

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 78897 / September 21, 2016

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3805 / September 21, 2016

ADMINISTRATIVE PROCEEDING
File No. 3-17562

In the Matter of

**ROBERT A. WAEGELEIN,
CPA**

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against Robert A. Waegelein (“Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (an “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, and, except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:¹

A. SUMMARY

This matter arises from a close personal relationship between Respondent, the former chief financial officer of a New York-based public issuer ("Issuer"), and a former partner of the public accounting firm retained to provide an independent audit of the Issuer's financial statements (respectively, the "Audit Partner" and the "Audit Firm"). Section 13(a) of the Exchange Act and Rule 13a-1 thereunder require public companies like the Issuer to file annual reports with the Commission that have been audited by an independent accountant. The close personal relationship between Respondent and the Audit Partner caused the Audit Firm to lack independence during the 2012, 2013, and 2014 audit and professional engagement periods. Nonetheless, Respondent continued to certify Issuer's annual reports and allowed them to be publicly filed. By so doing, Respondent caused the Issuer to violate Section 13(a) and Rule 13a-1 thereunder.

B. RESPONDENT

1. **Respondent**, age 55, is an accountant and CPA licensed in New York since 1987. Respondent served as the Issuer's chief financial officer for over two decades, until he retired in 2015. Prior to working for the Issuer, Respondent was employed as an accountant at an auditing firm.

C. RELEVANT ISSUER AND INDIVIDUAL

2. During the relevant period, the **Issuer's** securities were registered under Section 12(b) of the Exchange Act and were traded on the New York Stock Exchange. The Issuer filed annual reports on Form 10-K with the Commission.

3. **Audit Firm** is a professional services firm headquartered in New York, New York. The Audit Firm provides auditing, consulting, and tax services to various entities, including companies with securities registered with the Commission and traded in U.S. markets. The Audit Firm served as the Issuer's auditor from 1995 to August 2015.

4. **Audit Partner**, age 56, is an accountant and CPA licensed since September 1994. The Audit Partner served as the Audit Firm's coordinating partner on the Issuer's audit team from May 2010 to March 2015.

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.

D. FACTS

Background of the Audit Firm's Relationship with the Issuer

5. The Audit Firm served as the Issuer's auditor from 1995 until August 2015, when the Issuer terminated the Audit Firm. Between 1995 and 2010, the Issuer, including Respondent, expressed dissatisfaction with certain aspects of the Audit Firm's performance. As a result, in 2010, the Issuer informed the Audit Firm that it was considering changing audit firms.

6. In response, the Audit Firm presented the Issuer with a replacement audit team led by the Audit Partner, who would serve as coordinating partner. "Coordinating partner" was the term used by the Audit Firm to describe the lead partner on this audit engagement. The Issuer's audit committee decided to continue to retain the Audit Firm as its auditor.

7. Based on internal discussions at the Audit Firm, the Audit Partner understood that the Issuer was a "troubled account" and that his responsibilities as coordinating partner would include "developing" and "mending" the Audit Firm's relationship with the Issuer. The Audit Partner, along with several other engagement partners assigned to the Issuer's audit, assumed their roles on the Issuer's engagement team in or around May 2010. Respondent, as the chief financial officer ("CFO") of the Issuer, had regular communications with the Audit Firm engagement team about significant accounting issues and other issues relevant to the Issuer's audit.

The Audit Partner's Relationship with Respondent and Respondent's Family

8. Soon after the Audit Partner joined the Issuer's engagement team, he began entertaining Respondent. By 2012, the Audit Partner and the Respondent had developed a close personal relationship inappropriate for an independent auditor and a CFO of a public issuer. This close personal relationship continued through the 2012, 2013, and 2014 audit and professional engagement periods.

