

JULY 2004

Notices to Members

Notices

- | | | |
|--------------|--|-----|
| 04-50 | Treatment of Commodity Pool Trail Commissions under Rule 2810 (Direct Participation Programs Rule);
Effective Date: July 13, 2004 | 623 |
| 04-51 | SEC Approves Amendments to TRACE Rule 6230 to Reduce the Reporting Period to 30 Minutes on October 1, 2004, and to 15 Minutes on July 1, 2005 | 627 |
| 04-52 | Guidance on the Requirements for Availability of the Bona Fide Fully Arbitrated Exemption | 635 |
| 04-53 | SEC Approves Amendments to IM-10104 and Rules 10306 and 10319 Regarding "Last Minute" Adjournments of Arbitration Hearings; Effective Date: August 16, 2004 | 639 |

Disciplinary and Other NASD Actions

Reported for June D1



©2004. NASD. All rights reserved.

NASD Notices to Members is published monthly by NASD Corporate Communications, 1735 K Street, NW, Washington, DC 20006-1500, (202) 728-8370. No portion of this publication may be copied, photocopied, or duplicated in any form or by any means, except as described below, without prior written consent of NASD. Members of NASD are authorized to photocopy or otherwise duplicate any part of this publication without charge only for internal use by the member and its associated persons. Nonmembers of NASD may obtain permission to photocopy for internal use through the Copyright Clearance Center (CCC) for a \$3-per-page fee to be paid directly to CCC, 222 Rosewood Drive, Danvers, MA 01923.

Each member firm's Executive Representative is entitled to one annual subscription to *Notices to Members* at cost (\$15 per year). Additional annual subscriptions are available for \$225; single issues cost \$25. To order, send a check or money order (payable to NASD) to NASD MediaSource, P.O. Box 9403, Gaithersburg, MD 20898-9403; to order with a credit card (American Express, MasterCard, or Visa), call (240) 386-4200, Monday to Friday, 9 a.m. to 5 p.m., Eastern Time. Back issues may be ordered by calling MediaSource at (240) 386-4200. Subscribers with subscription problems may contact NASD Corporate Communications at gina.cherry@nasd.com. To make an address change, please contact NASD's CRD Department at (301) 590-6500, or log on to the NASD Contact System at http://www.nasdr.com/ncs.asp#NCS_Access.

Notices to Members (December 1996 to current) are also available on the Internet at www.nasd.com.

Notice to Members

JULY 2004

SUGGESTED ROUTING

Legal & Compliance
Senior Management

KEY TOPICS

Commodity Pools
Direct Participation Programs
Trail Commissions
Rule 2810

GUIDANCE

Commodity Pools

Treatment of Commodity Pool Trail Commissions under Rule 2810 (Direct Participation Programs Rule);
Effective Date: October 12, 2004

Executive Summary

NASD Rule 2810 (Direct Participation Programs Rule or DPP Rule) governs public offerings of direct participation programs (DPPs), including establishing limits on the level of underwriting compensation. Historically, in reviewing the level of underwriting compensation in commodity pool DPPs, NASD staff has excluded certain trail commissions. This *Notice* serves to advise members that effective immediately, NASD staff will consider all trail commissions paid in connection with commodity pool DPPs in calculating whether the level of underwriting compensation meets the requirements of Rule 2810.

Questions/Further Information

Questions concerning this *Notice* may be directed to Joseph E. Price, Vice President and Director, Corporate Financing Department, at (240) 386-4642; or Gary L. Goldsholle, Associate Vice President and Associate General Counsel, Office of General Counsel, Regulatory Policy and Oversight, at (202) 728-8104.

Discussion

The DPP Rule requires that, prior to participating in a public offering of securities, a member (or another member on its behalf) must file information regarding the DPP offering with NASD's Corporate Financing Department (Department) and receive a "no objections" opinion. The "no objections" opinion takes into account the proposed terms and arrangements of the DPP offering, including the level of underwriting compensation, which may not exceed 10 percent of the gross proceeds of the offering.

Historically, in calculating the level of underwriting compensation for commodity pool DPPs, NASD staff has excluded certain trail commissions. In particular, NASD staff excluded trail commissions paid to an associated person of a member if:

- (1) the member was registered with the Commodity Futures Trading Commission as a Futures Commission Merchant;
- (2) the associated person receiving the trail commissions had passed the National Commodity Futures Examination (Series 3) or the Futures Managed Funds Examination (Series 31); and
- (3) the associated person receiving the trail commissions provided ongoing investor relations services to the investors.

The staff's position was predicated on the provision of a higher level of services by persons selling commodity pool DPPs and a certain level of proficiency as demonstrated by passing either the Series 3 or Series 31. In reconsidering this position, NASD sought comment from members and other interested parties in *Notice to Members 04-07* (Regulation of Compensation, Fees, and Expenses in Public Offerings of Real Estate Investment Trusts; Direct Participation Programs, Including Commodity Pools; and Closed-End Funds).

Most commenters opposed changing this position, noting differences between commodity pools and other DPPs, and the services generally provided to persons investing in commodity pool DPPs. Many commenters cited the benefits to investors of diversification by investing in commodities in general and in commodity pool DPPs in particular, but also warned that if the level of underwriting compensation was capped, then they may no longer be in a position to recommend commodity pool DPPs to investors. Several commenters believed that establishing compensation limits for selling commodity pool DPPs was appropriate, but urged limits higher than those currently in place for other DPPs.

Based upon NASD staff's review and analysis, including the comments received, NASD staff continues to believe the reasons underlying the exclusion of certain trail commissions of commodity pool DPPs no longer apply today. NASD staff has seen no evidence that, presently, commodity pool DPP investors receive a significantly higher level of service than investors in other DPPs, including real estate, oil and gas, and equipment leasing partnerships. Moreover, commenters failed to adequately explain the differences in service provided by persons who have passed the Series 3 or Series 31 (and thus met the exclusion) and those who have not (and thus remained subject to the compensation limits of the DPP Rule). Finally, NASD staff believes that notwithstanding a limit on the level of underwriting compensation, firms and registered representatives will continue to offer and recommend commodity pool DPPs where there are benefits to investors in terms of diversification and where such products meet investors' financial status and investment objectives. Accordingly, NASD staff will no longer exclude the payment of any trail commissions for commodity pool DPPs from the underwriting compensation limits in the DPP Rule, regardless of whether such payments meet the three conditions discussed above. Effective immediately, in determining whether to issue a "no objections" opinion in connection with a commodity pool DPP filed with the Department under Rule 2810, NASD staff will consider, among other things, whether the level of underwriting compensation, including the types of trail commissions previously excluded, exceeds the 10 percent limitation in the DPP Rule.¹

Endnote

- 1 This interpretation does not alter the compensation that may be paid in offerings of commodity pool DPPs that have already been approved by the Department. However, future offerings of commodity pool DPPs, even additional offerings of securities by commodity pool DPPs previously approved by the Department, must adhere to the compensation limits of the DPP Rule.

