

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9053 / July 20, 2009

SECURITIES EXCHANGE ACT OF 1934
Release No. 60341 / July 20, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13557

In the Matter of

TD AMERITRADE, INC.,

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS, PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933 AND SECTION 15(b) OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER.**

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”) and Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”) against TD Ameritrade, Inc. (“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 Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 15(b) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

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

Summary

Respondent offered and sold to some of its customers financial instruments known as auction rate securities ("ARS") while not accurately characterizing or while failing to disclose the true nature and risks of these investments. ARS are bonds or preferred stock whose liquidity depends upon sufficient demand at periodic securities auctions. When soliciting customers to purchase ARS, Respondent's registered representatives improperly described ARS as safe, liquid alternatives to money market funds and other cash-like investments, without disclosing the auction process or the risk of illiquidity if these auctions failed. On February 13, 2008, a significant number of ARS auctions failed, resulting in an overall market collapse that has left thousands of investors, including Respondent's customers, holding ARS that they have not been able to liquidate. By engaging in the conduct described herein, Respondent violated Section 17(a)(2) of the Securities Act.

Respondent

1. Respondent, a New York corporation headquartered in Omaha, Nebraska, is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act and is a member of the Financial Industry Regulatory Authority ("FINRA"). Respondent is a wholly-owned subsidiary of TD Ameritrade Online Holding Corporation. Respondent was formed as a result of the consolidation of retail brokerage operations of Ameritrade, Inc. and TD Waterhouse Investors Services, Inc. following Ameritrade Holding Corporation's acquisition of TD Waterhouse Group, Inc. on January, 24, 2006 (the "Merger Date").

Background

Description of ARS

2. ARS are bonds or preferred stock which provide for interest rates or dividend yields that are periodically reset through auctions, typically held every seven, twenty-eight, or thirty-five days. ARS are usually issued with maturities of thirty years, but the maturities can range from five years to perpetuity. ARS yields are determined at the periodic auctions during which the ARS are auctioned at par. ARS typically can be bought or sold only at one of these periodic auctions.

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.

3. Under the typical procedures for an auction for ARS, investors who wished to purchase ARS at an auction submitted a bid which included the minimum interest or dividend rate that the investors would accept. Holders of ARS could either choose to keep their securities until the next auction or submit an offer to sell their ARS. An auction agent collected all of the bids and offers for a particular auction.

4. The final rate at which all of the ARS offered for sale were sold was the “clearing rate” that applied to that particular ARS until the next auction. Bids with the lowest rate and then successively higher rates were accepted until all of the sell orders were filled. The clearing rate was the lowest rate bid sufficient to cover all of the securities for sale in the auction.

5. If there were not enough bids to cover the securities offered for sale in an auction, then an auction would fail. In a failed auction, investors who want to sell securities are not able to do so, and hold their ARS until at least the next auction. In this event, the issuer pays the holders a maximum rate or “penalty” rate. These rates might be higher or lower than the prior clearing rate or market rates on similar products.

Respondent’s Role in the ARS Market

6. To facilitate the auction process, the issuers of the ARS selected one or more broker-dealers to underwrite the offering and/or manage the auction process. In many instances, these broker-dealers submitted their own bids to support the auctions and to prevent the auctions from failing.

7. Respondent did not act as an underwriter, manager, or agent for any issuer of ARS. Instead, Respondent acted as agent, both on a solicited and unsolicited basis, for its customers by submitting their bids to purchase and orders to sell ARS. As a distributing or “downstream” broker-dealer, Respondent did not submit bids in an effort to support any of the ARS auctions or to prevent them from failing. Respondent also did not hold any significant inventory of ARS in its proprietary accounts. However, as more fully described below, Respondent’s registered representatives did not accurately characterize the investment nature of ARS or provide adequate disclosures regarding the risks associated with ARS and the complexities of the auction process to Respondent’s customers.

Collapse of the ARS Market and the Effect on Respondent’s Customers

8. In the early part of 2008, many of the broker-dealers that acted as underwriters of the ARS offerings or as lead managers for the ARS auctions stopped submitting their own bids in support of the ARS auctions. As a result, by February 13, 2008, the ARS market began to experience widespread auction failures, leaving investors throughout the industry unable to sell their ARS holdings.

9. From February 13, 2008, through the present, the ARS market continues to experience widespread failures, making many ARS holdings illiquid. Some ARS have been redeemed by their issuers since that time. However, numerous investors, including Respondent’s

customers, currently hold ARS that they have been unable to sell through the auction process and have not yet been redeemed by the issuers.