9. During this period, the Audit Partner spent extensive leisure time, including frequent out-of-town and overnight trips, with Respondent and his family. In all, the Audit Partner and Respondent took at least seven out-of-town trips together during the relevant period, all of which were social in nature and did not have a valid business purpose. In addition to these trips, the Audit Partner and Respondent frequently attended sporting events and socialized near the Issuer's headquarters in the greater New York City area. The Audit Partner also gifted tickets to sporting events and other things of value to Respondent.

10. The Audit Partner, sometimes accompanied by his wife, stayed overnight as a guest at Respondent's primary residence in New York and his vacation home in South Carolina on several occasions during the relevant period. Likewise, Respondent stayed overnight at the Audit Partner's apartment in Chicago, Illinois, and on at least one other occasion, Respondent and his son stayed overnight in a guest apartment in the Audit Partner's apartment building.

11. These social events, gifts, out-of-town trips, and overnight visits took place during each of the 2012, 2013, and 2014 audit and professional engagement periods.

12. For example, in January 2012, the Audit Partner gifted tickets to two successive regular season professional football games to Respondent for Respondent and his family to attend. Neither the Audit Partner nor any other the Audit Firm employee attended these games with Respondent and his family.

13. The following week, the Audit Partner and his wife took a trip to Green Bay, Wisconsin with Respondent and Respondent's son to attend a professional football playoff game. The Audit Partner purchased the tickets for the group, and they stayed overnight at the same hotel near Green Bay.

14. Two months later, in March 2012, the Audit Partner, who was in South Carolina for a separate golf outing, visited Respondent at Respondent's brother-in-law's vacation home in Hilton Head. The Audit Partner stayed overnight in that vacation home, where Respondent was also staying.

15. In October 2012, Respondent stayed overnight at the Audit Partner's apartment while on a business trip to Chicago. The Audit Partner and Respondent then planned a joint overnight trip to Nashville, Tennessee the following month to, among other things, play golf and attend a professional football game. While Respondent ultimately cancelled the trip, the Audit Partner and his wife travelled to Nashville and attended the football game with the Audit Partner's brother and Respondent's son, both of whom lived in Nashville.

16. In April 2013, the Audit Partner, Respondent, and members of their respective families again traveled to Nashville to celebrate the Audit Partner's birthday and attend a professional hockey game together. Upon learning that the Respondent and his son were attending a golf tournament in Augusta, Georgia later that same month, the Audit Partner and his wife traveled to Augusta, Georgia to attend the Masters golf tournament. Another Audit Firm partner also attended this trip. The Audit Partner and his wife, the other Audit Firm partner, Respondent, and Respondent's son stayed in the same hotel during this trip.

17. In October 2013, Respondent and his son traveled to Chicago for the purpose of visiting the Audit Partner and his wife, and attending a professional football game and a golf outing with them. Respondent and his son stayed overnight in the guest apartment in the Audit Partner's building during this trip.

18. In April 2014, the Audit Partner and his wife traveled to South Carolina for the purpose of spending leisure time and attending a golf tournament with Respondent and his family over Easter weekend, staying three nights as guests at Respondent's vacation home. After the trip, the Audit Partner thanked Respondent and his family for "treating us to such a wonderful time"; Respondent responded, "I can see many more of these ahead in the coming years . . . we appreciate how generous you are with us as well."

19. In December 2014, the Audit Partner, Respondent, and their respective wives flew to Nashville to attend a professional hockey game with Respondent's son, among others. In an email to Respondent and members of Respondent's family after the trip, the Audit Partner described the trip as a "Great 24 Hour Extravaganza," writing "We had a blast (as usual) being with all of you."

20. In or around February 2015, the Audit Partner began planning a second overnight trip to the Masters golf tournament in April 2015 with Respondent, Respondent's son, and another Audit Firm partner, among others. The Audit Partner planned to treat the trip in part as a retirement party for Respondent. Respondent and the other Audit Firm partner did not attend this trip, after the Audit Firm received a regulatory inquiry in March 2015 regarding the Audit Partner's relationship with Respondent.