©2004. NASD. All rights reserved. *Notices to Members* attempt to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding, the rule language prevails.

Notice to Members

JULY 2004

SUGGESTED ROUTING

Corporate Finance
Legal and Compliance
Operations
Senior Management
Technology
Trading and Market Making
Training

KEY TOPICS

Debt Securities
Operations
Rule 6200 Series
Transaction Reporting
TRACE

GUIDANCE

Corporate Debt Securities

SEC Approves Amendments to TRACE Rule 6230 to Reduce the Reporting Period to 30 Minutes on October 1, 2004, and to 15 Minutes on July 1, 2005

Executive Summary

On June 14, 2004, the Securities and Exchange Commission (SEC or Commission) approved amendments to Rule 6230(a) of the Trade Reporting and Compliance Engine (TRACE) rules, the Rule 6200 Series, reducing the reporting period.¹ The reductions to the reporting period will occur in two stages. In the first stage (Stage One), the period to report a transaction in a TRACE-eligible security will be reduced from 45 minutes to 30 minutes. In the second stage (Stage Two), that period will be reduced to 15 minutes.

Stage One amendments to Rule 6230(a), requiring 30-minute reporting, will become effective on October 1, 2004. Stage Two amendments to Rule 6230(a), reducing the reporting period to 15 minutes, will become effective on July 1, 2005. Rule 6230, as amended by Stage One rule changes only, is set forth in Attachment A. (In 2005, NASD will issue a second *Notice to Members* (NtM) reminding firms of the effective date of Stage Two and incorporating the Stage Two amendments to Rule 6230(a) that will require 15-minute reporting.)

Questions/Further Information

Questions concerning this *Notice* should be directed to tracefeedback@nasd.com; Sharon K. Zackula, Associate General Counsel, Office of General Counsel, Regulatory Policy and Oversight, at 202-728-8985; or Elliot Levine, Chief Counsel, Markets, Services, and Information, at 202-728-8405.

Background and Discussion

Since 1999, when the first formal proposal to establish TRACE was filed with the SEC, NASD and SEC stated that the TRACE reporting period would be reduced after firms obtained experience reporting corporate bond transactions to TRACE. On October 1, 2003, NASD reduced the period to report a transaction in a TRACE-eligible security from 75 minutes to 45 minutes. At that time, NASD indicated that it planned to reduce the reporting period further in the future. Reducing the reporting period results in a qualitative increase in transparency in the debt markets because market participants and investors receive actual transaction prices and other information more quickly.

Since October 1, 2003, when 45-minute reporting began, firms have developed the technical and operational capabilities to report transactions within a much shorter period than the current 45-minute period. For example, during the first two months of 2004, approximately 84 percent of all transactions were reported within 30 minutes of the time of execution, and approximately 73 percent were reported within 15 minutes of the time of execution. By October 1, 2004, NASD expects that the membership as a whole will be able to report TRACE-eligible securities transactions within 30 minutes.

Stage One 30-Minute Reporting

The SEC approved the Stage One 30-minute reporting requirement, together with the Stage Two 15-minute reporting requirement, on June 14, 2004. The impact that the Stage One changes will have on reporting is discussed below.

The amendments to Rule 6230(a) that are set forth in Stage One require a firm to report a transaction in a TRACE-eligible security within 30 minutes of the time of execution. In addition, NASD reduced other 45-minute reporting periods to 30 minutes in related provisions in paragraphs (1) through (4) of Rule 6230(a). Specifically, under Rule 6230(a)(1), as amended, if a firm executes a transaction within 30 minutes of the time the TRACE System closes, which, on a normal day is 6:30:00 p.m. Eastern Time (ET), a firm *is permitted* to report the transaction the next business day that the TRACE System opens, but must do so within 30 minutes after the TRACE System opens for the report to be timely (*i.e.*, on or before 8:29:59 a.m. ET).² Under Rule 6230(a)(2), and (a)(4), as amended, a firm is required to report a transaction that occurs on or after the closing of the TRACE System (*i.e.*, on or after 6:30:00 p.m. ET through 11:59:59 p.m. ET, or during a weekend or holiday) the next business day that the TRACE System opens,

and must do so within 30 minutes after the TRACE System opens (*i.e.*, on or before 8:29:59 a.m. ET). Under Rule 6230(a)(3), as amended, a firm is required to report any transaction in a TRACE-eligible security that occurs on a business day on or after 12:00 a.m. (midnight) through 7:59:59 a.m. ET, within 30 minutes of the opening of the TRACE System (*i.e.*, on or before 8:29:59 a.m. ET).

Effective Date

The amendments to Rule 6230(a) designated as Stage One, which require a firm to report a transaction in a TRACE-eligible security within 30 minutes of the time of execution, will become effective on October 1, 2004.

15-Minute Reporting Takes Effect in 2005

As noted previously, the SEC also approved amendments to Rule 6230(a), designated as Stage Two, that will require firms to report a transaction in a TRACE-eligible security within 15 minutes of the time of execution, except as otherwise provided. The Stage Two amendments will become effective on July 1, 2005. NASD will remind firms in an NtM to be published in 2005 that Stage Two 15-minute reporting will become effective on July 1, 2005.

Interpretive Guidance

1. When the new TRACE 30-minute reporting requirement becomes effective, how much time does a firm have to resubmit a trade report that was rejected?

Under both the prior 75-minute and current 45-minute reporting regimes, NASD staff issued interpretive guidance regarding the time to re-submit a rejected trade report.³ NASD staff is issuing revised guidance regarding the time to re-submit a rejected trade report that is similar to the interpretive guidance provided in *NtM 03-58*, Q & A No. 6 regarding this issue. The revised guidance, as described in greater detail below, is based on the 30-minute reporting requirement, with the result that a 45-minute extension provided in *NtM 03-58* is reduced to a 30-minute extension, and a 15-minute extension in *NtM 03-58* is reduced to 10 minutes.

This interpretive guidance will become effective on October 1, 2004, when the requirement to report in 30 minutes becomes effective. In addition, as of October 1, 2004, the interpretive guidance in *NtM 03-58*, Q & A No. 6, relating to the same issue, is rescinded and superseded by the interpretive guidance set forth below. Accordingly, as of October 1, 2004, a firm may no longer rely on the guidance in *NtM 03-58*, Q & A No. 6.⁴

As noted in prior interpretive guidance regarding the resubmission of rejected trade reports, NASD recognizes that some firms may be using a reporting technology that does not immediately relay a message to the firm that a transaction report has been rejected. Thus, firms may be unaware for a substantial part of the 30-minute reporting period that they must resubmit the trade report.⁵ Accordingly, in these circumstances, as a general rule, NASD staff expects that firms will correct and resubmit rejected trade reports as soon as practicable, but not later than 60 minutes from the time of execution. (This generally applicable interpretive guidance is referred to hereinafter as the “30-Minute Extension.”)

