

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 61422 / January 26, 2010

INVESTMENT ADVISERS ACT OF 1940
Release No. 2977 / January 26, 2010

ADMINISTRATIVE PROCEEDING
File No. 3-13764

<p>In the Matter of</p> <p>AGB Partners LLC, Gregory A. Bied, and Andrew J. Goldberger,</p> <p>Respondents.</p>	<p>CORRECTED ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTIONS 203(e) AND 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER</p>
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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 21C of the Securities Exchange Act of 1934 (“Exchange Act”) and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 (“Advisers Act”), against AGB Partners LLC, Gregory A. Bied and Andrew J. Goldberger (“Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement of AGB Partners LLC, Gregory A. Bied and Andrew J. Goldberger (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 Respondents 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 Pursuant to Section 21C of the Securities Exchange Act of 1934 and Sections 203(e) and 203(f) of the Investment Advisers Act of 1940, 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 Respondents’ Offer, the Commission finds that:

Summary

These proceedings arise out of violations of Rule 105 of Regulation M, a rule designed to protect the independent pricing mechanism of the securities market shortly before follow-on and secondary offerings.¹ In connection with offerings in April 2007 and June 2008, Respondents violated Rule 105 through their improper short-selling practices.

Respondent AGB Partners LLC (“AGB Partners”) managed two investment funds. One fund was AGB Partners’ own account (the “AGB Partners Account”), which consisted solely of funds from its two principals, Respondents Gregory A. Bied (“Bied”) and Andrew J. Goldberger (“Goldberger”). The other was Del Rey Management LLP (“Del Rey”), which raised and invested funds primarily from outside investors (the “Del Rey Account”).

In April 2007, Respondents violated Rule 105 by covering short sales made during a specified time period (the “restricted period”) of the stock of Boots and Coots International Well Control, Inc. in the AGB Partners Account, with shares of Boots and Coots obtained in a follow-on offering in the Del Rey Account. In June 2008, Respondents violated Rule 105 with respect to a follow-on offering by BGC Partners Inc. AGB Partners shorted shares in the AGB Partners Account during the restricted period while its other client, Del Rey, purchased follow-on offering shares of the same company in the Del Rey Account. Respondents’ violative conduct with respect to the two offerings resulted in unlawful profits of \$23,740.

Respondents

1. AGB Partners LLC is a California limited liability corporation with its primary place of business in Boise, Idaho and an office in Santa Monica, California. The firm is an investment adviser that advises two private investment funds. AGB Partners is registered as an investment adviser with California and Idaho, but its assets under management are not sufficient to qualify it for investment adviser registration with the Commission under Section 203A of the Advisers Act.

¹ “The first time an issuer conducts a public offering of its securities, the offering is referred to as an initial public offering (“IPO”). Subsequent offerings by the issuer are referred to as follow-on offerings or repeat offerings. A secondary offering is an offering of securities held by security holders, for which there already exist trading markets for the same class of securities as those being offered.” Short Selling in Connection With a Public Offering: Proposed Rule, 71 Fed. Reg. 75,002, 75,003 n.12 (Dec. 13, 2006) (“Proposing Release on Rule 105”).

2. Gregory A. Bied, during all relevant times through the present, owned 50 percent of AGB Partners and 50 percent of the general partner of Del Rey. The Del Rey Account is managed and traded almost exclusively by Bied, age 45, and a resident of Boise, Idaho. Bied is registered as an investment adviser representative with Idaho and California.

3. Andrew J. Goldberger, during all relevant times through the present, owned 50 percent of AGB Partners and 50 percent of the general partner of Del Rey. The AGB Partners Account is managed and traded primarily by Goldberger, age 44, and a resident of Pacific Palisades, California. Goldberger is registered as an investment adviser representative with Idaho and California.

Other Relevant Entities

4. Del Rey Management LP, a Delaware limited partnership with its principal place of business in Boise, Idaho, offered unregistered limited partnership interests to certain institutional and individual investors. Bied and Goldberger each own half of its general partner, GB Management. AGB Partners is the investment adviser to Del Rey. Del Rey's advisory agreement with AGB Partners provides for the payment of management fees based on a percentage of assets under management plus a percentage of profits.

