UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 8466 / August 25, 2004

SECURITIES EXCHANGE ACT OF 1934
Release No. 50246 / August 25, 2004

ADMINISTRATIVE PROCEEDING
File No. 3-11600

In the Matter of **MORGAN KEEGAN & CO., INC.,** **Respondent.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933 AND SECTIONS 15(b)(4) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934**

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 Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Morgan Keegan & Co., Inc. ("Morgan Keegan" or "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 Respondent and the subject matter of these proceedings, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b)(4) and 21C of the Securities Exchange Act of 1934, as set forth below.

III.

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

A. RESPONDENT

Morgan Keegan & Co., Inc. is a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act and is a member of NASD, Inc. and the New York Stock Exchange, Inc. Morgan Keegan's principal place of business is in Memphis, Tennessee.

B. SUMMARY

During 1999 through 2002, Morgan Keegan received three payments in consideration for publishing research on three public companies. Morgan Keegan did not disclose those payments in its research reports. The firm's failure to disclose these payments was in violation of Section 17(b) of the Securities Act.

In addition, from July 1999 through June 2001, Morgan Keegan failed to preserve business-related internal electronic mail communications that it was required to maintain pursuant to Section 17(a) of the Exchange Act and Rule 17a-4 thereunder.

C. FACTS

1. Background

During the period 1999 through at least 2003, broker-dealers that were underwriting public offerings sometimes paid other broker-dealers to issue research on or "cover" their issuer clients. These arrangements were made with regard to both initial public offerings ("IPOs") and secondary offerings. In some situations, the issuers directed the lead underwriters to make the payments, and in others, the lead underwriters selected the firms that received the payments. Some firms issuing the research actively solicited the payment.

In certain instances, the payments were made to firms that were not participating in the underwriting, and therefore not earning investment banking fees from the issuer on the particular offering. In other instances, firms that were underwriting small portions of the offering received additional payments in consideration for publishing research. These payments often were significantly larger than the underwriting fee the firm received.

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[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.

Section 17(b) of the Securities Act requires that any person who receives consideration, directly or indirectly, from an issuer, underwriter, or dealer for issuing research must fully disclose the receipt of the payment (whether past or prospective) and the amount. However, the broker-dealers that received these payments failed to disclose in their research reports that they received payment for publishing research.

2. **Morgan Keegan Did Not Disclose Its Receipt of Payments In Consideration for Publishing Research**

On three occasions during the period 1999 through 2002, Morgan Keegan received payments from other investment banking firms for research coverage of those firms' investment banking clients (the "issuers"). These payments ranged in amounts from $49,000 to $200,000. Morgan Keegan published research regarding these issuers without disclosing in the reports the receipt of the consideration and the amount received.

For example, on November 9, 1999, Morgan Keegan was paid $49,000 by the lead underwriter for issuing research on 3DO Company in connection with a July 22, 1999 secondary offering. The letter accompanying the check referred to the payment as a "special research charge." In addition, Morgan Keegan's internal e-mail revealed that Morgan Keegan had "pretty much guaranteed" the Chief Financial Officer of 3DO that Morgan Keegan would "pick up coverage after the deal." Although Morgan Keegan was selected to participate as an underwriter on the offering, and underwrote 57,500 shares of the 9,085,000 shares being offered, the $49,000 research payment was in addition to the $3,634 underwriting fee Morgan Keegan received for its underwriting services. In fact, Morgan Keegan credited the $49,000 "special research charge" on its books to its equity research department. Morgan Keegan initiated research coverage on 3DO on November 16, 1999 without disclosing the $49,000 payment.

In another instance, in March 2002, Morgan Keegan received a $50,000 payment from an investment bank in consideration for publishing research in connection with a November 13, 2001 securities offering for THQ, Inc. Handwritten notes dated September 7, 2001 on an internal Morgan Keegan document stated that Morgan Keegan had been informed by the lead underwriter that Morgan Keegan would be paid $50,000 "for research." On November 12, 2001, the day before the offering, Morgan Keegan sent to the lead underwriter copies of the two October 11 and 19, 2001 research reports. The cover letter accompanying the reports referenced "THQ Inc." and stated: "Enclosed is Morgan Keegan & Company, Inc.'s research for the above referenced offering." Morgan Keegan, which had been issuing research reports on THQ since March 1999, also issued a research report on February 14, 2002. Although Morgan Keegan was aware at the time that it issued the October and February reports that it would be paid for issuing the research, Morgan Keegan did not disclose the $50,000 payment. Morgan Keegan credited this payment on its books to Morgan Keegan's equity research department.

By failing to disclose in these research reports that it had received payment for issuing that research, Morgan Keegan violated Section 17(b) of the Securities Act.

3. **Morgan Keegan Failed to Maintain Electronic Mail Communications**

From July 1999 through June 2001, Morgan Keegan's employees used e-mail to conduct Morgan Keegan's business as a broker, dealer and member of an exchange. During that period, Morgan Keegan failed to preserve copies of business-related e-mail as required under Section 17(a)(1) of the Exchange Act and Rule 17a-4 thereunder. Although Morgan Keegan retained "external" e-mail (e-mail that was sent to someone outside the firm), it did not preserve all of its "internal" e-mail (e-mail that was sent only between employees of the firm) that related to its business. As a result, the Commission did not have access to that e-mail in connection with the investigation that resulted in this proceeding.