21. In addition to these repeated out-of-town trips, the Audit Partner and Respondent frequently attended sporting events and socialized near the Issuer's headquarters in the greater New York City area. On a number of occasions, the Audit Partner flew to the greater New York City area for the purpose of attending a sporting event with Respondent and then left without visiting the Issuer's headquarters or otherwise performing any audit-related work. On at least two other occasions, the Audit Partner traveled to the greater New York City area for the purpose of having dinner at Respondent's home with Respondent, Respondent's family, Respondent's neighbors, and other members of the audit engagement team, and then left without visiting the Issuer's headquarters or otherwise performing any audit-related work.

22. On at least three other occasions, the Audit Partner gifted sports tickets to Respondent, Respondent's family, or friends of Respondent's son for use when the Audit Partner was not present. The Audit Partner also gifted hundreds of dollars' worth of sports memorabilia to Respondent over the five-year engagement.

23. The Audit Partner's entertainment of Respondent and his family caused the Audit Partner to incur significant entertainment, travel, and lodging expenses. In total, the Audit Partner incurred approximately \$109,000 in entertainment-related expenses—meals, sports tickets, and related travel and lodging—in connection with the Issuer's 2012, 2013, and 2014 audits. In 2012, he spent approximately \$29,545; in 2013, he spent approximately \$52,119; and in 2014, he spent approximately \$27,333.

24. The Respondent's relationship with the Audit Partner was marked not only by significant entertainment spending, but also by a close personal friendship. During the relevant period, the Audit Partner and Respondent exchanged hundreds of personal texts, emails, and voicemails that did not include meaningful business-related discussions. The Audit Partner and Respondent frequently referred to each other in emails as a "friend." Respondent also shared sensitive personal information not typically shared with a solely professional colleague with the Audit Partner. In 2013, Respondent and his wife invited the Audit Partner to spend Thanksgiving at their home, but the Audit Partner decided to visit his father instead.

25. In the aggregate, the frequent entertainment and social events shared by Respondent and the Audit Partner violated certain of the Audit Firm's policies with respect to independence and client entertainment. Respondent was aware, based upon his background in public accounting, that the Commission's Regulation S-X requires auditors of public companies to maintain their independence from audit clients, and avoid conflicts of interest that could taint an audit.

The Respondent's Representations Concerning the Audit Firm's Independence

26. Despite Respondent's understanding of the independence requirements of Regulation S-X and his knowledge of his close personal friendship with the Audit Partner, Respondent signed management representation letters to the Audit Firm stating that "We are not aware of any reason that [the Audit Firm] would not be considered to be independent" in connection with the 2012 and 2013 audits.

27. In connection with the 2014 audit, Respondent signed a similar management representation letter stating "We are not aware of any reason that [the Audit Firm] would not be considered to be independent for purposes of the Company's audit, including our consideration of the matters communicated to the Audit Committee on March 12, 2015 and March 27, 2015 by [the Audit Firm]." The "matters communicated to the Audit Committee on March 12, 2015 and March 27, 2015 by [the Audit Firm]" included a presentation by the Audit Firm to the Issuer's audit committee concerning the Audit Firm's preliminary evaluation of the close personal relationship between Respondent and the Audit Partner, and certain remedial steps undertaken by the Audit Firm in connection with the Issuer's audit in response to that relationship.

28. In each of 2012, 2013, and 2014, the Audit Firm provided to the Issuer audit reports representing that the Audit Firm was independent of the Issuer. These audit reports were included or incorporated by reference in the annual reports filed by the Issuer on Form 10-K. Although Respondent should have realized that his close personal relationship with the Audit Partner impaired the Audit Firm's independence and rendered the Audit Firm's audit reports inaccurate, Respondent certified the Issuer's annual reports in each of 2012, 2013, and 2014.

