

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

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 2654 / September 25, 2007**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-12827**

**In the Matter of**

**FINANCIAL DESIGN ASSOCIATES,  
INC. and ALBERT L. COLES, JR.,**

**Respondents.**

**ORDER INSTITUTING ADMINISTRATIVE  
AND CEASE-AND-DESIST PROCEEDINGS,  
MAKING FINDINGS, AND IMPOSING  
REMEDIAL SANCTIONS AND A CEASE-  
AND-DESIST ORDER PURSUANT TO  
SECTIONS 203(e), 203(f), AND 203(k) OF THE  
INVESTMENT ADVISERS ACT OF 1940**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Financial Design Associates, Inc. (“FDA”) and Sections 203(f) and 203(k) of the Advisers Act against Albert L. Coles, Jr. (“Coles”) (together, “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 Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, as set forth below.

### **III.**

On the basis of this Order and Respondents' Offers, the Commission finds that

#### **Summary**

1. Albert Coles and his investment advisory firm, FDA, failed to disclose to FDA clients payments Coles received from a company in which he advised FDA clients to invest. Coles and FDA falsely represented in various client disclosures that FDA and Coles were compensated solely by FDA clients and received no payments for the investments recommended by the firm. Between 2002 and 2006, Coles received approximately \$361,307 in undisclosed referral fees (including accrued interest on the fees) from a company in which Coles and FDA recommended clients invest. The undisclosed payments created a conflict of interest compromising the objectivity of FDA's investment recommendations to clients. Coles and FDA thus breached their fiduciary duties and willfully violated Sections 206(1), 206(2), and 207 of the Advisers Act.

#### **Respondents**

2. Respondent FDA is a Stinson Beach, California investment advisory firm which has been registered with the Commission since 1994. It currently has approximately \$85 million in assets under management and 65 client relationships.

3. Respondent Coles, 50, is a resident of Stinson Beach, California. Coles is the founder, President, Chief Operating Officer, and Chief Investment Officer of FDA.

#### **Facts**

4. FDA provides investment advice to high net-worth individuals, trusts, and small businesses' retirement accounts. Coles is FDA's founder, President, and its only full-time investment adviser. FDA does not publicly advertise or otherwise promote itself, acquiring clients generally through word of mouth.

5. Coles and FDA have typically relied on oral explanations of FDA's strategy and business model when offering advisory services to prospective clients. In addition to these oral explanations, since approximately 2003 Coles has provided prospective clients with an "Executive Summary" describing FDA. The two-page document claims that FDA is a "fee-only" investment adviser – in other words, FDA charges clients annual fees based on a percentage of assets under management and according to the Executive Summary, "[W]e are compensated only by [FDA] clients and receive nothing for the investments we recommend to them. This allows us to select the best investments for you without any conflicts of interest."

6. FDA clients also received Part II of FDA's Form ADV, a disclosure form filed with the Commission, which stated that FDA received compensation from clients as a percentage of assets under management. Part I of FDA's Forms ADV, filed with the Commission annually on June 15, 2001, May 7, 2002, April 2, 2003, March 2, 2004, March 15,

2005, and June 15, 2006, and signed by Coles, falsely stated that FDA and its related persons were not paid commissions and did not recommend securities to clients in which FDA had a sales interest. In Part II of the Form ADV, filed with the Commission in August 1999 and not updated until August 2006, FDA falsely stated that neither it nor or any related person “recommend[s] purchase or sale of securities to advisory clients for which you or any related person has any other sales interest.”

7. FDA’s client disclosures failed to disclose that, in fact, FDA and Coles were receiving payments from a company in which Coles was placing FDA clients’ investments. No later than early 2001, Coles entered into an agreement with a small mortgage finance company (the “issuer”) pursuant to which Coles would receive referral fees for recommending that FDA clients invest in its securities. The referral fees were based on the size of the investments in the issuer made by Respondents’ advisory clients.