D. LEGAL DISCUSSION

1. **Morgan Keegan Violated Section 17(b) of the Securities Act**

Section 17(b) of the Securities Act provides:

> It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

15 U.S.C. § 77q(b).

In order to violate Section 17(b), a person must "(1) publish or otherwise circulate (using a means of interstate commerce), (2) a notice or type of communication (which describes a security), (3) for consideration received (past, currently, or prospectively, directly or indirectly), (4) without full disclosure of the consideration received and the amount." *SEC v. Gorsek*, 222 F. Supp. 2d 1099, 1105 (C.D. Ill. 2001). Courts have held that Section 17(b) does not require a showing of scienter. *SEC v. Liberty Capital Group, Inc.*, 75 F. Supp. 2d 1160, 1163 (W.D. Wash. 1999); *SEC v. Huttoe*, 1998 WL 34078092 (D.D.C. Sept. 14, 1998).

Morgan Keegan published and circulated communications in the form of research reports that described certain securities for consideration received, but did not disclose the receipt or the amount of these payments. As a result, investors did not receive information relating to the objectivity of the research.

2. **Morgan Keegan Violated Section 17(a)(1) of the Exchange Act and Rule 17a-4 Thereunder**

Section 17(a)(1) of the Exchange Act provides that each member of a national securities exchange, broker, or dealer "shall make and keep for prescribed periods such records, furnish copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title."

The Commission has emphasized the importance of the records required by the rules as "the basic source documents" of a broker-dealer. *Statement Regarding the Maintenance of Current Books and Records by Brokers and Dealers*, 4 SEC Docket 195 (April 6, 1974). The record keeping rules are "a keystone of the surveillance of broker and dealers by [Commission] staff and by the securities industry's self-regulatory bodies." *Edward J. Mawod & Co.*, 46 S.E.C. 865, 873 n.39 (1977) (citation omitted), *aff'd sub nom. Mawod & Co. v. SEC*, 591 F.2d 588 (10th Cir. 1979).

Pursuant to its authority under Section 17(a)(1) of the Exchange Act, the Commission promulgated Rule 17a-4. Rule 17a-4(b)(4) in turn requires broker-dealers to "preserve for a period of not less than 3 years, the first two years in an accessible place…. [o]riginals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to his business as such." Rule 17a-4 is not limited to physical documents. The Commission has stated that internal electronic mail communications relating to a broker-dealer's "business as such" fall within the purview of Rule 17a-4 and that, for the purposes of Rule 17a-4, "the content of the electronic communication is determinative" as to whether that communication is required to be retained and accessible. *Reporting Requirements for Brokers or Dealers under the Securities Exchange Act of 1934*, Rel. No. 34-38245 (Feb. 5, 1997).

From July 1999 through June 2001, Morgan Keegan failed to preserve business-related internal e-mail for three years in violation of Section 17(a)(1) of the Exchange Act and Rule 17a-4 thereunder.

E. CONCLUSIONS

Based on the foregoing and Morgan Keegan's Offer of Settlement, the Commission finds that with respect to payments received for the issuance of research, Morgan Keegan willfully violated Section 17(b) of the Securities Act by publishing communications that described securities for consideration received, directly from an underwriter, without disclosing the receipt of such consideration and the amount thereof.

Based on the foregoing and Morgan Keegan's Offer of Settlement, the Commission finds that with respect to electronic mail communications during the relevant period, Morgan Keegan willfully violated Section 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder by failing to preserve business-related internal electronic mail communications for three years.

F. UNDERTAKINGS

Morgan Keegan has undertaken to review its procedures regarding the preservation of electronic mail communications for compliance with the federal securities laws and regulations, and the rules of NASD, Inc. and the New York Stock Exchange, Inc. Within ninety days of the issuance of this Order, unless otherwise extended by the staff of the Commission for good cause shown, Morgan Keegan undertakes and agrees to inform the Commission in writing that it has completed its review and that it has established systems and procedures reasonably designed to achieve compliance with those laws, regulations, and rules concerning the preservation of electronic mail communications. In determining whether to accept the Offer, the Commission has considered these undertakings.

IV.

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

Accordingly, it is hereby ORDERED**:**

A. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, that Respondent cease and desist from committing or causing any violations and any future violations of Section 17(b) of the Securities Act and Section 17(a) of the Exchange Act and Rule 17a-4 promulgated thereunder.

B. Respondent is censured pursuant to Section 15(b)(4) of the Exchange Act.

C. It is further ordered that Respondent shall, within ten days of the entry of this Order, pay a civil money penalty in the amount of $875,000 to the United States Treasury. Such 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 Morgan Keegan & Co., Inc. as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Antonia Chion, Division of Enforcement, Securities and Exchange Commission, 450 5th Street N.W., Washington, D.C. 20549-0801.

D. Respondent shall comply with the undertakings contained in Section III.F above.

By the Commission.

Jonathan G. Katz
Secretary