However, there are three scenarios set forth below when a firm may not rely on the 30-Minute Extension.

- a. **Rule 6230(a)(1): 30-Minute Extension is Inapplicable.** If a firm executes a trade less than 30 minutes before the closing of the TRACE System (on or after 6:00:01 p.m. ET through 6:29:59 p.m. ET)⁶ under Rule 6230(a)(1), the firm has the option to report the transaction to TRACE the same day, or the next day that the TRACE System is open, within 30 minutes of the opening. In both of these scenarios, a firm is not entitled to rely on the 30-Minute Extension to comply with the obligation to timely report.
 - i. **No Extension of Time.** If the firm reports the transaction to TRACE before the TRACE System closes and the transaction report is rejected, the firm must report the transaction the next day the TRACE System is open, within the first 30 minutes that the System is open in order for the report to be timely. The 30-Minute Extension does not apply in these circumstances. For example, a firm executes a transaction at 6:10:00 p.m. ET on Thursday, the firm reports the transaction at 6:29:00 p.m. ET, and the transaction report is rejected. On Friday morning, the firm must resubmit the correct transaction report within the first 30 minutes that the TRACE System is open for the report to be timely.
 - ii. **10-Minute Extension.** If the firm opts to first file the transaction report on the next business day that the TRACE System is open, and the transaction report is rejected, the firm must correct and resubmit the transaction report as soon as possible and not later than forty minutes after the TRACE System opens, because the firm is granted a 10-minute extension (“10-Minute Extension”) in these circumstances. The 30-Minute Extension does not apply. The 10-Minute Extension is an appropriate extension of time because firms have had time to prepare the transaction report, and should attempt to report outstanding transactions promptly after the TRACE System opens. For example, a firm executes a trade at 6:10:00 p.m. ET on Thursday, the firm first reports the trade on Friday at 8:05:00 a.m. ET, and the report is rejected. The firm must correct and resubmit the transaction report not later than 8:39:59 a.m. ET in order for the report to be considered timely filed.

-
- b. **Rule 6230(a)(2) through (4): 30 Minute Extension is Inapplicable and 10-Minute Extension Applies.** If a firm executes a trade when the TRACE System is closed (on or after 6:30:00 p.m. ET on a business day that the TRACE System was open, during a weekend or a holiday, or before 8:00:00 a.m. ET on a business day that the TRACE System will open), the firm is required under Rule 6230(a)(2) through (4) to report the transaction the first day that the TRACE System is open, within 30 minutes. If the transaction report is rejected, the firm must correct and resubmit a transaction report as soon as possible, but not later than forty minutes after the TRACE System opens. Again, in these circumstances, the 10-Minute Extension applies, for the reasons set forth in the preceding paragraph, and the 30-Minute Extension is inapplicable. For example, a firm executes a trade at 7:00:00 p.m. ET on Thursday. The TRACE System is closed until Friday at 8:00:00 a.m. ET. The firm first reports the trade on Friday at 8:05:00 a.m. ET, and the report is rejected. The firm must correct and resubmit the trade report not later than 8:39:59 a.m. ET to report on time.

Regardless of the reporting mechanism used by the firm (e.g., batch submission, CTCL, Web browser, third-party intermediary reporting system), any rejected trade reports should be corrected and resubmitted to TRACE as soon as possible by the reporting firm. NASD will continue to monitor firms' reporting to ensure that firms have procedures in place that are reasonably designed to ensure that rejected trade reports are identified, corrected, and resubmitted in a timely manner. Patterns and practices of late submissions due to rejections may be considered a violation of the TRACE Rules and Rule 2110 (Standards of Commercial Honor and Principles of Trade).

Endnotes

- 1 See Securities Exchange Act Release No. 49854 (June 14, 2004), 69 Fed. Reg. 35088 (June 23, 2004) (File No. SR-NASD-2004-057).
- 2 Generally, the TRACE System is open to receive reports Monday through Friday, from 8:00 a.m. through 6:29:59 p.m. and closes at 6:30 p.m. Eastern Time (ET). On days when NASD announces that the TRACE System will close early (e.g., at 2:00 p.m. ET on the day after Thanksgiving), NASD will announce the early closing and specify when the TRACE System will cease accepting reports. When early closings in TRACE occur, NASD staff interprets Rule 6230(a)(1) as allowing a firm (for a transaction that occurs just before the end of the TRACE System closing) to report the transaction on the day of execution before the system closes or the next business day, to provide the firm the same flexibility that is provided when the TRACE System closes at 6:30 p.m. ET. Assume, for example, that NASD announces that the TRACE System will close at 2:00 p.m. ET, in which case the TRACE System will not accept reports at or after the 2:00 p.m. closing. If a 30-minute reporting period is in effect, and a firm executes a transaction at 1:40 p.m. ET, the firm may report the transaction on the day of execution (up to 2:00 p.m. ET) or may report the transaction the next business day that the TRACE System is open within 30 minutes of the opening.
- 3 NASD staff previously issued interpretive guidance on this topic in *NtM 02-76*, Q & A No. 1 (in the context of 75-minute reporting) and *NtM 03-58*, Q & A No. 6 (in the context of 45-minute reporting). When the guidance in *NtM 3-58*, Q & A No. 6 was published, NASD staff rescinded the guidance in *NtM 02-76*, Q & A No. 1.
- 4 NASD staff notes that a firm may continue to rely on the guidance in *NtM 03-58*, Q & A No. 6 for transactions executed and reported prior to October 1, 2004.
- 5 Certain firms are using technology that reports transactions to and receives verification of accepted reports back from TRACE via a "batch" process. This batch process may add time to the identification and correction of trade reports initially rejected by the TRACE System.
- 6 As noted previously, the normal schedule for TRACE System operations is 8:00 a.m. ET through 6:29:59 p.m. ET. The times are provided as an example. The actual times may vary if the TRACE System is not operating on a normal schedule.

©2004. NASD. All rights reserved. *Notices to Members* attempt to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding, the rule language prevails.

ATTACHMENT A

New language is underlined; deletions in brackets.

6200. TRADE REPORTING AND COMPLIANCE ENGINE (TRACE)

* * * * *

6230. Transaction Reporting

(a) When and How Transactions are Reported

A member that is required to report transaction information pursuant to paragraph (b) below must report such transaction information within 30[45] minutes of the time of execution, except as otherwise provided below, or the transaction report will be "late." The member must transmit the report to TRACE during the hours the TRACE system is open ("TRACE system hours"), which are 8:00 a.m. Eastern Time through 6:29:59 p.m. Eastern Time. Specific trade reporting obligations during a 24-hour cycle are set forth below.

