

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69765 / June 14, 2013

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3464 / June 14, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15358

In the Matter of

**Rosenberg Rich Baker Berman
& Company and Brian Zucker,
CPA,**

Respondents.

**ORDER INSTITUTING PUBLIC
ADMINISTRATIVE AND CEASE-
AND-DESIST PROCEEDINGS PURSUANT
TO SECTIONS 4C AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934
AND RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that public administrative and cease-and-desist proceedings be, and hereby are, instituted against Rosenberg Rich Baker Berman & Company ("RRBB") and Brian Zucker ("Zucker") pursuant to Sections 4C¹ and 21C of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.²

¹ Section 4C provides, in relevant part, that the Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found to be lacking in character or integrity, or to have engaged in unethical or improper professional conduct.

² Rule 102(e)(1)(ii) provides, in pertinent part, that: "The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct."

II.

In anticipation of the institution of these proceedings, Respondents have each submitted an Offer of Settlement (the “Offers”) 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 them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission’s Rules of Practice, 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 finds³ that:

A. SUMMARY

This matter concerns violations of the auditor independence rules by RRBB and Zucker. RRBB partner Brian Zucker performed Financial and Operations Principal (“FINOP”)⁴ services for a broker-dealer client, (the “Broker-Dealer”), while his firm was serving as the Broker-Dealer’s auditor. Zucker also arranged for RRBB to pay a contractor who was serving as the Broker-Dealer’s FINOP (the “Designated FINOP”) and directed an RRBB staff accountant to provide FINOP services to the Broker-Dealer. As a consequence of this conduct, Zucker and RRBB engaged in improper professional conduct, violated the auditor independence rules, and caused the Broker-Dealer’s failure to file an annual report audited by an independent accountant.

B. RESPONDENTS

1. Respondent RRBB, a professional corporation, is an accounting and auditing firm that also provides tax and management consulting services. RRBB has 10 partners and 50 professional staff located in two New Jersey based offices. In October 2011, RRBB merged with Zucker & Associates LLP and CFO Partners. Following the merger, RRBB provided FINOP services through a group it called CFO Financial Partners LLC.

³ The findings herein are made pursuant to Respondents’ Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

⁴ FINOPs are responsible for broker-dealer compliance with applicable net capital rules and have final approval and responsibility for the accuracy of financial reports submitted to any securities industry regulatory body. Moreover, FINOPs are charged with the supervision and/or performance of broker-dealer responsibilities under all financial responsibility rules promulgated pursuant to the Exchange Act and are responsible for the overall supervision of and responsibility for the individuals who are involved in the administration of and maintenance of the broker-dealer’s back office operations. *See* FINRA Rule 1022(b).

2. Respondent Zucker, a CPA licensed in New York and New Jersey, is an equity partner at RRBB. Prior to October 2011, Zucker owned an entity called Zucker & Associates LLP, which provided FINOP and CFO services to broker-dealers. In October 2011, Zucker & Associates LLP merged with RRBB. At RRBB, Zucker provides FINOP and CFO services for broker-dealers and hedge funds and oversees individuals at RRBB who provide such services. He does not perform financial statement audits at RRBB. Zucker holds Series 7, 24, 53, 79, and 99 licenses. Zucker 51 years old, resides in Wall Township, New Jersey.

C. FACTS

Zucker's Relationship with the Broker-Dealer and His Firm's Merger with RRBB

3. In late 2008, Zucker began working as the Broker-Dealer's FINOP. At that time, Zucker owned Zucker & Associates LLP, a firm that provided outsourced FINOP and CFO services to broker-dealers. In 2010 the Designated FINOP became the Broker-Dealer's FINOP. Whereas the Broker-Dealer had paid Zucker \$1,250 per month when he was the firm's FINOP, Zucker & Associates began billing the Broker-Dealer \$2,500 per month, which it split evenly between Zucker and the Designated FINOP.

4. In October 2011, Zucker & Associates merged with RRBB, and Zucker became one of RRBB's equity partners. Among Zucker's responsibilities at RRBB was to lead a newly-created group at the firm called CFO Financial Partners LLC that provided FINOP and CFO services to broker-dealers and hedge funds.

5. During the merger, one of RRBB's co-managing partners told Zucker that RRBB could not be FINOP and auditor to the same client at the same time. Zucker and the co-managing partner discussed the fact that Zucker & Associates and RRBB had two overlapping clients for whom Zucker served as FINOP and for which RRBB served as auditor. They agreed that RRBB would terminate their auditor relationship with the clients so that Zucker could remain FINOP for those clients.

6. The co-managing partner participated in a second conversation with Zucker and the head of RRBB's audit department in or around October or November 2011 in which they told Zucker that RRBB could not audit entities for whom two independent contractors who were joining RRBB from Zucker & Associates were acting as FINOPs.