Purchases of ARS by Respondent's Customers

10. Prior to the middle of February 2008, Respondent's registered representatives sold ARS to customers through telephone, email, and other interstate communications. Respondent's representatives made inaccurate comparisons between ARS and other investments, such as certificates of deposit or money market accounts, telling customers that ARS were similar investments but with a slightly higher yield. Respondent's representatives did not accurately characterize the investment nature of ARS since ARS are highly complex securities that are very different from money market funds or certificates of deposit, as evidenced by, among other things, the dependence of ARS on successful auctions for liquidity.

11. Respondent's registered representatives also did not provide customers with adequate and complete disclosures regarding the complexity of the auction process and the risks associated with ARS, including the circumstances under which an auction could fail. For example, Respondent's representatives did not adequately disclose to customers that their ability to liquidate the ARS depended on the willingness of other investors to buy the instruments at an auction. This information was material, and Respondent should have provided it to its customers when offering and selling ARS.

12. Respondent was aware that its registered representatives marketed ARS to customers as liquid and as an alternative to cash, certificates of deposit, or money market funds without adequately disclosing that ARS are complex securities that may become illiquid.

13. Currently, thousands of customers who purchased ARS through Respondent prior to the collapse of the ARS market in the middle of February 2008 hold hundreds of millions of dollars in illiquid ARS.

Violations

14. As a result of the conduct described above, Respondent willfully² violated Section 17(a)(2) of the Securities Act, which prohibits the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, 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.

² A willful violation of the securities laws means merely “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.3d 798, 803 (D.C. Cir. 1965)).

Undertakings

15. Respondent has undertaken to purchase Eligible ARS held by Eligible Customers, and other measures, as specified under the terms set forth below. In determining whether to accept Respondent's Offer, the Commission has considered these undertakings.

A. Key Definitions

1. Eligible Auction Rate Securities. As used in these undertakings, "Eligible ARS" shall mean auction rate securities that were purchased at Respondent on or before February 13, 2008 and that have failed at auction at least once since February 13, 2008. Notwithstanding the foregoing definition, the term "Eligible ARS" shall not include ARS that were purchased at Respondent or through entities acquired by Respondent's parent companies in accounts owned, managed or advised by or through independent registered investment advisers.

2. Eligible Customers. As used in these undertakings, "Eligible Customers" shall mean the following current and former account owners who purchased Eligible ARS at Respondent on or before February 13, 2008, did not transfer such Eligible ARS away from Respondent prior to the Merger Date, and held those securities on February 13, 2008:

a. Natural persons (including their IRA accounts, testamentary trust and estate accounts, custodial accounts established under the Uniform Transfers to Minors Act or the Uniform Gifts to Minors Act, and guardianship accounts);

b. Charities, endowments or foundations with Internal Revenue Code Section 501(c)(3) status; or

c. Small Businesses and Institutions. For purposes of this class of Eligible Customers, "Small Businesses and Institutions" shall mean the following account owners with total assets at Respondent of \$10 million or less as of March 13, 2009: trusts; corporate trusts; corporations; employee pension plans/ERISA and Taft Hartley Act plans; educational institutions; incorporated not-for-profit organizations; limited liability companies; limited partnerships; non-public companies; partnerships; personal holding companies; unincorporated associations; and government and quasi-government entities.

i. In calculating total assets at Respondent for the purposes of this paragraph, Respondent may include household accounts.

ii. If an account owner described within this paragraph had transferred his Eligible ARS away from Respondent prior to March 13, 2009, then the date of the account owner's request to transfer his Eligible ARS shall be used for determining whether the account holder had total assets of \$10 million or less.

iii. For purposes of this paragraph, “Small Businesses and Institutions” shall not include broker-dealers or banks acting as conduits for their customers or customers that had total assets of greater than \$50 million as of the date of this Order.

iv. In no event shall Respondent be required to purchase more than \$10 million of Eligible ARS from any Small Business or Institution.

B. Customer Notification -- Customer Assistance Line and Internet Page. No later than two (2) business days after the date of this Order, Respondent shall establish: 1) a dedicated toll-free telephone assistance line, with appropriate staffing, to provide information and to respond to questions concerning the terms of this Order; and 2) a public Internet page on its corporate Web site(s), with a prominent link to that page appearing on Respondent’s relevant homepage(s), to provide information concerning the terms of this Order and, via an e-mail address or other reasonable means, to respond to questions concerning the terms of this Order. Respondent shall maintain the telephone assistance line and Internet page through at least the Purchase Deadline, as defined below.

