INITIAL DECISION RELEASE NO. 374
ADMINISTRATIVE PROCEEDING
FILE NO. 3-13337

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

In the Matter of	:	
	:	INITIAL DECISION
DIANE M. KEEFE	:	April 3, 2009
	:	

APPEARANCES: Rachel E. Hershfang, Kevin M. Kelcourse, and James M. Fay for the Division of Enforcement, Securities and Exchange Commission

Robert Knuts, for Diane M. Keefe

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

Background

The Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) on January 13, 2009, pursuant to Sections 9(b) and 9(f) of the Investment Company Act of 1940 (Investment Company Act), Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act), and Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act). Diane M. Keefe (Keefe) filed an Answer on February 6, 2009.

At a prehearing conference on February 10, 2009, the parties each requested that I decide the case in their respective favor prior to the hearing scheduled to begin in early May 2009. On March 6, 2009, Keefe filed a Memorandum of Law in Support of Respondent's Motion for Summary Disposition Dismissing the OIP (Keefe Motion or Mot.). The Keefe Motion has thirteen exhibits.[1]

[1] Those exhibits are: (1) August 7, 2003, letter from the Commission examiners to The Pax World Fund Family and Pax World Management Corp.; (2) September 30, 2003, letter from the Commission examiners to The Pax World Fund Family and Pax World Management Corp.; (3) October 29, 2003, letter from counsel for the Pax World Family of Funds and the Pax World Management Corp. to the Commission examiners; (4) transcript excerpts of the investigative

On March 6, 2009, the Division of Enforcement (Division) filed a Motion for Summary Disposition, Memorandum in Support, and Declaration of Rachel E. Hershfang in Support with seven exhibits (Division Motion or Mot.).[2]

On March 20, 2009, Keefe filed a Memoranda of Law in Opposition to the Division's Motion (Keefe Opp'n), and the Division filed its opposition to Keefe's Motion (Div. Opp'n). Keefe argues that an evidentiary hearing is necessary if her position does not prevail. (Keefe Opp'n, 12 n.8.)

Issue

Whether Keefe willfully violated Section 34(b) of the Investment Company Act by submitting untrue statements of material fact in documents the registered investment company was required to keep pursuant to Section 31(a) of the Investment Company Act and Rule 31a-1(b)(11) thereunder.

Background

Keefe earned an undergraduate degree from Wellesley College and an MBA from Columbia University, she holds Series 7 and Series 63 licenses, and she is a Chartered Financial Analyst. (Keefe Mot., 5-6; Div. Mot., Ex. 2 at 30, Ex. 5A at 34-35.) From 1984 until 1999, Keefe was employed in the securities industry by PaineWebber, Inc., Oppenheimer Government Securities, Inc., Dillon Reed & Co., and Swiss Bank Corp., specializing in high yield securities. (Div. Mot., Ex. 5A at 35.) According to Keefe, in 1998-99, she developed the concept of a mutual fund that focused on socially responsible investing in companies that issued high yield bonds. (Keefe Mot., 6-7; Div. Ex. 2 at 31.) Keefe was associated with registered broker-dealers

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testimony of Keefe, January 17, 2007; (5) transcript excerpts of the investigative testimony of Janet L. Spates (Spates), December 6, 2006; (6) handwritten notes of staff interview of Spates, dated May 8, 2008; (7) handwritten notes of staff interview of Spates, dated December 3, 2008; (8) Keefe's handwritten notes of Investment Committee Meetings with different dates beginning February 2, 1999; (9) typed notes headed "Investment Committee" with different dates beginning February 2, 1999; (10) "Adviser Materials" that the Commission examiners obtained during an August 2003 exam; (11) July 2, 2007, letter from the Commission's Deputy Assistant Boston Regional Director to Robert Knuts, Esq. (Knuts); (12) August 19, 2008, e-mail from a Division counsel to Knuts; and (13) November 6, 2008, e-mail from a Division counsel to Knuts.

