Ex. 26 at 1-2.) As is typical with older school structures, the elementary school had an electrical system that would soon cause power fluctuations or "complete power loss" at full demand. (Div. Ex. 26 at 2.) Therefore, to bring the facility "up to code," replacement of most of the wiring would be necessary to upgrade and increase electrical capacity. (Div. Ex. 26 at 2.) Total electrical repairs, including replacement of all light fixtures and receptacles, would cost about $260,000. (Div. Ex. 26 at 4.)

Mechanical systems also posed risks. The hot water heating supply piping in the boiler room showed evidence of leaking and some deterioration was obvious. The fresh-air dampers were leaking and problems with control were present. Under the floor slab, the ventilator water supply pipes had started to leak. Although the heating system was operational, the equipment and material needed to be upgraded to "prevent major breakdowns." The estimate for these repairs, nearly $599,000, included costs for a new heating and air conditioning system. (Div. Ex. 26 at 2-4.)

A section of the roof was "in very poor condition" and required "immediate attention." Insulation had delaminated from the roof deck. Dry rot had set in the roof system. Replacement of the roof decking with a metal deck system would allow proper mechanical attachment of the installation as part of a new membrane roofing system. Another large section of the roof needed to be replaced within three to four years. Roof replacement that would not include asbestos remediation work was estimated to cost $254,000. The construction costs for the elementary school repairs to be done in 1998 amounted to more than $1 million. As for project priority, the report recommended that the heating system be replaced immediately to prevent costly system failure. It also recommended the electrical system upgrades be commenced immediately due to their unsafe condition. (Div. Ex 26 at 6.) In 1998, bond financing paid for some capital improvements that were mandated by the Board. (Tr. 400-13.)

On July 27, 1999, Eckles Architecture (Eckles) submitted a report on the elementary school that included asbestos abatement and other more detailed costs, as well as the requirements listed in the August 4, 1998, report. The new estimate for the cost of the project was nearly $5 million. (Div. Ex. 27 at 1.) In 1999, Scungio retired, and a new superintendent, Dr. Ronald M. Mento (Mento), was hired by the Board. When he was hired, Mento was informed that part of his responsibilities would be ensuring that the elementary school and other areas in the school complex were improved. (Tr. 379.) By then, the Board knew that the total cost of renovations would be more than $10 million. (Tr. 375-79, 416; Div. Ex. 10.) The newly hired superintendent came from a school system that had been audited as a result of "irregularities" and he became controversial. (Tr. 420.) In preparation for its capital projects, the School District hired Thomas Graney, a municipal planning consultant, to do demographic work in March 2000. (Tr. 509-10; Div. Ex. 33.) His later report predicted student enrollment figures that were consistent with the work conducted by the Pennsylvania Department of Education. (Tr. 526-28; Div. Ex. 34.)

The Issuance of the Bonds

By May 2000, the Board began to explore the possibility of issuing bonds once more to fund its capital projects. (Tr. 213; Div. Ex. 11.) In Pennsylvania, some school district construction projects qualify for reimbursement from state tax revenue. (Tr. 667-70.) To qualify for state fiscal assistance school districts must follow a state mandated process known by the acronym PLANCON. (Tr. 669-70.) Of course, a school district may also decide to pay for projects locally, with the funding that is generated by taxes. (Tr. 671-73.) The School District's old buildings had been constructed through the issuance of bonds and the levying of taxes, combined with state reimbursement. (Tr. 674.) Repair projects are not reimbursable under PLANCON. (Tr. 673.) The elementary school and the middle school construction, however, would be reimbursable via PLANCON. (Tr. 839.) Pursuant to PLANCON, the project must be approved by the state before bids may be solicited. (Tr. 839-40.)

A municipal bond is a debt obligation of a state or local government entity. (Tr. 46.) A bank purchases the bond and acts as an underwriter, or middle man, accepting risk of nonpayment until their customers buy the bond. (Tr. 46.) The bank prices the bond so that it will sell quickly. (Tr. 47.) The issuer is the entity that borrows the money. (Tr. 47.) In the instant case, the School District was the issuer. (Tr. 47.) "[W]hen state and local governments borrow money, the interest is not subject to federal income tax. For that reason, these obligations bear interest at a much lower rate than taxable obligations such as Unites States Government bonds." (Tr. 47-48.) Municipalities are prevented by law from garnering arbitrage profit by issuing municipal bonds, and using the proceeds solely for investing tax free in Federal Government bonds at a higher interest rate. (Tr. 48-50.) The principal role of bond counsel in a municipal bond transaction is to give a legal opinion as to the validity of the bonds, and as to federal income tax exemption status of the interest paid on the bonds. (Tr. 51.) Bond counsel's role evolved in the nineteenth century after municipalities defaulted on bonds, due to state constitutional debt limits, and other factors that were ignored by the issuer. (Tr. 51.) Purchasers of the bonds began to insist that a lawyer with recognized expertise in the area give an opinion as to the validity of the offering. (Tr. 51.)

Bond lawyers, such as Weiss, are listed in the Red Book, a national publication of the trade publishers of the Bond Guide. Division Exhibits 5 and 6 are the Model Opinion Report standards for bond lawyer practice in 1993 and 1997. (Tr. 53-62; Div. Exs. 5, 6.) If bond counsel concluded that it would be unreasonable for a court to rule against the bond counsel's opinion on tax matters, an unqualified opinion could be given as to a municipal bond issue. (Tr. 62-64; Div. Exs. 5, 6.) The Internal Revenue Service (IRS) has established a three-prong test for determining whether a bond complies with the arbitrage restriction rules that apply to municipalities. First, the expenditure test requires that eighty-five percent of the proceeds must be spent on capital projects within three years. Second, the time test requires that, within six months of issuance, the issuer must enter a substantial binding obligation to an outside party to expend at least five percent of the bond proceeds. And third, the due diligence test requires that the bond proceeds be used for completion of capital projects with due diligence. (Div. Ex. 9.) If the IRS concludes that any one prong of the test is not met, then the bonds will be classified as arbitrage bonds, and subject to federal income taxation. (Tr. 69-70; Div. Ex. 9.)

On April 10, 2000, a public meeting was announced as part of the process for making capital improvements to the school facilities. (Tr. 479-80; Div. Ex. 32.) No public meeting was held before the bonds were issued in June 2000. A "wish list" that included the elementary school renovations as well as other options, totaling \$4 million to \$10 million, had been made on February 23, 2000; however, no consensus was reached as of that date on proceeding with the work. (Tr. 480-84.) Although a five-year plan of major projects had been generated by the Board during the tenure of Mento's predecessor, the Board had not decided which part of the plan would be implemented first. (Tr. 500.) Leslie Andrew Shupe (Shupe), like several other businessmen involved in investment banking, learned from the newspaper that the School District was exploring issuing bonds. Like others, he contacted Mento with a preliminary proposal. When Shupe was mayor of a borough in Pennsylvania, Weiss was the solicitor, and he had previously worked with Weiss on approximately twenty municipal bond transactions. Shupe, therefore, contacted Weiss about becoming bond counsel for his proposal to the School District. (Tr. 212-14.)

After graduating from Duquesne University School of Law in 1973, Weiss clerked in Pennsylvania for an attorney who specialized in municipal and school law. In 1979, he opened his own practice in the same field. By the date of the hearing, Weiss had served as solicitor for more than a dozen school districts and municipalities, and as general counsel or special counsel for many others. Weiss has also served as a board member and chairman of the Allegheny County Sanitary Authority. Weiss's experience with municipal bonds and notes stems from his work as solicitor, bond counsel, issuer, or underwriter's counsel during his legal career. Weiss appeared in the Red Book in 1986, and has participated in about 100 bond transactions as note or bond counsel. (Tr. 650-54.) In 1999, Weiss had represented the School District in the trial and successful appeal of a state tax matter. During the relevant time period, seven of nine members of the Board had also been active in the tax case. Weiss attended several Board meetings during which he was questioned as to tax matters. (Tr. 661-64.)

Weiss was retained by the School District for the transaction at issue. (Tr. 554.) Weiss knows that bond counsel is retained in a municipal bond transaction "to assure that the bonds are validly issued and to provide an opinion to that effect, as well as to the effect that they are issued on a tax-exempt basis . . . ." (Tr. 554.) Opinions of bond counsel are required so that purchasers can be assured that the interest on the bonds are "exempt from federal taxes." (Tr. 555.) Before issuing his opinion, Weiss ensures that the transaction meets all tax requirements. (Tr. 556.) Weiss considered the defined project in the instant case to be capital repairs, renovations, and an addition to the elementary school. (Tr. 556-57.) Mento, whom Weiss had known since 1994, was Weiss's primary contact with the School District. (Tr. 562-63.)

In the past, the School District had "bid out the investment counsel" who would cause the note to issue. For some earlier bond issues, Solicitor Flannery had selected bond counsel, and for another bond issue the bond counsel position "was bid." In April 2000, Mento called Solicitor Flannery about a bond plan that Solicitor Flannery "was not comfortable with." Mento told Solicitor Flannery that bond counsel for the April 2000 project would be Weiss. Mento had engaged Weiss when Solicitor Flannery "was in conflict," and Weiss "did very well for the district" on that occasion. (Tr. 269-72.) On May 2, 2000, Weiss faxed a letter to Solicitor Flannery (May 2 Letter) addressing issues that he had raised regarding the 2000 bond issue. (Tr. 272-73; Div. Ex. 12.) In the letter, Weiss addressed Solicitor Flannery's questions about the financing. (Tr. 273-74.) Weiss understood that the School District had intended to issue notes to pay for capital projects.

(Div. Ex. 12.) Weiss wrote that the School District could issue notes for three years, and, provided they undertook the projects, they could invest the proceeds of the Notes during the three-year period. (Tr. 580, 590; Div. Ex. 12.)

In a later conversation, Weiss told Solicitor Flannery "that during the three-year period, provided the District was doing the projects, they could invest the money they weren't using and gain positive interest." (Tr. 590.) In his conversation with Weiss, Weiss made it clear to Solicitor Flannery that "there had to be projects intended . . . ." (Tr. 276.) Weiss stated that the bond proceeds "could have been spent any time during the three years, as long as it was spent on the projects." (Tr. 276-77, 364-65.) Weiss also made it clear to Solicitor Flannery that "until the [School] District proceeded with the projects, that they could legitimately earn interest on investments. . . ." (Tr. 277.)

Weiss did not tell Solicitor Flannery that the School District had to spend five percent of the notes within six months, but Weiss did not consider it to be an "issue," since the Board was "moving forward." (Tr. 590-91.) Weiss concluded from conversations with Solicitor Flannery and Mento that Eckles had an oral contract or commitment to perform work related to the listed projects. (Tr. 832-34.) In Pennsylvania, the architect receives the majority of his fee before the project is advertised for a bid. That fee is usually six or seven percent of construction costs. (Tr. 834-35.) From Mento, Solicitor Flannery, and the Board, Weiss concluded that an architect was on "board." (Tr. 559, 833-34.) Weiss knew that the Board was committed to "doing the elementary school," which had electrical wiring problems. (Tr. 591.) The Notes were structured on a three-year basis with a one-year call. (Tr. 595.) Ultimately, the Board called the Notes at the end of the year. (Tr. 595.)

During a May 8, 2000, Board meeting (May 8 Meeting), Shupe presented his note proposal. Shupe told the Board about a "loophole" in the tax laws that would allow school districts to borrow tax-free money "as long as we had a pending building project." (Tr. 493-94.) This "loophole" would allow the School District to earn $225,000. (Tr. 495-96.) During the presentation Shupe told the Board that they could borrow money just to invest the proceeds for profit. (Tr. 474, 597.) Weiss knew Shupe was wrong, and contradicted him. Weiss informed the Board that what Shupe described "[was not] exactly the case." (Tr. 598-99.) Weiss told the Board "that they had to have projects, that they had to spend the money in three years and they had to proceed with [the projects]" and that "if they didn't want to do the project, [he] shouldn't be there." (Tr. 598.) President Flannery recalled that Weiss told the Board at the meeting that eighty-five percent of the proceeds of the Notes had to be spent on projects or contracted for before the end of the three years. (Tr. 382-83.) I credit President Flannery's testimony.

Weiss concluded that the projects that the Board decided to implement at the close of the school year would exceed the five percent expenditure requirement, and that, therefore, there was no need to emphasize that requirement at the meeting. (Tr. 601-02.) The Board members had nodded their heads in assent at the May 8 Meeting when Weiss mentioned an oral arrangement with Eckles, and Weiss interpreted that as a sign that the School Board had approved the architect's participation in the projects. (Tr. 833-34.) The Board asked "a lot of questions" about Shupe's proposal. (Tr. 284-85.) The Notes were being proposed as a way for the School District to make money, but the proposal came from Shupe "not by Mr. Weiss." (Tr. 287.) Shupe's scheme appealed to the Board's desire to make money, and was a common sales pitch, albeit irresponsible and dishonest. (Tr. 169-71.) At the time of the May 8 Meeting, President Flannery concluded that he and the entire Board had reasonable expectations that capital projects would be completed with the proceeds of the Notes. (Tr. 410-11.)

The Board had already decided to complete a number of projects that were discussed at the May 8 Meeting, and were to "start as soon as [they could]" on them. (Tr. 282.) Solicitor Flannery had previously spoken with Weiss about the fact that eighty-five percent of the proceeds had to be spent in three years, and "it was said" at the May 8 Meeting as well. (Tr. 285, 333, 365-66.) Solicitor Flannery received a copy of Shupe's proposal during the May 8 Meeting. Solicitor Flannery was not sure whether there was a consensus on the projects. (Tr. 280-82.)

Between the May 8 Meeting and the closing date, Solicitor Flannery initiated an investigation to determine whether the note issue should go forward. (Tr. 339-40.) After reviewing the list of intended projects and speaking with Weiss, Solicitor Flannery was "absolutely" convinced that the note issues should be completed because the School District would "proceed with projects." (Tr. 342.) Solicitor Flannery also discussed the issue of the architect with Mento and concluded that "[w]e already were on board with an architect." (Tr. 344-45.) Solicitor Flannery did not view his legal representation of the School District to include "follow-up" to ensure that the School District acted consistently after the Notes closed because he was paid at an hourly rate for his work. (Tr. 354.) Indeed, for the earlier bond issues, he never conducted any follow-up work or due diligence. (Tr. 354-55.) Before the date of closing Solicitor Flannery reviewed and read the documents, including the Non-arbitrage Certificate. (Tr. 289; Div. Ex. 8.) Shupe showed Weiss a proposal for an illiquid investment for a fixed period, after the May 8 Board Meeting. When Weiss objected to the proposal as generating a possible penalty, Shupe eliminated it from his final proposal, which was presented to the Board at a May 31, 2000, Board meeting (May 31 Meeting). Weiss never mentioned this matter to the Board because he considered it to be a "dead issue" that had been eliminated from the proposal. (Tr. 607-10.)