C. Respondent’s Offer to Purchase Eligible ARS

1. Offer Notices.

a. First Offer Notice. No later than fifteen (15) business days after the date of this Order, or, for those Eligible Customers not identified prior to this date despite Respondent’s best efforts, as soon as practicable thereafter, Respondent shall offer to purchase, at par plus accrued and unpaid dividends/interest, Eligible ARS from Eligible Customers (“Purchase Offer”), and explain what the Eligible Customers must do to accept, in whole or in part, the Purchase Offer. Respondent shall also inform the Eligible Customers of the relevant terms of this Order and any other material issues regarding the Eligible Customers’ rights.

b. Second Offer Notice. To the extent that any Eligible Customers have not responded to the Purchase Offer on or before forty-five (45) days before the end of the applicable Offer Period (defined below), Respondent shall provide any such Eligible Customers a second written notice informing them again of the Respondent’s Purchase Offer, the relevant terms of this Order and any other material issues regarding the Eligible Customers’ rights.

2. Offer Periods.

a. First Offer Period. For those Eligible Customers with assets at Respondent of \$250,000 or less as of March 13, 2009, the Purchase Offer shall remain open for a period of seventy-five (75) days from the date on which the Purchase Offer was sent (“First Offer Period”). To the extent any Eligible Customer had transferred his Eligible ARS away from Respondent before March 13, 2009, then the measurement date for the \$250,000 threshold shall be the date on which the transfer was requested by the Eligible Customer.

b. Second Offer Period. For those Eligible Customers with assets at Respondent of more than \$250,000 as of March 13, 2009, the Purchase Offer shall remain open until at least March 23, 2010 (“Second Offer Period”), subject to extension under the purchase procedures described below. To the extent any Eligible Customer had transferred his Eligible ARS away from Respondent before March 13, 2009, then the measurement date for the \$250,000 threshold shall be the date on which the transfer was requested by the Eligible Customer.

D. Acceptance and Purchase Procedures

1. Eligible Customer Acceptance. Eligible Customers may accept Respondent’s Purchase Offer by notifying Respondent in writing at any time before midnight, Eastern Time, on the last day of the applicable offer period, or such later date and time as may be extended by Respondent. An acceptance must be received by Respondent prior to the expiration of the applicable offer period, or such later date as may be extended by Respondent and the Commission staff.

2. Purchase Notice. For those Eligible Customers who accept Respondent’s Purchase Offer within the applicable Offer Period, Respondent shall send those Eligible Customers a notice (“Purchase Notice”), indicating when (“Purchase Date”) and how Respondent will purchase their Eligible ARS.

3. Eligible Customers’ Right to Revoke. Eligible Customers may revoke their acceptance of Respondent’s Purchase Offer up until Respondent purchases an Eligible Customer’s Eligible ARS.

4. Purchases Relating to Eligible Customers to Whom the First Offer Period Applies. For those Eligible Customers to whom the First Offer Period applies, and who accept Respondent’s Purchase Offer within the First Offer Period, Respondent shall purchase their Eligible ARS no later than five (5) business days following expiration of the First Offer Period.

5. Purchases Relating to Eligible Customers to Whom the Second Offer Period Applies. For those Eligible Customers to whom the Second Offer Period applies, and who accept Respondent’s Purchase Offer within the Second Offer Period, Respondent shall purchase their Eligible ARS as soon as practicable and by no later than five (5) business days following the expiration of the Second Offer Period.

a. Respondent shall use its best efforts to effectuate all purchases under this paragraph by March 31, 2010, and in no event shall the purchases extend beyond June 30, 2010.

b. In the event that Respondent’s purchases under this paragraph extend beyond March 31, 2010, then the Second Offer Period shall be extended from March 23, 2010 until June 23, 2010. Under such circumstances, Respondent shall issue a notice of such extension in conformity with the federal securities laws by no later than March 24, 2010.

6. Purchases Relating to Eligible Customers Who Have Since Transferred Their Eligible ARS Away from Respondent. Respondent's purchase obligations described above apply equally to those Eligible Customers who accept Respondent's Purchase Offer within the applicable Offer Period, but who have since transferred their Eligible ARS away from Respondent.

a. Respondent's purchase obligations to these Eligible Customers shall be contingent on: (1) Respondent receiving reasonably satisfactory assurance from the financial services firm currently holding the Eligible Customer's Eligible ARS that the bidding rights associated with the Eligible ARS will be transferred to the Respondent; (2) the Eligible Customer opening a new account with Respondent; and (3) the transfer of the Eligible ARS to the Eligible Customer's new account with Respondent.

b. Respondent shall use its best efforts to identify, contact and assist such Eligible Customers to open a new account at Respondent and to transfer the Eligible ARS to such account, and shall not charge such Eligible Customers any fees relating to or in connection with the transfer to Respondent or custodianship by Respondent of such Eligible ARS.

E. Customers Who Transferred Their Eligible ARS Away from Respondent before the Merger Date. In the event that Respondent receives a purchase request from a customer who purchased Eligible ARS at Respondent prior to February 13, 2008 but who transferred such Eligible ARS away from Respondent before the Merger Date, Respondent shall engage in good faith negotiations with such customer in an attempt to resolve the customer's request. Respondent shall notify the Commission staff of all such requests and their ultimate resolutions, if any.