(1) Transactions Executed During TRACE System Hours

Transactions in TRACE-eligible securities executed on a business day at or after 8:00 a.m. Eastern Time through 6:29:59 p.m. Eastern Time must be reported within 30[45] minutes of the time of execution. If a transaction is executed on a business day less than 30[45] minutes before 6:30 p.m. Eastern Time, a member may report the transaction the next business day within 30[45] minutes after the TRACE system opens. If reporting the next business day, the member must indicate "as/of" and provide the actual transaction date.

(2) Transactions Executed At or After 6:30 P.M. Through 11:59:59 P.M. Eastern Time

Transactions in TRACE-eligible securities executed on a business day at or after 6:30 p.m. Eastern Time through 11:59:59 p.m. Eastern Time must be reported the next business day within 30[45] minutes after the TRACE system opens. The member must indicate "as/of" and provide the actual transaction date.

(3) Transactions Executed At or After 12:00 A.M. Through 7:59:59 A.M. Eastern Time

Transactions in TRACE-eligible securities executed on a business day at or after 12:00 a.m. Eastern Time through 7:59:59 a.m. Eastern Time must be reported the same day within 30[45] minutes after the TRACE system opens.

(4) Transactions Executed on a Non-Business Day

Transactions in TRACE-eligible securities executed on a Saturday, Sunday, or a federal or religious holiday on which the TRACE system is closed, at any time during that day (determined using Eastern Time), must be reported the next business day within 30[45] minutes after the TRACE system opens. The transaction must be reported as follows: the date of execution must be the first business day (the same day the report must be made); the execution time must be "12:01:00 a.m. Eastern Time" (stated in military time as "00:01:00"); and the modifier, "special price," must be selected. In addition, the transaction must not be designated "as/of". When the reporting method chosen provides a "special price" memo field, the member must enter the actual date and time of the transaction in the field.

(5) and (6) No Change

(b) through (f) No Change

* * * * *

Notice to Members

JULY 2004

SUGGESTED ROUTING

Internal Audit
Legal & Compliance
Operations
Senior Management
Trading

KEY TOPICS

Affirmative Determination
Rule 3370(b)(2)(B)
Rule 3370(b)(5)(B)
Short Sales

GUIDANCE

Short Sales

Guidance on the Requirements for Availability of the Bona Fide Fully Arbitrated Exemption

Executive Summary

There has been discussion in the financial press about the listing of securities on foreign markets without a company's knowledge or authorization. Some reports have suggested that the purpose behind such listings is to avoid the requirements of Rule 3370 (affirmative determination requirements) through the use of the arbitrage exemption available under subparagraphs (b)(2)(B) and (b)(5)(B) of Rule 3370. Without commenting on listing activity occurring in non-U.S. markets, NASD is taking this opportunity to remind member firms of their affirmative determination obligations for both member and non-member proprietary short sale transactions and under what circumstances the bona fide fully arbitrated exemption is available.

Questions/Further Information

Questions regarding this *Notice* may be directed to the Legal Section, Market Regulation, at (240) 386-5126; or the Office of General Counsel, Regulatory Policy and Oversight, at (202) 728-8071.

Discussion

NASD Rule 3370(b)(2)(B) requires that, prior to effecting a short sale order for its own account (proprietary short sale), a member (or associated person) must make an affirmative determination that the member can borrow the security or otherwise provide for delivery by the settlement date. The affirmative determination requirements also apply to orders from non-member broker-dealers other than those orders executed by a member as an arm's length transaction.¹ In addition, where orders are executed by a non-member broker-dealer on or through electronic communications networks (ECNs) or alternative trading systems (ATSs), a member that operates the ECN or ATS is responsible for ensuring compliance with the affirmative determination requirements with respect to such orders.

NASD Rule 3370(b)(2)(B) provides an exemption for, among others, proprietary orders of member firms that result in bona fide, fully arbitrated positions. Accordingly, proprietary orders of a member firm are exempt from the affirmative determination requirements if they meet the conditions for the bona fide fully arbitrated exemption. Likewise, proprietary orders of a non-member broker-dealer that is registered with the Securities and Exchange Commission (SEC) are also exempt from the affirmative determination requirements if the member that receives the order is able to verify and document that the non-member order meets the conditions for the bona fide fully arbitrated exemption applicable to proprietary orders of member firms. It is important to note, however, that the uniform locate requirements that are part of Regulation SHO, which become effective January 3, 2005, will not provide for a similar exemption for short sales that are part of arbitrage transactions.

NASD Rule 3370(b)(5)(B) provides guidelines in determining the availability of the bona fide fully arbitrated exemption. With respect to arbitrage positions taken when the same security trades on two markets, the guidelines provide that a short sale transaction would be exempt from the affirmative determination requirements if a long position is taken in a security purchased in one market, together with an offsetting short sale of the same security in a different market, at as nearly the same time as practicable for the purpose of taking advantage of a difference in price in the two markets. Members must be in a position to demonstrate that they are in fact hedged at the time of the short sale and have executed such transactions in a manner consistent with the purpose of the exemption before applying such exemption to the locate requirements of Rule 3370.

The bona fide fully arbitrated exemption was established to recognize those short-selling transactions engaged in for risk reduction and market liquidity. Bona fide arbitrage exists where essentially contemporaneous short sales and purchases are effected to capture the spread resulting from a current differential in pricing. To claim the bona fide fully arbitrage exemption, there must be an offsetting transaction that occurs at as nearly the same time as practicable. The mere speculative listing of prices or offers to deal on another market would not constitute bona fide arbitrage; rather, an actual offsetting arbitrage transaction must be effected on another market at as nearly the same time as practicable for the purpose of taking advantage of a difference in price in the two markets. Accordingly, uncovered short positions that are not hedged at a time that is virtually identical to the time of the execution of the short sale are not entitled to the exemption. Any time difference should only be the time necessary to execute the transaction in two different markets.

NASD also reminds members that intend to rely on the bona fide fully arbitrated exemption that they will be required to demonstrate, upon request, how every applicable short sale transaction meets the bona fide fully arbitrated exemption. Members must be able to establish and document that a proprietary order, whether a member proprietary order or a non-member broker-dealer proprietary order, satisfies the terms of the exemption. As with all exemptions to the affirmative determination requirements, NASD reminds members that the bona fide fully arbitrated exemption is narrowly applied and may only be used for legitimate arbitrage purposes and may not be used in an effort to circumvent the requirements of Rule 3370, facilitate speculative short selling, or otherwise engage in manipulative behavior. Members also are reminded that, as with the bona fide market making exemption, proprietary positions taken to facilitate a short sale or short sale equivalent position for a customer will not be deemed to fall within the bona fide fully arbitrated exemption.

Endnotes

1. See *Notice to Members 04-21* (March 17, 2004).

©2004. NASD. All rights reserved. *Notices to Members* attempt to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding, the rule language prevails.