[2] Those exhibits are: (1) investigative testimony of Spates, December 6, 2006; (2) investigative testimony of Keefe, January 17, 2007; (3) Keefe's handwritten notes of Investment Committee meetings beginning February 2, 1999; (4) e-mail from Keefe to Spates on August 12, 2003; (5A through 5F) Excerpts from Form N-1A, Prospectus and Statement of Additional Information, filed by the High Yield Fund in the period from July 5, 2001 through April 30, 2004; (6A through 6E) Form DEF 14A, Proxy Statement and Notice of Annual Meeting of Shareholders, filed by the High Yield Fund in the period June 8, 2000, through June 10, 2004; (7) August 7, 2003, letter from the Commission examiners to The Pax World Fund Family.

from March 1987 through August 1998, from April 1999 through July 2006, and from June to December 2007. (OIP at 1; Answer at 1.)

In April 1999, Keefe became an employee of Pax World Management Corp. (Pax Management), a registered investment adviser.[3] (Keefe Mot., 7; Div. Mot., Ex. 5A at 32.) Shortly thereafter, on June 15, 1999, the Pax High Yield Fund (High Yield Fund), a registered investment company, was incorporated in Delaware.[4] (Keefe Mot., 7.) Pax Management became the investment adviser to the High Yield Fund and Keefe became the portfolio manager. (Div. Mot., Ex. 5A at 32, 34; Keefe Mot., 7.) According to Keefe, she "conceived and launched the first high yield, fixed income mutual fund that explicitly screened its investment activities to actively seek high yield bonds in more socially responsible companies through consideration of environmental, social, and governance factors." (Answer at 1.)

As the portfolio manager, Keefe made the High Yield Fund's investment decisions. (Keefe Mot., 7.) Keefe gave oral reports on her investment decisions to the High Yield Fund Board at every quarterly meeting. (Keefe Mot., 7, 11; Keefe Opp'n, 3.) Keefe was not a member of the High Yield Fund Board and the Board never adopted a resolution forming an Investment Committee. (Keefe Mot., 7-8.) Nonetheless, the original High Yield Fund prospectus identifies Laurence Shadek (Shadek) and Thomas Grant (Grant), Chairman and President, respectively, of Pax Management, as members of an Investment Committee of the High Yield Fund Board. (Keefe Mot., 7-8; Div. Mot., 4 n.4, Ex. 5A at 72, 74-75.)

On August 7, 2003, Commission examiners notified The Pax World Fund Family that it would be examining the books and records of the Pax World Funds complex, including the High Yield Fund. (Div. Mot., Ex. 7; Keefe Mot., Ex. 1.) Following that notice, in August 2003, Spates, Chief Financial Officer (CFO) and Compliance Officer of "the Pax World Funds" and Pax Management and Assistant Treasurer of the High Yield Fund, contacted Keefe and told her that the High Yield Fund had an "Investment Committee" that was supposed to meet at least two times a year and that Spates needed to have a record of the meetings.[5] (Keefe Mot., Ex. 4 at 118-20; Div. Mot., Ex. 1 at 20, 35, 80, Ex. 5D at 86.) Spates asked Keefe for documentation concerning meetings relating to the High Yield Fund. (Keefe Mot., 9.)

Spates requested documentation concerning the Investment Committee meetings because she believed the Commission examiners, conducting an examination beginning August 18, 2003,

[3] Pax Management, a private Delaware corporation, headquartered in Portsmouth, New Hampshire, is owned by the Shadek family. (Div. Mot., Exs. 5A at 32, 6A at 10.)

[4] The principal executive offices of the High Yield Fund are located at the same address in Portsmouth, New Hampshire, as Pax Management. (Div. Mot., Ex. 5A at 1.)

[5] Spates has been with Pax Management since 1992. (Div. Mot., 10.)

had requested it.[6] (Keefe Mot., 9, Ex. 5 at 71.) Keefe testified that Spates told her that she, Shadek, and Grant were on the Investment Committee.[7] (Keefe Mot., 9, Ex. 4 at 120.) In an e-mail to Spates on August 12, 2003, Keefe asked:

> PS did you confirm with Kevin or anywhere in your records that I need to provide evidence of investment committee meetings 2x per year.