E. LEGAL ANALYSIS

Basic Principles of Auditor Independence

29. As the Commission has long recognized, "[i]ndependent auditors have an important public trust. . . . It is the auditor's opinion that furnishes investors with critical assurance that the financial statements have been subjected to a rigorous examination by an objective, impartial, and skilled professional, and that investors, therefore, can rely on them." *Revision of the Commission's Auditor Independence Requirements*, Exchange Act Rel. No. 43602, 2000 WL 1726933, at *2 (Nov. 21, 2000) (Adopting Release).

30. To be considered "independent" for purposes of the federal securities laws, a public accountant must be independent in both fact and appearance. *See In the Matter of Ernst & Young LLP*, Exchange Act Rel. No. 46821, 2004 WL 824099, at *30 (Apr. 16, 2004) (independence in fact and appearance are "equally important under the securities laws"); *see also United States v. Arthur Young & Co.*, 465 U.S. 805, 819 n.15 (1984) ("It is therefore not enough that financial statements *be* accurate; the public must also *perceive* them as being accurate.")

31. The circumstances in which an auditor will—and will not—be deemed independent are set forth in Rule 2-01 of Regulation S-X. Rule 2-01(c) provides a non-exclusive list of specific relationships that render an accountant non-independent. Rule 2-01(b) provides the "general

standard” for auditor independence, which all auditors must meet even if their conduct does not fall within one of the specific prohibitions in Rule 2-01(c). Under the general standard,

[t]he Commission will not recognize an accountant as independent, with respect to an audit client, if the accountant is not, or *a reasonable investor with knowledge of all relevant facts and circumstances would conclude that the accountant is not, capable of exercising objective and impartial judgment* on all issues encompassed within the accountant’s engagement. In determining whether an accountant is independent, the Commission will consider all relevant circumstances, including all relationships between the accountant and the audit client and not just those relating to reports filed with the Commission.

17 C.F.R. § 210.2-01(b) (emphasis added). This standard applies with equal force to individual accountants and the audit firms in which they practice. *See* 17 C.F.R. § 210.2-01(f)(1).

32. A reasonable investor with knowledge of all relevant facts and circumstances concerning Respondent’s personal relationship with the Audit Partner would conclude that the Audit Partner was not capable of exercising objective and impartial judgment with respect to the audits of the Issuer. Accordingly, the Audit Partner and the Audit Firm lacked independence during 2012, 2013, and 2014.²

33. Section 13(a) of the Exchange Act and Rule 13a-1 thereunder require public issuers to file with the Commission annual reports certified by an independent public accountant. Because the Issuer’s annual reports for 2012, 2013, and 2014 were not audited by a public accountant who was independent within the meaning set forth in Rule 2-01 of Regulation S-X, the Issuer violated Section 13(a) of the Exchange Act and Rule 13a-1 thereunder in each of those years.

Violations

34. As a result of the conduct described above, Respondent caused the Issuer to violate Section 13(a) of the Exchange Act and Rule 13a-1 thereunder during each of 2012, 2013, and 2014.

F. FINDINGS

35. Based on the foregoing, the Commission finds that Respondent caused violations of Section 13(a) of the Exchange Act and Rule 13a-1 thereunder by the Issuer.

² As the Commission noted in the Adopting Release for the revisions to Rules 2-01 and 2-02, “[t]he definition of ‘accountant’ includes the accounting firm in which the auditor practices. The definition makes clear that an individual accountant’s lack of independence may be attributed to the firm.” Revision, Exchange Act Rel. No. 43602, 2000 WL 1726933, at *86.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in the Respondent's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent cease and desist from committing or causing any violations and any future violations of Section 13(a) of the Exchange Act and Rule 13a-1 thereunder.

B. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$25,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Section 21F(g)(3) of the Exchange Act. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

C. 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;
- (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 Waegelein's name as the applicable 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 Sanjay Wadhwa, Senior Associate Regional Director, Division of Enforcement, Securities and Exchange Commission, 200 Vesey Street, Suite 400, New York, NY 10281-1022.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, he shall not argue that Respondent is entitled to, nor shall Respondent benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty

Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty, or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree, or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

By the Commission.

Brent J. Fields
Secretary