Notice to Members

JULY 2004

SUGGESTED ROUTING

Legal and Compliance

KEY TOPICS

Arbitration
Arbitrators
Dispute Resolution

GUIDANCE

Arbitration Hearing Adjournments

SEC Approves Amendments to IM-10104 and Rules 10306 and 10319 Regarding “Last Minute” Adjournments of Arbitration Hearings; **Effective Date: August 16, 2004**

Executive Summary

The Securities and Exchange Commission (SEC) has approved amendments to IM-10104 and Rules 10306 and 10319 of the NASD Code of Arbitration Procedure (Code) to impose a fee and provide an arbitrators’ honorarium when hearings are postponed, canceled, or settled on short notice.¹

The text of the amendments is set forth in Attachment A. The amendments will be effective on August 16, 2004, and will apply to any adjournment request or notification of final settlement received by NASD on or after August 16, 2004.

Questions/Further Information

Questions regarding this *Notice* may be directed to Mignon McLemore, Counsel, NASD Dispute Resolution, at (202) 728-8151 or mignon.mclemore@nasd.com.

Discussion

NASD has amended IM-10104 and Rules 10306 and 10319 of the Code to charge parties a fee of \$100 per arbitrator and to compensate arbitrators by that amount in the event that a hearing is adjourned within three business days before a scheduled hearing session.

Background

Over the past 13 years, NASD has taken several steps to address the delays caused by adjournments, including both postponements and cancellations of hearings. In 1990, NASD increased the adjournment fee and established a timeframe within which an arbitration case could be settled or withdrawn without parties' forfeiting their hearing session deposit. In 2001, NASD increased the cap for second or subsequent adjournments from \$1,000 to \$1,500 in an attempt to make these adjournment fees operate as a deterrent to repeated adjournment requests. These changes have helped reduce delays in the arbitration process, but they have not had the expected impact on curbing last-minute adjournment requests.

NASD has found that parties often seek to adjourn scheduled hearing sessions at the last minute for various reasons, which may include scheduling conflicts of parties or their counsel, ongoing settlement discussions, or other personal matters unrelated to the arbitration process. Regardless of the reasons for the requests, last-minute adjournments result in inconvenience and lost income to the arbitrators. NASD has, therefore, amended several Code provisions to discourage these types of requests and encourage the parties, when appropriate, to begin settlement discussions as soon as reasonably possible.

Last-Minute Adjournments

Rule 10319 authorizes arbitrators to adjourn hearings under certain circumstances, and establishes fees the parties could incur, depending on the timing of the adjournment request. This rule has been amended to address last-minute adjournment requests and establish an honorarium for arbitrators in the event that such a request is granted. Specifically, Rule 10319 has been amended to add subparagraph (d), which requires that an additional \$100 fee per arbitrator be paid if a request for an adjournment is made and granted within three business days before a scheduled hearing session or before the first in a number of consecutively scheduled hearing sessions.²

The following example illustrates how the rule will work. An arbitrator schedules five consecutive hearing sessions to begin on a Monday. If a party's adjournment request is made and granted no later than the preceding Tuesday, the party would not be assessed the \$100 per-arbitrator fee, because the request was made and granted more than three business days before the first scheduled day of the hearing session.³ If, however, a party's request is made and granted on the preceding Wednesday or later in that week, then the party would be assessed the \$100 per-arbitrator fee for the adjournment of the first day in a group of consecutively scheduled hearing sessions, or, in the example, Monday.⁴ The party would not be assessed a \$100 per-arbitrator fee for each of the four remaining scheduled hearing sessions that also have been canceled.

In all last-minute adjournment cases, arbitrators will be instructed to assess the \$100 per-arbitrator fee, regardless of the reason for the request. The only exception will be in cases where extraordinary circumstances exist. NASD Dispute Resolution recognizes that there are some extraordinary circumstances that could prevent a party from making an adjournment request in time to avoid the additional fee assessment (e.g., a serious accident or a sudden severe illness). In these cases, arbitrators will have the discretion to waive the fee, provided they receive verification of such circumstances.

Arbitrators' Honorarium

The Interpretative Material concerning Arbitrators' Honorarium (IM-10104) has been amended to reference the \$100 per-arbitrator fee if a hearing session is adjourned pursuant to Rule 10319(d). Generally, arbitrators will assess the \$100 per-arbitrator fee against the requesting party, after the request is granted. There may be instances, however, in which the arbitrators determine that a non-requesting party caused or contributed to the need for the adjournment. In these instances, the requesting party can ask for a reallocation of the fees to the non-requesting party or a sharing of the fees.

Settlements

Rule 10306 has been amended to clarify that, if parties to an arbitration settle their dispute, they will be responsible for any fees incurred, including fees incurred as a result of a last-minute adjournment. Thus, if the parties notify staff of a final settlement within three business days before a scheduled hearing session, and the hearing session must be canceled, this notification will be treated as an adjournment request that is "made and granted" for purposes of Rule 10319(d), and will result in the assessment of the \$100 per-arbitrator fee.

Effective Date

The amendments described in this *Notice* are effective on August 16, 2004, and will apply to any adjournment request or notification of final settlement received by NASD on or after August 16, 2004.

Endnotes

- 1 Exchange Act Release No. 49716 (May 17, 2004) (File No. SR-NASD-2003-164), 69 *Federal Register* 29342 (May 21, 2004).
- 2 For purposes of this rule, a scheduled hearing session refers to a hearing on the merits, and not to a prehearing conference or a hearing on request for permanent injunctive relief under Rule 10335(b).
- 3 The party could be subject to other fees and costs as a result of adjourning the hearing in this timeframe, however. See Rules 10319(b) and 10332(f).
- 4 *Id.* The analysis would be the same if, in the example, Monday was a holiday (or other day on which NASD was closed) and the hearing sessions were scheduled to begin on the Tuesday after the holiday.

©2004. NASD. All rights reserved. *Notices to Members* attempt to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding, the rule language prevails.

ATTACHMENT A

New language is underlined; deletions in brackets.

Code of Arbitration Procedure

* * *

IM-10104. Arbitrators' Honorarium

All persons selected to serve as arbitrators pursuant to the Association's Code of Arbitration Procedure shall be paid an honorarium for each hearing session (including a prehearing conference) in which they participate.

The honorarium shall be \$200 for each hearing session[, \$50 for travel to a canceled hearing,] and \$75 per day additional honorarium to the chairperson of the panel. The honorarium for a case not requiring a hearing shall be \$125.

The honorarium for travel to a canceled hearing session shall be \$50. If a hearing session other than a prehearing conference is adjourned pursuant to Rule 10319(d), each arbitrator shall receive an additional honorarium of \$100.

10306. Settlements

(a) Parties to an arbitration may agree to settle their dispute at any time.

(b) If the parties agree to settle their dispute, they will remain responsible for payment of fees incurred, including fees for previously scheduled hearing sessions and fees incurred as a result of adjournments, pursuant to Rule 10319.

[(b)] (c) The terms of a settlement agreement do not need to be disclosed to the Association. However, [the parties will remain responsible for payment of fees incurred, including fees for previously scheduled hearing sessions. If] if the parties fail to agree on the allocation of outstanding fees, the fees shall be divided equally among all parties.