(Div. Mot., Ex. 4.)

In response to Spates's request, Keefe put together eleven pages of handwritten notes each identified as "Investment Committee Meeting" or "Investment Committee" with fictitious dates and sent them via facsimile from New York to Spates in New Hampshire.[8] (Keefe Mot., 9-10, Ex. 8, Ex. 9; Div. Mot., 4-6, Ex. 3.) The dates on the eleven pages of handwritten notes are February 2, 1999; April 7, 2000; December 15, 2000; February 2, 2001; June 19, 2001; October 30, 2001; July 3, 2002; December 27, 2002; and August 12, 2003. (Keefe Mot., Ex. 8.) Keefe created the eleven pages of handwritten notes from notes she had of conversations with Shadek and she "drafted the portion of the [h]andwritten [n]otes that did not previously exist." (Keefe Mot., 9, Ex. 4 at 120-21, Ex. 8, Ex. 9.) She did so because she "believed that it would be helpful to document, to the best of her recollection, informal conversations that she had previously had with Shadek and Grant because Spates identified those two persons as members of the '[I]nvestment [C]ommittee'". (Keefe Mot., 9-10.) Keefe claims she created the handwritten notes in less than an hour and a half to reflect subjects of investment management importance that she had discussed with Shadek and Grant. (Div. Mot., 6; Keefe Mot., 10-11, Ex. 4 at 118-21, 140.) Keefe's handwritten notes reflect three-party conversations that did not occur on the dates specified or any other date. (Keefe Mot., 4.)

Spates put the handwritten notes in the Investment Committee files, in folders she thinks were marked "high yield investment notes" or "minutes" next to similar folders for the Pax growth and balanced funds in the New Hampshire office of Pax Management and the High Yield

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[6] Spates also testified that she thinks she asked for the documentation because she though they were minutes, but Lee Unterman (Unterman), outside counsel to Pax Management and the Pax World Funds, said they were not minutes. (Keefe Mot., Ex. 3 at 1, 6, Ex. 5 at 71, 73-74.)

[7] Shadek is chairman of the adviser and the High Yield Fund, and Grant is president of the adviser and the High Yield Fund. (Div. Mot., Ex. 6A at 8-9.)

[8] Keefe continues to believe that Spates's inquiry occurred in August 2004, despite a date of August 18, 2003, on the facsimile of the handwritten notes; an e-mail she sent to Spates dated August 12, 2003, asking for confirmation that she needed to provide evidence of investment committee meetings; and Spates's investigative testimony that about a year after the Commission's 2003 examination, Spates learned that the accuracy of the handwritten notes was in question. (Keefe Mot., 8 n.4, Ex. 4 at 121-22, 184-85; Div. Mot., Ex. 1 at 85, Ex. 3, Ex. 4.)

Fund.[9] (Keefe Mot., Ex. 5 at 73; Div. Mot., 6, Ex. 1 at 81-82, 98, Ex. 5A at 1.) Keefe does not agree that this action amounted to receipt of the handwritten notes by the High Yield Fund. (Keefe Opp'n, 5.)

During an on-site examination at the headquarters of Pax Management and the High Yield Fund in August 2003, Commission examiners were given a folder labeled "Adviser Materials." (Keefe Mot., 12 n.10, Ex. 10.) The handwritten notes were not in that folder. (Keefe Mot., 12 n.10.) Spates is not sure, but she does not think that the folder with Keefe's handwritten notes was given to the Commission examiners and she is not sure why. (Keefe Mot., Ex. 5 at 73-74.)

In August 2004, Keefe told Shadek and Grant what she had done, and Shadek told her to report her actions to Unterman. (Keefe Mot., 12, Ex. 4 at 121.) Pax Management disclosed the existence of the handwritten notes to the Commission's staff. (Keefe Mot., 12.)