Gina Marie Hennon (Hennon), a college graduate working in the medical field, was elected to the School Board in 1991 and served through 2003. (Tr. 470.) Hennon had participated in a federal-state school financing system in the past. (Tr. 472.) She knew that the three-year bond financing scheme originally proposed by Mento was too good to be true. (Tr. 472-74.) At that time, there was no consensus on whether to proceed with a middle school. (Tr. 428.) Indeed, no middle school was ever constructed, and no major construction project was started until 2002. (Tr. 478.) If Weiss had told the Board that they were obligated to spend five percent of the proceeds within the first six months after issuance of the Notes, Hennon would have insisted on a firmer project or not done the bond issuance at all. (Tr. 485.) While the Board had retained Solicitor Flannery to do an independent investigation of the legality of the bond transaction, Hennon relied on the advice of both Solicitor Flannery and Weiss. (Tr. 486.) The Board redeemed the Notes when Mento told them that favorable "rates" would enable them to "capture the proceeds." (Tr. 486.)

Karen L. Houk (Houk), a retired teacher, was a Board member for eight years. (Tr. 492-93.) At the May 8 Meeting, she learned more about Mento's idea to issue three-year notes, an idea that Mento had already discussed with her. (Tr. 493.) Houk was absent for the May 31 Meeting when the Board approved the issuance of the Notes, and was also absent for the closing of the Notes. (Tr. 507-08.) She never met or spoke with Weiss about the transaction before or after the May 8 Meeting. (Tr. 507-08.)

The day after the May 31 Meeting, Weiss sent a letter to Mento requesting a list of projects and associated costs that the Board "contemplated undertaking," so that they could approve them at a Board meeting, scheduled for June 15, 2000. (Tr. 611-13; Div. Ex. 37.) The Board had not advertised for bids on the projects yet. (Tr. 613-14.) The Board's approval of the list provided assurance to Weiss that they would proceed with the projects that were the basis for the issuance of the Notes. (Tr. 614-15.) In reply, Mento sent a June 15, 2000, letter to Weiss that listed thirty-three projects, without the associated costs. (Tr. 615-16; Div. Ex. 11.) Mento refused to provide cost estimates when Weiss's later requested them. (Tr. 616-17.) Bernadette Barattini (Barattini) of the Pennsylvania Department of Community Economic Development, the agency responsible for approving state debt issuance by government entities, approved the School District debt plan submitted by Mr. Weiss. Thus, he had no need to press Mento for more specific figures after Mento responded to his letter. (Tr. 791-92.) The Debt Act approval by Barattini is included in the closing documents because bond counsel's opinion must indicate that the state government's pledge is legally enforceable against the issuer pursuant to Pennsylvania law. (Tr. 793-94.)

Weiss gave the Non-Arbitrage Certificate to Solicitor Flannery for his review eight days before the closing date, and Weiss relied upon it for the issuance of his opinion. (Tr. 627-28.) The description of the capital projects in the Non-Arbitrage Certificate is consistent with the plans described by the Board, Mento, Solicitor Flannery, and other project language in similar certificates that Weiss had seen and generated in his legal career. (Tr. 627-30; Div. Ex. 8.) Weiss is familiar with the U.S. Treasury Regulations relevant to this transaction and concluded that the Non-arbitrage Certificate in the instant case met the Regulations. (Tr. 632-34.) Weiss prepared the standard solicitor's opinion for the signature of Solicitor Flannery. (Tr. 639.) He also issued his unqualified Bond Opinion as to tax-exempt status of the Notes. (Tr. 641-42; Div. Ex. 14.) "The purpose of the Notes was to fund capital improvement projects." (Tr. 644-45; Div. Ex. 22.) However, no proceeds from the sale of the Notes were used to provide funds for the capital improvements of the School District. (Tr. 645-46.) Weiss received a fee of $9,000, plus costs of $509.63 for his work in the instant case. (Tr. 646.) The Notes were issued at closing on June 28, 2000. (Tr. 646-47.)

The Bond Proceeds

On July 7, 2000, Solicitor Flannery forwarded Weiss a letter that he had written to Shupe. (Tr. 300-01; Div. Ex. 24.) Solicitor Flannery wanted to ensure that the School District did not lose money on the investments that Shupe recommended. (Tr. 301-04; Div. Ex. 24.) Shupe's plan was to "sell off the long three-year piece of paper and provide cash for them" if the Board started a project. (Tr. 238-39.)

The Board appointed Eckles on October 11, 2001, with a contract that "might have been retroactive from 1998." (Tr. 389-91; Div. Ex. 16 at 2.) The architect prepares the specifications for bid, even for a leaking roof, since any work over $10,000 must be competitively bid. The architect ensures that the performance and bid bonds are in order and oversees the work. For concrete repair work, the architect analyzes the structure to determine whether test borings must be performed to the subsurface. The architect would compare bid specifications in terms of materials and would inspect the work before the School Board could approve payment to the contractor. The architect assists the School Board in reviewing the lowest responsible bids, and makes recommendations. The time between preparations of bid specifications to bid awards could be as long as a month. (Tr. 835-39.)

The proceeds of the Notes were initially invested in money-market funds because "the yields were dropping" in the Treasury Market. (Tr. 420.) Shupe eventually purchased $8.2 million in Federal Home Loan Bank securities so that the School District could earn the $225,000 profit it sought. (Tr. 240.) Shupe prepared Division Exhibit 17 for Carol Robinson (Robinson), the School District's business manager, so that the securities could be delivered. (Tr. 241; Div. Ex. 17.) Shupe generated Division Exhibit 18 so that the Notes could be called at the first call date, May 15, 2001, about one year after the issue date. (Tr. 242; Div. Ex. 18.) Shupe discovered that the Board was "muddling around, procrastinating a lot" in reference to the projects. Noteholders were paid at the first call date. The School District was left with a balance of $150,000 after completing the call. Weiss never expressed concern about the investment of the Note proceeds, and he never told Shupe that the funds should be kept available for use on projects. (Tr. 241-44.) Weiss merely reviewed the documents that Shupe mailed describing the use of the proceeds of the Notes. (Tr. 248-51; Div. Exs. 22, 23.)

The School District had bought Treasury strips so that interest would be paid to the noteholders on, or about, the date that the strips matured. Noteholders were paid interest from profits, although no money had been spent on construction or project contracts. (Tr. 175-76.) An architect was hired more than a year after the Notes issued, not within the required six months. (Tr. 389-91.) Finally, the Board's investment exposed them to market risk. (Tr. 176-77; Div. Exs. 17, 18.)

Solicitor Flannery investigated the Federal Home Loan investment that Shupe handled and concluded that it was legal and appropriate. During the first two months of 2001, Mento called Solicitor Flannery to inform him that the Notes were being recalled on the recommendation of Weiss. Mento explained that, because of the "investment rates," this would be the "prudent thing to do." (Tr. 305-07.) Weiss's work was complete at the closing on June 28, 2000. (Tr. 696.) Mento asked Weiss, however, to help with the early redemption of the bonds, which Weiss told the Board to complete by April 2001. (Tr. 697-99; Div. Ex. 39.)

Board's Distractions

The Board was indeed "muddling around" after the issuance of the Notes because it had become paralyzed by an unanticipated series of complex and emotionally charged events. By the May Board meetings, President Flannery was already "very concerned about a football coach problem" and "high numbers of people in attendance" at the Board's meetings. (Tr. 381; Resp. Ex. 6.)

In 1999, the Board became involved in a crisis over the replacement of a popular senior high school football coach. (Tr. 418-19; Resp. Ex. 6.) The newly hired superintendent, Mento, had also been hired away from a school system that had been audited as a result of "irregularities." (Tr. 420.) The Board also became distracted from its work by employee personnel problems that resulted in two dismissals. Additionally, a student filed a complaint in federal court alleging a violation of privacy in reference to a cheating allegation. (Resp. Ex. 6.) These and other "side shows" competed for the Board's time with the construction project. (Tr. 420-21.) By the date of the hearing in the instant case, construction had been completed to transform the school building and grounds. (Tr. 422.) The projects "did go forward" after President Flannery left. (Tr. 422, 424.) During President Flannery's tenure, the Board also hired several principals and administrators to fill an unusually high number of vacancies. The Board executive meetings often lasted until midnight. (Tr. 423-25.) Finally, Board member Gary Clobus, the owner of a printing company, and chair of the Building and Grounds Committee in 2000, became ill with cancer in early 2000 and missed several meetings during the early PLANCON process that started in June 2000. (Tr. 539, 547-448.)

On November 8, 2000, the IRS sent a letter to the School District. (Tr. 692; Div. Ex. 38.) The School District is one of thirteen Pennsylvania School districts that the IRS determined had issued taxable arbitrage bonds between 1999 and 2001. (Tr. 152-53.) The IRS has a Web site dedicated to bond material, and the director, a bond lawyer, and the chief counsel answer telephone inquiries to provide answers to tax questions. (Tr. 154.) Weiss did not learn that the Board had placed the proceeds of the Notes in a three-year investment until he received a copy of the Board's bank statement that the IRS requested. (Tr. 683.) The Board's solicitor and business manager are responsible for ensuring that the Board acts consistently with the representations they made at closing. (Tr. 685-86.) Solicitor Flannery was responsible for ensuring that the Board acted with due diligence to complete the projects. (Tr. 687.)

At a June 14, 2001, Board meeting, the Board received bids on bus garage re-roofing and grandstand refurbishing. (Tr. 456-58.) These were the first bids received by the Board related to the capital projects described in 1999. (Tr. 458.) In May 2003, the Board's decision to make additions and alterations to the elementary school resulted in work

being started on the project. (Tr. 468-69.) In December 2002, a public hearing was held on the issue of the middle school construction. (Tr. 692-93.)
The School District ultimately entered into a settlement with the IRS in which it agreed to pay $150,056.07 to the IRS. (Tr. 308-09; Div. Ex. 20.) The School District also entered into a settlement with the Commission on April 22, 2004, in which it agreed to pay disgorgement, plus pre-judgment interest, in the amount of $28,904. See Neshannock Township School District, 82 SEC Docket 2718 (April 22, 2004).

CONCLUSIONS OF LAW

The OIP alleges that Weiss violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The OIP also alleges that Weiss caused the School District to violate of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Although the Division's primary concern is violation of Section 17(a)(1), it also alleges that Weiss violated Sections 17(a)(2) and 17(a)(3). (Div. Post-Hearing Br. at 53-54.) By invoking Section 17(a) in its entirety, the OIP gave appropriate notice that all subsections would be in issue. Therefore, I reject Weiss's claim that the Division tried to turn this into "trial by ambush by inserting negligence into [the] case" because the OIP does not allege negligence under Section 17(a)(2) and 17(a)(3). (Weiss Reply at 2, 32-33.)

A. Legal Standards

Section 17(a) of the Securities Act prohibits fraudulent conduct in the offer and sale of securities, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit fraudulent conduct in connection with the purchase and sale of securities. These provisions essentially prohibit the same type of conduct. See United States v. Naftalin, 441 U.S. 768, 773 n.4 (1979).

To establish violations of Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, the Division must establish: (1) misrepresentations or omissions of material facts or other fraudulent devices; (2) made in connection with the offer, sale, or purchase of securities; and (3) that the respondent acted with scienter. Scienter is not necessary to prove violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act; rather, liability may be established by merely showing negligence. Aaron v. SEC, 446 U.S. 680, 697 (1980); SEC v. Solucorp Indus., 274 F. Supp. 2d 379, 419 (S.D.N.Y. 2003); SEC v. Scott, 565 F. Supp. 1513, 1525-26 (S.D.N.Y. 1983).

A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision and would view disclosure of the fact as having significantly altered the total mix of information made available. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Indus. Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). Materiality is a mixed question of law and fact. TSC Indus., 426 U.S. at 450.

Scienter is defined as "a mental state embracing intent to deceive, manipulate or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976). The scienter requirement may be satisfied by a showing of recklessness. Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990); David Disner, 52 S.E.C. 1217, 1222 & n.20 (1997) (citation omitted). Recklessness is defined as "an extreme departure from the standards of ordinary care … present[ing] a danger of misleading buyers or sellers that is either known to the [respondent] or is so obvious that the [respondent] must have been aware of it." Sundstram Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1044-54 (7th Cir. 1977) (citation omitted), cert. denied, 434 U.S. 875 (1977). Proof of scienter can be demonstrated by circumstantial evidence. Herman & MacLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983).

Section 8A of the Securities Act and Section 21C of the Exchange Act authorize the Commission to order any person who was a cause of a violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation. For such an order, the Division must prove: (1) a primary violation occurred; (2) there was an act or omission by the respondent that was a cause of the violation; and (3) respondent knew, or should have known, that his conduct would contribute to the violation. Robert M. Fuller, 80 SEC Docket 3538, 3545 (Aug. 25, 2003) (citing Erik W. Chan, 77 SEC Docket 851, 859-60 (Apr. 4, 2002)), appeal pending, No. 03-1334 (D.C. Cir.). The "should have known" language is akin to negligence. KPMG Peat Marwick LLP, 74 SEC Docket 384, 421-23 (Jan. 19, 2001).

B. Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder

The Division alleges that Weiss violated the antifraud provisions by making several material misrepresentations and omissions during the course of his representation in the Note Transaction. (Div. Post-Hearing Br. at 44.) The Division alleges that Weiss knew, or was reckless, in not knowing that the Notes were issued solely to gain illegal arbitrage profit when he: reviewed the preliminary official statement and Official Statement which represented that the issuance of the Notes was to provide funds for capital improvements; issued his unqualified Bond Opinion that the Notes would be exempt from federal income taxation; and, issued his Supplemental Opinion to the effect that nothing had come to his attention that led him to believe that the Official Statement was materially inaccurate or incomplete. Specifically, the Division alleges that the representations communicated to noteholders in the Bond Opinion, the Supplemental Opinion, and the Official Statement, are the basis for Weiss's direct violations of the securities laws. (Id.) The Division argues that the misrepresentations and omissions made to the School District serve as evidence of scienter. (Id.)

The Division alleges that Weiss either knew the School District issued Notes for the sole purpose of obtaining arbitrage profit, or was reckless or negligent in not knowing, because he failed to follow industry standards. (Div. Post-Hearing Br. at 52.) The Division alleges that the following facts are evidence of Weiss's knowing or reckless misconduct: The May 2 Letter from Weiss to the Solicitor Flannery, in which Weiss misstated both his experience and the law (specifically, 26 C.F.R. § 1.148-2(e)) (Div. Post-Hearing Br. at 19); The May 8 Meeting and Weiss's reactions/communications in which he failed to advise the School Board that the transaction was illegal (pursuant to 26 C.F.R. § 1.148-2(e)); Solicitor Flannery raised concerns with Weiss and pointed out that the School District had not decided what projects they were going to undertake; Board members asked Weiss "pointed questions," including what happens if the School District does not spend the money; Shupe presented Weiss with a document prior to the Note issue showing Shupe's intention to tie the money up for three years in an illiquid investment; Weiss failed to obtain cost estimates from the School District for the projects, despite a Treasury Regulation that requires estimates as a part of the process; and, When the IRS began its investigation, Weiss assisted the School District in redeeming the Notes, rather than advising the School District to quickly enter into binding commitments as there was still time to meet the Treasury Regulation requirements (Div. Post-Hearing Br. at 3-4.) The Division, additionally, alleges that Weiss failed to investigate whether the School District took any of the required steps required by Pennsylvania law to undertake construction projects. (Div. Post-Hearing Br. at 11.)