10319. Adjournments

(a) The arbitrator(s) may, in their discretion, adjourn any hearing(s) either upon their own initiative or upon the request of any party to the arbitration.

(b) If an adjournment requested by a party is granted after arbitrators have been appointed, the party requesting the adjournment shall pay a fee equal to the initial deposit of hearing session fees for the first adjournment and twice the initial deposit of hearing session fees, not to exceed \$1,500, for a second or subsequent adjournment requested by that party. The arbitrators may waive these fees in their discretion. If more than one party requests the adjournment, the arbitrators shall allocate the fees among the requesting parties.

(c) Upon receiving a third request consented to by all parties for an adjournment, the arbitrator(s) may dismiss the arbitration without prejudice to the Claimant filing a new arbitration.

(d) If an adjournment request is made by one or more parties and granted within three business days before a scheduled hearing session, the party or parties making the request shall pay an additional fee of \$100 per arbitrator. If more than one party requests the adjournment, the arbitrators shall allocate the \$100 per arbitrator fee among the requesting parties. The arbitrators may allocate all or portion of the \$100 per arbitrator fee to the non-requesting party or parties, if the arbitrators determine that the non-requesting party or parties caused or contributed to the need for the adjournment. In the event that a request results in the adjournment of consecutively scheduled hearing sessions, the additional fee will be assessed only for the first of the consecutively scheduled hearing sessions. In the event that an extraordinary circumstance prevents a party or parties from making a timely adjournment request, arbitrators may use their discretion to waive the fee, provided verification of such circumstance is received.

* * * *

Disciplinary and Other NASD Actions

REPORTED FOR JULY

NASD® has taken disciplinary actions against the following firms and individuals for violations of NASD rules; federal securities laws, rules, and regulations; and the rules of the Municipal Securities Rulemaking Board (MSRB). The information relating to matters contained in this *Notice* is current as of the end of June 2004.

Firms Fined, Individuals Sanctioned

Legend Merchant Group, Inc. (CRD #5155, New York, New York) and Edward A. Sita (CRD #1509735, Registered Principal, Staten Island, New York) submitted Offers of Settlement in which the firm was censured and fined \$25,000. Sita was fined \$30,000, suspended from association with any NASD member in any capacity for 30 business days, and suspended from association with any NASD member in a principal capacity for six months. The fine must be paid before Sita reassociates with any NASD member following the suspensions or before requesting relief from any statutory disqualification. Without admitting or denying the allegations the respondents consented to the described sanctions and to the entry of findings that the firm, acting through Sita, made a misrepresentation in a Private Placement Memorandum (PPM), failed to disclose material facts in the PPM, or failed to disseminate supplements to the PPM disclosing material facts. The findings also stated that the firm, acting through Sita, failed to disclose material facts in a PPM Supplement and participated in the private offerings, even though the firm's Membership Agreement with NASD did not permit the firm to engage in such activity.

Sita's suspension in any capacity began June 21, 2004, and will conclude at the close of business August 2, 2004. Sita's suspension in a principal capacity will begin August 3, 2004, and will conclude at the close of business February 2, 2005. (NASD Case #C10030058)

Wunderlich Securities, Inc. (CRD #2543, St. Louis, Missouri), Philip Richard Zanone, Jr. (CRD #2135221, Registered Principal, Memphis, Tennessee), Patricia Diana Hester (CRD #710893, Registered Principal, Rossville, Tennessee), Patrick James Forkin, III (CRD #2514476, Registered Principal, Chesterfield, Missouri), and Joel Christopher Rolla (CRD #2515481, Registered Principal, O'Fallon, Illinois) submitted a Letter of Acceptance, Waiver, and Consent in which the firm, Forkin, and Rolla were censured. The firm was fined \$50,000, \$30,000 of which was jointly and severally with Zanone and Hester, \$10,000 of which was jointly and severally with Forkin, and \$10,000 of which was jointly and severally with Rolla. Zanone and Hester each were suspended from association with any NASD member in a principal capacity for 15 business days and ordered to requalify as general securities principals (Series 24) prior to acting as principals following the suspension.

Without admitting or denying the allegations, the respondents consented to the described sanctions and to the entry of findings that the firm, acting through Forkin, selectively shared research and sell recommendations to institutional clients before disseminating the information to the public that provided an unfair advantage to the institutional clients. The findings also stated that, by providing the report early to institutional clients, Forkin improperly gave the clients incentive to trade through the firm and potentially profit from increased trade activity because his compensation was, in part, commission-based. NASD also found that the firm, acting through Rolla, traded ahead of the dissemination of a research report to the public and sold shares of the common stock prior to the release of the report, anticipating that the price of the stock would drop once the public became aware of Forkin's sell recommendation. In addition, the findings stated that the firm was market making in research reports and Forkin failed to include the required market making disclosures in research reports. Moreover, the findings stated that the firm failed to provide written disclosure to public customers that it was a market maker in securities traded by its customers on transaction confirmations, causing the firm's books and records to be inaccurate.

Furthermore, the findings stated that a branch office of the firm failed to maintain copies of e-mails and keep copies readily accessible for two years. NASD also found that the firm, Zanone, and Hester failed to establish reasonable supervisory systems and procedures tailored to the firm's activities at a branch office. In addition, the findings stated that Zanone and Hester failed to fulfill their responsibilities for integrating new activities into the firm's compliance and supervisory policies and procedures or systems so that the firm could comply with securities laws, regulations, and NASD rules regarding research reports, disclosure of the firm's market maker status, and retention of e-mails. The findings also stated that Hester was assigned to review e-mails, yet e-mails for a three-month period were lost and some employees used another terminal for e-mails for over a year without Hester's knowledge.

Zanone's suspension began July 13, 2004, and will conclude at the close of business August 2, 2004. Hester's suspension began June 21, 2004, and concluded at the close of business July 12, 2004. (NASD Case #CAF040034)

Firm and Individual Fined

Arvest Asset Management, Inc. (CRD #42057, Rogers, Arkansas) and Merissa Rae Spicer (CRD #4073794, Registered Representative, Rogers, Arkansas) submitted a Letter of Acceptance, Waiver, and Consent in which they were censured and fined \$15,000, jointly and severally. The firm was also fined an additional \$20,000. Without admitting or denying the allegations, the firm and Spicer consented to the described

sanctions and to the entry of findings that the firm sold unregistered securities that were not exempt from registration requirements. NASD found that Spicer, in connection with the sale of unregistered securities, made no inquiry into the facts surrounding a trust's ownership of the stock, the purpose of the transfers, or the identity of the transferees before executing the sale and transfers of stock. The findings also stated that the firm failed to establish and maintain supervisory procedures or a system of supervision reasonably designed to achieve compliance with federal securities laws, regulations, and NASD rules with respect to the sale of unregistered securities. (NASD Case #CAF040044)