In 2005, Pax Management reduced Keefe's annual compensation by $50,000, reduced her position to co-portfolio manager of the High Yield Fund, and placed her on probation for one year. (Keefe Mot., 4, 12, Ex. 4 at 176.) She was told that the reasons were "the market timing and the investment committee notes." (Keefe Mot., Ex. 4 at 176.) In October 2006, Pax Management terminated Keefe's employment as portfolio manager of the High Yield Fund. (Keefe Mot., 4, 12.) In December 2007, Pax Management terminated Keefe's employment completely. (Id.)

Keefe Motion

Keefe advances two main arguments:

1. Keefe's handwritten notes are not required records or advisory materials under Investment Company Act Rule 31a-1(b)(11) and, therefore, Keefe did not violate Section 34(b) of the Investment Company Act. (Keefe Mot., 15-19; Keefe Opp'n, 6-10.):

Keefe argues that the handwritten notes were not "advisory materials" "received from" the adviser by the High Yield Fund that the latter was required to retain under Section 34(b) of the Investment Company Act. (Keefe Mot., 1-2, 8 n.4; Keefe Opp'n, 4.) She insists that the handwritten notes are not "advisory materials" "received from" the adviser that the High Yield Fund was required to maintain under Investment Company Act Rule 31a-1(b)(11) because she created the handwritten notes to document past conversations with her superiors at Pax Management and the notes did not concern any advice she gave to any officer or director of the High Yield Fund. (Keefe Opp'n, 1.) Keefe takes issue with the Division's common sense definition of advice and argues instead that advice involves a prospective recommendation and the handwritten notes reflect past conversations. (Keefe Opp'n, 7.) Keefe asserts that there is no

[9] The context of Spates's investigative testimony indicates that she put the material into the Investment Committee files for the High Yield Fund.

factual basis for the OIP's characterization of the handwritten notes as advisory materials. (Keefe Mot., 17.)

Keefe complains that the OIP is inconsistent in stating both that the conversations reflected in the handwritten notes never occurred and that they constitute investment advice. (Id.) She maintains that there is no evidence that the High Yield Fund ever received the handwritten notes or that anyone at the High Yield Fund or Pax Management considered the handwritten notes to be advisory materials. (Keefe Mot., 13, 17; Keefe Opp'n, 2, 8-10.) Keefe cites a number of cases that she believes show by analogy that the Division did not show by a preponderance of the evidence that the High Yield Fund received Keefe's handwritten notes. (Keefe Opp'n, 9-10.) Keefe maintains that the High Yield Fund did not maintain any files of advisory materials. (Keefe Mot., 2, 16.) She notes that Spates told the Division that the adviser kept research files in its New York office and Spates could not think of any advisory material maintained by the High Yield Fund. (Keefe Mot., 16.)

Keefe argues that: (1) the Division did not present evidence in support of a finding that the handwritten notes contained any material untrue statements of fact; (2) the handwritten notes did not contain material untrue statements of fact because "there was no significant difference between the type and manner of supervision described in the handwritten notes and the supervision actually implemented by the High Yield Fund Board"; (3) there is no basis for concluding, prior to an evidentiary hearing,[10] that her handwritten notes contained any material untrue statements; (4) the handwritten notes accurately reflect conversations Keefe had with Shadek and/or Grant; and (5) no one relied on the handwritten notes so no one was misled. (Keefe Opp'n, 2-3, 5-6, 11-13.)

Keefe challenges the allegation that her "error in judgment" constitutes a violation of the federal securities laws. (Keefe Mot., 1; Keefe Opp'n, 4.) She concludes that the OIP should be summarily dismissed because it contains no facts which can be the basis of a violation. (Keefe Mot., 3; Keefe Opp'n, 4.)

