

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933

Release No. 8894 / February 14, 2008

SECURITIES EXCHANGE ACT OF 1934

Release No. 57327 / February 14, 2008

INVESTMENT COMPANY ACT OF 1940

Release No. 28152 / February 14, 2008

ADMINISTRATIVE PROCEEDING

File No. 3-12559

In the Matter of

**TRAUTMAN WASSERMAN &
COMPANY, INC.,
GREGORY O. TRAUTMAN,
SAMUEL M. WASSERMAN,
MARK BARBERA,
JAMES A. WILSON, JR.,
JEROME SNYDER, AND
FORDE H. PRIGOT,**

Respondents.

**ORDER MAKING FINDINGS AND
IMPOSING REMEDIAL SANCTIONS
PURSUANT TO SECTION 15(b) OF
THE SECURITIES EXCHANGE ACT
OF 1934 AND SECTION 9(b) OF THE
INVESTMENT COMPANY ACT OF
1940, AND INSTITUTING A CEASE-
AND-DESIST PROCEEDING
PURSUANT TO SECTION 8A OF THE
SECURITIES ACT OF 1933, SECTION
21C OF THE SECURITIES
EXCHANGE ACT OF 1934 AND
SECTION 9(f) OF THE INVESTMENT
COMPANY ACT OF 1940, MAKING
FINDINGS AND IMPOSING A
CEASE-AND-DESIST ORDER AS TO
MARK BARBERA**

I.

On February 5, 2007, the Securities and Exchange Commission (“Commission”) instituted public administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”), Sections 15(b) and 21C of the Securities Exchange Act of 1934 (“Exchange Act”), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 (“Investment Company Act”) against respondents including Mark Barbera (“Respondent” or “Barbera”). On June 1, 2007, the Commission issued an Order Dismissing Cease-and-Desist Proceedings Against Barbera, which dismissed the cease-and-desist proceedings instituted by the

Commission's order dated February 5, 2007. The Commission deems it appropriate and in the public interest that the cease-and-desist proceedings be, and hereby are, instituted as to Barbera.

II.

Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 9(b) of the Investment Company Act of 1940, and Instituting a Cease-and-Desist Proceeding Pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934 and Section 9(f) of the Investment Company Act of 1940, Making Findings and Imposing a Cease-and-Desist Order as to Mark Barbera ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

Summary

1. This matter concerns a scheme to defraud mutual funds through, among other conduct, late trading of mutual funds through Trautman Wasserman & Company, Inc. ("TWCO"), a registered broker-dealer. Between January 2001 and September 2003, TWCO accepted thousands of orders from its hedge fund customers to trade mutual funds after 4:00 p.m. ET, but executed the trades as though they had been received prior to 4:00 p.m. ET. In addition, TWCO employed deceptive tactics to evade mutual funds' efforts to restrict TWCO's hedge fund customers' market timing of mutual funds. This illegal conduct generated significant revenues for TWCO and harmed mutual fund investors by diluting the value of their investment.

2. TWCO's mutual fund trading department consisted principally of two registered representatives ("RRs"), James A. Wilson, Jr. ("Wilson") and Scott A. Christian ("Christian"). Wilson directed the late trading and market timing schemes, and he personally accepted customers' late trading orders. Christian handled day-to-day communications with customers, and he regularly accepted and entered late trades. In carrying out the fraudulent late trading scheme, Wilson and Christian created records falsely indicating that customers had placed trades before 4 p.m.

3. Barbera, TWCO's chief financial officer ("CFO"), was present for parts of various discussions between other TWCO partners and officers, including TWCO's Chief Executive Officer ("CEO") and Chairman, and Wilson where the practice of submitting trades after 4:00 p.m. ET was

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.

discussed. In addition, Barbera sought capacity that could be used for mutual fund trading. Further, Barbera approved using TWCO assets to trade mutual funds through a proprietary account, which subsequently traded on the basis of news and market conditions after the market close, but those trades were priced at that day's net asset value (NAV). The CEO of TWCO generally placed the trades in the proprietary account.

Respondent

4. **Barbera**, age 50, is a resident of Bronxville, NY. Barbera has been CFO of TWCO since 1993. At all relevant times, Barbera was associated with TWCO. Barbera holds or has held Series 3, 4, 7, 24, 27 and 63 licenses.

Related Entity

5. **TWCO**, based in New York, New York, was at all relevant times a broker-dealer registered with the Commission.