The Division's position fails to take into account the unique events that affected the Board's decisions. It also mischaracterizes the relationship between Weiss and the Board members. Weiss acted with the requisite standard of care. Weiss contacted Mento, who informed him that the School District was committed to renovations and other repairs, and that there was an architect on board. (Tr. Weiss Facts at 9-10.) When he met with Mento, he advised Mento of the pertinent Treasury Regulations, and was informed that the School District was "committed" to renovations. (Id. at 11-12.) During the May 8 Meeting, Weiss contradicted Shupe, after Shupe told the Board that they could borrow money in advance of construction projects and legally keep the investment earnings. (Id. at 13-14.) At the May 8 Meeting, he advised the School Board that this was not the case. (Id.) While he never received the estimates for the projects that he requested from Mento, Weiss reasonably believed he could issue his opinion based on his conversation with School Officials and his own experience. (Id. at 17.) Weiss also attended two Board meetings and forwarded the closing documents to solicitor Flannery eight days before closing. I conclude that Weiss's actions were consistent with the actions of a reasonable bond counsel. This conclusion is based on the expert opinions of Weiss's witnesses, Henry Klaiman and Wayne Gerhold. (Tr. 702-33, 761-99.)

I conclude that the School District did not issue the Notes solely for the purpose of obtaining arbitrage profit. I also conclude that Weiss did not act recklessly, or negligently, during the course of his representation of the School District for the Note Transaction. I reject the opinions of the Division's expert witnesses, Joseph H. Johnson and Charles Anderson. (Tr. 66-99, 175-92.) The securities laws generally define recklessness as an act so highly unreasonable and such an extreme departure from the standard of ordinary care to the extent that the "danger" was either known or so obvious that the accused must have been aware of it. See Phillips v. LCI Int'l, Inc., 190 F.3d 609, 621 (4th Cir. 1999). The parties are in agreement that at the time of the Note issuance the prevailing standard of practice for counsel issuing a tax opinion was set forth in the

National Association of Bond Lawyer's (NABL) Model Bond Opinion Report for 1997, (Weiss Facts at 8; Div. Post-Hearing Br. at 6), which states:

Bond counsel should not render an unqualified opinion as to the validity and tax exemption of bonds unless it has concluded that it would be unreasonable for a Court to hold to the contrary. Bond counsel may reach such a conclusion as to federal income tax issues addressed in the opinion by determining that there is no reasonable possibility that the [IRS] would not concur or acquiesce in the opinion if it considered all material legal issues and relevant facts.

The plain language of the NABL Model Bond Opinion Report for 1997 is clear: a bond counsel's opinion must be reasonable, and, in reference to tax matters, there must be no reasonable possibility that, if it considered all material legal issues and relevant facts, the IRS would not concur. Taking the material legal issues and relevant facts into account, it would be an impermissible extension of the legal responsibility of bond counsel to conclude that Weiss violated the antifraud provisions of the securities laws.

Bond proceeds, in a three-year issuance, may be invested in higher yielding investments without being classified as arbitrage bonds if the issuer reasonably expects to satisfy the expenditure, time, and due diligence tests. 26 C.F.R. § 1.148-2. The expenditure test is met if at least eighty-five percent of the net proceeds are allocated to expenditures on the capital project by the end of the three-year period. 26 C.F.R. § 1.148-2(e)(2)(i)(A). The time test is met if the issuer incurs a substantial binding obligation to a third party to expend at least five percent of the net proceeds of the issue on capital projects within six months of the issue date. 26 C.F.R. § 1.148-2(e)(2)(i)(B). The due diligence test is met if completion of the capital projects and the allocation of the net proceeds moves forward with due diligence. 26 C.F.R. § 1.148-2(e)(2)(i)(C). If any one of the three tests is not met, then the bonds may be arbitrage bonds and, therefore, taxable. 26 C.F.R. § 1.148-2(a).

The determination of whether bonds meet the exception to the arbitrage bond rules "is based on the issuer's reasonable expectations as of the issue date." 26 C.F.R. § 1.148-2(b)(1). The issuer's "expectations or actions are reasonable only if a prudent person in the same circumstances as the issuer would have those same expectations or take those same actions, based on all objective facts and circumstances." 26 C.F.R. § 1.148-2(b). Bond counsel's role in issuing its bond opinion is to make sure that the bond issuance meets all the tax requirements. The bond lawyer accomplishes this by gathering information from the issuer to show that what the issuer is doing meets the requirements of the tax laws. (Tr. 556.) A bond opinion, however, is not a guarantee; it merely serves as the lawyer's informed judgment as to a specific question of law on the date of issuance; specifically, in this case, Treasury Regulation § 1.148-2. (Div. Exs. 1, 5.) This is because "certain post issuance events may result in the interest on the bonds becoming taxable as of some future date after the date of issuance." (Div. Ex. 1 at 5.)

After Weiss was retained by the School District, he faxed his May 2 Letter to Solicitor Flannery. The May 2 Letter was preliminary in nature, as evidenced by the fact that Weiss did not go into great detail regarding the transaction and in the closing wrote: "I would be glad to discuss these matters with you at your earliest convenience" (Div. Ex. 12.) I conclude that the May 2 Letter, while containing some puffery concerning Weiss's qualifications, did not misstate the law. In a later phone conversation, Weiss more directly addressed Solicitor Flannery's concerns and informed him that as long as the School District was doing the projects, they could invest the proceeds from the Notes that were not being used and gain positive interest. (Tr. 590.) Weiss never told Solicitor Flannery that the School District had to spend five percent of the Notes within six months because Solicitor Flannery represented to Weiss, that Eckles was "on board" as the architect for the projects, whose fee could account for up to seven percent of the proceeds. (Tr. 559, 788-89.) Under these facts and circumstances, Weiss attended the May 8 Meeting.

At the May 8 Meeting, Weiss corrected Shupe and told the Board that they had to have projects, that they had to spend eighty-five percent of the proceeds within the three-years, and that if they did not have projects he should not even be there. (Tr. 598-99.) Weiss's statements were consistent with the representations he had made earlier to Solicitor Flannery. (Tr. 285, 333.) When asked whether there was an agreement with Eckles, the Board nodded their heads in assent. (Tr. 833-34.) The Board also indicated that it would implement some of the projects at the end of the year. (Tr. 601-02.) Weiss, therefore, reasonably decided that it was unnecessary to discuss the five percent expenditure requirement. (Tr. 833-34.) At the May 8 Meeting President Flannery, as well as the Board, had reasonable expectations that capital projects would be completed with the proceeds of the Notes. (Tr. 410-11.) No witness testified to the contrary.

After the May 8 Meeting, Shupe showed Weiss a proposal that contained an illiquid investment. (Tr. 607.) Weiss objected to this investment, because he knew that it was contrary to the Treasury Regulations and would generate a possible penalty. (Tr. 607-09.) This investment "option" was eliminated from the final proposal that was presented to the Board at the May 31 Meeting. (Tr. 610.) After the May 31 Meeting, Weiss requested that Mento provide him with a list of projects, along with cost estimates, to submit to state officials for approval. (Tr. 611-13.) Mento responded in a June 15, 2000, letter which listed thirty-three projects, however, without the requested associated estimates. (Tr. 615-16.) Weiss had requested this information because he wanted to be sure that the School District was going to proceed with the projects. (Tr. 614-15.) Weiss never received cost estimates from Mento. (Tr. 616-17.) Barattini, the state official who approved the issuance of the Notes, reviewed the same project list that Weiss obtained from Mento and signed the documents so that the Board could proceed to closing. (Tr. 794.)

I conclude that Weiss's failure to include cost estimates does not make him reckless or negligent. With his vast experience in municipal and school law, and with the material facts and circumstances known to him at the time, it was reasonable for Weiss to issue his opinion without cost estimates in the closing documents. He knew that the projects would cost $10 million to complete and he knew that the projects had been planned for years and were overdue. Weiss completed the Non-Arbitrage certificate, and gave it to Solicitor Flannery for review eight days before the transaction closed on June 28, 2000. (Tr. 627-28.) The Non-Arbitrage Certificate stated that the purpose of the Notes was to fund "capital projects in the [School] District," and also set out the expenditure, time, and due diligence tests in Treasury Regulation § 1.148-2. (Div. Ex. 8.) Weiss's representation of the School District ended when the transaction closed.

At no time before the Notes closed on June 28, 2000, did anyone associated with the School District indicate that they planned to abandon the projects in order to enrich the School District's coffers with arbitrage profits. To the contrary, it is clear that at the time of the closing for the Notes, the School District reasonably expected to proceed with the projects. There were newspaper articles about the School Districts engaging in capital projects and Mento had been hired for the express purpose of leading the completion of the capital projects. (Tr. 213, 379.) The School District had also hired a municipal consultant to perform demographic work and, at the very least, consulted with an architect who provided cost estimates for several projects. (Tr. 509-10; Div. Ex. 27.) The School District knew that renovations were long overdue and that the total cost would be over $10 million. (Div. Ex. 26, 27.)

Thus, at the time the Notes were issued, the School District reasonably expected to satisfy Treasury Regulation § 1.148-2. I credit the testimony of President Flannery who concluded that at the time of the May 8 Meeting, he and the entire Board had reasonable expectations that capital improvement projects would be completed with the proceeds from the Notes. (Tr. 382-83.) I therefore conclude that a prudent person in the same circumstances would have reached the same expectations and taken the same actions. The School District stated that it reasonably expected to satisfy the expenditure, time, and due diligence tests, but was "thrown into turmoil due to several highly contentious, controversial, and largely unforeseeable events" immediately after the issuance of the Notes. (Resp. Ex. 6.) Although the School District ultimately settled with the IRS, the closing agreement between the School District and the IRS specifically states that the School District "contends that it issued the [Notes] with the reasonable expectations to use the bonds for governmental purposes." (Div. Ex. 20.) The Division fails to take into account the Board's reasonable explanation for its own conduct.

In a case nearly on point, the United States District Court for the Western District of Oklahoma held that a bond counsel's opinions regarding the tax-exempt status of bonds were violations of the issuer, not the issuer's attorney, even if the bond opinions were wrong. SEC v. Haswell, 1977 WL 1074 (W.D. Okla. 1977), aff'd, 654 F.2d 698 (10th Cir. 1981). In Haswell, a bond attorney, in issuing his tax opinion, failed to insist upon viewing the underwriter's final form of the offering circular, which improperly omitted financial projections. Id. at *3-4. The Commission characterized this as a violation of the antifraud provisions of the federal securities laws, alleging that his bond opinions as to the tax-exempt status of the bonds were falsely issued. Id. While stating that "a more careful attorney would have insisted" upon reviewing the final offering circular, the court held that failure to do so did not necessitate a finding of fraudulent or reckless behavior. Id. In making its decision, the court found that the bond opinions were carefully considered and made in "utmost good faith." Id. at 4.

It would be an impermissible interpretation of the law to conclude that Weiss violated the antifraud provisions of the federal securities laws. The Division points out, correctly, that the bond opinions in Haswell were never challenged by any governmental agency charged with enforcement of the Internal Revenue Code, while the IRS has "determined" that the Notes in the case at hand were not tax-exempt. (Div. Reply at 15.) A settlement agreement, even one with the IRS, is not binding as to any legal issue in this case. In fact, the closing agreement states that it is binding between the School District and IRS, and is limited specifically to those parties and to the issue of the tax-exempt status of the Notes. (Div. Ex. 20.) The facts show that Weiss followed the then-applicable standards when arriving at the conclusions in his bond opinions and that in doing so he acted in good faith. I therefore conclude that Weiss's opinions were not fraudulently, recklessly, or negligently issued. To find otherwise would be to hold Weiss responsible for the inaction of the School District after the issuance of the Notes. In making my determination I have accepted the opinions of Weiss's experts, Henry Klaiman and Wayne Gerhold. I reject the opinions of the Division's Expert witnesses, Joseph H. Johnson, and Charles Anderson, as inconsistent with credible testimony and exhibits admitted into evidence at the hearing.

C. Section 8A of the Securities Act and Section 21C of the Exchange Act

The School District is alleged to have violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. The OIP alleges that the School District issued the Official Statement which contained information that was materially false, including the description of the purpose of the Notes, the statement that the Notes were "NOT ARBITRAGE NOTES," and the descriptions of Weiss's opinions. (Div. Post-Hearing Br. at 55.) The Division alleges that the false statements and omissions in the Official Statement were material to investors, as similar false statements have "routinely been found to violate the securities laws." (Id.) The Division argues that the essence of the transaction was to make arbitrage profit and that testimony from witnesses at the hearing and the steps the School Board took both before and after the issuance are evidence of this. (Id. at 9-12.)

As evidence of scienter, the Division claims that the testimony from all of the witnesses at the hearing, other than Weiss, stated that the purpose of the Notes was to make money on the difference in interest rates. (Div. Post-Hearing Br. at 9.) The Division argues that actions taken, or lack thereof, were consistent with this. The Division argues that Weiss was the cause of the School District's violations by virtue of his misrepresentations and omissions to the School District. (Div. Post-Hearing Br. at 44, 55.)

In support of its argument the Division cites SEC v. Fehn, 97 F.3d 1276 (9th Cir. 1996), cert. denied, 522 U.S. 813 (1997), in which the Ninth Circuit affirmed a permanent injunction, finding that an attorney aided and abetted securities laws violations when: he reviewed and altered an initial draft of a 10-Q that misstated or omitted material facts; and, he failed to instruct the issuing company to disclose previous violations of federal securities laws. The court found that the attorney "substantially assisted" the primary violator because the attorney had a hand in creating the 10-Q and knew that it was inaccurate. Id. at 1295. The court rejected the attorney's good faith defense, stating that his actions were not "‘reasonable' in light of the well-established disclosure requirements imposed by. . . SEC regulations." Id. at 1294.

I agree with Weiss's assessment that the statements in the Official Statement were not false because the School District "reasonably expected" that it would spend the Note proceeds on capital projects. (Weiss Facts at 35-36.) Even though the School District invested in high-yield securities after the transaction closed, the statement in the Tax Certificate that the School District intended to proceed with the projects is evidence of their "reasonable expectation." In support, Weiss cites In Re Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1245 (3rd Cir. 1989), which stands for the proposition that statements of intent are required to be true when made. Id.