2. The Division's interpretation of "Advisory Materials" is not enforceable under the due process clause of the U.S. Constitution. (Keefe Mot., 18-19):

Keefe argues that the OIP's declaration that the handwritten notes are advisory materials and that she should be sanctioned is a violation of her constitutional right of due process. (Keefe Mot., 3-4, 18-19.) Keefe claims that in a second Wells notice in August 2008, the Division concluded that the handwritten notes were not "advisory materials," but instead, "minute books . . . of directors' . . . committee meetings" within the meaning of Investment Company Act Rule 31a-1(b)(4). (Keefe Mot., 3.) She contends that the definitions of required records in Investment Company Act Rule 31a-1(b) must have specific, actual meaning and cannot be left to the prosecutorial whim of the Division. (Id.)

[10] Keefe also argues that the allegation that the handwritten notes contain material statements of fact cannot be proven at an evidentiary hearing because no one ever viewed or relied on them. (Keefe Opp'n, 3.)

Keefe alleges that the only commentary by the Commission concerning Investment Company Act Rule 31a-1(b)(11) indicates that "advisory materials" refers to research reports concerning specific security investments received by a registered investment company. (Keefe Mot., 19; Keefe Opp'n, 8.)

Keefe contends that the Division is interpreting the phrase "advisory materials" to include her handwritten notes for the sole purpose of alleging that she violated Section 34(b) of the Investment Company Act and that this novel interpretation violates the principles established in Upton v. SEC, 75 F.3d 92, 98 (2d Cir. 1996); KPMG, LLP v. SEC, 289 F.3d 109, 115-18 (D.C. Cir. 2002); Blount v. SEC, 61 F.3d 938, 948-49 (D.C. Cir. 1995); and Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34, 36-37 (1st Cir. 1989). (Keefe Mot., 18-19.)

Keefe views this administrative proceeding as an arbitrary and unlawful assertion of government power because it is based on a changed definition by the Division of an Investment Company Act rule. (Keefe Mot., 4.) Keefe urges the Commission to amend Investment Company Act Rule 31a-1(b) if it believes registered investment companies should be required to retain copies of all handwritten notes of a portfolio manager pertaining to the portfolio, even if the notes are never communicated to anyone else or relied upon as investment advice. (Keefe Mot., 4-5.) Keefe views the Division's attempt to punish her, where there was no investor harm or monetary benefit to Keefe, as vindictive and disconnected from investor protection. (Keefe Mot., 4.)

Division's Motion

According to the Division, Investment Company Act Rule 31a-1(b)(11) requires that a document be retained when it is advisory material and it was received from a person from whom the investment company accepts investment advice. (Div. Opp'n, 2.) The Division claims that Keefe violated Section 34(b) of the Investment Company Act because as portfolio manager, and, thus, a person who gave the High Yield Fund investment advice, her handwritten notes contained false representations about material matters that were required records of the High Yield Fund under Investment Company Act Rule 31a-1(b)(11). (Div. Mot., 2-3, 12.) The Division considers Keefe's defenses, that she did not intend the handwritten notes to communicate investment advice, the notes were not filed in an "Adviser Material" folder, and no one at the High Yield Fund or Pax Management considered the handwritten notes to be advisory material, irrelevant. (Div. Opp'n, 2-5.)

The "[I]nvestment [C]ommittee notes" are "advisory material" under Investment Company Act Rule 31a-1(b)(11).

The Division did not find any published decisions addressing the meaning of the term advisory material.[11]

[11] In one settled proceeding, Jerome E. Treisman, 21 SEC Docket 1465 (Jan. 29, 1981), the Commission barred Treisman from association with any broker, dealer, and/or investment

The Division insists that, taken at face value, the handwritten notes meet the common sense description of advisory materials in that Keefe was a person from whom the High Yield Fund accepted investment advice, and, therefore, the handwritten notes, which reflect advice and counsel regarding purchases and sales made on the High Yield Fund's behalf, are required records under Investment Company Act Rule 31a-1(b)(11). (Div. Mot., 2, 12; Div. Opp'n, 2.) To buttress its position, the Division cites to Keefe's description of what she tried to do in writing the handwritten notes. (Div. Mot., 14-16.)

Keefe was a person from whom the investment company received investment advice.

This fact is undisputed.

