

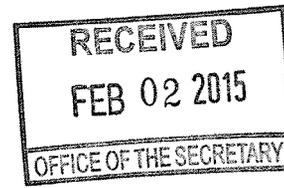
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15873

In the Matter of

THOMAS R. DELANEY II and
CHARLES W. YANCEY

Respondents.



**RESPONDENT THOMAS R. DELANEY II's RESPONSE TO DIVISION'S
PROPOSED SUPPLEMENTAL FINDINGS OF FACT**

Respondent Thomas R. Delaney II (“Delaney”), by and through counsel, submits this Response to the Division of Enforcement’s (“Division”) Proposed Supplemental Findings of Fact, pursuant to this Court’s Order dated January 27, 2015 (“Order”).¹

	DIVISION’S PROPOSED FINDING OF FACT	DELANEY’S RESPONSE
323	Delaney claimed that he was unprepared for his first testimony and that, due to the lack of preparation, he did not have a good recollection of the salient events.	<p><u>Response</u> No dispute.</p>
324	Delaney gave notice at PFSI in the middle of March, 2011.	<p><u>Response</u> No dispute; however the Division’s statement is redundant of Stipulated Finding of Fact 56 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact.</p> <p><u>Support</u> <u>Stipulated Finding of Fact 56.</u> Mr. Delaney gave notice to Penson that he was resigning as chief compliance officer and leaving Penson to pursue other employment in mid-March 2011.</p>
325	Delaney was responsible for PFSI’s WSPs.	<p><u>Response</u> Dispute: Incomplete recitation of the record; mischaracterization of the testimony.</p> <p><u>Support</u> Ex. 200 at p. PFSI2163747</p> <p>Tr. 805:20-24 [Alaniz] Q Did you -- during your time at Penson, did you have any role in creating WSPs? A As a group, we all created them. We all amended them, changed them, adjusted them to business practices. So as a group, we all did.</p> <p>Tr. 1712:19 – 1713:11 [Hasty] Q And when you were at Penson, did you understand that the WSPs was to be updated? A Yes, they were updated regularly. Q: And if you can, what -- at a high level, how did that process</p>

¹ Delaney maintains and preserves his objection to the Division’s Supplemental Findings of Fact as improper. See Respondent Thomas R. Delaney’s Combined Motion to Strike and Motion to Enter Delaney’s Unopposed Findings of Fact and Conclusions of Law into the Record, filed January 22, 2015, at pp. 2-3.

work?

A Typically, it could happen a couple of different ways. One could be there could be a change or a modification to a rule or a regulation that would require us to make a targeted change to the WSPs. It could also be as a result of an annual review or a regular review of the WSPs, where the WSPs are sent out to the various business owners in all of the different areas that those WSPs that attach to each business unit are sent to the managers of those units for them to review, to let us know if there's anything that needs to be updated or anything that's changed in their day-to-day work that we need to address in those procedures.

Delaney Finding of Fact 65. At Penson, creating WSPs was the responsibility of the business units, as was reviewing those WSPs to be certain they accurately reflected the business practices of the business unit.

Tr. 1758:3-10 [Hasty]

3 Who was it who was

4 responsible for generating the WSPs related to a
5 business unit?

6 A So it was a responsibility of the business

7 unit to convey to compliance what they were doing, how

8 they were supervising their business, what documents

9 they were using to evidence supervision of their

10 business.

Tr. 1758:13 – 1759:2 [Hasty]

13 Q Why is it that the business unit originated

14 that?

15 A Well, they're the experts. They are the

16 people who are doing this day to day. As Compliance

17 Officers, we're not experts in every area of the

18 business. We don't sit at someone's desk and process

19 buy-ins or use the reports or, you know, escalate

20 certain items to our supervisors. We're unfamiliar

21 with the process. We're unfamiliar in general with

22 what they're doing on a day-to-day basis. So it's

23 absolutely is necessary to have the business owners be

24 the original people who are drafting those WSPs and

25 providing the information so that we can make sure it's

1 accurate and that it includes what's really being done

2 day to day.

Tr. 807:8-16 [Alaniz]

8 Why is it that the business owner would --

9 would make changes to a WSP?