F. Reimbursement for Related Loan Expenses. Respondent shall use its best efforts to identify Eligible Customers who took out loans from Respondent after February 13, 2008 secured by Eligible ARS that were not successfully auctioning at the time the loan was taken and who paid interest associated with the ARS-based portion of those loans in excess of the total interest and dividends received on the Eligible ARS during the duration of the loan. Respondent shall reimburse such customers for the excess expense, plus reasonable interest thereon. Such reimbursement shall occur no later than seventy-five (75) days after the date of this Order.

G. Relief for Eligible Customers Who Sold Below Par. Respondent shall use its best efforts to identify any Eligible Customers who: (1) purchased Eligible ARS at Respondent on or before February 13, 2008; and (2) subsequently sold those Eligible ARS below par between February 13, 2008 and the date of this Order (referred to as "Below Par Sellers"). Within seventy-five (75) days of the date of this Order, Respondent shall pay any such identified Below Par Sellers the difference between par and the price at which the Below Par Seller sold the Eligible ARS, plus reasonable interest thereon. Respondent shall promptly pay any such Below Par Seller identified thereafter.

H. Consequential Damages Claims

1. Special Arbitration Procedures. Respondent shall consent to participate, at the election of an Eligible Customer, in the special arbitration procedures announced by FINRA on December 16, 2008, and available on its website at <http://www.finra.org/web/groups/arbitrationmediation/@arbmed/documents/arbmed/p117445.pdf> for the exclusive purpose of arbitrating an Eligible Customer's claim for consequential damages against Respondent related to the customer's investment in Eligible ARS. As explained by the special arbitration procedures, the following shall apply:

a. Forum Fees. Respondent will pay all forum fees associated with the arbitration.

b. Burden of Proof. Eligible Customers shall bear the burden of proving by a preponderance of the evidence the existence and amount of consequential damages suffered as a result of the illiquidity of the Eligible ARS. Although it may defend itself against consequential damage claims, Respondent shall not argue against liability for the illiquidity of the underlying Eligible ARS position or use as part of its defense any decision by the Eligible Customer not to borrow money from Respondent.

c. Other Damages. Eligible Customers who elect to use the special arbitration procedures provided for within this subparagraph shall not be eligible for punitive damages, or any other type of damages other than consequential damages. Eligible Customers proceeding under the special arbitration procedures may not recover as consequential damages any attorneys' fees incurred in connection with the arbitration or any related mediation proceeding.

I. Other Proceedings/Relief. All Eligible Customers who avail themselves of the relief provided pursuant to this Order may pursue any remedies against Respondent available under the law subject to any defenses Respondent may have. However, those customers that elect to utilize the special arbitration procedures set forth above are limited to the remedies available in that process and may not bring or pursue a claim relating to ARS in another forum.

J. Reports and Meetings

1. Within 45 days of the end of each month, beginning with a report covering the month ended after the date of this Order and continuing through and including a report covering the month ended June 30, 2010, Respondent shall submit a monthly written report detailing Respondent's progress with respect to its undertakings. The report shall be submitted to Noel M. Franklin, Esq., U.S. Securities and Exchange Commission, 1801 California Street, Suite 1500, Denver, Colorado 80202 or as directed in writing by the Commission Staff.

2. Beginning in September 2009, Respondent shall confer at least quarterly with the Commission staff to discuss its progress with respect to these undertakings. Such quarterly progress reports shall continue until June, 2010.

3. The reporting and conference deadlines set forth above may be amended or modified with agreement from 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 Respondent TD Ameritrade, Inc.'s Offer.

Accordingly, pursuant to Section 8A of the Securities Act and Section 15(b) of the Exchange Act, it is hereby ORDERED that:

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

B. Respondent TD Ameritrade, Inc. is censured; and

C. The Commission is not imposing a penalty against Respondent at this time. However, in the event the Division of Enforcement ("Division") believes that Respondent has not complied with its undertakings as more fully described above, the Division may, at any time following the entry of this Order, petition the Commission to: (1) reopen this matter to consider the appropriateness of a penalty; and (2) seek an order directing payment of up to the maximum civil penalty allowable under the law. In determining whether to impose a penalty, the Commission will take into consideration its traditional criteria in determining whether to assess civil penalties, including the extent to which Respondent has satisfied its undertakings and cooperated with the Commission and other regulators in their investigations. Respondent may not, by way of defense to any such petition: (1) contest the findings in this Order; or (2) assert any defense to liability or remedy, including, but not limited to, any statute of limitations defense.

By the Commission.

Elizabeth M. Murphy
Secretary