Late Trading

6. Rule 22c-1(a) under the Investment Company Act requires investment companies issuing redeemable securities, their principal underwriters and dealers, and any person designated in the fund's prospectus as authorized to consummate transactions in securities issued by the fund to sell and redeem fund shares at a price based on the current net asset value ("NAV") next computed after receipt of an order to buy or redeem. Mutual funds generally determine the daily price of their mutual fund shares as of 4:00 p.m. ET. In these circumstances, orders received before 4:00 p.m. ET must be executed at the price determined as of 4:00 p.m. ET that day. Orders received after 4:00 p.m. ET must be executed at the price determined as of 4:00 p.m. ET the next trading day.

7. "Late trading" refers to the practice of placing orders to buy or sell mutual fund shares after the time as of which a mutual fund has calculated its NAV (usually as of the close of trading at 4:00 p.m. ET), but receiving the price based on the prior NAV already determined as of 4:00 p.m. ET. Late trading enables the trader to profit from market events that occur after 4:00 p.m. ET but that are not reflected in that day's price. In particular, the late trader obtains an advantage – at the expense of the other shareholders of the mutual fund – when he learns of market moving information and is able to purchase (or sell) mutual fund shares at prices set *before* the market moving information was released. Late trading violates Rule 22c-1(a) under the Investment Company Act. Late trading also harms shareholders, for instance, when late trading dilutes the value of their shares.

Late Trading At TWCO

8. In 2000, the Chairman of TWCO began attempting to set up a mutual fund trading operation at TWCO. The Chairman recruited Wilson and Christian, who were at that time working at another broker-dealer. While interviewing for their positions at TWCO, Wilson and Christian learned that TWCO's clearing broker, Banc of America Securities, LLC ("B of A"), offered a mutual fund trading system that allowed mutual fund trades to be entered until 8:30 p.m. ET and still be priced at the same NAV as orders submitted by 4:00 p.m. ET. The

Chairman, who managed TWCO's relationship with B of A, arranged meetings between Wilson, Christian, and B of A representatives so that they could discuss the mutual fund trading platform. After these meetings, Wilson and Christian realized that they could directly enter mutual fund trades into this system, thereby bypassing the B of A mutual fund desk.

9. Wilson and Christian began working at TWCO in December 2000.

10. Although the B of A system allowed orders to be entered and processed as late as 8:30 p.m. ET, Wilson and Christian were aware that they were supposed to receive orders from customers by 4:00 p.m. ET in order to execute them at that day's price. For example, B of A's "Mutual Funds Processing" manual that B of A provided to TWCO required that: "All orders should be received and time stamped by the close of the NYSE, 4 PM EST."

11. Wilson and Christian then contacted their former market timing customers as well as other prospective customers to pitch the advantages of the market timing and late trading system that they were developing at TWCO. In return, Wilson extracted extra compensation for providing late trading. For example, on April 11, 2001, the manager of a hedge fund, Hedge Fund A, that was interested in late trading sent an e-mail to Wilson complaining that TWCO was "earning double what everyone else takes home on this business," and that "[y]ou currently earn 2% p.a. [per annum]." Further, the manager of Hedge Fund A complained that "[y]our facility for late trading is not the only one we have," and that "[i]n all the other cases, we pay 1% p.a." On April 11, 2001, Wilson sent an e-mail to Hedge Fund A's manager indicating that "**we are the only place to trade late past 530**" (emphasis in original), and "thus you have to pay more." On May 1, 2001, the hedge fund manager notified Wilson by e-mail that Hedge Fund A was sending funds to begin trading. The hedge fund manager described how the late trading would work as follows:

In essence, most of it will be done by you within certain parameters that we will give you each day. In the majority of cases, your decision point will be 5:30pm NY time. In a few cases, your decision point will be 6:30pm – I know, slave labor...whatever will you do working that late!

12. Wilson directed the daily operations of his and Christian's late trading and market timing business. At Wilson's direction, Christian and another TWCO employee entered tens of thousands of late trades for Wilson's customers. Moreover, Wilson directed Christian and the other employee to create false records, "for compliance reasons," intended to show that TWCO had received the customer's trading orders prior to 4:00 p.m. ET.

13. On a daily basis, customers sent tentative instructions to purchase or redeem mutual fund shares to TWCO during the day, beginning at approximately 12 noon ET. TWCO treated these trading instructions as order tickets. As the trading instructions came in, Christian would collect them, but he would not enter the orders or time stamp the order tickets. Rather, Christian waited until shortly before 4:00 p.m. ET to time stamp the order tickets.

14. Christian sometimes forgot to time stamp the order tickets before 4:00 p.m. ET, resulting in some order tickets that were stamped after 4:00 p.m. ET. Wilson eventually gave Christian an alarm clock, which Christian set to go off shortly before 4:00 p.m. ET to remind him to stamp the order tickets. When the alarm went off, Christian and the other TWCO employee

would time stamp the trading instructions. This practice made it appear as if TWCO received the instructions shortly before 4:00 p.m. ET.