Background

A. Background of Rule 105 of Regulation M

5. Prior to the Commission amending it in October 2007, Rule 105 of Regulation M, "Short Selling in Connection with a Public Offering," provided, in pertinent part:

In connection with an offering of securities for cash pursuant to a registration statement ... filed under the Securities Act, it shall be unlawful for any person to cover a short sale with offered securities purchased from an underwriter or broker or dealer participating in the offering, if such a short sale occurred during the ... period beginning five business days before the pricing of the offered securities and ending with such pricing ...

17 C.F.R. § 242.105(a)(1).

6. The Commission amended Rule 105 in October 2007, to provide, in pertinent part:

In connection with an offering of equity securities for cash pursuant to a registration statement ... filed under the Securities Act of 1933 (“offered securities”), it shall be unlawful for any person to sell short ... the security that is the subject of the offering and purchase the offered securities from an underwriter or broker or dealer participating in the offering if such short sale was effected during the period (“Rule 105 restricted period”) that is the shorter of the period: (1) Beginning five business days before the pricing of the offered securities and ending with such pricing; or (2) Beginning with the initial filing of such registration statement ... and ending with the pricing.

17 C.F.R. § 242.105(a)(1) (effective October 9, 2007).

7. Subsection (b)(2) of the amended Rule 105 provides that it does “not prohibit the purchase of the offered security in an account of a person where such person sold short during the Rule 105 restricted period in a separate account, if decisions regarding securities transactions for each account are made separately and without coordination of trading or cooperation among or between the accounts.” 17 C.F.R. § 242.105(b)(2).

8. The Commission’s adopting release on amended Rule 105 provides that “[g]enerally, the offering prices of follow-on and secondary offerings are priced at a discount to a stock’s closing price prior to pricing. This discount provides a motivation for a person who has a high expectation of receiving offering shares to capture this discount by aggressively short selling just prior to pricing and then covering the person’s short sales at the lower offering price with securities received through an allocation.” Short Selling in Connection With a Public Offering; Final Rule, 72 Fed. Reg. 45,094, 45,096 (Aug. 10, 2007) (the “Adopting Release on Rule 105”).

9. When persons are likely to be allocated offering shares, they have “an advantage over other persons, which they may exploit to the detriment of pricing efficiency. Not only is this conduct harmful to the market and current security holders, but it can reduce the proceeds the issuer or the selling security holder receives from the securities offering.” Proposing Release on Rule 105, 71 Fed. Reg. at 75,003.

10. The Commission further explained that “[c]overing the short sale with a specified amount of registered offering securities at a fixed price allows a short seller largely to avoid market risk and usually guarantee a profit.” Adopting Release on Rule 105, 72 Fed. Reg. at 45,096.

11. Effective October 9, 2007, the Commission amended Rule 105 to eliminate the covering component to “reduce[] a potential investor’s incentive to aggressively sell short prior

to pricing solely due to the anticipation of this discount.” *Id.* Both the pre- and post-amendment versions of Rule 105 are prophylactic and prohibit the conduct irrespective of the short seller’s intent in effecting the short sale. *See id.* at 45,094 (“Rule 105 is prophylactic. Thus, its provisions apply irrespective of a seller’s intent”); Proposing Release on Rule 105, 71 Fed. Reg. at 75,002 (“The proposal, like the current rule, provides a bright line test for Rule 105 compliance consistent with the prophylactic nature of Regulation M”).

B. Structure of AGB Partners and Del Rey

12. In addition to trading its own account, AGB Partners managed funds for an advisory client. The client, Del Rey, consists primarily of funds from about 15 investors along with a smaller proportion of Bied’s and Goldberger’s assets. With respect to the violations described below, the AGB Partners Account established a short position during the restricted period and the Del Rey Account purchased shares of the same issuer in the follow-on offering. Because the short positions were placed in the AGB Partners Account, owned equally by Bied and Goldberger and consisting of their personal funds, they alone received the economic benefit of the short positions.

13. The Del Rey Account and the AGB Partners Account were held at two different prime brokerages. Although Del Rey and AGB Partners had separate trading strategies and separate profit and loss statements, AGB Partners did not separately manage the AGB Partners and Del Rey Accounts. In one instance, Respondents allocated shares from the Del Rey Account to cover a short position in the AGB Partners Account. In addition, Bied and Goldberger each had authority to place trades in both the AGB Partners and Del Rey Accounts. With respect to their overall orders, Bied placed most of the trades for the Del Rey Account and approximately one-third of the trades for the AGB Partners Account, including certain of the short sales during the restricted period at issue here. Respondents lacked information barriers to separate the accounts or to prevent information sharing about securities positions and investment decisions. Instead, Bied and Goldberger often discussed and shared trading ideas.

