

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940  
Release No. 2819 / December 11, 2008

INVESTMENT COMPANY ACT OF 1940  
Release No. 28538 / December 11, 2008

ADMINISTRATIVE PROCEEDING  
File No. 3-12978

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In the Matter of	)	
	)	
SCOTT E. DeSANO,	)	ORDER MAKING FINDINGS AND IMPOSING
THOMAS H. BRUDERMAN,	)	REMEDIAL SANCTIONS AND A CEASE-AND-
TIMOTHY J. BURNIEIKA,	)	DESIST ORDER PURSUANT TO SECTION
ROBERT L. BURNS,	)	203(f) OF THE INVESTMENT ADVISERS ACT
DAVID K. DONOVAN,	)	OF 1940 AND SECTIONS 9(b) AND 9(f) OF THE
EDWARD S. DRISCOLL,	)	INVESTMENT COMPANY ACT OF 1940 AS TO
JEFFREY D. HARRIS,	)	KIRK C. SMITH
CHRISTOPHER J. HORAN,	)	
STEVEN P. PASCUCCI and	)	
KIRK C. SMITH,	)	
	)	
Respondents.	)	

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**I.**

On March 5, 2008, the Securities and Exchange Commission (“Commission”) instituted public administrative and cease-and-desist proceedings pursuant to Sections 203(f) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) and Sections 9(b) and 9(f) of the Investment Company Act of 1940 (“Investment Company Act”) against Scott E. DeSano, Thomas H. Bruderman, Timothy J. Burnieika, Robert L. Burns, David K. Donovan, Edward S. Driscoll, Jeffrey D. Harris, Christopher J. Horan, Steven P. Pascucci, and Kirk C. Smith (“Smith” or “Respondent Smith”).

**II.**

In response to these proceedings, Respondent Smith 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, 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 Smith consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 203(f) of the Investment Advisers Act of 1940 and Sections 9(b) and 9(f) of the Investment Company Act of 1940 as to Kirk C. Smith ("Order"), as set forth below.

### III.

On the basis of this Order and Respondent Smith's Offer, the Commission finds<sup>1</sup> that:

#### **Settling Respondent**

1. **Smith**, age 44, is a resident of Walpole, Massachusetts. At all relevant times, Smith was employed as a sector trader on the equity trading desk of registered investment adviser FMR Co., Inc., located in Boston, Massachusetts. Smith has been associated with FMR Co., Inc. from 1997 to the present.

#### **Other Relevant Parties**

2. **Fidelity Management & Research Company** ("FMR") is a privately held Massachusetts corporation registered with the Commission as an investment adviser pursuant to Section 203(c) of the Advisers Act, with its principal place of business in Boston, Massachusetts. FMR is a wholly owned subsidiary of FMR LLC, a privately held Delaware corporation. FMR is an adviser to various institutional clients and has approximately \$1.25 trillion in assets under management. FMR's institutional clients include a group of approximately 350 registered investment companies marketed under the "Fidelity Investments" trade name and managed by FMR and its affiliates (hereafter "the Fidelity Funds").

3. **FMR Co., Inc.** is a privately held Massachusetts corporation registered with the Commission as an investment adviser pursuant to Section 203(c) of the Advisers Act, with its principal place of business in Boston, Massachusetts. FMR Co., Inc. is a wholly owned subsidiary of FMR (collectively "Fidelity") and provides portfolio management services as a sub-adviser to certain clients of FMR, including the Fidelity Funds.<sup>2</sup>

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<sup>1</sup> The findings herein are made pursuant to Respondent Smith's Offer and are not binding on any other person or entity in this or any other proceeding.

<sup>2</sup> On March 5, 2008, the Commission instituted related administrative and/or cease-and-desist proceedings against Fidelity and certain of its employees. See *In the Matter of Fidelity Management & Research Co. and FMR Co. Inc.*, Advisers Act Release No. 2713, Admin. Proc. File No. 3-19276 (March 5, 2008); *In the Matter of Peter S. Lynch*, Company Act Release No. 28189, Admin. Proc. File No. 3-12980 (March 5, 2008); *In the Matter of Bart A. Grenier*, Advisers Act Release No. 2714, Admin. Proc. File No. 3-12977 (March 5, 2008); *In the Matter of Marc C. Beran*, Advisers Act Release No. 2716, Admin. Proc. File No. 3-12979 (March 5, 2008).