Solicitor Flannery, paid by the hour, had responsibility for general legal advice to the Board. Weiss was not responsible for actions that the School District took after his representation concluded. (Weiss Law at 36.) The huge discrepancy between the set fee paid to Shupe and the fee paid to Weiss also demonstrates that the Board did not expect Weiss to be its primary business or financial advisor. Weiss was unaware that the School District might improperly invest the Note proceeds because he reasonably relied on the School District's representations to the contrary. (Id.) The School District represented, in the Official Statement, that it was going to follow the expenditure requirements of the tax laws, and he was entitled to rely on those representations. (Id.) (citing Model Bond Report, National Association of Bond Counsel 2003 at 12 ("‘counsel may make assumptions or conditions (e.g. based on a certificate or documentation), unless bond counsel has knowledge that any such assumption or condition is false, or has knowledge of facts that, under the circumstances, would make it unreasonable so to assume.'")) Weiss's May 2 Letter was preliminary in nature and, the language used therein was appropriate and consistent with what he was told by the Mento, as well as with the Treasury Regulations. The "contemplated" language of the May 2 Letter does not deviate materially from the "reasonably expected" language of the tax law; and, taken within the context of the facts, they are synonymous. (Weiss Law at 28-29.)

At all times Weiss acted properly and without knowledge of any intent by the School District to fail to use the Note proceeds as described in the Official Statement, and there was no way that he could have reasonably anticipated that the School District would not use the Note proceeds as planned. (Weiss Law at 37.) Weiss's May 2 Letter, his talk with the Solicitor Flannery, and the events of the May 8 Meeting all show that the School District represented that it was planning complete construction projects. (Id.) At no time was there ever a reason for Weiss to believe that the representations made to him were false and, therefore, he had no duty to investigate further. (Id. at 38.) The School District was responsible for a physical plant that was in dire need of renovation. There is no proof that the School District was in need of funds from arbitrage; it could have used its taxing power to raise the necessary funds. Shupe had planned to take the funds from the "illiquid" investment when the Board decided to act. The IRS's involvement merely served to unnerve the already distracted and overworked Board, causing them to call the Notes.

The Division bases its Section 8A Securities Act claim and Section 21C Exchange Act claim on the same theory on which it based Weiss's primary violations of the antifraud provision of the federal securities laws. That is: the School issued a false Official Statement and Weiss, in preparing the Non-Arbitrage Certificate, Bond Opinion, and Supplemental Opinion, caused the School District to violate the antifraud provisions of the federal securities laws. For the same reasons that Weiss did not violate Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, I conclude that Weiss did not cause the School District to violate the antifraud provision of the federal securities laws.

The Division has failed to prove by a preponderance of the evidence that this sophisticated, experienced School District violated the antifraud provisions of the federal securities laws. The Division alleges that the School District violated Section 17(a) of the Securities Act and 10(b) of the Exchange Act, and Rule 10b-5 thereunder. As detailed above, at the time that the School District issued the Notes they reasonably expected to use the bonds for governmental purposes; however, several unforeseen distractions caused it to fail to follow through with the requirements of Treasury Regulation § 1.148-2. The possibility that some Board members believed that they could invest bond proceeds for mere arbitrage profits does not prove that they, or the Board as a whole, planned to do so at the time of issuance. Even if the Division had proven that the School District had violated the antifraud provisions Weiss would not have been the cause. Weiss followed the applicable standards when arriving at the conclusions in his bond opinions and in doing so he acted in good faith. For these reasons the Division's reliance on Fehn is misplaced.

In Fehn, the underlying disclosure documents misstated and omitted material facts known by the attorney, who had inaccurately advised the issuer that it was unnecessary to disclose those facts. 97 F.3d at 1293-94. The case at hand is distinguishable, as there were no misstated or omitted material facts. When the Notes closed, the School District reasonably expected to use the bonds for governmental purposes. Secondly, even if there had been material misstatements and omissions, Weiss did not posses the requisite scienter to be the cause of any resulting federal security law violations. Weiss, throughout his representation, acted reasonably and in good faith.

D. Conclusion

I conclude that the Division has failed to prove by a preponderance of the evidence that Weiss violated Section 17(a) of the Securities Act, or Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. I further conclude that the Division has failed to carry the necessary burden and prove that, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Weiss caused the School District to violate Section 17(a) of the Securities Act, or Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. Thus this matter must be dismissed.

CERTIFICATION OF RECORD

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I hereby certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on November 3, 2004.

ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED THAT the proceeding brought against Respondent Ira Weiss be and it hereby is DISMISSED.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Lillian A. McEwen
Administrative Law Judge

Endnotes

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[1] In connection with this matter, L. Andrew Shupe consented to the entry of sanctions barring him from association with any broker or dealer, ordering him to 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 ordering him to pay $15,043.00 in disgorgement. See L Andrew Shupe, 83 SEC Docket 2113 (Aug. 24, 2004).

[2] Citations to Weiss's Answer will be noted as "(Answer __.)." Citations to the transcript of the hearing will be noted as "(Tr. __.)." Citations to the Division's and Weiss's exhibits will be noted as "(Div. Ex. __.)," and "(Resp. Ex. __.)," respectively. Citations to the Division's and Weiss's Post-Hearing Briefs will be noted as "(Div. Post-Hearing Br. __.)," and "(Resp. Post-Hearing Br. __.)," respectively. Citations to the Division's and Weiss's Proposed Findings of Fact or Proposed Conclusions of Law will be noted as

"(Div. Facts __ or Div. Law __.)" and "(Resp. Facts __ or Resp. Law __.)," respectively. Citations to the Division's and Weiss's Reply Briefs will be noted as "(Div. Reply __.)," and "(Resp. Reply __.)," respectively.

In the Matter of Ira Weiss, A.P. File No. 3-11462, Securities Act Release No. 8641, Securities Exchange Release No. 52875 (December 2, 2005) (opinion of the Commission).

Grounds for Remedial Action
Antifraud Violations

Attorney who acted as bond counsel for school district violated antifraud provisions by negligently rendering unqualified opinion that interest on notes issued by school district would be exempt from federal income taxation, and representing that the proceeds would be used for school renovation and construction projects. Held, it is in the public interest to order the attorney to cease and desist from violating Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 and to pay disgorgement of $9,509.63, plus prejudgment interest.

I.

The Division of Enforcement appeals from an administrative law judge's decision dismissing this proceeding against Ira Weiss. Weiss served as bond counsel for the Neshannock Township School District ("School District"), of Lawrence County, Pennsylvania, in connection with the School District's issuance of $9.6 million in three-year general obligation notes (the "Notes") to fund capital improvement projects. The Notes were offered and sold to investors in June 2000 based on Weiss's unqualified opinion that the interest on the Notes would be exempt from federal income taxation, and on a representation that the proceeds would be used to finance projects. The Division alleged that Weiss violated Section 17(a) of the Securities Act of 1933,[1] Section 10(b) of the Securities Exchange Act of 1934,[2] and Exchange Act Rule 10b-5,[3] by making material misrepresentations and omissions about the proposed use of the Note proceeds and the risk that the interest on the Notes would be taxable. The Division also alleged that Weiss caused the School District to violate those antifraud provisions.[4] We base our findings on an independent review of the record, except with respect to findings not challenged on appeal.

II.

The School District is located in New Castle, Pennsylvania, approximately eighty miles north of Pittsburgh. The School District is governed by a Board of School Directors ("Board"), composed of nine unpaid members elected by the citizens of Neshannock Township for four-year terms. The Board hires several officials, including a superintendent, business manager, and solicitor, to administer the school system. The superintendent, as the School District's chief executive officer, is responsible for all aspects of school operations. The School District operates one elementary school for grades kindergarten through six and one junior/senior high school for grades seven through twelve. The elementary and junior/senior high schools are housed in the same building.

A. School District's Construction Projects Since at least early 1999, the School District recognized that the portion of the building housing the elementary school had multiple physical and mechanical deficiencies and needed substantial repairs and renovations.[5] The School District was also considering the idea, referred to as the "middle school concept," of separating students in grades six through eight and constructing a new middle school facility to serve them. In July 1999, Eckles Architecture, a New Castle firm, submitted a report detailing the costs associated solely with the elementary school repairs and renovations. The report estimated nearly $5 million in costs.

In the summer of 1999, the School District hired a new superintendent, Dr. Ronald Mento. Mento had been superintendent of the Duquesne City School District in Duquesne, Pennsylvania. When Mento was hired, the Board told him that the School District would be involved in school construction projects, and that part of his duties would be to ensure that the elementary school and other areas of the building were improved. By then, School Board President Harry Flannery ("President Flannery") testified, the Board believed that the elementary school repairs and renovations, coupled with the construction of a new middle school, would cost in the "ball park" of $9 or $10 million.

With Mento installed as superintendent, the planning continued on the various projects. The minutes of a December 1999 Board meeting stated that the School District was "in the process of putting together ideas and looking at renovations and updating the Elementary School, fixing the roof at both schools and the bus garage. A middle school concept [was] also being explored." A "wish list" of projects that included the elementary school repairs and renovations as well as other options was compiled in February 2000. However, as of that time, there was no consensus among the Board members on whether to proceed with any projects.

In Pennsylvania, a school district's major construction projects, i.e., a new school building or building renovation, are eligible for state reimbursement. Reimbursement requires state approval, a feasibility study, including enrollment projects, and public hearings. The School District had only a preliminary demographic report before the Note closing. In April 2000, the Board announced that public hearings would be held before any final decisions on the projects were made.[6] No public hearings were held before the Notes were issued in June 2000.

B. Shupe Presents Financing Proposal to School District

In or about May 2000, the School District began to consider issuing tax-exempt securities to finance its construction projects.[7] Around this time, L. Andrew Shupe II, who was president of Quaestor Municipal Group, Inc., a registered broker-dealer, read in the local newspapers that the School District was contemplating projects.[8] Shupe contacted Mento and proposed that the School District issue a three-year note in order to fund its projects and make additional money by investing the Note proceeds that were not immediately being used for projects.[9]

Shupe also contacted his friend, Weiss, a Pittsburgh attorney listed in the "Bond Buyer's Municipal Marketplace" (the "Red Book") of experienced counsel. Shupe had worked with Weiss on more than twenty municipal bond transactions, and had referred bond counsel matters to Weiss in the past. Shupe testified that he "offered the deal" to Weiss if Weiss "felt comfortable" writing the bond opinion. Shupe told Weiss that, if he did not write the bond opinion, Shupe "could get it done elsewhere." Weiss replied that he would get back to Shupe.

C. Requirements for Three-Year Tax-Exempt Municipal Securities

Applicable Treasury regulations provide that a local government entity such as a school district may issue up to $10 million in tax-exempt securities, including notes, and invest the proceeds in higher yielding investments for up to a three-year period, without the notes being considered arbitrage notes,[10] if, and only if, the issuer reasonably expects to satisfy three tests, known as the expenditure, time, and due diligence tests. "The expenditure test is met if at least 85 percent of the net sale proceeds of the issue are allocated to expenditures on the capital projects by the end of the 3-year temporary period."[11] "The time test is met if the issuer incurs within 6 months of the issue date a substantial binding obligation to a third party to expend at least 5 percent of the net sale proceeds of the issue on the capital projects."[12] "The due diligence test is met if completion of the capital projects and the allocation of the net sale proceeds of the issue to expenditures proceeds with due diligence."[13]

The determination of whether an issuer satisfies the expenditure, time, and due diligence tests is based on its reasonable expectations as of the issue date of the notes.[14] The issuer's expectations are considered reasonable only if a prudent person in the same circumstances would have the same expectations based on all the objective facts and circumstances.[15] If any one of the tests is not met, and the issuer earns arbitrage profits, the notes lose their tax exemption, and note purchasers may be required to pay tax on the interest earned on those notes.

D. Weiss's Preliminary Conversation with Mento

Weiss testified that he had a preliminary conversation with Mento before responding to Shupe. During that conversation, Mento described the construction projects contemplated by the School District. Weiss understood that the projects included repairs to, and renovations of, the elementary school, and that certain repair work would begin at the end of the 2000 school year.

Mento informed Weiss that there was "some back and forth, some uncertainty" about the elementary school renovations, but Weiss believed that the elementary school project was "moving forward." Mento admitted to Weiss that the Board did not have a consensus on the middle school project.

Mento further informed Weiss that an architect was "on board." Weiss testified that he interpreted this expression to mean that "Eckles was project architect for these capital repair projects and any other project" the School District was going to undertake.

E. Weiss's Role as Bond Counsel

After his conversation with Mento, Weiss called Shupe and agreed to write the bond opinion. The School District retained Weiss as bond counsel. Weiss testified that bond counsel is retained in a municipal securities transaction "to assure that the bonds are validly issued and to provide an opinion to that effect, as well as to the effect that they are issued on a tax-exempt basis."[16] Weiss testified that an unqualified opinion is required so that investors can be assured that interest on the bonds is "exempt from federal taxes."[17]

F. Solicitor Flannery's Concerns

Mento relayed Shupe's proposal to Richard Flannery ("Solicitor Flannery"), the School District's solicitor and brother of School Board President Harry Flannery.[18] Solicitor Flannery, who served as solicitor during the School District's prior bond issues, indicated to Mento that he was "not comfortable with the concept being presented." Solicitor Flannery told Mento that the proposal was "not consistent with" the School District's past experience. Solicitor Flannery explained that, "typically," the School District would begin a project "quickly after a bond issue was approved, and this sounded different"; "[h]istorically, the [School] [D]istrict was about ready to proceed more close at a point in time with projects" than the situation here. Solicitor Flannery also asked why the School District was not "bidding" out the underwriting work, as had been done before.

According to Solicitor Flannery, Mento responded that Shupe "had a new concept or way of doing a bond issue." He testified that Mento claimed that the School District "did not have to be at the ready to dig ground when the bonds were issued. That's why [Shupe] was the person the district needed." Mento also informed Solicitor Flannery that Weiss would be the School District's bond counsel.

G. Weiss's May 2, 2000 Letter

Weiss learned from Mento that Solicitor Flannery had concerns that the School District had not decided which projects it was going to undertake. Weiss also understood that Solicitor Flannery had a question about "how far along" the School District had to be on its list of projects before it could do a financing.

In response to those concerns, Weiss wrote a letter to Solicitor Flannery dated May 2, 2000. Weiss began the letter by stating that he had prior experience with "similar notes." Solicitor Flannery testified that he believed this statement meant that Weiss was an expert on whom he could rely for questions he had on the note issue. At the hearing, however, Weiss admitted that he had never before given an opinion on a note issue structured similarly to the Notes.[19]

Weiss also stated that "the School District will be able to invest the proceeds of the Notes in available Treasury obligations during the period of the Notes," without mentioning the requirement that, absent objectively reasonable plans to use the proceeds, interest on the Notes would be taxable. Weiss concluded by stating that, "because there [were] capital projects being contemplated for which proceeds [would] be used should the projects be undertaken," he believed that issuance of the Notes was "totally proper and authorized under the [Internal Revenue] Code." (Emphasis supplied.) At the hearing, Weiss was asked by the Division if this statement was contrary to the Treasury regulations because it suggested that the School District was not required to actually undertake any projects. Weiss agreed that his statement in the letter "[did not] read as the Treasury regulations read." Weiss wrote the May 2 letter without having met with the Board and without having reviewed any documents. Weiss admitted that he based his assertions in the May 2 letter exclusively on his preliminary conversation with Mento.