10 A I would call them preliminary changes. You

11 would want to have them review it to ensure that if it

12 states that they're doing A, when in actuality, they're

		<p>13 doing B, you want that to be adjusted. That's why you 14 would want them to review it; so in the event the 15 regulators would come in and they do ask for WSPs, we are 16 doing what we are saying and not –</p> <p>Exhibit 312</p> <p><u>Proposed Counterstatement</u> By virtue of his role as CCO, Delaney was ultimately responsible for PFSI's WSPs; however, the process for drafting, updating, and maintaining the WSPs was a collaborative effort between Penson's business units and various personnel within the Compliance Department.</p>
326	<p>The "House Buy-Ins" section of PFSI's WSPs pertains to buy-ins to cover short sales caused by customer shorts, not fails due to long sales of securities that PFSI had loaned out.</p>	<p><u>Response</u> Dispute: accuracy of statement; mischaracterization of the record; contrary evidence.</p> <p><u>Support</u> Ex. 66, pp. 387-388</p> <p>Tr. 398:9 – 401:1 [Wetzig]</p> <p>Q. Let me have you then jump — go to Page 388, the next page, "House Buy-Ins." Yeah, that right there. So it indicates there that a buy-in can be on the borrower loan side, in that first bullet point, doesn't it?</p> <p>A That is correct. That means if we're borrowing the securities, somebody can buy us in. And if we're loaning securities, we can buy it from them.</p> <p>Q. Right. And go to the last bullet point. So when you don't have a counterparty to buy them into, what -- that tells you you're supposed to pass it down to Stock Loan, right?</p> <p>A No.</p> <p>Q. Or I'm sorry. To the buy-ins department, right?</p> <p>A That would go to the customer.</p> <p>Q,. Is that not the buy-ins — is there a different customer buy-ins department from the from — is there multiple buy-in departments at Penson?</p> <p>A There's one buy-in department at Penson.</p> <p>Q. So that must be referring to just the buy-in department headed by Mr. Gover, correct?</p> <p>A Correct. Mr. Gover did run the buy-in department. If we received a -- if we were borrowing shares, and we couldn't return those shares, we would get a buy-in. That would go to the customer short sale.</p> <p>Q. Well.</p> <p>A That's what that's referring to.</p> <p>Q. Doesn't it say it could be on the loan side as well? The first --</p> <p>A If we were loaning a security, we would buy from the</p>

broker-dealer that we're loaning into.

Q. Okay.

A. If we're borrowing a security, we're borrowing to cover a customer short sale; they would pass us the price. At that point, we would give that to the customer that is short. None of this has anything to do with taking proprietary positions.

Q. So it doesn't -- doesn't -- the first bullet point doesn't say buy-ins can be on the borrow or loans --

A. No, that's exactly what it says.

Q. So --

A. A buy-in can be if we're -- if we are -- we can get bought in if we're borrowing securities. The reason we're borrowing securities is to cover a customer short sale. At that point, if we get bought in, we're going to pass that price to the customer that's short, just like the other broker-dealer is going to do. If we're loaning the shares to them, they can't return the shares. We're going to give them a price; they're going to give it to their customer. None of this has anything to do with proprietary trading.

Q. These are 204 procedures, aren't they?

A. They are, that's correct.

Q. Okay. So it has -- it -- and the loan side would be when you guys have loaned out a security, right?

A. That is correct.

Q. Okay. And doesn't that, there, say -- pardon my colloquialism. The buy-ins -- it says buy- -- it has a capitalized term, "Buy-Ins," right? In the first bullet point.

A. Yes, it is capitalized.

Q. The same in the last bullet point. If Stock Loan does not have a counterparty to pass the Buy-In to" -- and it could be a Buy-In on the borrow or loan side -- "then the Buy-In is forwarded to the customer Buy-In department"

Delaney Finding of Fact 67. Penson's WSPs were adequate and typical of the industry.

Tr. 1993:16 – 1994:13 [Poppalardo]

16 A Okay. Yes, I did look at PFSI's policies and
17 procedures. And I think what I would say is you start
18 with, you know, as a general matter, you look at all of
19 the key elements of the rule, and you make sure that
20 those are reflected in the policies and procedures and
21 to -- for the Reg SHO, certainly the important things
22 are, you know, that the orders be marked correctly,
23 locate and delivery requirements, close-out
24 requirements and the penalty box restrictions. And I
25 saw all of those elements in the PFSI policies, albeit
1 in not necessarily a single policy because there are
2 separate and distinct responsibilities within different
3 groups in PFSI.