7. In connection with this discussion, the co-managing partner and the head of RRBB's audit department provided Zucker with relevant guidance on the independence rules.

RRBB Becomes the Broker-Dealer's Auditor

8. In November 2011, the Broker-Dealer hired RRBB as its independent auditor for its fiscal year 2011 audit.

9. Though he did not ultimately sign the audit opinion, Zucker was listed on the Broker-Dealer's engagement letter as the audit engagement partner. Zucker was also the relationship and billing partner on the Broker-Dealer engagement. RRBB also billed approximately two hours of Zucker's time to the Broker-Dealer audit.

10. Between February and April 2012, members of the audit engagement team kept Zucker updated on the progress of the audit. Zucker sent e-mails encouraging the audit engagement team and the Broker-Dealer's CFO to keep the audit moving forward amid delays and difficulty pulling source documents together.

The Designated FINOP's Role After RRBB Becomes the Broker-Dealer's Auditor

11. During the audit engagement period, the Designated FINOP consulted with and obtained advice from Zucker about his FINOP work at the Broker-Dealer just as he had before Zucker & Associates merged with RRBB and before RRBB took over the Broker-Dealer audit engagement.

12. In November 2011, Zucker also arranged for RRBB to handle billing for the Designated FINOP, telling the Designated FINOP to invoice RRBB for his FINOP work at the Broker-Dealer. RRBB collected the FINOP payments from the Broker-Dealer and then paid the Designated FINOP for his work just as Zucker & Associates had previously done.

13. Also in November 2011, following discussions between Zucker, RRBB's co-managing partner and the head of RRBB's audit department, RRBB decided to stop administering the Designated FINOP's billings because of the perception it created that Zucker, and thereby RRBB, was not independent. However the billing arrangement continued until March 2012 when Zucker directed the Designated FINOP to start invoicing the Broker-Dealer directly.

Zucker Performs and Directs an RRBB Staff Accountant to Perform FINOP Work for the Broker-Dealer

14. From January to March 2012, the Designated FINOP was on vacation or otherwise unavailable on at least two occasions when the Broker-Dealer needed to file reports with FINRA or when there were net capital deficiency issues.

15. When that happened, Zucker personally performed FINOP services for the Broker-Dealer. In January 2012, Zucker filed a Financial and Operational Combined Uniform Single ("FOCUS") report for the Broker-Dealer. In February 2012, Zucker advised the Broker-Dealer's CFO on what was allowable for net capital purposes. In March 2012, Zucker calculated the Broker-Dealer's net capital and filed a notification with FINRA that the Broker-Dealer had a net capital deficiency. That same day, Zucker e-mailed individuals at FINRA regarding the Broker-Dealer's net capital deficiency, stating that he was "the firm's 'acting FINOP' in [the Designated FINOP's] absence."

16. At the end of March 2012, Zucker directed an RRBB staff accountant to perform FINOP work for the Broker-Dealer. During the audit and professional engagement period, the RRBB staff accountant prepared net capital calculations, filed FOCUS reports, and filed at least one net capital deficiency notice for the Broker-Dealer. In late March 2012, in response to a request from the Broker-Dealer's CFO to Zucker and the RRBB staff accountant to conduct a net capital calculation for FINRA, the RRBB staff accountant confirmed that he did the calculation, then engaged in an e-mail exchange with FINRA regarding that calculation. In April 2012, the RRBB staff accountant filed an amended FOCUS report for the Broker-Dealer.

The Broker-Dealer Files its Annual Audited Report for Fiscal Year 2011

17. On April 20, 2012, the Broker-Dealer filed its Annual Audited Report for fiscal year 2011. Included in the report was RRBB's unqualified audit report, dated April 20, 2012, which represented that RRBB "conducted our audit in accordance with auditing standards generally accepted in the United States of America."

18. Shortly after this filing, the Broker-Dealer terminated the Designated FINOP, and on May 2, 2012, the RRBB staff accountant, officially became the Broker-Dealer's FINOP.

19. In May 2012, FINRA informed the Broker-Dealer that it did not consider the firm's annual fiscal year 2011 audit filed by the Broker-Dealer as having been filed because the audit was not conducted by an independent public accountant.

20. In response to FINRA raising the independence issue, RRBB resigned as the Broker-Dealer's auditor, and the Broker-Dealer hired another audit firm to conduct a new audit for fiscal year 2011. The new audit opinion was filed in June 2012, along with a new FOCUS report. After the new auditor performed its work there were no substantive changes to the audit report or the FOCUS report as prepared by RRBB.