Solicitor Flannery, after receiving the May 2 letter, spoke with Weiss over the telephone. Solicitor Flannery testified that "probably the most important part" of their conversation involved the "timing of expenditures." While Solicitor Flannery believed that the School District intended to proceed with projects, he wondered when the School District would be able to go forward with projects. He recalled that "the only thing that came out of that conversation was what I would refer to [as] an 85 percent rule, where the bond money would have to be spent during the three years of the bond issue." Solicitor Flannery testified that he understood from Weiss that the money could be spent "any time during the three years, as long as it was spent on the projects." He understood further that, in the course of this three-year period, the School District could invest the money it was not using and "legitimately earn interest" that could be used for projects.

During the conversation, Weiss did not tell Solicitor Flannery that the School District had to incur an obligation to spend 5% of the net proceeds within six months. Nor did Weiss tell Solicitor Flannery that the School District had to proceed with due diligence. Weiss testified that he did not consider these requirements to be an "issue" because he understood the School District was "moving forward" with certain elementary school repairs after the 2000 school year ended. In Weiss's judgment, the cost of those repairs "easily could have exceeded" the 5% requirement. Weiss also did not discuss with Solicitor Flannery any potential downside to the transaction, i.e., the risk to the Notes' tax-exempt status if the School District did not comply with Treasury regulations.

H. May 8, 2000 Board Meeting

Weiss and Shupe met with the Board on May 8, 2000, shortly after Weiss's telephone conversation with Solicitor Flannery. Before the meeting, Weiss and Shupe met in Mento's office, where Mento reiterated the nature of the elementary school repairs and renovations. Weiss saw "some documents" from the Eckles firm on a table in the office, but he did not examine them.

At the May 8 meeting, Shupe presented the Note transaction as a means for the school district to make money by investing, and not spending, the Note proceeds. Shupe stated that there was a "loophole" in the federal tax laws that would allow school districts to borrow tax-free money just to invest the proceeds for profit. He indicated that the School District could earn $225,000 by investing 100% of the net Note proceeds in higher yielding investments for the full three-year period of the Notes.[20]

Shupe's written proposal, which was circulated at the May 8 meeting, tracked his oral presentation. The proposal stated that "current tax regulations allow school districts to prefund construction projects for up to three years, to borrow up to $10 million in any calendar year, and to keep any positive investment earnings gained on the money." The proposal also stated that school districts "have and are borrowing in advance of projects just to invest the proceeds for three years and legally keep the positive investment earnings." The proposal gave the example that a school district could borrow $9.6 million for three years on a tax-exempt basis and pay an annual interest rate of 5.10%. The school district could invest the net Note proceeds in United States Treasury securities over the same three-year period at a yield of 6.56%, to generate "excess earnings," less issuance costs, of $225,000. Under this example, $225,000 in profits would be available to the school district from the investment of the net proceeds.

Weiss admitted that he understood that Shupe's proposal assumed that the School District would invest 100% of the net Note proceeds for the full three years. Weiss testified that he knew school districts could not borrow money just to invest the proceeds, and that Shupe's assertion to that effect did not accurately describe the Treasury regulations. Weiss's expert, Henry Klaiman, conceded that Shupe's proposal was a red flag to reasonable bond counsel because it indicated that "maybe the money [was] not going to be spent."[21] Weiss's other expert, Wayne Gerhold, stated that the standard industry practice for bond counsel, after being shown a proposal like Shupe's, would be to "get up right away" and "indicate that this [was] not legal." Gerhold also testified that, in such circumstances, bond counsel should "go into a little more detail" about the Treasury regulation requirements.)

Weiss did not advise the Board that Shupe's proposal was "not legal." Instead, Weiss advised the Board that the proposal "wasn't exactly the case." Weiss testified that he told the Board members that "they had to have projects, that they had to spend the money in three years[,] and they had to proceed with [the projects]." Weiss further told them that, "[i]f they didn't want to do the project[s], [he] shouldn't be there."[22] Weiss believed the Board members understood him because "[t]hey all nodded their heads." In addition, the Board members nodded their heads when Weiss mentioned that there was an architect "in place." Weiss testified that he interpreted the nods as a sign that the Board had approved Eckles' participation in the projects. As a result, Weiss did not ask to contact Eckles or see a copy of any contract with the firm. Weiss made no further inquiries about Eckles.

The five Board members who testified stated that Shupe's proposal to invest the Note proceeds for three years was the "focus" of the May 8 meeting. According to their testimony, the Board understood that the plan was to invest the Note proceeds at a higher rate of interest than the rate the School District was to pay the noteholders and retain the difference. The Board believed that the School District could make money on the interest rate difference, and thereby have more money to fund school projects. At the May 8 meeting, Board members questioned

Weiss about the propriety of Shupe's proposal. Board member Hennon stated that "[t]here was some incredulity, skepticism about this. There were questions along the nature of is this too good to be true." When asked about Weiss's response to those questions, Hennon stated that Weiss "endorsed it [the proposal]. He said absolutely, it was legal, it was being done, it was an opportunity not to be missed, and that, no, it was not too good to be true." Hennon also stated that she asked Weiss whether "the bond issue committed [the School District] to a building project," and that Weiss answered, "No. As long as you [the Board members] have intent or reasonable expectations to do the project[s], you don't actually have to do them at the time the notes were issued. If the intent was there, that was adequate." Other Board members' hearing testimony supported Hennon's recollection of the discussion at the May 8 meeting.

Weiss acknowledged that, during the May 8 meeting, he did not advise Board members about the time test -- the requirement that the School District enter into binding commitments to spend 5% of the net Note proceeds within six months of the issue date of the Notes. Weiss "saw no reason to get into 5% rules" because he understood that there were several repair projects set to begin at the end of the 2000 school year which would have satisfied the 5% requirement.[23]

At the hearing, Weiss did not explain the basis for his conclusion that the cost of those repairs would amount to 5% of the net Note proceeds.

Weiss also acknowledged that he did not advise Board members about the due diligence test -- the requirement that the School District complete the projects with due diligence. Weiss testified that he believed the School District was "moving forward" with the elementary school repairs, so that the due diligence test "wasn't an issue." While Weiss mentioned in passing the expenditure test -- the requirement that the School District expend 85% of the net proceeds in three years, he did not tell the Board that it needed to have "objectively reasonable expectations" that those proceeds could be spent, nor did he explain to the Board what that phrase meant. As President Flannery testified, Weiss and Shupe told the Board that the School District "needed to have the intent to do the projects and . . . the interest would be available to [it], even if [the School District] didn't follow through with the projects."

Weiss's expert, Gerhold, acknowledged that a reasonable bond lawyer would have advised the School District of the time test because the School District had not decided on the scope of its major projects and whether they would include a new middle school. Solicitor Flannery testified that the time test "would have raised a lot of red flags" because it "would have meant that the [B]oard probably would have started asking questions about when do we have to have our consensus" on moving forward with the various projects. Two Board members testified that knowledge of the time test would have affected their vote to authorize the Notes' issuance.

Weiss's failure to inform the Board of the due diligence test gave Board members the impression that there was no "urgency" in proceeding with projects. President Flannery stated that, based on Weiss's legal advice to the Board, "there was no need to proceed -- there was no hammer over our [the Board's] head. The project[s] didn't even have to occur, and we wouldn't have any problems." President Flannery added that it was "understood that[,] if we did not do the projects, there would be no downside."

I. Board Approves Financing Proposal

Board members left the May 8 meeting agreeing in principle to Shupe's proposal pending Solicitor Flannery's approval. Solicitor Flannery subsequently spoke to Weiss and Mento and reviewed a list of proposed projects prepared by Mento. Thereafter, he informed the Board that he was "not opposed to" the transaction. Meanwhile, Shupe was preparing the final proposal to be presented to the Board at its May 31, 2000 meeting. Shupe showed Weiss a provision that "tied up" Note proceeds for the full three-year period of the Notes. When Weiss objected to Shupe that this was "contrary to the concept of spending the money," Shupe took the provision out of the proposal.

Between May 8 and May 31, 2000, Weiss had no discussions with any school officials regarding the status of the construction projects to be financed by the Notes. Weiss attended the May 31 meeting. In spite of Shupe's earlier proposal that the Board invest the entire proceeds for three years, Weiss did not tell Board members that tying up the Note proceeds for the full three year period could result in the Notes being considered taxable. Weiss asserted that he believed that tying up the money was a "dead" issue because the provision had been eliminated from the proposal. The Board approved the final proposal, which structured the Notes on a three-year basis, with a one-year call.

J. Weiss Prepares Non-Arbitrage Certificate

On June 1, 2000, Weiss wrote to Mento and requested the list of projects to be financed by the Notes and their associated costs, so that the Board could approve the projects at a Board meeting scheduled for June 15, 2000. Weiss knew that the Board had not awarded bids or even authorized advertising for the bids. He sought its approval because he wanted assurance that the School District would proceed with the projects. In his own words, Weiss "wanted evidence that the Board had seen the list and voted on it, [and] said, this is what [the Board was] . . . going to do."

However, Weiss did not ask Mento for evidence that the School District had committed to undertake any of the projects for which estimates were to be provided. Nor did he ask Mento for evidence that the School District was in a position to spend the money within three years.

Instead, Weiss enclosed a response letter for Mento to complete and sign. The draft letter stated, "In conjunction with the issuance of the School District's General Obligation Notes, Series of 2000, the Board of School Directors has authorized the issuance of this letter which sets forth capital projects which the District is contemplating undertaking in the next three years to utilize the proceeds of the Note issue." (Emphasis supplied.) The draft letter provided space for a list of the projects and their estimated costs.

In the response letter, dated June 15, 2000, Mento repeated Weiss's language that the Board had "authorized the issuance of this letter which sets forth capital projects which the School District is contemplating undertaking." The June 15 letter listed thirty-three projects, but omitted any cost estimates or prioritization among the projects. This letter was the only School District document that Weiss examined. Weiss admitted that he was "upset" when he received the letter because it did not contain cost estimates. Weiss called Mento and again asked for costs, but he did not get them.

Weiss acknowledged that he should have obtained a list of costs. Weiss's expert, Klaiman, testified that reasonable bond counsel would want to know "how much money [was] involved" with the school projects, and whether there were "enough projects to absorb the proceeds of the bond issue." Weiss did not know "how much money was involved" because he did not have cost estimates for any of the projects.[24] Weiss also did not know if there were "enough projects to absorb" the $9.6 million in Note proceeds because he never obtained evidence that the Board had voted on or approved any of the thirty-three projects on the list.

There is no dispute that neither the Board nor any of its members saw Mento's June 15 letter.

Had Weiss examined minutes of Board meetings, he would have discovered that the Board had yet to vote on or approve a single project to be financed by the Notes. Weiss, however, never looked at or asked for Board minutes or any other documents to confirm the Board's purported action.

Applicable Treasury regulations require an issuer to certify a statement of its reasonable expectations to use note proceeds on projects. This certification is accomplished in a Non15

Arbitrage Certificate. The Non-Arbitrage Certificate "must state the facts and estimates that form the basis for the issuer's expectations" as of the issuance date.[25]

Weiss prepared the Non-Arbitrage Certificate certifying the School District's reasonable expectations to spend Note proceeds. The Non-Arbitrage Certificate provided that the proceeds were to be used to fund "capital projects." The term "capital projects," however, was not defined. Weiss acknowledged that "greater specificity" "might not have been wrong," but believed it was understood that a "capital project" referred to a "new money" project as opposed to a refunding. On page six of the thirteen page Non-Arbitrage Certificate, it stated:

> The Issuer reasonably expects that prior to the expiration of six months following the date hereof (the "Closing Date"), there will be binding obligations to expend in the aggregate at least five (5%) percent of the proceeds of the Notes (net any reserve funds established with proceeds of the Notes) for costs of the acquisition, construction, equipping or improvement of the Project. The Issuer reasonably expects that the Project will proceed with due diligence to completion. The Issuer reasonably expects that at least eighty-five (85%) percent of the proceeds of the Notes (net of any reserve funds established with proceeds of the Notes) will have been expended prior to the date that is three years from the Closing Date.

Weiss admitted that the Non-Arbitrage Certificate did not contain "estimates," meaning figures indicating "how much [the construction projects were] going to cost." Weiss prepared the Non-Arbitrage Certificate based on the list of thirty-three projects from Mento and his conversations with Mento, Solicitor Flannery, and the Board. Weiss testified that he relied on the Non-Arbitrage Certificate in issuing his unqualified opinion.

K. Weiss Reviews and Approves Official Statement

In addition to preparing the Non-Arbitrage Certificate, Weiss reviewed and approved the Official Statement, the School District's disclosure document that Shupe drafted. The Official Statement indicated that the purpose of the Notes was to "provide funds for capital improvement projects." It also referred to the fact that Weiss, as bond counsel, had rendered an opinion that interest on the Notes was tax-exempt. It did not discuss or disclose the existence of any risk to the Notes' tax-exempt status. The Official Statement further provided that the Notes were "not arbitrage notes." It also stated that the Non-Arbitrage Certificate would be "accompanied by an opinion [of] [c]ounsel, based solely upon the facts, estimates and circumstances set forth in the Non-Arbitrage Certificate."

L. Weiss Issues Two Legal Opinions

Weiss stated that, before he issues an unqualified opinion, he ascertains that the Treasury regulation requirements are met. In making this determination, Weiss considers whether there is a "defined project"; whether there is a time schedule for spending the proceeds; whether the project is for a new building or an addition; and whether there is a "professional team" in place, for example, an architect or a project manager. Weiss agreed that, with a nine-member school board, such as the Board in this case, he would require some assurance that a clear majority of members wished to proceed with the project. Had Weiss inquired, he would have found that the School District had not determined to begin work on any major construction project at the time the Notes issued. The testifying Board members agreed that, as of June 2000, the Board had not reached a consensus on the major projects to be undertaken. The Board was still in "the very early stages" of decision-making, "looking at floor plans" and "preliminary schematics."[26]

Nonetheless, after approving the Official Statement, Weiss prepared a proposed unqualified opinion addressed to potential note purchasers and to be printed on the reverse side of each note. In the opinion, Weiss stated that the School District "determined to undertake" projects requiring "in excess" of $10 million, and that all the Note proceeds, less issuance costs, would be used to fund the projects. He also stated that interest on the Notes would not be subject to federal income taxation. He further stated that the Notes were not "arbitrage bonds." Weiss prepared a "supplemental opinion of note counsel" affirming that nothing had come to his attention that would lead him to believe that the Official Statement was materially inaccurate or incomplete. Both opinions were required by the Note Purchase Agreement.

M. June 28, 2000 Closing

At the closing, Weiss delivered his legal opinions. Weiss also reviewed generally all of the documents with President Flannery, who signed the Official Statement. President Flannery testified that he relied on Weiss's advice in signing the document because Weiss had the "expertise." Solicitor Flannery signed a standard form solicitor's opinion that Weiss prepared.

The school business manager, Sharon Robinson, signed the Non-Arbitrage Certificate. Weiss's expert, Klaiman, testified that reasonable bond counsel would have ensured that the official signing the Non-Arbitrage Certificate understood the document before it was signed.