4 Q How did they compare to what you've seen in

		<p>5 the industry with respect to policies and procedures? 6 A Relating to Reg SHO, I think their policies 7 and procedures overall were very comprehensive. And 8 we've seen better, but, you know, they're -- they're 9 perfectly adequate. In connection with Reg SHO, it's a 10 really complicated area. I see a lot of policies and 11 procedures and it took me a really long time to parse 12 through them, but I do think that -- I think they were 13 okay.</p> <p>Tr. 2039:23 – 2040:6 [Poppalardo] 23 Q Can you tell me, did anything in the 24 cross-examination questions that Ms. Atkinson asked 25 change your opinion that PFSI policies and procedures 1 were consistent with what you saw in the industry? 2 MS. ATKINSON: I'm going to object to that as 3 leading. 4 JUDGE PATIL: Overruled. 5 A No, I -- I think they're consistent with -- 6 with other policies and procedures that I've seen.</p> <p><u>Proposed Counterstatement</u> The section titled “House Buy-Ins” contained within the “Securities Lending (Stock Loan) – Dallas Office II – Rule 204” section of PFSI’s WSPs pertains to buy-ins of securities that Person had borrowed to cover its customers’ short sales and securities that Person had loaned to its counterparties.</p>
327	Holly Hasty did not remember any specific meetings about Rule 204, even meetings she admitted attending.	<p><u>Response</u> Dispute: Accuracy of statement; mischaracterization of the record; incomplete recitation of the cited source.</p> <p><u>Support</u> Tr. 1771:5 – 1772:3 [Hasty] Q. You don't recall being in any meetings with Mr. Yancey in which Rule 204 compliance was discussed; isn't that right? A Not specifically, no. Q. Okay. You don't remember, for instance, a March meeting at which Mr. Gover was there, Mr. Delaney was there, Mr. Alaniz was there, all discussing the -- the Rule 204 testing; you don't remember that? A I don't recall it, no. *** Q This is Exhibit 99. And Exhibit 99 indicates that you were at least invited to this meeting with all of these people; isn't that right? A Yes, Q Do you have any doubt that you attended that meeting? A I don't. Q. Your expectation is that you would have attended that meeting?</p>

		<p>A Yes, it's likely.</p> <p><u>Proposed Counterstatement</u> Holly Hasty did not recall any specific meetings with Mr. Yancey in which Rule 204 compliance was discussed, including a meeting in which she was invited to and testified that she likely would have attended.</p>
328	<p>Delaney referred to PFSI's response to FINRA's notification of Stock Loan's violations of Rule 204 as "self-reporting."</p>	<p><u>Response</u> Dispute: Accuracy of statement; mischaracterization of the record.</p> <p><u>Support</u> Tr. 1373:24 – 1374:8 [Delaney] Q . . . And then if you look at the next page, Page 32 of Exhibit 89, in that second paragraph there, that's where we see Penson telling FINRA that they're executing close-out versus long sales at the conclusion of the DTCC trading window instead of at market open; is that right? A Yes. Q And this is what you're calling self-reporting; is that right? Your response to FINRA's notification to you about these CNS fails? A Yes.</p> <p><u>Proposed Counterstatement</u> Delaney referred to Penson's statement that they were executing close-outs versus long sales at the conclusion of the DTCC trading window instead of at market open as "self-reporting."</p>
329	<p>In the supervisory matrices that were sent to Yancey for review by Kim Miller, fewer than 20 employees were listed under Yancey's name.</p>	<p><u>Response</u> Delaney agrees with and joins Yancey's dispute of this Proposed Supplemental Finding of Fact and incorporates the same herein.</p>
330	<p>Between the February 2009 supervisory matrix and the January 2010 supervisory matrix, several changes were made.</p>	<p><u>Response</u> Delaney agrees with and joins Yancey's dispute of this Proposed Supplemental Finding of Fact and incorporates the same herein.</p>