By giving the impression that there had been regular meetings attended by Keefe, Shadek, and Grant, Keefe's "[I]nvestment [C]ommittee meeting" notes were materially untrue.

The Division contends that the plain text of the rule and the legislative history show that the materiality requirement should be defined in keeping with Investment Company Act Rule 31a-1(b)(11) purpose of preserving advisory material for review by regulators. (Div. Mot., 18.) The Division quotes certain portions of the handwritten notes to support its position that Keefe's purpose was to give the false impression that she, Shadek, and Grant met together. (Div. Mot., 20.) The Division finds it material that the three-way meetings that Keefe described, at which Shadek and Grant collectively considered the High Yield Fund's investment strategy and agreed with her investment approach, did not occur. (Div. Mot., 19-21; Div. Opp'n, 4 n.5.) The Division sees a material difference between instances where Keefe received counseling from two senior managers on a regular basis, as described in the handwritten notes, and a written recollection of certain important investment decisions where she had investment supervision, which is what seems to have actually happened. (Div. Mot., 22.)

The Division responds to Keefe's due process argument with the following:

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adviser. Treisman had pled guilty in a criminal proceeding, United States v. Treisman, 73 Cr. 74 (S.D.N.Y. Jan. 23, 1973), to:

> unlawfully, willfully and knowingly and without just cause hindering the making and keeping of required investment advisory materials on behalf of Tudor Hedge Fund by preparing and assisting in the preparation of a research report, which purported to be research information concerning Computerized Knitwear, Inc., a stock owned by the Fund, in order to create the appearance that the aforesaid security had been purchased by the Fund on the basis of its investment merits.

(Div. Mot., 13 n.9.)

Treisman had also been enjoined by consent in a parallel civil action. SEC v. Everest Management Corp., 71 Civ. 4932 (S.D.N.Y. Jan. 1981).

> It strains credulity to imagine that Keefe, a sophisticated investment professional, did not have a reasonable opportunity to know that it was prohibited to fabricate records of meetings that had not occurred so as to give the SEC examination staff the impression that such meetings had happened regularly.

(Div. Opp'n, 5.)

Ruling

Section 34(b) of the Investment Company Act states in part:

> It shall be unlawful for any person to make any untrue statement of a material fact in any registration statement, application, report, account, record, or other document filed or transmitted pursuant to this title or the keeping of which is required pursuant to Section 31(a). It shall be unlawful for any person so filing, transmitting, or keeping any such document to omit to state therein any fact necessary in order to prevent the statements made therein, in the light of the circumstances under which they were made, from being materially misleading.

Section 31(a) of the Investment Company Act mandates that each registered investment company maintain and preserve such records as defined in Section 3(a)(37) of the Exchange Act.[12]

Investment Company Act Rule 31a-1 states:

> (b) Every registered investment company shall maintain and keep current the following books, accounts, and other documents:
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> ***
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> (11) Files of all advisory material received from the investment adviser, any advisory board or advisory committee, or any other persons from whom the investment company accepts investment advice, other than material which is furnished solely through uniform publications distributed generally.

The Supreme Court has held that the federal securities laws should be "construed not technically and restrictively, but flexibly to effectuate its remedial purposes." See SEC v. Zanford, 535 U.S. 813, 819 (2002) (quoting SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963)). I find that Keefe willfully violated Section 34(b) of the Investment Company Act and Investment Company Act Rule 31a-1(b)(11) because she was an employee of

[12] Section 3(a)(37) of the Exchange Act defines records as "accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language."

the adviser who managed the High Yield Fund's portfolio and she was the person "from whom the investment company accept[ed] investment advice."