Weiss admitted that he did not explain the Non-Arbitrage Certificate to Robinson, despite the fact that he believed she was "not a sophisticated person." Robinson testified that she signed the Non-Arbitrage Certificate "pretty much having no idea what the document meant."

The School District thereupon issued $9.6 million in three-year general obligation notes, dated May 15, 2000.[27] The Notes had an interest rate of 5.25% and a stated maturity date of May 15, 2003. The Notes were structured in accordance with Shupe's proposal, with a one-year call. All the net Note proceeds were initially invested in money-market funds because "the yields were dropping" in the Treasury Market. Shupe testified that he eventually invested the entire net Note proceeds in Federal Home Loan Bank securities maturing in 2003, so the School District could earn the $225,000 in profits that it sought. Before the closing, Weiss did not inquire about the disposition of the Note proceeds. Nor did he tell Shupe that the funds should be kept available for use on projects. Weiss's engagement as bond counsel ended at the conclusion of the bond closing. Weiss received $9,509.63 for his work. Weiss's fee was paid out of Note proceeds.

N. IRS Declares Notes Taxable

On November 8, 2000, the IRS sent a letter to the School District indicating that it had commenced an examination of the Notes. The IRS began investigating three-year note issues in the Commonwealth after receiving information that some school districts were "bragging" about making money from tax-exempt bond issues. On November 16, 2000, Weiss received the IRS's November 8 letter from the School District. Weiss claimed that he did not know that the Board had placed the net Note proceeds in a three-year investment until he received a copy of the Board's bank statement requested by the IRS. Although the School District still had six weeks to enter into binding commitments to spend 5% of the net proceeds, Weiss assisted the School District in redeeming the Notes. The Notes were redeemed at the first available call date, one year after the Notes were issued, on May 15, 2001. The redemption price for the Notes was paid from the Note proceeds. The Notes were fully redeemed as of June 15, 2001. None of the Note proceeds were spent on construction projects. The School District was left with around $150,000 in arbitrage profits after calling the Notes.

On September 25, 2001, the IRS issued a preliminary determination that the interest on the Notes was taxable. In the IRS's view, the School District issued the Notes with no reasonable expectations to use the proceeds on capital projects.[28] The School District and IRS eventually entered into a closing agreement under which the School District agreed to rebate its arbitrage profits to the IRS.

O. Post-Closing Events

No work was performed on any construction project for over a year after the Notes were issued. The Board did not authorize the elementary school repairs, which were supposed to start at the end of the 2000 school year, until June 2001. The total cost of those repairs was around $350,000, significantly less than $480,000, or 5% of the $9.6 million the Board was obligated to commit to spending in the first six months under the Treasury regulations.

In October 2001, the Board formally retained the Eckles firm. In 2002, the Board reached an agreement on the major construction projects and held public hearings. The Board decided in favor of renovating the existing elementary school, and against building a new middle school. The elementary school renovations began in May 2003 and were financed with other funds. When Board member Hennon was asked to identify "the single most important factor . . . as to why that work didn't start sooner," she replied, "[i]ndecision," meaning "an inability [by the Board] to come to a conclusion about the scope" of its major projects.

III.

Securities Act Sections 17(a)(2) and 17(a)(3) make it unlawful for any person in the offer or sale of any securities to obtain money or property by means of any material misrepresentations or omissions, or to engage in any transaction, practice, or course of business which operates as a fraud or deceit on the purchaser.[29] Proof of scienter is not required to establish violations of that those provisions; negligence alone is sufficient.[30] Negligence is the failure to exercise reasonable care.[31]

Weiss is primarily liable for his role in the Note issue.[32] Weiss reviewed and approved the Official Statement, which misrepresented that Note proceeds would be used to fund school construction projects. Weiss also rendered an unqualified bond opinion, reinforced by a second, supplemental opinion, that misrepresented the risk that interest on the Notes would be taxable. The Official Statement referred to Weiss's unqualified opinion that interest on the Notes would be tax-exempt. Weiss knew the statements in the Official Statement and in his legal opinions were communicated to, and relied on, by prospective investors in deciding whether to purchase the Notes.[33] As the Division's expert testified, the Notes were sold to investors, and priced, based on Weiss's unqualified opinion that interest on the Notes would be tax-exempt. Weiss also knew that information about the Notes' tax-exempt character was material to investors because they would have wanted to know that their interest earnings might be taxable, at a minimum reducing the return from the Notes.[34]

A. Weiss's Conduct

Before rendering an unqualified opinion, Weiss was obligated to determine, based on all the objective facts and circumstances, whether the School District had reasonable expectations to satisfy the expenditure, time, and due diligence tests as of June 28, 2000, the issuance date of the Notes. Weiss acknowledged that he also was obligated to conduct a reasonable investigation of the facts to establish the objective reasonableness of the School District's expectations. The evidence adduced at the hearing indicates that Weiss knew or should have known that the Note transaction was intended to earn arbitrage profits, and that the School District lacked sufficiently concrete plans for the use of the proceeds to justify the Notes' tax-exempt status. The evidence also indicates that Weiss did not make adequate inquiry to determine the level of certainty of the School District's construction plans, objectively viewed, before reviewing and approving the Official Statement and issuing his legal opinions. Weiss's failure to look for even minimal objective indicia of the School District's reasonable expectations to spend Note proceeds on projects was at least negligent. From the outset of the transaction, Weiss understood that the Board had gone "back and forth" on the elementary school project, and that the Board had not committed to the middle school project. He also understood that Solicitor Flannery had concerns about the financing because the Board had not determined which projects it was going to undertake.

After being advised of Solicitor Flannery's concerns, Weiss wrote the June 2 letter in which he misstated the Treasury regulation requirements by indicating it was sufficient for the tax-exempt status of the Notes that the School District merely "contemplate" projects on which the Note proceeds would be spent "should the projects be undertaken." In a follow-up conversation with Solicitor Flannery, Weiss told Solicitor Flannery of the requirement that the School District spend 85% of the net proceeds in three years. However, as he acknowledged, Weiss did not mention the potential risk to the Notes' tax-exempt status if the School District did not spend that amount during the three-year period. Nor did Weiss describe the time and due diligence tests.

At the May 8 meeting, Shupe articulated to the Board the arbitrage opportunity presented by the Note transaction. Weiss understood that Shupe proposed that the School District issue the Notes solely to invest the net proceeds and to earn $225,000 in arbitrage profits. Weiss admitted that he knew at the time that Shupe's proposal was contrary to the Treasury regulations. Weiss also admitted that he knew Shupe's $225,000 figure was based on the School District investing all the net Note proceeds for the full three years, and not spending any of those proceeds, much less 5% in six months or 85% in three years.

Board members asked Weiss if Shupe's proposal was "too good to be true." They also asked whether the Note issue committed the School District to proceed with the projects, or whether it was sufficient that there were projects to be done. Weiss did not advise the Board that Shupe's proposal was illegal. Nor did Weiss explain what the Board had to do in order to comply with the Treasury regulations. While Weiss informed the Board that it had to have projects, he did not advise the Board about the time or due diligence tests. Those two requirements were critical. The Board did not comprehend that it had to commit 5% of the net proceeds on projects within six months of the issue date of the Notes, or that it had to proceed with due diligence to complete the projects. At best, the Board was left with the impression that it had three years in which to undertake projects. At worst, the Board believed that it merely had to identify some projects that could be funded by the Notes.[35]

Following the May 8 meeting, Shupe presented Weiss with a document showing Shupe's intention to tie up the Note proceeds for three years in an illiquid investment. Weiss told Shupe to take the provision out of the final Note proposal. Weiss did not mention to the Board when it approved the Note issue that tying up the proceeds for a full three-year period could result in the interest on the Notes being taxable.

Weiss also asked Mento for a list of projects that the Board "contemplated undertaking" with associated costs. In response, Weiss received an unapproved list of potential projects, without costs. At no time prior to the Notes' issuance did Weiss review a single cost estimate for any of the projects. Despite the requirement that the Non-Arbitrage Certificate set forth the facts and estimates underlying the issuer's expectations, Weiss prepared a Non-Arbitrage Certificate that did not contain any estimates and was short on facts. Weiss himself recognized that he should have obtained a list of costs.

Thereafter, Weiss failed to ascertain whether there was a time schedule for spending Note proceeds, failed to confirm the nature and scope of any engagement with the architect, and failed to determine whether a majority of Board members wished to proceed with the projects, despite acknowledging that he viewed all of these considerations as important in issuing an unqualified opinion. Indeed, the Treasury Regulations required, among other things, that the School Board "incur[] within 6 months of the issue date a substantial binding obligation to a third party to expend at least 5 percent of the net sale proceeds of the issue on the capital projects."[36] Had Weiss exercised even minimal care, he would have learned that there was no time schedule for spending Note proceeds, no written contract with Eckles,[37] and no agreement on proceeding with any of the projects. At the time, Weiss was aware that the School District had not yet advertised for bids. Nonetheless, Weiss reviewed and approved the offering documents, and signed and reiterated an unqualified opinion that the Notes were tax-exempt, when he knew or should have known that the School District's primary purpose in issuing the Notes was to earn arbitrage profits, and that it did not have any objectively reasonable expectation of satisfying the Treasury regulations.[38] His conduct departed from the standard of reasonable prudence and was at least negligent.[39] Weiss violated Securities Act Sections 17(a)(2) and 17(a)(3).[40]

B. Weiss's Contentions

1. Weiss notes that the Order Instituting Proceedings ("OIP") alleged that he "violated Section 17(a) of the Securities Act" without specifying a particular subsection.[41] Weiss argues that the Division "made no allegations in the OIP supporting a violation of Section 17(a)(2) or 17(a)(3)," and did not assert before its final brief to the law judge that he was negligent. Weiss concedes that the law judge considered whether he acted intentionally, recklessly, or negligently.

We believe that the OIP fairly placed Weiss on notice that all subsections of Securities Act Section 17(a) would be at issue. While the Division's primary focus was violation of Section 24 17(a)(1), the OIP alleged misconduct that sounded in negligence. For example, the OIP charged that Weiss drafted an "inaccurate" certificate and "made untrue statements of material fact and omitted to state material facts" in connection with the note offering. Weiss's answer to the OIP reflected his awareness that the allegations therein could provide a basis for negligence liability.

Weiss asserted in his answer that he acted with "due care" and performed his professional duties in compliance with NABL standards, which he indicated were the applicable industry standards. At the hearing, Weiss introduced expert testimony on the issue of whether his conduct conformed to NABL standards, and was given full opportunity to defend himself. The OIP gave Weiss sufficient notice of the charges against him.[42]

2. Weiss contends that, for the purposes of his unqualified opinion, he was entitled to rely on the representations from School District officials and Board members that the School District had projects it intended to undertake and plans to proceed with them. As bond counsel, Weiss was obligated to determine whether all the objective facts and circumstances, established, for example, by Board minutes and resolutions, contracts, and estimates, justified an unqualified opinion that the Board's intention to undertake projects satisfied the objective standard under the Treasury regulations. Weiss's reliance on vague, subjective expressions of intent to undertake projects, without independent inquiry, was unreasonable and an abdication of his responsibilities as bond counsel.[43] Moreover, even assuming that the School District had projects it was planning to do in the future, the Notes were issued prematurely. Treasury regulations provide that issuers may not issue bonds any sooner than necessary.[44]

3. Weiss contends that he was entitled to rely on the Non-Arbitrage Certificate. Weiss concedes, however, that he could not base an unqualified opinion on the Non-Arbitrage Certificate if he was aware of facts indicating that it was inaccurate. The Non-Arbitrage Certificate contained no cost estimates and was devoid of information supporting the School District's expectations to spend Note proceeds on projects. Weiss offered no explanation for his preparation of a Non-Arbitrage Certificate with insufficient facts and no estimates, which therefore failed to comply with Treasury regulations. Although Weiss twice asked for cost estimates from Mento, none were provided to him. Mento's failure or refusal to provide cost estimates for the projects should have prompted Weiss to question whether the School District was ready to proceed with its projects and comply with the Treasury regulations. In the absence of the requisite facts and estimates, the list of projects from Mento was merely a "wish" list and could not be used as a basis for rendering an unqualified opinion.

4. Weiss accuses the Division of taking a "fraud by hindsight" approach, and seeking to hold him liable for not being able to foresee that the IRS would declare interest on the Notes to be taxable. In order that interest on the Notes be tax-exempt, Weiss was required to evaluate the objective reasonableness of the School District's expectations to meet the expenditure, time, and due diligence tests as of the issue date. Weiss's liability under antifraud provisions arises from his negligence in his role of bond counsel, and not as a result of actions taken by the IRS after the Notes were issued.[45]

IV.

Under Securities Act Section 8A(a),[46] the Commission may order any person who is violating, has violated, or is about to violate any Securities Act provisions to cease and desist from committing or causing any violation or future violation of those provisions. In determining the appropriateness of a cease-and-desist order, we look to the risk of future violations and other factors, including the seriousness of the violation, the isolated or recurrent nature of the violation, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, the respondent's state of mind, the sincerity of assurances against future violations, the respondent's recognition of the wrongful nature of the conduct, the respondent's opportunity to commit future violations, and the remedial function to be served by the cease-and-desist order in the context of other sanctions sought in the proceeding.[47] We impose a cease-and-desist order only when we have determined that there is some risk of future violation.[48]

Weiss was responsible for misrepresentations and omissions in the Official Statement and in his legal opinions which were made available to investors. Weiss's conduct caused harm to investors who purchased the Notes because they were without full information concerning the substantial risk that the IRS would find the Notes to be taxable. Weiss's conduct also caused harm to the marketplace by eroding confidence in bond counsels' unqualified opinions. The importance that investors place on such opinions cannot be overestimated. We have stated that "[t]he smooth functioning of the securities markets will be subject to serious disruption if the public cannot safely rely on the expertise proffered by lawyers rendering their opinions."[49] As we have found, Weiss was at least negligent. He appears not to acknowledge any wrongdoing. Weiss, moreover, continues to practice in the area of municipal finance, and could give another unqualified opinion in the future. We believe there is a sufficiently high level of risk of future violations that would endanger the public. A cease-and-desist order is therefore warranted against Weiss to protect the public.[50]

Under Securities Act Section 8A(e), the Commission may enter an order requiring disgorgement, including reasonable interest. The remedy of disgorgement seeks to deprive the wrongdoer of his ill-gotten gains.[51] It returns the violator to where he would have been absent the violative activity. An order to disgorge a certain amount need only be a reasonable approximation of the profits causally connected to the violations.[52] Once the Division shows that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden shifts to the respondent to demonstrate that the Division's figure is not a reasonable approximation.[53] Any risk of uncertainty as to that amount falls on the wrongdoer whose illegal conduct created the uncertainty.[54]

The Division has established that Weiss received $9,509.63 for his work relating to the transaction. The Division also has established that this figure was causally connected to Weiss's wrongdoing because it represented his fee for his negligently rendered services as bond counsel. The Division's showing has presumptively satisfied its burden of proof. Weiss has not argued or shown that the $9,509.63 figure is an unreasonable approximation of his unjust enrichment. We will order Weiss to disgorge $9,509.63, plus prejudgment interest.