330 (a)	Employees were removed from Yancey's supervision and re-assigned to other executives. For example, Doug Throckmorton was re-assigned from Yancey to John Kenney, Jack Boyle from Yancey to Bart McCain, and Michael Scaplen from Yancey to Dan Weingarten.	<u>Response</u> Delaney agrees with and joins Yancey's dispute of this Proposed Supplemental Finding of Fact and incorporates the same herein.
330 (b)	Employees were added to Pendergraft's supervision.	<u>Response</u> Delaney agrees with and joins Yancey's dispute of this Proposed Supplemental Finding of Fact and incorporates the same herein.
330 (c)	Johnson's title was updated from head of Securities Lending, but he remained under Yancey with Yancey as his regulatory supervisor.	<u>Response</u> Delaney agrees with and joins Yancey's dispute of this Proposed Supplemental Finding of Fact and incorporates the same herein.
331	Between the February 2009 supervisory matrix and the January 2010 supervisory matrix, several employees were moved from Yancey to Pendergraft, but Johnson was not one of them.	<u>Response</u> Delaney agrees with and joins Yancey's dispute of this Proposed Supplemental Finding of Fact and incorporates the same herein.
331 (a)	Anne Maxey moved from strategic development with PFSI to strategic development with PWI and was reassigned, and her Regulatory Supervisor was changed, from Yancey to Pendergraft.	<u>Response</u> Delaney agrees with and joins Yancey's dispute of this Proposed Supplemental Finding of Fact and incorporates the same herein.
331 (b)	Peter Wind moved from marketing with PFSI to Senior Vice President of Sales with PWI, and was reassigned, and her Regulatory Supervisor was changed, from Yancey to Pendergraft.	<u>Response</u> Delaney agrees with and joins Yancey's dispute of this Proposed Supplemental Finding of Fact and incorporates the same herein.

331 (c)	Johnson was listed under Yancey, with Yancey as his Regulatory Supervisor, even when he was formally moved from PFSI to PWI.	<p><u>Response</u> Delaney agrees with and joins Yancey's dispute of this Proposed Supplemental Finding of Fact and incorporates the same herein.</p>
332	Dawn Gardner did not know about Johnson's supervision from a regulatory standpoint.	<p><u>Response</u> Delaney agrees with and joins Yancey's dispute of this Proposed Supplemental Finding of Fact and incorporates the same herein.</p>
333	Two PWI employees – Sean Malloy and Dan Weingarten – reported to Yancey rather than to anyone at PWI.	<p><u>Response</u> Delaney agrees with and joins Yancey's dispute of this Proposed Supplemental Finding of Fact and incorporates the same herein.</p>
334	Eric Alaniz, the compliance official who conducted the December 2009 audit of Buy-Ins' compliance with Rule 204, described the audit findings as a failure rate of 99%. He was later instructed by Delaney to remove this language from the Rule 3012 Summary Report.	<p><u>Response</u> Dispute: Incomplete recitation of the record; accuracy of statement.</p> <p><u>Support</u> Ex. 70. "Final Result – The failure to comply with the close-out requirement placed 112 out of 113 securities in the "Penalty Box".</p> <p>Tr. 778:19-22 [Alaniz] Q All right. You were asked a bit about Exhibit 70. Do you recall -- I lost my pen. Do you recall this document? A Yes.</p> <p>Tr. 779:8-21 [Alaniz] Q. Okay. I think you mentioned on -- on direct that Mr. Delaney suggested a change to this document or maybe to your testing results? A Yes. Q. And what was that change? A It was just a percentage change Q. And what do you mean by -- A -- of the results. Q. -- "a percentage change"? A I initially had indicated out of 113, 112 failed equally, 99 percent failure rate, whatever that number came out to, and I was asked to take it off. Q. Take off what, the -- A The percentage.</p> <p>Tr. 1300:10 – 1301:1 [Delaney] Q And can you explain to us why it is that you asked him to remove that 99 percent language? A A couple of -- a couple of reasons; the first being that the 112 out of 113 is certainly self-evident for what it is. But I</p>