15. However, Christian and the other employee did not enter the orders into the B of A mutual fund trading system when they time stamped the orders. Instead, between 4:00 p.m. ET and 6:30 p.m. ET, Wilson, Christian, or the other employee spoke with customers to get their final trading decisions.

16. Sometimes customers gave final trading instructions that were “cancellations” or partial cancellations of the tentative orders placed earlier in the day. Often, customers submitted wholly new orders that were not part of the tentative instructions they had submitted earlier in the day. Only then did Christian or the other employee enter the trading orders, without creating a new or modified order ticket reflecting the actual order or with the correct time stamp on the ticket.

17. TWCO, through Wilson and Christian, routinely accepted mutual fund trading instructions for Hedge Fund A, as well as for two other hedge funds, Hedge Fund B and Hedge Fund C, well past 4:00 p.m. ET and often as late as between 5:00 and 6:45 p.m. ET. For these customers, virtually all the trading in mutual funds at TWCO consisted of late trading.

18. Wilson also personally took customers’ mutual fund orders to engage in late trading. For example, tape recordings made at Hedge Fund B of telephone calls indicate that Wilson accepted mutual fund orders at 4:41 p.m. ET on February 14, 2003, at 5:17 p.m. ET on September 27, 2001, and at 6:08 p.m. ET on December 18, 2001. After receiving these orders, Wilson then entered the trades so they could be executed at the same day’s NAV.

19. Further, Wilson was fully aware of the procedures that Christian and the other employee routinely used for executing late trades. For example, on February 14, 2003, at 4:41 p.m. ET, a trader at Hedge Fund B telephoned TWCO and said, “Hey, Jim, it’s [a representative of Hedge Fund B]. ... You got Scott or [the other employee] there to take some trades?” Wilson replied, “I can help you,” and proceeded to accept Hedge Fund B’s late trading decisions. Wilson then said, “Let me just read this back to you. I haven’t done this in a while so I don’t have any embarrassing situations.” On September 27, 2001 at 5:17 p.m. ET, the same representative of Hedge Fund B telephoned TWCO and asked for Christian. Wilson said that Christian had just stepped away, offered to take the order, and said he would “grab the sheets” off Christian’s desk, referring to the trading instructions sent by Hedge Fund B and time stamped by TWCO before 4:00 p.m. ET. Wilson proceeded to accept Hedge Fund B’s instructions as to which trades on the trading instructions it wished to confirm, cancel, or modify. Wilson concluded by telling Hedge Fund B’s representative that he could call with additional trading decisions until 5:30 p.m. ET.

20. Further, as evident from his April 11, 2001 email to Hedge Fund A quoted above (demanding higher fees because of the value of late trading), Wilson knew that TWCO’s hedge fund customers benefited from the ability to late trade. Wilson knew that customers factored into their trading decisions after-hours news announcements and market conditions. For example, he knew from e-mails with Hedge Fund A that the hedge fund based its trading instructions on parameters for after-hours index futures prices that Hedge Fund A provided to TWCO.

21. At Wilson's direction, Christian and the other TWCO employee regularly helped customers follow calendars of corporate earnings announcements and relayed to customers information regarding notable developments after the market close. Further, Christian frequently provided customers shortly after 4:00 p.m. ET with newly-calculated mutual fund NAVs reflecting the current day's pricing. This allowed customers to compare the NAVs of mutual funds against after hours trading in stocks in those funds, and thereby compute with some degree of precision the actual trading profit they would make on a given late trade.

22. Wilson also persuaded TWCO's partners to establish a proprietary account with the firm's money to serve as the basis for a TWCO managed hedge fund. In late 2001, TWCO opened a mutual fund trading account, and TWCO ultimately deposited approximately \$500,000 into the account.

TWCO Partners Approved and/or Participated in Late Trading

23. An executive committee consisting of the firm's principals, including TWCO's CEO, TWCO's Chairman, and Barbera, managed TWCO. The executive committee held regular weekly meetings and other ad hoc meetings to discuss the business of the firm and to engage in planning and decision-making. TWCO's CEO and TWCO's Chairman were aware of Wilson's and Christian's late trading.

24. Barbera was present for parts of various discussions between other TWCO partners and officers, including TWCO's CEO and Chairman, and Wilson where the practice of submitting trades after 4:00 p.m. ET was discussed.