An appropriate order will issue.[55]

By the Commission (Chairman COX and Commissioners ATKINS, CAMPOS, and NAZARETH); Commissioner GLASSMAN dissenting.

Jonathan G. Katz
Secretary

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is ORDERED that Ira Weiss cease and desist from committing or causing any violations or future violations of Sections 17(a)(2) or 17(a)(3) of the Securities Act of 1933; and it is further ORDERED that Ira Weiss disgorge the amount of $9,509.63, plus prejudgment interest, as calculated in accordance with Commission Rule of Practice 600(b).

Weiss's payment of disgorgement shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order made payable to the Securities and Exchange Commission; (ii) delivered by hand or courier to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312, within thirty days of the date of this order; and (iii) submitted under cover letter which identifies Weiss as the respondent in this proceeding and gives the file number of this proceeding. A copy of the cover letter and check shall be sent to Mark Zehner, Esq., Philadelphia District Office, Division of Enforcement, 701 Market Street, Suite 2000, Philadelphia, Pennsylvania 19106.

By the Commission.
Jonathan G. Katz
Secretary

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[1] 15 U.S.C. § 77q(a).

[2] 15 U.S.C. § 78j(b).

[3] 17 C.F.R. § 240.10b-5.

[4] The School District consented, without admitting or denying the findings, to the entry of a cease-and-desist order in which the Commission found that the School District recklessly violated the antifraud provisions in connection with the Notes' issuance. Neshannock Township School District, Securities Act Rel. No. 8411 (Apr. 22, 2004), 82 SEC Docket 2718. The School District also agreed to pay disgorgement, plus prejudgment interest, in the amount of $28,904.

[5] In August 1998, the School District received a report evaluating the elementary school's electrical and mechanical systems, roofs, and other structures. That report estimated over $1 million in needed repairs.
[6] Board member Gina Hennon stated that the Board was responding to concerns from citizens who "heard that we [the Board] were going to build a middle school, and they were very upset about it." According to Hennon, the Board sought to "reassure" citizens that "this was a process, and that part of that process would be a public hearing with an opportunity for [their] input."

[7] Tax-exempt municipal securities typically have lower interest rates than taxable securities. Investors accept those lower interest rate dif'gs because they will not be taxed at the federal level on the income received. See 26 U.S.C. § 103(a) (providing that gross income generally does not include interest on state or local bonds).

[8] Shupe was named as a respondent in this proceeding, but entered into a settlement with the Commission. Shupe consented, without admitting or denying the findings, to the entry of a cease-and-desist order in which the Commission found that Shupe willfully violated Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5, and willfully aided, abetted, and caused the School District's violations of those provisions. The Commission also barred Shupe from association with any broker or dealer, and ordered him to disgorge $15,043, plus prejudgment interest. L. Andrew Shupe II, Securities Act Rel. No. 8459 (Aug. 24, 2004), 83 SEC Docket 2113. However, it waived Shupe's payment of disgorgement and prejudgment interest, and did not impose a penalty against him, based on his sworn representations in his Statement of Financial Condition, as updated, and other documents submitted to the Commission. Id.

[9] Mento and Shupe had previously worked together on a Duquesne City School District bond offering. When Mento was superintendent of that district, Weiss had been its solicitor. Mento was not called as a witness at the hearing.

[10] See 26 U.S.C. § 148(a) (defining "arbitrage bond" as any bond issued as part of any issue any portion of the proceeds of which is to be used, directly or indirectly, to acquire higher yielding investments or to replace funds which were so used).

[11] 26 C.F.R. § 1.148-2(e)(2)(i)(A).

[12] 26 C.F.R. § 1.148-2(e)(2)(i)(B).

[13] 26 C.F.R. § 1.148-2(e)(2)(i)(C). The Internal Revenue Service ("IRS") has ruled that the due diligence test is not met when bonds are deliberately issued earlier than necessary to prolong the period during which arbitrage profits are earned. See IRS Rev. Rul. 80-204, 1980-2 C.B. 51.

[14] 26 C.F.R. § 1.148-2(b)(1).

[15] See 26 C.F.R. § 1.148-1.

[16] Both parties point to the industry standard of care for bond counsel set forth by the National Association of Bond Lawyers ("NABL"). Under NABL standards in effect during the relevant period,

> [b]ond counsel should not render an "unqualified opinion" as to the validity and tax exemption of bonds unless it has concluded that it would be unreasonable for a court to hold to the contrary. Bond counsel may reach such a conclusion as to federal income tax issues addressed in the opinion by determining that there is no reasonable possibility that the Internal Revenue Service would not concur or acquiesce in the opinion, if it considered all material legal issues and relevant facts.

1997 NABL Model Bond Opinion Report at p.7. In addition, bond counsel's opinion should be based on a reasonably sufficient examination of material legal and factual sources and reasonable certainty as to the subjects addressed. 1993 NABL Statement Concerning Standard Applied in Rendering the Federal Income Tax Portion of Bond Opinions at p.9.

We have stated that, "[w]hile compliance with industry standards is a consideration, it is only one factor to be weighed" in determining liability under the federal securities laws.

See Piper Capital Mgmt., Inc., Exchange Act Rel. No. 48409 (Aug. 26, 2003), 80 SEC Docket 3594, 3607 & n.28, petition for review denied, No. 03-1349 (D.C. Cir. 2004) (unpublished order). See also, e.g., SEC v. Dain Rauscher, Inc., 254 F.3d 852, 857 (9th Cir. 2001) ("The industry standard is a relevant factor, but the controlling standard remains one of reasonable prudence."); Monetta Fin. Serv., Inc. v. SEC, 390 F.3d 952, 956 (7 Cir. 2004) (same) (quoting Dain Rauscher). The United States Court of Appeals for the Ninth Circuit has held that the standard of care by which to measure conduct "is not defined solely by industry practice, but must be judged by a more expansive standard of reasonable prudence, for which the industry standard is but one factor to consider." Dain Rauscher, 254 F.3d at 856; see also Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 274 (3d Cir.) ("Even a universal industry practice may still be fraudulent."), cert. denied, 525 U.S. 811 (1998).

[17] An unqualified opinion "describes an opinion that is subject only to customary assumptions, limitations, and qualifications, and that is not otherwise 'explained.'" 1997 NABL Model Bond Opinion Report at p.7. An unqualified opinion assures investors that the risk of the IRS declaring the Notes taxable is so "small" that the investor "need not factor it into the calculation of the price he is willing to pay." Id.

[18] Solicitor Flannery testified that, as solicitor, he was a part-time employee of the School District, and devoted, at most, 15% of his practice to School District matters. Solicitor Flannery represented the School District in "all general matters that might come before the district, including assessment appeals, grievances involving teachers, suspension issues involving students, [and] policies of the district that required legal participation."

Solicitor Flannery stated that, "[w]henever we [the School District] got into areas requiring specific expertise, we would bring in outside counsel." Solicitor Flannery did not act as bond counsel for the School District on any bond or note issue.

[19] Weiss had been consulted regarding other three-year notes, but those notes had not been issued. Weiss's expert, Henry Klaiman, found Weiss's misrepresentation of his expertise to be "puffery," and testified that he, Klaiman, "would not do it."

[20] Weiss disputes Shupe's calculation of the School District's potential arbitrage profits. He contends that the correct figure was $430,000, and not $225,000. For the purpose of our analysis, the difference in the calculation of potential arbitrage profits is immaterial. The Treasury regulations do not specify the amount of arbitrage profits that can be earned by an issuer. Rather, they proscribe the issuer's investment of note proceeds without meeting certain minimum requirements.

[21] We note that, during the proceeding below, the law judge stated that she had accepted the opinions of Weiss's experts, but rejected those of the Division's experts "as inconsistent with the credible testimony and exhibits." In resolving the issues in this case, we have appraised and given such weight to the expert testimony as we consider is indicated by the relevant facts in the record. See, e.g., West Penn Elec. Co., 29 S.E.C. 685, 693 n.7 (1949) ("[w]hile an expert's testimony may properly be given substantial weight by the Commission, it has the duty to make its independent analyses and findings") (citing SEC v. Central-Illinois Sec. Corp., 338 U.S. 96 (1949)). Moreover, we reiterate that, although expert testimony as to industry practice, in this case, NABL standards, is relevant to show the standard of care necessary to evaluate Weiss's liability, that standard ultimately is one of reasonable prudence. See Dain Rauscher, 254 F.3d at 856 ("[I]t is well-settled that proof of adherence to an industry practice or custom is not dispositive of the issue of negligence, because what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.") (citations and internal quotations omitted).

[22] Weiss also testified that, after the May 8 meeting, he took Shupe aside and told him that his proposal was wrong. Shupe, however, did not remember having such a discussion. Rather, Shupe recalled that Weiss said he thought it had been a good meeting.

[23] Weiss also argues that he had no reason to explain the time test because Pennsylvania architects who participate in school construction projects typically receive 6% to 7% of the total cost of the projects as their fees. Consequently, if an architect is "on board," as Weiss believed Eckles was, the 5% requirement "takes care of itself." As indicated above, Weiss made no inquiries about Eckles' relationship with the School District. In addition, Weiss admitted he was unsure of the scope of the School District's engagement with Eckles. In the absence of information about Eckles' engagement with the School District, we fail to see how Weiss reasonably could have believed that the architect's fee would "take care of" the 5% requirement.

[24] At the hearing, a School District witness testified that "there was no study done to exactly know how much money" all the projects on the list were going to cost because "we [the Board] hadn't decided on what [projects] we were going to do."

[25] 26 C.F.R. § 1.148-2(b)(2). Under NABL standards, bond counsel may base an unqualified opinion on the assumption that the Non-Arbitrage Certificate is accurate unless it "has knowledge that any such assumption or condition is false, or has knowledge of facts that, under the circumstances, would make it unreasonable so to assume." 2003 NABL Model Bond Opinion Report at p.12.

[26] Weiss also never inquired whether the School District had a feasibility study, despite his awareness that such a study was an initial step to obtain state reimbursement. At no time did Weiss seek to ascertain the School District's status in the reimbursement process, even though he knew that the process required major projects to be approved by the state before construction could begin.

[27] The record is unclear as to why the Notes were dated May 15, 2000, but the Note closing was not held until June 28, 2000.

[28] At the hearing, an IRS official testified that the IRS considered the following: that "the bulk of the money . . . was locked up" in a security that matured "three years out"; that it was "rare" for notes to be issued "without intensive discussion of how much and when the money will be spent"; that there was "a virtual absence in any discussion of the [Board's] minutes about any significant project as much as a year or so

after the notes were issued"; that no Board members were able to "recall discussing how likely these [projects on the June 15 list] were and how much they would cost"; and that "to find a list of projects with no discussion of costs is very unusual" because school districts "seem to obsess on how much things are going to cost because they want to keep the taxes down for the citizens."

[29] Neither party disputes that all of the statements and omissions at issue here were made in connection with the offer, purchase, or sale of securities, i.e., the Notes. expectations to use the proceeds on capital projects.

[30] Aaron v. SEC, 446 U.S. 680, 697 & 701-02 (1980).

[31] SEC v. Hughes Capital Corp., 124 F.3d 449, 453-54 (3d Cir. 1997).

[32] Courts have held that a person may be primarily liable under Exchange Act Section 10(b) and Rule 10b-5 for directly or indirectly making an untrue statement of fact if that person creates a false statement that reaches investors. See, e.g., In re Enron Corp. Sec. Litig., 235 F. Supp. 2d 549, 588 (S.D. Tex. 2002) (adopting the Commission's proposed test for liability under Exchange Act Rule 10b-5, and stating that a person is primarily liable when he creates or writes misrepresentations for inclusion in document to investors); In re ZZZZ Best Sec. Litig., 864 F. Supp. 960, 970 (C.D. Cal. 1994) (holding accountant liable if it was "intricately involved" in drafting company's fraudulent financial reports and press releases, including "incorporat[ing] data" it had prepared into them and "modif[ying] the financial data [they] contained"); In re Software Toolworks, Inc., 50 F.3d 615, 628 n.3 & 629 (9th Cir. 1994) (accounting firm could be primarily liable under Exchange Act Section 10(b) when it reviewed and played significant role in drafting and editing letters to Commission containing misstatements), cert. denied, 516 U.S. 907 (1995). United States v. Naftalin, 441 U.S. 768 (1979), holds that Exchange Act Section 10(b) and Securities Act Section 17(a) prohibit some of the same conduct. Id. at 778. Weiss does not assert that he should be at most an aider and abetter and not primarily liable.

[33] Courts have held that, when a lawyer provides an opinion letter or drafts disclosure documents that contain a material misstatement or omission of fact, the lawyer may be held liable for violations of the securities laws. See, e.g., SEC v. Fehn, 97 F.3d 1276, 1294 (9 Cir. 1996) (holding that attorney violated federal securities laws by editing and filing misleading Forms 10-Q that were prepared by attorney's law firm), cert. denied, 522 U.S. 813 (1997); Ackerman v. Schwartz, 947 F.2d 841, 848 (7 Cir. 1991) (stating, with respect to Exchange Act Section 10(b) and Exchange Act Rule 10b-5 allegations, attorney "cannot evade responsibility to the extent he permitted the promoters to release his [opinion] letter"; noting that, if the attorney "authorized the inclusion of the [opinion] letter with the offering documents, then he appears as a principal . . . and not as an aider or abettor".

Cf. Restatement (Third) of the Law Governing Lawyers § 56, cmt. b (2000) ("Lawyers are subject to the general law. If the activities of a nonlawyer in the same circumstances would render the nonlawyer civilly liable or afford the nonlawyer a defense to liability, the same activities by a lawyer in the same circumstances generally render the lawyer liable or afford the lawyer a defense.").

[34] Information is material if there is a substantial likelihood that reasonable investors would consider it important in making their investment decision. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 & 240 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976). The Commission has stated that "[t]ax-exempt securities typically pay a lower interest rate than other debt securities, which interest rate differential investors accept because of the tax-exempt status. Thus, if the securities are not tax-exempt, the interest rate is not competitive and the securities are not as attractive to investors." County of Orange, California, Securities Act Rel. No. 7260 (Jan. 24, 1996) (settled case), 61 SEC Docket 395, 422-23.

[35] Weiss's expert, Gerhold, testified that the standard industry practice for bond counsel, when faced with an uncertain School Board and a financing proposal for unconfirmed projects, would be to "speak strongly," if not "yell at" the School Board. Gerhold stated that bond counsel should give a "finger pointing lecture . . . and get[] very firm with regard to this, that at the time that you go into this transaction, and the

closing, you better be doing a project and it better be a project that has expenditures that are the same or in excess of what you are talking about, and if you don't, you better have a good reason why you were not able to expend those funds."

[36] 36/ 26 C.F.R. § 1.148-2(e)(2)(i)(B).

