

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

Securities Exchange Act of 1934  
Release No. 58792 / October 15, 2008

Administrative Proceeding  
File Number 3-11893

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In the Matter of	:	ORDER MAKING FINDINGS
	:	AND IMPOSING A CEASE-AND-DESIST
	:	ORDER PURSUANT TO SECTION
	:	21C OF THE SECURITIES EXCHANGE
	:	ACT OF 1934 AS TO KEVIN M. FEE
David A. Finnerty,	:	
Donald R. Foley II,	:	
Scott G. Hunt,	:	
Thomas J. Murphy, Jr.,	:	
Kevin M. Fee,	:	
Frank A. Delaney IV,	:	
Freddy DeBoer,	:	
Todd J. Christie,	:	
James V. Parolisi,	:	
Robert W. Luckow,	:	
Patrick E. Murphy,	:	
Robert A. Johnson, Jr.,	:	
Patrick J. McGagh, Jr.,	:	
Joseph Bongiorno,	:	
Michael J. Hayward,	:	
Richard P. Volpe,	:	
Michael F. Stern,	:	
Warren E. Turk,	:	
Gerard T. Hayes, and	:	
Robert A. Scavone, Jr.	:	
	:	
	:	
Respondents.	:	
	:	
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On April 12, 2005, the Securities and Exchange Commission (“Commission”) entered an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b)(6), 21C and 11(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 11b-1 Thereunder (“OIP”) against respondent Kevin M. Fee (“Fee”).

## **II.**

Fee has submitted an Offer of Settlement (“Offer”) in these administrative proceedings, 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, Fee consents to the entry of this Order Making Findings and Imposing a Cease-and-Desist Order Pursuant to Section 21C Securities Exchange Act of 1934 as to Kevin M. Fee, as set forth below.

## **III.**

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

### **FACTS**

1. Fee is one of several respondents in pending administrative and cease-and-desist proceedings, file number 3-11893, who have been charged with improper trading during the period from at least 1999 through June 30, 2003 (the “Relevant Period”), while they were acting as specialists on the New York Stock Exchange (“NYSE”).
2. Fee, age 40, of Ridgewood, New Jersey, acted as a specialist on the NYSE at Bear Wagner Specialists LLC (“Bear Wagner”) from at least March 2000 to approximately November 2004.
3. During the Relevant Period charged in the Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b), 21C and 11(b) of the Securities Exchange Act of 1934 and Rule 11b-1 Thereunder, Fee acted as a specialist in Texas Instruments, Inc. (“TXN”) (from approximately March 2000 through June 2003).
4. As a specialist, Fee had an obligation to serve public customer orders over the proprietary interests of the firm with whom he was formerly employed, Bear

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

Wagner. In his role as a specialist, Fee had a general duty to match executable public customer or “agency” buy and sell orders and not to fill customer orders through trades from Bear Wagner’s own account when those customer orders could be matched with other customer orders.

5. Interpositioning involves a two-step process that allows the specialist to generate a profit for the specialist firm from the spread between two opposite trades. Interpositioning can take various forms. In one form, the specialist purchases stock for the specialist firm’s proprietary account from the customer sell order, and then fills the customer buy order by selling from the specialist firm’s proprietary account at a higher price. A second form of interpositioning involves the specialist selling stock into the customer buy order, and then filling the customer sell order by buying for the specialist firm’s proprietary account at a lower price. In both forms of interpositioning, the specialist participates on both sides of the trade, thereby capturing the spread between the purchase and sale prices, disadvantaging at least one of the parties to the transaction.
6. Trading ahead involves a practice whereby the specialist fills an agency order through a proprietary trade for the specialist firm’s proprietary account – by improperly ‘stepping in front’ of, or ‘trading ahead’ of, another agency order. Unlike interpositioning, the practice of “trading ahead” does not necessarily involve a second specialist trade for the specialist firm’s proprietary account into the opposite, disadvantaged agency order. For example, in a declining market, a specialist may “trade ahead” by filling a market buy order by selling stock from the specialist firm’s proprietary account in front of an agency market sell order. In so doing, the specialist would execute a trade for the proprietary account at a higher price, then fill the agency sell order *after* the proprietary trade, thereby resulting in the agency market sell order receiving a lower price as the price of the stock fell.
7. During the Relevant Period, in TXN, Fee executed hundreds of trades that constituted interpositioning, which generated thousands of dollars in profit for his firm’s proprietary account at the expense of customer orders, and hundreds of trades that constituted trading ahead, which generated thousands of dollars in customer harm.