		<p>think, more importantly, a characterization of 99 percent failure rate may actually mischaracterize what exactly it was that we were testing. This report going out, somebody sees 99 percent test failure, could certainly impugn the entire process as a 99 percent failure and create additional confusion. What Eric found was that 112 out of 113 of those items he tested failed his test. I just felt that it could be potentially misleading and add confusion to have 99 percent -- a 99 percent label, when we weren't even sure really about the quality of the testing, the methodology of his testing, anything that went along with his test and the implications of his test.</p> <p><u>Proposed Counterstatement</u> In his original draft 3012 Test Results for the December 2009 Rule 204 Audit, Eric Alaniz, the compliance official who conducted the December 2009 audit of compliance with Rule 204, testified that he indicated that out of 113 securities, 112 failed, which equaled a 99 percent failure rate. He testified that he was later asked to remove the 99 percent language from the December 2009 Rule 204 Audit Results. Delaney testified that he asked Alaniz to remove the reference to a 99 percent failure rate because it was potentially misleading and confusing. The December 2009 Rule 204 Audit Results did reflect that "the failure to comply with the close-out requirement placed 112 out of 113 securities in the 'Penalty Box.'"</p>
335	<p>Eric Alaniz did not recall whether or not he suggested to Delaney that the December 2009 audit results be included in the 3012 Summary Report.</p>	<p><u>Response</u> Dispute: Incomplete recitation of the record; contrary testimony.</p> <p><u>Support</u> Tr. 826:13-21 [Alaniz] Q And in filling out this form, do you recall if you put those 3012 test results in? A No. Q No, you didn't? A No. Q Okay. I suppose you could have if you thought they were -- if you considered them to be that important, right? A Yes.</p> <p>Tr. 857:13-21 [Alaniz] Q And then if you'll turn to -- I want to make sure I've got the right page -- the page marked at the bottom .00004, and it says, "The identification of any significant compliance problems". Do you see that? A Yes. Q And you said earlier none of your 3012 testing for the year was included in that, right? A Correct.</p> <p>Tr. 858:7-25 [Alaniz]</p>

Q If you had wanted that to be included, would you have suggested that to Mr. Delaney?

A I believe we definitely would have had a discussion about it. I don't see why it would not have been -- it would have been an issue with him.

Q Have you had discussions with him about other issues, about what to include in a report or what not to include in a report, not necessarily a 3012 summary, but any report you've had discussions with him about what's important and what's not important?

A Yes.

Q And he was receptive to that?

A Yes.

Q So if you had thought it was an important issue and should have been included, you had the ability to tell him to include it?

A Yes.

Q Or suggest it anyway?

A Suggest it, yes.

Proposed Counterstatement

In his draft of the Rule 3012 Summary Report, Alaniz did not include the December 2009 Audit results, although he could have if he considered them to be that important. If Alaniz wanted them to be included, he would have suggested that to Delaney and they would have had discussions about it. None of the 3012 testing for that year was included in the Rule 3012 Summary Report appended to the CEO Certification.

DATED this 30th day of January 2015.

CLYDE SNOW & SESSIONS



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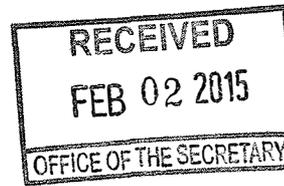
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January 30, 2015

Via Federal Express

Lynn M. Powalski, Deputy Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Mail Stop 1090
Washington, D.C. 20549



RE: *In the Matter of Thomas R. Delaney II and Charles W. Yancey, Administrative Proceeding File No.: 3-15873*

Dear Ms. Powalski:

Enclosed please find the original and three copies each of Thomas R. Delaney II's: (1) Response to the Division's Proposed Supplemental Findings of Fact; and (2) Letter to the Court pursuant to January 28, 2015 email correspondence from the Office of the ALJ.

By copy of this letter, I have served all parties of record. If you have any questions or need additional information, please do not hesitate to contact our office.

Sincerely,

CLYDE SNOW & SESSIONS

A handwritten signature in black ink, appearing to be "A. Lebenta". The signature is stylized with a large, looped initial "A" and a horizontal line extending to the right.

Aaron D. Lebenta

Encls.

cc: Honorable Jason S. Patil, Administrative Law Judge, U.S. Securities and Exchange Commission (via email)
Polly Atkinson, Division of Enforcement, U.S. Securities and Exchange Commission (via email)
Sarah S. Mallett, Haynes and Boone, Counsel to Yancey (via email)