Violations

21. Rule 17a-5(d)(1) under the Exchange Act requires that, "[e]very broker or dealer registered pursuant to section 15 of the Act shall file annually, on a calendar or fiscal year basis, a report which shall be audited by an independent public accountant." Rule 17a-5(f)(3) further states that, for such audits, "[a]n accountant shall be independent in accordance with the provisions of Rule 2-01(b) and (c) of Regulation S-X." Rule 17a-5(g) requires that "[t]he audit shall be made in accordance with generally accepted auditing standards" and Rule 17a-5(i) requires that "[t]he accountant's report shall . . . [s]tate whether the audit was made in accordance with generally accepted auditing standards." Generally Accepted Auditing Standards ("GAAS") requires auditors to maintain strict independence from their audit clients; an auditor "must be free from any obligation to or interest in the client, its management or its owners." *See* Statement on Auditing Standard No. 1, Section 220.03. Accordingly, if an auditor's report states that its audit was in accordance with GAAS when the auditor was not independent, then it has violated Rule 17a-5(i).

22. Regulation S-X Rule 2-01(c)(4) provides that accountants are not independent if, at any point during the audit and professional engagement period, the accountant provides prohibited non-audit services to an audit client. Regulation S-X Rule 2-01(c)(4)(i) provides that prohibited non-audit services include bookkeeping or other services related to the accounting records or financial statements of the audit client, and defines such services as:

Any service, unless it is reasonable to conclude that the results of these services will not be subject to audit procedures during an audit of the audit client's financial statements, including:

- (A) Maintaining or preparing the audit client's accounting records;
- (B) Preparing the audit client's financial statements that are filed with the Commission or that form the basis of financial statements filed with the Commission; or
- (C) Preparing or originating source data underlying the audit client's financial statements.

23. Regulation S-X Rule 2-01(c)(4)(vi) defines an additional area of prohibited non-audit services as “[a]cting, temporarily or permanently, as a director, officer, or employee of an audit client, or performing any decision-making, supervisory, or ongoing monitoring function for the audit client.” FINOPs perform management functions at broker-dealers and are specifically charged with providing supervisory and monitoring functions. FINOPs are responsible for the broker-dealer’s compliance with applicable net capital rules and have final approval and responsibility for the accuracy of financial reports submitted to any securities industry regulatory body. Moreover, FINOPs are charged with the supervision and/or performance of a broker-dealer’s responsibilities under all financial responsibility rules promulgated pursuant to the Exchange Act and are responsible for the overall supervision of and responsibility for the individuals who are involved in the administration of and maintenance of a broker-dealer’s back office operations.

24. Under Section 21C of the Exchange Act, a person is a “cause” of another’s primary violation if the person knew or should have known that his act or omission would contribute to the primary violation. Negligence is sufficient to establish “causing” liability under Section 21C when a person is alleged to have caused a primary violation that does not require scienter. *In re KPMG Peat Marwick*, Exch. Act. Rel. No. 43862 (Jan. 19, 2001), *aff’d*, *KPMG v. SEC*, 289 F.3d 109 (D.C. Cir. 2002).

25. Zucker and RRBB provided FINOP related services to the Broker-Dealer, including Zucker’s personal provision of FINOP services, Zucker’s oversight of the RRBB staff accountant’s FINOP work, and through Zucker and RRBB’s payment to and consultation with the Designated FINOP. Regulation S-X Rules 2-01(c)(4)(i) and 2-01(c)(4)(vi) prohibited these services given that RRBB was engaged as the Broker-Dealer’s independent auditor.

26. RRBB's fiscal year 2011 audit report for the Broker-Dealer falsely stated that its audit of the Broker-Dealer's financial statements was conducted in accordance with GAAS. RRBB therefore violated Exchange Act Rule 17a-5(i).

27. Zucker caused RRBB's violation of Exchange Act Rule 17a-5(i). Zucker contributed to this violation through his own performance of FINOP duties as well as through his directing of the RRBB staff accountant to perform FINOP work and his consultations with the Designated FINOP while RRBB was handling the Designated FINOP's billing during the audit engagement period. Based on his communications with RRBB partners about the independence rules, his review of AICPA independence guidance, and his understanding that RRBB dropped audit clients so that he could continue to provide those clients FINOP services, Zucker knew or should have known that he was contributing to RRBB's violation of Exchange Act Rule 17a-5(i).

28. Exchange Act Section 17(a) and Rule 17a-5 require broker-dealers to file annual reports containing financial statements audited by independent public accountants. No showing of scienter is necessary to establish a violation of Exchange Act Section 17(a)(1). *See In the Matter of Orlando Joseph Jett*, Exchange Act Release No. 49366 at n.45 (March 5, 2004) (citing *SEC v Drexel Burham Lambert Inc.*, 837 F. Supp. 587, 610 (S.D.N.Y 1993); *Stead v. SEC*, 444 F.2d 713, 716-17 (10th Cir. 1971), *cert denied*, 404 U.S. 1059 (1972)).