Firm and Individual Sanctioned

Morgan Wilshire Securities, Inc. (CRD #44807, Westbury, New York) and Barry Francis Cassese (CRD #2080657, Registered Principal, E. Northport, New York) submitted Offers of Settlement in which the firm was censured and ordered to pay \$175,000 in restitution to public customers. Cassese was fined \$25,000, suspended from association with any NASD member in any capacity for three months, and ordered to pay \$140,000 in restitution to public customers. Without admitting or denying the allegations, the firm and Cassese consented to the described sanctions and to the entry of findings that the firm, acting through Cassese and other representatives, charged excessive markups, markdowns, and commissions on principal or agent transactions involving highly liquid securities. The findings also stated that the firm's markups, markdowns, and commissions were excessive in light of the type of securities involved, the availability of the securities in the market, the price of the securities, the amount of money involved in the transactions, disclosures to the customers, the pattern of charges, and the nature of the firm's business. NASD also found that the firm and Cassese failed to maintain and enforce a supervisory system with regard to customers that was reasonably designed to achieve compliance with NASD rules. In addition, NASD found that Cassese failed to implement the firm's written procedures regarding factors enumerated in NASD Conduct Rule IM-2440 to be considered when determining whether a charge was fair and reasonable.

Cassese's suspension will begin July 19, 2004, and will conclude at the close of business October 18, 2004. (NASD Case #CAF030030)

Firms Fined

Axiom Capital Management, Inc. (CRD #26580, New York, New York) submitted a Letter of Acceptance, Waiver, and Consent in which the firm was censured and fined \$15,000. Without admitting or denying the allegations, the firm

consented to the described sanctions and to the entry of findings that it failed to disclose the commission charged to customers on transaction confirmations relating to corporate debt securities and failed to disclose payments to the firm for order flow on transaction confirmations effected. The findings also stated that the firm failed to time stamp, time stamp accurately, and/or identify accurately whether a transaction was a market order or limit order on order tickets used to effect retail transactions in equity, corporate, and municipal securities. NASD also found that the firm failed to file municipal security transaction reports in a timely and accurate manner. In addition, NASD determined that the firm inaccurately reported the price of corporate bonds in transaction reports and inaccurately identified the contra-party to the transaction on reports. **(NASD Case #C10040044)**

CIBC World Markets Corp. (CRD #630, New York, New York) submitted a Letter of Acceptance, Waiver, and Consent in which the firm was censured, fined \$75,000, and required to reimburse \$154,700, plus interest of \$50,600, to public customers. Without admitting or denying the allegations the firm consented to the described sanctions and to the entry of findings that the firm, through two retail brokers and a retail liaison, executed convertible bond trades with retail customers by interpositioning a hedge fund between firm and retail branch customers, and charging the customers unlawfully high prices for the purchase of convertible debentures. NASD found that the firm, through the retail brokers and a retail liaison, engaged in an unlawful interpositioning in a series of trades and generated over \$500,000 in revenue by effecting purchases of over \$9.1 million par value of convertible bonds by retail branch customers. The findings also stated that the firm failed to register the retail liaison as a Series 55 equity trader and permitted the individual to act as a trader. In addition, NASD found that the firm failed to supervise its trading desk, retail brokers, and a retail liaison with respect to convertible bond trading. **(NASD Case #CAF040030)**

See also CIBC World Markets Corp., NASD Case #CMS040081, below.

CIBC World Markets Corp. (CRD #630, New York, New York) submitted a Letter of Acceptance, Waiver, and Consent in which the firm was censured and fined \$12,000. Without admitting or denying the allegations, the firm consented to the described sanctions and to the entry of findings that the firm, using a market participant identifier (MPID) for clearing transactions in Canadian securities for U.S. broker-dealers, failed, within 90 seconds after execution, to transmit through the Automated Confirmation Transaction ServiceSM (ACTSM) last sale reports of transactions in OTC Equity securities. The findings also stated that the firm, using the same MPID, failed, within 90 seconds after execution, to transmit through ACT last sale reports of transactions in OTC Equity securities and failed to designate through ACT such last sale reports as late. **(NASD Case #CMS040081)**

See also CIBC World Markets Corp., NASD Case #CAF040030, above.

Epoch Partners (CRD #103899, San Francisco, California) submitted a Letter of Acceptance, Waiver, and Consent in which the firm was censured and fined \$15,000. Without admitting or denying the allegations, the firm consented to the described sanctions and to the entry of findings that it permitted individuals to engage in activities on behalf of the firm requiring registration with NASD when the individuals were not registered with NASD in any capacity relating to their association with the firm. The findings also stated that the firm failed to establish and maintain a supervisory system or to establish, maintain, and enforce written supervisory procedures reasonably designed to ensure compliance with NASD Rules 1021(a) and 1031(a). **(NASD Case #C01040012)**

Fiserv Securities, Inc. (CRD #14285, Philadelphia, Pennsylvania) submitted a Letter of Acceptance, Waiver, and Consent in which the firm was censured, fined \$15,000, and required to revise the firm's written supervisory procedures regarding compliance with NASD Marketplace Rule 6130(b) within 30 business days. Without admitting or denying the allegations, the firm consented to the described sanctions and to the entry of findings that the firm failed to accept or decline in ACT transactions in eligible securities within 20 minutes after execution that the firm had an obligation to accept or decline in ACT as the Order Entry Firm. The findings also stated that the firm's supervisory system failed to provide for supervision reasonably designed to achieve compliance with NASD Marketplace Rule 6130(b). **(NASD Case #CMS040077)**

Grant Williams LP (CRD #45961, Philadelphia, Pennsylvania) submitted a Letter of Acceptance, Waiver, and Consent in which the firm was censured, fined \$11,000, and required to revise the firm's written supervisory procedures regarding the Trade Reporting and Compliance Engine (TRACE) within 30 business days. Without admitting or denying the allegations, the firm consented to the described sanctions and to the entry of findings that the firm failed to report to TRACE transactions in TRACE-eligible securities within 75 minutes after execution. The findings also stated that the firm failed to have a TRACE Participant application agreement in place prior to executing trades in TRACE-eligible securities. In addition, NASD found that the firm's supervisory system failed to provide for supervision reasonably designed to achieve compliance with applicable securities laws, regulations, and NASD rules concerning TRACE reporting. **(NASD Case #CMS040079)**

Huntleigh Securities Corporation (CRD #7456, St. Louis, Missouri) submitted a Letter of Acceptance, Waiver, and Consent in which the firm was fined \$15,000. Without admitting or denying the allegations, the firm consented to the described sanctions and to the entry of findings that it failed to enforce its written supervisory procedures, in that the firm failed

to report suspicious transactions to the Internal Revenue Service (IRS) or other federal law enforcement authorities in the account of a public customer that was just below the \$10,000 government reporting threshold. **(NASD Case #C04040023)**

Lloyd, Scott, and Valenti Ltd (CRD #23640, Austin, Texas) submitted a Letter of Acceptance, Waiver, and Consent in which the firm was censured, fined \$50,000, and required to pay \$22,657.40 in restitution to public customers. The firm was also required to complete an ownership change through NASD's Membership Continuance process no later than 60 days after the acceptance of the AWC. If the firm fails to complete an ownership change within the prescribed time period, its NASD membership will be suspended until an ownership change is effected.