8. Coles and FDA did not tell FDA clients of the agreement prior to advising them to invest in the issuer. Between 2002 and 2006, around 40 FDA clients invested a total of approximately \$30 million in the issuer. Pursuant to their agreement, Coles received approximately \$361,307, including accrued interest, in undisclosed referral fees from the issuer during this period.

9. The payments to Coles created a conflict of interest between FDA and its clients. By receiving compensation from the issuer, Coles compromised his ability to evaluate independently the merit of the investments he recommended to FDA clients.

10. Coles and FDA breached their fiduciary duties by failing to disclose to FDA clients the agreement with the issuer. In addition, Coles’ receipt of undisclosed payments from a company in which he recommended his clients invest made FDA’s representations false and misleading. Contrary to Respondents’ representations in FDA’s Executive Summary and Form ADV disclosures, Coles did, in fact, receive payments from an issuer whose securities he recommended to FDA clients.

### **Violations**

11. Sections 206(1) and 206(2) of the Advisers Act establish a fiduciary duty for investment advisers to act for the benefit of their clients. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 17 (1979). Section 206(1) prohibits an investment adviser from employing any device, scheme, or artifice to defraud any client or prospective client; Section 206(2) makes it unlawful for an adviser to engage in any transaction, practice, or course of business that operates as a fraud or deceit upon any client or prospective client. Section 207 of the Advisers Act makes it unlawful for any person to willfully make any untrue statement of a material fact or omit to state any material fact required to be stated in a report filed with the Commission.

12. Coles and FDA willfully violated Sections 206(1), 206(2), and 207 of the Advisers Act by receiving referral fees from an issuer in which they recommended FDA clients invest, failing to disclose the referral fee agreement to FDA clients and in FDA’s Form ADV, and misstating that no such agreement existed.

## Undertakings

Respondent FDA will undertake to:

13. Within thirty (30) days of entry of the Order, mail a copy of this Order, together with a cover letter in a form not unacceptable to the staff, to each of FDA's existing clients. Respondents shall also provide any new FDA client which engages FDA within one year of the date of the Order with a copy of the Order.

### IV.

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

Accordingly, pursuant to Sections 203(e), 203(f), and 203(k) of the Advisers Act it is hereby ORDERED that:

- A. Respondents be, and hereby are, censured;
- B. Respondents shall cease and desist from committing or causing any violations and any future violations of Sections 206(1), 206(2), and 207 of the Advisers Act;
- C. IT IS FURTHERED ORDERED that Respondent Coles shall, within 30 days of the entry of this Order, pay an initial disgorgement payment of \$260,000 and a civil money penalty in the amount of \$40,000 to the United States Treasury. Such payment shall be: (A) made by United States postal money order, certified check, bank cashier's check, or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Albert L. Coles, Jr. as a Respondent in these proceedings and the file number of these proceedings. A copy of the cover letter and money order or check shall be sent to Helane L. Morrison, Esq., Regional Director, Division of Enforcement, Securities and Exchange Commission, San Francisco Regional Office, 44 Montgomery Street, Suite 2600, San Francisco, CA 94104;
- D. IT IS FURTHER ORDERED that, on a quarterly basis beginning 90 days from the date of the entry of this Order, Respondent Coles shall pay, in three equal installments, the remainder of \$101,307 in disgorgement owed, plus post-judgment interest. Such payments shall be: (A) made by United States postal money order, certified check, bank cashier's check, or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Albert L. Coles, Jr. as a Respondent in these proceedings and the file number of these proceedings. A copy of the cover letter and money

order or check shall be sent to Helane L. Morrison, Esq., Regional Director, Division of Enforcement, Securities and Exchange Commission, San Francisco Regional Office, 44 Montgomery Street, Suite 2600, San Francisco, CA 94104. Respondent Coles agrees that if the full amount of any payment described above is not made by the date the payment is required by this Order, the entire amount of disgorgement and civil penalties, plus any interest accrued pursuant to SEC Rule of Practice 600 minus payments made, if any, is due and payable immediately without further application; and

E. IT IS FURTHER ORDERED that Respondent FDA shall comply with the undertakings enumerated in Section III, above.

By the Commission.

Nancy M. Morris  
Secretary