[37] The record indicates that, at all relevant times, the School District and Eckles had an informal agreement by which Eckles would provide services to the School District at no initial cost.

[38] Weiss's reliance on SEC v. Haswell, 1979-1980 Fed. Sec. L. Rep. (CCH) ¶ 97.156 (W.D. Okla. 1977), aff'd, 654 F.2d 698 (10th Cir. 1981), is misplaced. In holding that bond counsel was not liable under the antifraud provisions, the district court there found that counsel had no duty to insist on reviewing an offering circular in final form or withdraw his tax opinions from the circular, when facts known to him were insufficient to place him on notice of a fraud perpetrated by the underwriters. The district court also cited the fact that the IRS had not disagreed with bond counsel's tax opinions. By contrast, in this case, Weiss was responsible for misrepresentations and omissions in the Official Statement and in his legal opinions regarding the School District's use of the Note proceeds and the Notes' non-taxable nature. Weiss's liability stems from his making those misrepresentations and omissions without conducting adequate inquiries, and not on any failure to discover the fraud.

[39] See Jean Costanza, Securities Act Rel. No. 7621 (Jan. 6, 1999) (attorney serving as municipal issuer's bond counsel in connection with eight note offerings consented, without admitting or denying findings, to the entry of a cease and desist order in which the Commission found that she violated Securities Act Sections 17(a)(2) and 17(a)(3) by negligently participating in drafting offering documents and negligently issuing a legal opinion that notes were tax-exempt), 68 SEC Docket 2730.

[40] Because we find that Weiss committed primary violations of Securities Act Sections 17(a)(2) and 17(a)(3), we do not decide whether he was also liable for causing the School District's antifraud violations.

[41] Weiss notes that some conduct in the OIP was alleged to be committed "willfully." Courts have held that willfulness under the securities laws "means intentionally committing the act which constitutes the violation," not an intent to violate the laws or rules. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000).

[42] See, e.g., Aloha Airlines, Inc. v. Civil Aeronautics Board, 598 F.2d 250, 262 (D.C. Cir. 1979) (notice is "sufficient if the respondent 'understood the issue' and 'was afforded full opportunity' to justify its conduct during the course of the litigation").

[43] Compare Attorney's Conduct in Issuing an Opinion Letter, Exchange Act Rel. No. 17831 (June 1, 1981) (in a report issued under Exchange Act Section 21(a), the Commission opined that an attorney who served as counsel for an underwriter in connection with a bond offering failed to carry out his professional obligations when he issued a false opinion letter without making adequate factual inquiry; the Commission stated that "the preparation of an opinion letter is too essential and the reliance of the public too high to permit due diligence to be cast aside in the name of convenience"), 22 SEC Docket 1200, 1202.

[44] See 26 C.F.R. § 1.148-10(a)(4) (a transaction illegally overburdens the tax-exempt market "if it results in . . . issuing bonds earlier . . . than is otherwise reasonably necessary to accomplish the governmental purposes of the bonds"). The Non-Arbitrage Certificate prepared by Weiss recited this requirement. In addition, the IRS witness testified at the hearing that, if the School District planned to do the projects at a future date, it should have issued the Notes later.

[45] We reject Weiss's argument that the School District was "distracted" by "unforeseeable events" which prevented it from moving forward on the projects. Most of those events occurred after the School District issued the Notes. Under applicable Treasury regulations, an issuer's reasonable expectations are determined as of the issue date of the bonds.

[46] 15 U.S.C. § 77h-1(a).

[47] KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1192 (2001), reconsideration denied, Exchange Act Rel. No. 44050 (Mar. 8, 2001), 74 SEC Docket 1351, petition for review denied, 289 F.3d 109 (D. C. Cir. 2002).

[48] 54 S.E.C. at 1185. The risk of future violations required to support a cease-and-desist order is significantly less than that required for an injunction. Id. at 1191.

[49] Attorney's Conduct in Issuing an Opinion Letter, Exchange Act Rel. No. 17831 (June 1, 1981), 22 SEC Docket at 1202.

[50] We decline the Division's invitation to impose, for a five-year period, certain specified preconditions on Weiss's issuance of written opinions. We do not find such conditions to be necessary here in order to achieve compliance with the securities laws.

[51] See SEC v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989).

[52] Id. at 1231.

[53] SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995).

[54] First City Fin. Corp., 890 F.2d at 1232.

[55] 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.

ACCOUNTANTS/AUDITORS

INJUNCTIVE PROCEEDINGS

SEC v. William F. Buettner, Mark D. Kirstein and Amy S. Frazier, Civ. Action No. 01-CV-3898 (E.D. Penn.), Litigation Release No. 18818 (August 3, 2004).

The Commission today announced that on July 28, 2004, the Honorable Norma L. Shapiro, United States District Court Judge, Eastern District of Pennsylvania, entered Final Judgments against defendants William F. Buettner, Mark D. Kirstein, and Amy S. Frazier -- members of the Coopers & Lybrand, LLP (now PricewaterhouseCoopers, LLP) engagement team that audited the consolidated financial statements of Allegheny Health, Education and Research Foundation ("AHERF") for the year ending June 30, 1997:

- The Final Judgment as to defendant Buettner permanently enjoins him from violating section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, and requires him to pay a civil money penalty of $40,000.00.

- The Final Judgments as to defendants Kirstein and Frazier enjoin them from participating as a member of the engagement team of any independent auditing firm that issues audit reports in connection with the financial statements of any public or private entity for a two-year period.

The defendants consented to the entry of the final judgments without admitting or denying the allegations of the Second Amended Complaint ("complaint").
According to the allegations of complaint, Buettner, Kirstein, and Frazier, certified public accountants, served respectively as the engagement partner, the senior manager, and the manager on the failed audit of AHERF -- at its height the largest nonprofit healthcare organization in the Commonwealth of Pennsylvania. The Commission's complaint also alleged that each of them actively participated in a fraudulent scheme to mask AHERF's deteriorating financial condition. In so doing, the defendants participated in the creation and issuance of, and failed to correct, audit reports that contained unqualified opinions concerning AHERF's 1997 consolidated financial statements and AHERF's 1997 supplementary consolidating and combining financial information. For its fiscal year 1997, AHERF reported net income when, in reality, it was operating at substantial net loss.

The scheme, as alleged in the complaint, involved the fraudulent transfer of $99.6 million of reserves from the books of a recently-acquired entity to the books of a group of AHERF-related entities collectively known as the Delaware Valley Obligated Group ("Delaware Valley"). The transferred reserves were used by Delaware Valley to either increase its own reserves or to reduce expenses related to the write-off of uncollectible accounts receivable. According to the complaint, Buettner, Kirstein and Frazier played an active role in the fraud by, among other things, helping AHERF plan fraudulent transfers of reserves and subsequently conducting the 1997 audit in a manner intended to hide both the fraud and their involvement in it. Furthermore, they failed to expand their audit to address the improper transfers, or to investigate evidence of other transfers that violated Generally Accepted Accounting Principles ("GAAP"), as required by Generally Accepted Auditing Standards ("GAAS").

Ultimately, the complaint charged that the defendants knowingly or recklessly caused Coopers and Lybrand to issue false and misleading audit reports containing unqualified opinions that enhanced the credibility of AHERF's reported financial statements. The audited financial statements with attached consolidating schedules were made available to, among others, investors in AHERF-related bonds. The audit reports falsely state, among other things, that the audit was conducted in accordance with GAAS and that the financial statements were in accordance with GAAP and fairly presented AHERF's financial condition. The financial statements, issued by AHERF in February 1997, materially misrepresented that AHERF and Delaware Valley had net income of $21.9 million and $23.7 million, respectively, for fiscal year 1997. Absent the fraud, AHERF and Delaware Valley would have posted substantial net losses of approximately $37.7 million and $35.9 million respectively.

On July 21, 1998, AHERF filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code on behalf of itself and four of its subsidiaries in the U.S. District Court for the Western District of Pennsylvania. By the time of the bankruptcy filing, one or more of the obligated groups were responsible for repaying a total of more than $900 million of outstanding AHERF Bonds. Subsequently, on September 2, 1998, AHERF issued a press release in which it acknowledged that its audits consolidated financial statement for 1997 were inaccurate. In the release, AHERF stated that "[n]o further reliance should be placed on the financial statements or the [Coopers] report thereon." The Commission also announced that, based upon the District Court injunction, it had instituted and simultaneously settled a Rule 102(e)(3) proceeding against Buettner. With Buettner's consent, the Commission suspended him from appearing or practicing before the Commission as an accountant with the right to apply for reinstatement after a period of four years.

See SEC v. William F. Buettner, Mark D. Kirstein and Amy S. Frazier, Litigation Rel. No. 17708; Accounting and Auditing Enforcement Release No. 1624 (Sept. 4, 2002); SEC v. William F. Buettner, Mark D. Kirstein and Amy S. Frazier, Litigation Rel. No. 17083; Accounting and Auditing Enforcement Release No. 1431 (Aug. 1, 2001); In the Matter of Charles P. Morrison, CPA, SEC Litigation Rel. No. 16885, Accounting and Auditing Enforcement Rel. No. 1365 (Jan. 1, 2001); In the Matter of Allegheny Health, Education and Research Foundation, Exchange Act Rel. No.42992 (June 30, 2000); SEC v. David W. McConnell and Charles P. Morrison, SEC Litigation Rel. No. 16534, Accounting and Auditing Enforcement Rel No. 1254 (May 2, 2000); In the Matter of Albert Adamczak, CPA, Exchange Act Rel. No. 42743 (May 2, 2000); In the Matter of Stephen H. Spargo, CPA, Exchange Act Rel. No. 42742 (May 2, 2000).

SEC v. Bruce M. Perry and M. Brooks Turkel, Civ. Action No. 05-21525-CIV-Martinez (S.D. Fla.), Litigation Release No. 19256 (June 8, 2005) (complaint).
See "OBLIGATED PERSONS" section.

COMMISSION ORDERS – SETTLED ADMINISTRATIVE PROCEEDINGS

In the Matter of William F. Buettner, CPA, Exchange Act Release No. 50134, Accounting and Auditing Enforcement Release No. 2070, A.P. File No. 3-11571 (August 2, 2004).

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 William F. Buettner ("Respondent" or "Buettner") pursuant to Rule 102(e)(3)(i) of the Commission's Rules of Practice.[1]

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") that 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 entry of the injunction set forth in Section III.E. below, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

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

A. Buettner, age 53, is an inactive certified public accountant licensed in the Commonwealth of Pennsylvania. Buettner was an engagement partner on Coopers & Lybrand, L.L.P.'s ("Coopers") independent audits of Allegheny Health, Education and Research Foundation ("AHERF") for fiscal years 1989 through 1992 and sole engagement partner from 1992 through 1997. Buettner retired from Coopers, now PricewaterhouseCoopers, L.L.P. in 2000.

B. AHERF was a Pennsylvania non-profit healthcare organization formed in 1983. Through, at least, July 1998, AHERF was the parent holding company and sole member or owner of numerous subsidiaries.[2] On July 21, 1998, AHERF instituted bankruptcy proceedings under Chapter 11 of the United States Bankruptcy Code on behalf of itself and four of these subsidiaries in the U.S. District Court for the Western District of Pennsylvania.

C. As an umbrella holding company, AHERF managed and provided centralized corporate support services for subsidiaries that it acquired, but did not assume liability for their pre-existing debt. The obligation to repay debt within AHERF was the responsibility of one or more of its non-profit subsidiaries known as "obligated groups." By 1997, AHERF had five obligated groups. By the time of the bankruptcy in July 1998, AHERF's obligated groups were responsible for, at least, thirteen bond issues, with outstanding debt of more than $900 million.

D. On November 5, 2002, the Commission filed a Second Amended Complaint (the "Complaint") against Buettner and others in the United States District Court for the Eastern District of Pennsylvania. SEC v. William F. Buettner, et al., Civil Action No. 01-CV-3898 (E.D. Pa.). The Commission's Complaint alleges that, during 1997, AHERF had engaged in a scheme to conceal its deteriorating financial condition by fraudulently transferring $99.6 million of reserves from the books of one AHERF-related entity to the books of a group of AHERF-related entities collectively known as the Delaware Valley Obligated Group. The Complaint also alleges that Buettner knew or should have known that AHERF had improperly created and/or transferred certain reserves and that he knowingly or recklessly failed to conclude that 1997 income was overstated on both the 1997 AHERF consolidated financial statements and the 1997 Delaware Valley consolidating schedules. The Complaint alleges that Buettner participated in the creation and issuance of, and failed to correct the unqualified audit report on AHERF's 1997 consolidated financial statements and the report on AHERF's 1997 supplementary consolidating and combining financial information. The Complaint alleges that these reports materially misstated that the 1997 audit was conducted in accordance with Generally Accepted Auditing Standards ("GAAS") and that the financial statements fairly presented AHERF's financial condition in conformity with Generally Accepted Accounting Principles ("GAAP"). The Complaint also alleges that the reports misrepresented that the supplementary consolidating and combining financial information was fairly stated in all material respects in relation to the consolidated financial statements taken as a whole. The Complaint further alleges that, for its fiscal year 1997, AHERF reported net income when, in reality, it was operating at a substantial net loss.

E. On July 28, 2004, the United States District Court for the Eastern District of Pennsylvania entered a final judgment permanently enjoining Buettner from violating Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Buettner consented to the entry of the final judgment without admitting or denying the allegations in the Commission's Second Amended Complaint.

IV.

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

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

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

B. After four (4) years from the date of this Order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

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

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

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

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

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

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

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

By the Commission.
Jonathan G. Katz
Secretary

Endnotes

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[1] Rule 102(e)(3)(i)(A) provides, in relevant part, that:

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

[2] AHERF's underlying entities are referred to as "subsidiaries," although technically AHERF was their sole "member," not a shareholder.

In the Matter of Mount Sinai Medical Center of Florida, Inc., M. Brooks Turkel and Harvey W. Smith, Securities Act Release No. 8580, Securities Exchange Act Release No. 51797, Accounting and Auditing Enforcement Release No. 2254, A.P. File No. 3-11944 (June 7, 2005).
See “OBLIGATED PERSONS” section.

SALES PRACTICES

INJUNCTIVE PROCEEDINGS

SEC v. Mark David Anderson, Civ. Action No. 04-1114 GAF (RCx) (C.D. Cal.), Litigation Release No. 18587 (February 23, 2004).

On February 19, 2004, the Commission filed an injunctive action in United States District Court in Los Angeles, California to enforce an order issued against Mark David Anderson by the Commission in an administrative proceeding in which Anderson was a respondent. Specifically, on August 15, 2003, Anderson was ordered, among other things, to pay a $96,000 civil penalty in a proceeding in which the Commission found that he had fraudulently charged undisclosed and excessive markups and markdowns in trades with retail customers. In the Matter of Mark David Anderson, Admin. Pro. File No. 3-9499. Anderson has failed to pay any of the $96,000 civil penalty. Through the present action, the Commission is seeking a federal court order compelling Anderson to pay the $96,000 penalty as previously ordered by the Commission.