## Summary

4. These proceedings concern Smith's acceptance of gifts and travel from securities brokerage firms ("brokerage firms") with which he, through Fidelity, conducted business on behalf of the Fidelity Funds. During the period from January 1, 2002 to October 2004 (the "Relevant Period"), Smith accepted a significant amount of gifts, including a private jet trip to the Caribbean and numerous tickets to sporting and other events that he did not attend with the representatives of brokerage firms. By accepting those gifts and travel, Smith willfully<sup>3</sup> violated Section 17(e)(1) of the Investment Company Act.

## Background

5. During the Relevant Period, Smith worked as a sector trader on Fidelity's equity trading desk, and was an affiliated person of FMR Co., Inc., which is an affiliated person of registered investment companies (the Fidelity Funds). Fidelity's advisory clients (including the Fidelity Funds) gave Fidelity authority to select brokerage firms to execute securities transactions in their managed accounts. Portfolio managers initiated securities trades by contacting Fidelity's equity trading desk with orders to purchase or sell securities for client accounts under their management. As a Fidelity trader, Smith was responsible for, among other things, selecting brokerage firm(s) from a list of brokerage firms approved by Fidelity to execute securities transactions to fulfill the portfolio managers' orders.

### Smith Accepted Gifts and Travel from Brokerage Firms

6. Smith received a significant amount of travel and gifts from representatives of brokerage firms during the Relevant Period. In November 2003, Kevin Quinn, then a registered representative at the brokerage firm Jefferies & Co., Inc., provided Smith the use of a private jet so that Smith and a family member could take a vacation in the Caribbean.<sup>4</sup> Representatives of brokerage firms also paid additional travel and lodging expenses on Smith's behalf and gave Smith numerous tickets to events that the broker did not attend, including Celtics, Patriots and Red Sox regular season games, various professional playoff games and several college hockey games.

### Smith Violated Section 17(e)(1) of the Investment Company Act

7. As a result of the conduct described above, Smith willfully violated Section 17(e)(1) of the Investment Company Act, which makes it unlawful for an affiliated person of a

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

<sup>4</sup> On December 1, 2006, the Commission instituted settled administrative proceedings against Jefferies, a Jefferies senior executive, and Quinn with respect to Quinn's provision of approximately \$2 million in travel, entertainment and gifts to certain Fidelity equity trading desk employees. See *In the Matter of Jefferies & Co., Inc. et al.*, Release No. 34-54861 (Dec. 1, 2006), and *In the Matter of Kevin W. Quinn*, Release No. 34-54862 (Dec. 1, 2006).

registered investment company, or an affiliate of an affiliate, when acting as an agent, to accept compensation from any source (other than a salary or wages from the registered investment company) for the purchase or sale of any property to or for the registered investment company. A violation of Section 17(e)(1) is complete upon receipt of the compensation. Smith was an affiliated person of Fidelity, which is an affiliated person of investment companies (the Fidelity Funds), because Fidelity advises those funds. Smith's receipt of gifts and travel from representatives of brokerage firms constituted compensation in violation of Section 17(e)(1) of the Investment Company Act.

#### IV.

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

Accordingly, pursuant to Section 203(f) of the Advisers Act and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

- A. Respondent Smith cease and desist from committing or causing any violations and any future violations of Section 17(e)(1) of the Investment Company Act;
- B. Respondent Smith is censured; and
- C. Respondent Smith shall, within ten days of the entry of this Order, pay disgorgement of \$56,690, prejudgment interest of \$19,506.89 and a civil money penalty in the amount of \$30,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. 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, VA 22312, Stop 0-3; and (D) submitted under cover letter that identifies Smith 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 David P. Bergers, Regional Director, Securities and Exchange Commission, 33 Arch St., 23<sup>rd</sup> Floor, Boston, MA 02110.

By the Commission.

Florence E. Harmon  
Acting Secretary