It is well established that the adviser-client relationship has a fiduciary nature, which requires that "[f]iduciaries should be honest and deal fairly and in good faith with their beneficiaries. They should disclose conflicts of interest, avoid intentional misconduct and refrain from competing with or seizing opportunities of their beneficiaries." Tamar Frankel, 2 The Regulation of Money Managers §14.01 at 14-5 (2d ed. Supp. 2009). See also Capital Gains, 375 U.S. at 191, 194. Keefe violated her fiduciary duty when, as portfolio manger, she knowingly submitted to Spates, an officer of the adviser who was gathering material for the High Yield Fund, documentation describing nine Investment Committee meetings that falsely represented that the High Yield Fund had an Investment Committee of three members and that these members met on nine specific dates and discussed the High Yield Fund's investments. Keefe submitted the false documentation knowing it was being gathered for a Commission examination of the High Yield Fund. Keefe's handwritten notes were put into the High Yield Fund's Investment Committee files.

The Commission's reporting provisions are satisfied only by filing accurate reports. See SEC v. IMC Int'l, Inc., 384 F. Supp. 889, 893 (N.D. Tex. 1974), aff'd mem., 505 F.2d 733 (5th Cir. 1974), cert. denied sub nom. Evans v. SEC, 420 U.S. 930 (1975). It is reasonable to assume that the accuracy requirement applies also to files that regulated entities are required to maintain. Keefe's handwritten notes were indisputably false. They were material because they described investment decisions, a matter of significance to the fund shareholders. They were advisory material because portions purportedly described what the Investment Committee thought should be done on certain investments. Neither the statute nor the regulation requires that someone rely on the false documentation or that it be shown to Commission examiners. The fact that the Commission examiners did not review the handwritten notes in their August 2003 examination does not change the fact that Keefe, who was in a fiduciary capacity to the High Yield Fund, provided false information about a material issue relative to a nonexistent Investment Committee to an officer of the adviser and the High Yield Fund.

I reject Keefe's claim that she thought the request was for documentation for the Pax Management Investment Committee and the Division is wrong to "assume" the documentation was for the Investment Committee of the High Yield Fund. (Keefe Opp'n, 4-5.) Keefe's claim is contrary to her prior position that "[b]oth Keefe and Spates recall [that] Spates asked Keefe for documentation concerning "[I]nvestment [C]ommittee" meetings relating to the High Yield Fund." (Keefe Mot., 9.) Moreover, her new position makes no sense. Keefe argues that she could not have created minutes of High Yield Fund Investment Committee meetings because she was not on the High Yield Fund Board and, since committees consist of directors, she could not have been on the Investment Committee. (Keefe Mot., 8; Keefe Opp'n, 5.) Her position seems to be that she was documenting meetings of a Pax Management committee, but she was not a member of the Pax Management Board either. (Keefe Opp'n, 4-5.)

As portfolio manager, Keefe should have known that later High Yield Fund prospectuses identified Keefe as a member of the Investment Committee.[13] (Keefe Mot., 8.) In addition, Keefe should have known that the High Yield Fund stated in numerous proxy statements that it had an Investment Committee consisting of Shadek, Grant, and Keefe with responsibility for overseeing investments of the High Yield Fund. (Div. Mot., 8, Exs. 6A at 10, 6B at 9-10, 6C at 10, 6D at 16, 6E at 14-15.) And further, Keefe should have known and taken steps to correct the fact that some of the High Yield Fund proxy statements falsely stated that the Investment Committee met twice a year and that the members attended all the meetings of the committees on which they served. (Div. Mot., 8, Exs. 6B at 10, 6C at 10, 6D at 16, 6E at 15.)

I reject Keefe's argument that the Division's actions violated her due process rights under the U.S. Constitution. The Fifth Amendment provides that no person shall be deprived of life, liberty, or property, without due process of law by the federal government. There is no evidence that the Commission is acting in an arbitrary or capricious manner in bringing this proceeding for what Keefe admits was a substantial error in judgment. (Keefe Mot., 4.)

Rule 250 of the Commission's Rules of Practice provides that a Motion for Summary Disposition may be granted where there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. There is no dispute as to the facts that show that Keefe willfully violated Section 34(b) of the Investment Company Act for failing to meet the requirements of Section 31(a) of the Investment Company Act and Rule 31a-1(b)(11) thereunder.