29. Zucker and RRBB caused the Broker-Dealer's violation of Exchange Act 17(a) and Rule 17a-5. Zucker personally performed FINOP services for the Broker-Dealer, arranged for RRBB to pay the Designated FINOP for serving as the Broker Dealer's FINOP and directed the RRBB staff accountant to provide FINOP services to the Broker-Dealer. Zucker and RRBB knew or should have known that they were contributing to the Broker-Dealer's violation of Section 17(a) and Rule 17a-5.

30. RRBB also caused the Broker-Dealer's violation of Exchange Act 17(a) and Rule 17a-5 by falsely stating in its fiscal year 2011 audit report for the Broker-Dealer that its audit was conducted in accordance with GAAS.

31. Rule 102(e) of the Commission's Rule of Practice allows the Commission to censure a person, or deny such person, temporarily or permanently, the privilege of appearing or practicing before the Commission if it finds that such person has engaged in "improper professional conduct." Exchange Act § 4C(a)(2); Rule 102(e)(1)(ii). Rule 102(e) defines improper professional conduct, in part, as: "a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which the registered public accounting firm or associated person knows, or should know, that heightened scrutiny is warranted." Exchange Act § 4C(b)(2); Rule 102(e)(1)(iv)(B).

32. Questions regarding an auditor's independence always warrant heightened scrutiny. *See* Amendment to Rule 102(e) of the Commission's Rules of Practice, 63 Fed. Reg. 57,164, at 57,168 (Oct. 26, 1998) (codified at 17 C.F.R. Part 201). The Commission has defined the "highly unreasonable" standard as

an intermediate standard, higher than ordinary negligence but lower than the traditional definition of recklessness used in cases brought under Section 10(b) of the Exchange Act and Rule 10b-5 of the Exchange Act. The highly unreasonable standard is an objective standard. The conduct at issue is measured by the degree of the departure from professional standards and not the intent of the accountant.

Id. at 57,167; *see also PeopleSoft* Initial Decision Release No. 249, at 60 (April 16, 2004).

33. Because of the conduct set forth above, Zucker engaged in highly unreasonable conduct that resulted in a violation of applicable professional standards when he knew or should have known that heightened scrutiny was required.

34. As a consequence of Zucker's conduct, and by affirming, in violation of Exchange Act Rule 17a-5(i), that its fiscal year 2011 audit for the Broker-Dealer was conducted in accordance with GAAS when RRBB was not in fact independent during the audit engagement period, RRBB also engaged in highly unreasonable conduct that resulted in a violation of applicable professional standards when it knew or should have known that heightened scrutiny was required.

35. Based on the foregoing, the Commission finds that RRBB engaged in improper professional conduct pursuant to Exchange Act Section 4C and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

36. Based on the foregoing, the Commission finds that RRBB committed a violation of Exchange Act Rule 17a-5(i) and caused the Broker-Dealer's violation of Section 17(a) and Rule 17a-5 promulgated thereunder.

37. Based on the foregoing, the Commission finds that Zucker engaged in improper professional conduct pursuant to Exchange Act Section 4C and Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

38. Based on the foregoing, the Commission finds that Zucker caused RRBB's violation of Exchange Act Rule 17a-5(i) and caused the Broker-Dealer's violation of Section 17(a) and Rule 17a-5 promulgated thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents RRBB and Zucker's Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

A. RRBB is hereby censured.

B. RRBB shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Exchange Act and Rule 17a-5 promulgated thereunder.

C. RRBB shall, within seven days of the entry of this Order, pay disgorgement of \$12,000 and a civil monetary penalty in the amount of \$25,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600 and 31 U.S.C. 3717. Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;⁵
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying RRBB as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Stephen L. Cohen, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

D. Zucker shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Exchange Act and Rule 17a-5 promulgated thereunder.

E. Zucker is denied the privilege of appearing or practicing before the Commission as an accountant.

F. After one-year from the date of this order, Zucker may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his/her practice before the Commission will be reviewed either by the independent audit committee of the public company

⁵ The minimum threshold for transmission of payment electronically is \$50,000.00 as of April 1, 2012. This threshold will be increased to \$1,000,000 by December 31, 2012. For amounts below the threshold, respondents must make payments pursuant to option (2) or (3) above.

for which he/she works or in some other acceptable manner, as long as he/she practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Zucker, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board (“Board”) in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Zucker, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the respondent’s or the firm’s quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Zucker has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Zucker acknowledges his responsibility, as long as he appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

G. The Commission will consider an application by Zucker to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission’s review may include consideration of, in addition to the matters referenced above, any other matters relating to Zucker’s character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Elizabeth M. Murphy
Secretary