## **APPLICABLE LAW**

### **Section 11(b) of the Exchange Act and Rule 11b-1 Thereunder**

8. Section 11(b) of the Exchange Act and Rule 11b-1 thereunder require various limitations on the operations of specialists, including limiting a specialist’s dealer transactions to those “reasonably necessary to permit him to maintain a fair and orderly market.” Section 11(b) and Rule 11b-1 permit a national securities exchange to promulgate rules that allow a member to register as a specialist and to act as a dealer. Under Rule 11b-1 if the Commission finds, after appropriate

notice and opportunity for hearing, that a specialist has for any account in which he has an interest “effected transactions ... which were not part of a course of dealings reasonably necessary to permit such specialist to maintain a fair and orderly market,” and were “not effected in a manner consistent with the rules adopted by such exchange,” the Commission may order the exchange to suspend or cancel the specialist’s registration. If, however, the exchange itself has suspended or canceled the specialist’s registration, no further sanction shall be imposed unless the Commission finds “substantial or continued misconduct.”

9. Where specialists make trades for their firm’s proprietary accounts that are not “reasonably necessary to permit [such specialists] to maintain a fair and orderly market,” they have violated Section 11(b) and Rule 11b-1 of the Exchange Act. The Commission has brought settled actions for sanctions under Exchange Act Section 15(b) against specialists under Section 11(b) and Rule 11b-1. See In the Matter of Albert Fried & Co. and Albert Fried, Jr., 1978 WL 196046, S.E.C. Release No. 34-15293 (Nov. 3, 1978).
10. Several NYSE rules prohibit a specialist from trading ahead of a customer order, as well as from engaging in interpositioning, and require agency orders to be matched whenever possible, consistent with a specialist’s duty to maintain a fair and orderly market.
11. NYSE Rule 104 (Dealings by Specialists), which sets forth specialists’ obligations, prohibits specialists from trading for their own accounts unless it is reasonably necessary to maintain a fair and orderly market. This is known as the negative obligation. Rule 104 states in relevant part: “No specialist shall effect . . . purchases or sales of any security in which such specialist is registered . . . , unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market.”<sup>2</sup>
12. NYSE Rule 92 (Limitations on Members’ Trading Because of Customers Orders) generally prohibits a member from entering a proprietary order to buy (or sell) a security while in possession of an executable buy (or sell) agency order that could be executed at the same price. During the Relevant Period, Rule 92 stated in relevant part:

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<sup>2</sup> Rule 104.10(3), which describes specialists’ affirmative obligations, also expands on the negative obligation:

Transactions on the Exchange for his own account effected by a member acting as a specialist must constitute a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to the minimizing of the effects of temporary disparity between supply and demand, immediate or reasonably to be anticipated. Transactions not part of such a course of dealings ... are not to be effected.

No member shall personally buy . . . any security . . . for his own account or for any account in which he is . . . interested . . . while such member personally holds or has knowledge that his member organization holds an unexecuted market order to buy such security . . . for a customer.<sup>3</sup>

13. Similarly, NYSE Rule 92 also applies to the specialist buying or selling a security while holding an unexecuted market buy or sell order, as well as to circumstances where the specialist holds unexecuted customer limit orders at a price that could be satisfied by the proprietary transaction effected by the specialist.
14. NYSE Rule 123B (Exchange Automated Order Routing Systems) requires specialists to cross orders received over the DOT system. Rule 123B(d) states in relevant part: “a specialist shall execute System orders in accordance with Exchange auction market rules and procedures, including requirements to expose orders to buying and selling interest in the trading crowd and *to cross orders before buying or selling from his own account.*” (Emphasis added).
15. NYSE Rule 401 requires NYSE members to “adhere to the principles of good business practice in the conduct of his or its business affairs.” Similarly, NYSE Rule 476(a)(6) provides sanctions if NYSE members are adjudged guilty of “conduct or proceeding inconsistent with just and equitable principles of trade.”
16. As a result of the conduct described above, Fee violated the aforementioned NYSE rules and violated Section 11(b) of the Exchange Act and Rule 11b-1 thereunder.

#### IV.

In view of the foregoing, the Commission deems it appropriate to impose the cease-and-desist order agreed to in Fee’s Offer.

Accordingly, it is hereby ORDERED that:

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<sup>3</sup> Rule 92 was amended on January 7, 2002 to read in relevant part:

[n]o member or member organization shall cause the entry of an order to buy (sell) any Exchange-listed security for any account in which such member or member organization or any approved person thereof is directly or indirectly interested (a “proprietary order”), if the person responsible for the entry of such order has knowledge of any particular unexecuted customer’s order to buy (sell) such security which could be executed at the same price.

Pursuant to Section 21C of the Exchange Act, Fee shall cease and desist from committing or causing any violations and any future violations of Section 11(b) of the Exchange Act and Rule 11b-1 thereunder.

By the Commission.

Florence E. Harmon  
Acting Secretary