For the reasons stated above, I DENY Keefe's Motion for Summary Disposition Dismissing the OIP and I GRANT the Division's Motion for Summary Disposition. I CANCEL the hearing scheduled to begin on May 4, 2009, and I DENY Keefe's request for an evidentiary hearing in the event her motion was denied.[14]

Section 9(b) of the Investment Company Act, Section 203(f) of the Advisers Act, and Section 15(b) of the Exchange Act provide that the Commission may take a variety of actions where it is in the public interest and a person is shown to have willfully violated a provision of

[13] Even though Keefe acknowledges this, the portions of the prospectuses in evidence do not name Keefe as a member of the High Yield Fund's Investment Committee and neither do the complete copies on file with the Commission. (Div. Mot., Exs. 5A through 5F.)

[14] Keefe cites three facts which she contends are in dispute and require an evidentiary hearing to resolve: (1) Keefe did not create the handwritten notes for the High Yield Fund Investment Committee; (2) there is no evidence that the handwritten notes were delivered to the High Yield Fund; and (3) the handwritten notes did not contain material statements of untrue facts. (Keefe Opp'n, 4-5.) I disagree with Keefe that there are genuine issues of material fact in dispute. What she disputes is the meaning or conclusions to be drawn from the handwritten notes and their transmission, facts that are not in dispute.

the respective statutes.[15] These actions include a prohibition against serving on or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter. Where a person was associated with an investment adviser or broker or dealer at the time of the violations, and where it is in the public interest, the Commission may censure or place limits on the activities, suspend from association for up to twelve months, or bar such person from being associated with an investment adviser or broker or dealer. Sections 9(d) and 9(f) of the Investment Company Act authorize imposition of civil money penalties and a cease-and-desist order, respectively, where a person has been found to have committed willful violations and it is in the public interest.

The fact that Keefe has no record of prior violations is outweighed by the facts that her transgressions were committed while she was in a fiduciary capacity and that her actions resulted from deliberate conduct that Keefe undertook with an intent to deceive. Moreover, Keefe kept her conduct secret for about a year, which allowed her to postpone the inevitable consequences of her actions.

Based on the public interest factors set out in SEC v. Steadman, 603 F.2d 1126, 1140 (5th Cir. 1979), I find that Keefe should be suspended from association with an investment adviser, broker, or dealer for twelve months. See also Orlando Joseph Jett, 82 SEC Docket 1211, 1260-61 (Mar. 5, 2004); KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1183-84 (2001), reh'g denied, 55 S.E.C. 1 (2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002). I arrive at this determination because Keefe's action was egregious. She was a highly placed professional serving in a fiduciary capacity with significant responsibility who created fictitious documents that were intended for government regulators. The event happened once, but it involved nine false reports. Keefe's vigor in defending herself is understandable, but her rigidity at refusing to accept the validity of evidence that shows she transmitted the handwritten notes in 2003 shows an unreasonable intractability. Moreover, the persuasive evidence is that it took her a year to reveal to her superior what she had done. "The purpose of . . . sanctions must be to demonstrate not only to petitioners but to others that the Commission will deal harshly with egregious cases." Arthur Lipper Corp. v. SEC, 547 F.2d 171, 184 (2d Cir. 1976).

I find that a suspension from association is sufficient to protect the public and that a civil money penalty and a cease-and-desist order are not necessary to protect the investing public. The fact that Keefe has been found to have violated federal securities statutes and regulations will, in and of itself, cause considerable damage to her professional reputation. Still, to protect the public, it is necessary that Keefe and others know that willful, knowing violations of the securities statutes come with a cost.

[15] The term "willful" as used in the Exchange Act simply requires the intentional doing of the wrongful acts – no knowledge of the rule or regulation is required. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); United States v. O'Hagan, 139 F.3d 641, 647 (8th Cir. 1998); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

Order

For all these reasons, I ORDER that Diane M. Keefe is suspended from association with an investment adviser, broker, or dealer for twelve months.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Brenda P. Murray
Chief Administrative Law Judge