25. TWCO's CEO offered late trading to at least one of his customers ("Customer 89001"). With Barbera present, TWCO's CEO explained to Customer 89001 that when deciding to purchase shares of mutual funds, for instance, TWCO would use a "trigger." The trigger was when the price of stock futures contracts rose by 1.5% in after-hours (post-4:00 p.m. ET) trading. TWCO's CEO told Customer 89001, and Barbera confirmed to Customer 89001, that TWCO's CEO had made money on 13 of 15 trades using this system. Customer 89001 then invested with TWCO. TWCO placed Customer 89001's funds in a TWCO brokerage account. Subsequently, TWCO's CEO placed late trades for Customer 89001's account.

26. The TWCO partners actively participated in the mutual fund business by seeking timing capacity from fund companies. In particular, TWCO's CEO used a personal friendship with a fund manager at one fund complex to obtain large amounts of capacity. Further, TWCO's Chairman used his long-standing contacts at another fund complex to increase TWCO's capacity in those funds. Neither TWCO's CEO nor TWCO's Chairman disclosed to the fund complexes that TWCO would use the capacity for late trading.

27. Barbera also engaged in efforts to obtain capacity. At various times in 2002 and 2003, Barbera sought timing capacity from other entities that could be used for mutual fund trading on behalf of TWCO's customers.

28. In September 2002, Barbera drafted a letter agreement setting forth the fee arrangement for a \$5 million discretionary account established by one customer, which TWCO's

CEO, TWCO's Chairman, Wilson, and Christian knew would be used for late trading. Barbera should have known that others intended to and did use this account to place trades after 4:00 p.m. ET.

29. Also in the spring of 2003, Barbera and Christian sought to develop a relationship with a data processing firm for the purpose of enabling TWCO to engage in mutual fund trading apart from the B of A system.

30. Wilson also persuaded TWCO's partners to establish a proprietary account with the firm's money to serve as the basis for a TWCO managed hedge fund. In late 2001, TWCO opened a mutual fund trading account, and TWCO ultimately deposited approximately \$500,000 into the account. Initially, the TWCO proprietary account copied the market timing trades of a TWCO customer. When the account started losing money, TWCO's CEO took charge of trading in the account. TWCO's CEO then began to make trading decisions in the account based on news developments that occurred after 4:00 p.m. ET.

31. Subsequently, TWCO's CEO often went to Wilson's and Christian's office at TWCO after the market close to decide whether to place mutual fund trades in the TWCO account based on news and market conditions after 4:00 p.m. ET. TWCO's CEO occasionally referred to the ability to trade late on news or post-4:00 p.m. ET futures market conditions as the firm's "elixir," "magic potion," or "special juice."

32. Barbera monitored the TWCO proprietary account for net capital purposes.

Violations

33. As a result of the conduct described above, Barbera willfully violated Section 17(a)(2) of the Securities Act, which makes it unlawful for any person in the offer or sale of securities, directly or indirectly, to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. Section 17(a)(2) of the Securities Act has no scienter requirement. *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980). Negligent conduct can violate Section 17(a)(2) of the Securities Act. *See, e.g., SEC v. Hughes Capital Corp.*, 124 F.2d 449, 453 (3d Cir. 1997); *In the Matter of Raymond James Financial Services, Inc.*, Exchange Act Release No. 49234 (Feb. 12, 2004).

34. As a result of the conduct described above, TWCO violated Section 15(c) of the Exchange Act, which prohibits fraudulent, deceptive or manipulative acts by brokers or dealers in connection with the purchase or sale of securities. Barbera caused TWCO's violations of Section 15(c) of the Exchange Act.

35. As a result of the conduct described above, TWCO's clearing firm, B of A, violated Rule 22c-1, as adopted under Section 22(c) of the Investment Company Act, and Barbera caused B of A's violations. Rule 22c-1 prohibits dealers in a mutual fund's shares, among others, from executing a trade in that mutual fund's shares at that day's NAV if the trade was received after the time as of which the mutual fund has calculated that day's NAV (e.g., 4:00 p.m. ET). B of A had dealer agreements with the primary underwriters of several mutual funds that were late traded by

TWCO's customers. B of A sold and redeemed fund shares at prices not based on the current NAV next computed after receipt of an order to buy or redeem to facilitate the late trading engaged in by these customers.

IV.

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

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

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

B. Respondent Barbera cease and desist from causing any violations and any future violations of Section 15(c) of the Exchange Act, and from committing or causing any violations and any future violations of Rule 22c-1, as adopted under Section 22(c) of the Investment Company Act;

C. Respondent be, and hereby is, suspended from association with any broker or dealer for a period of six (6) months, effective on the second Monday following the entry of this Order; and

D. Respondent 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 for a period of six (6) months, effective on the second Monday following the entry of this Order.

By the Commission.

Nancy M. Morris
Secretary