C. Respondents’ Violations of Rule 105 of Regulation M

14. During the relevant period, Respondents violated Rule 105 with respect to two follow-on offerings resulting in unlawful profits of \$23,740.

15. Respondents violated the pre-amendment version of Rule 105 in connection with short sales made before a follow-on offering by Boots and Coots International Well Control, Inc. (“Boots and Coots” trading under AMEX ticker: WEL). On April 18, 2007, Boots and Coots priced a follow-on offering of 26 million shares of its common stock at \$2.10 per share. The registered shares were offered to the public through an underwriter on a firm commitment basis. Del Rey purchased 1,125,000 shares of the offering in the Del Rey Account.

16. During Rule 105’s five-business day restricted period from April 12 to April 18, AGB Partners sold short 173,632 shares of Boots and Coots at an average price of \$2.57 per share in

the AGB Partners Account. On April 19, 2007, AGB Partners covered 35,000 shares of its restricted period short position with shares that Del Rey had purchased in the secondary offering. AGB Partners' profit on these transactions was \$16,450.

17. Respondents also violated amended Rule 105. On June 5, 2008, BGC Partners Inc. ("BGCP" trading under NASDAQ ticker: BGCP) priced a secondary offering of 20 million shares of its common stock at \$8 per share and its shares closed at \$8.08 per share that day. The registered shares were offered to the public through an underwriter on a firm commitment basis. Del Rey purchased 200,000 shares of the offering in the Del Rey Account. During the May 30 to June 5 restricted period, AGB Partners had sold short 16,200 shares of BGCP at an average price of \$8.45 per share in the AGB Partners Account. The difference between AGB Partners' short sale proceeds and the price for the secondary offering on these transactions was \$7,290. AGB Partners also obtained a benefit of \$14,704 as of June 5 by participating in the secondary offering after selling short shares of BGCP during the restricted period.

18. As a result of the conduct described above with respect to trading in the shares of Boots and Coots, Respondents willfully violated Rule 105 of Regulation M then in effect, which made it "unlawful for any person to cover a short sale with offered securities purchased from an underwriter or broker or dealer participating in an offering, if such short sales occurred during the ... period beginning five business days before pricing of the offered securities and ending with such pricing."²

19. As a result of the conduct described above with respect to trading in the shares of BGCP, Respondents willfully violated Rule 105 of Regulation M of the Exchange Act, as amended effective October 9, 2007, which makes it "unlawful for any person to sell short ... the security that is the subject of the offering and purchase the offered securities from an underwriter, broker or dealer participating in the offering if such short sale was effected during the period: (1) Beginning five business days before the pricing of the offered securities and ending with such pricing; or (2) Beginning with the initial filing of such registration statement ... and ending with such pricing."

20. AGB Partners, Bied and Goldberger violated Rule 105 by selling short securities during the restricted period and purchasing offered securities of the same issuer through two trading accounts that they failed to separately manage.

² A willful violation of the securities laws means "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)).

Respondents' Remedial Efforts

21. In determining to accept the Offer, the Commission considered Respondents' remedial efforts and cooperation afforded 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 Respondents' Offer.

Accordingly, pursuant to Section 21C of the Exchange Act and Sections 203(e) and 203(f) of the Advisers Act, it is hereby ORDERED that:

- A. Respondents shall cease and desist from committing or causing any violations and any future violations of Rule 105 of Regulation M of the Exchange Act.
- B. Respondents are censured.
- C. Respondents shall, jointly and severally, within 30 days of the entry of this Order, pay disgorgement of \$38,444, prejudgment interest of \$2,921 and a civil penalty of \$20,000 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, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies AGB Partners, Bied and Goldberger as Respondents in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Michael S. Dicke, Associate Director, Division of

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Enforcement, Securities and Exchange Commission, 44 Montgomery Street, Suite 2600,
San Francisco, California 94104.

By the Commission.

Elizabeth M. Murphy
Secretary