Without admitting or denying the allegations, the firm consented to the described sanctions and to the entry of findings that the firm, acting through principals, permitted an individual to actively engage in the investment banking and securities business of the firm without being registered in any capacity. The findings also stated that the firm, acting through its principals, failed to amend its Form BD to disclose the individual's role at the firm. NASD also found that the firm effected sales of securities to public customers in riskless principal transactions and charged its customers more than a fair markup, taking into consideration all relevant circumstances, including market conditions with respect to the security at the time of the transactions, the expense involved, and the fact that the firm was entitled to a profit. In addition, NASD found that the firm failed to establish and maintain a supervisory system reasonably designed to achieve compliance with applicable securities laws, regulations, and NASD rules regarding excessive markups. Furthermore, the findings stated that the firm, acting through its principals, failed to adequately disclose on customer order confirmations the difference in the price securities were purchased from and sold to customers and the firm's contemporaneous offsetting purchase or sale price. **(NASD Case #C06040015)**

RenCap Securities, Inc. (CRD #37821, New York, New York) submitted a Letter of Acceptance, Waiver, and Consent in which the firm was censured and fined \$18,000. Without admitting or denying the allegations, the firm consented to the described sanctions and to the entry of findings that customer order confirmations failed to disclose adequately the markups or markdowns charged to its customers. The findings also stated that the firm memoranda of the brokerage orders were deficient in that the memoranda failed to show the type of order, whether or not the transaction was solicited, and the correct time of order entry and order execution. NASD also found that the firm memorandum of customer sell orders failed to indicate whether the orders were long or short and contained the wrong information or no information as to whether the customer was buying or selling. In addition, NASD determined that principal

transactions, which were executed in NASDAQ National Market® (NNM®) securities, Consolidated Quotation Services securities traded in the over-the-counter market, and/or OTC Equity Securities, were reported to ACT as agency transactions. The findings also stated that buy transactions were reported to ACT as sell transactions. Furthermore, NASD found that the firm failed to establish a supervisory system reasonably designed to achieve compliance with NASD rules concerning trade reporting to ACT, and failed to take steps to ensure compliance with Securities and Exchange Commission (SEC) rules concerning disclosure of markups and markdowns on customer confirmations and NASD and SEC rules regarding information to be contained on memorandum of each brokerage order. **(NASD Case #C10040058)**

State Street Global Markets, LLC (CRD #30107, Boston, Massachusetts) submitted a Letter of Acceptance, Waiver and Consent in which the firm was censured, fined \$20,000, and required to revise its written supervisory procedures with respect to the Order Audit Trail SystemSM (OATSSM) and ACT reporting. Without admitting or denying the allegations, the firm consented to the described sanctions and to the entry of findings that it reported execution records to OATS that contained inaccurate, incomplete, or improperly formatted data. The findings also stated that the firm's supervisory system did not provide for supervision reasonably designed to achieve compliance with applicable securities laws, regulations, and NASD rules concerning OATS and ACT reporting. NASD also found that the firm failed to accept or decline in ACT transactions in eligible securities within 20 minutes after execution. **(NASD Case #CMS040083)**

Track Data Securities Corporation (CRD #103802, Brooklyn, New York) submitted a Letter of Acceptance, Waiver, and Consent in which the firm was censured and fined \$15,000. Without admitting or denying the allegations, the firm consented to the described sanctions and to the entry of findings that it accepted customer short sale orders in certain securities and, for each order, failed to make/annotate an affirmative determination that the firm would receive delivery of the security on behalf of the customer or that the firm could borrow the security on behalf of the customer for delivery by settlement date. The findings also stated that the firm's supervisory system did not provide for supervision reasonably designed to achieve compliance with applicable securities laws, regulations, and NASD rules concerning short sales. **(NASD Case #CMS040070)**

Individuals Barred or Suspended

Jason Acosta (CRD #4419505, Associated Person, Glassboro, New Jersey) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any

NASD member in any capacity. Without admitting or denying the allegations, Acosta consented to the described sanction and to the entry of findings that, without the prior authorization or consent of the applicants, he directed a clerical employee to affix the purported signatures of applicants to policy-related documents for insurance policies. (NASD Case #C9A040010)

Richard Juan Adams (CRD #2896069, Registered Representative, Houston, Texas) was barred from association with any NASD member in any capacity. The sanction was based on findings that Adams received a \$2,057.53 check from a public customer to be used for investment purposes and, instead, Adams cashed the check, returned \$57.53 to the customer, and used \$2,000 of the funds for his own use and benefit. NASD also found that Adams failed to respond to NASD requests for information. (NASD Case #C06030025)

Markel Taron Albritton (CRD #3183199, Registered Representative, New York, New York) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Albritton consented to the described sanction and to the entry of findings that he knowingly prepared and submitted false and/or fictitious life insurance applications to his member firm. (NASD Case #C10040054)

James Albert Allen (CRD #1645732, Registered Principal, Malibu, California) and Richard Gabriel Sarkisian (CRD #1743428, Registered Principal, New York, New York) submitted Offers of Settlement in which Allen was fined \$50,000 and suspended from association with any NASD member in any capacity for two years. Sarkisian was fined \$15,000, suspended from association with any NASD member in any capacity for nine months, and required to requalify by exam as a Series 7, general securities representative, within 30 business days after reassociating with a member firm. The fines must be paid before Allen or Sarkisian reassociate with any NASD member following the suspensions or before requesting relief from any statutory disqualification.

Without admitting or denying the allegations, Allen and Sarkisian consented to the described sanctions and to the entry of findings that they exercised discretion in the accounts of public customers without prior written authorization from the customers and prior written acceptance of the accounts as discretionary by their member firm. The findings also stated that Allen and Sarkisian prepared and maintained inaccurate new account forms, order tickets, and confirmations for public customers. NASD also found that Allen failed to ensure that all of the firm's branch offices were properly registered with NASD and permitted salespersons in branch offices to engage in the securities business of the firm and function as representatives of his member firm without properly qualifying or registering in the appropriate capacity. Moreover, the findings stated that Allen failed to establish, maintain, or enforce a supervisory system or

written supervisory procedures at his member firm to address the handling and supervision of "off-market" transactions and the handling of customer orders placed by third person or discretionary trading.

Allen's suspension began June 21, 2004, and will conclude at the close of business June 20, 2006. Sarkisian's suspension began June 21, 2004, and will conclude March 20, 2005. (NASD Case #CAF030038)

Edward Faust Amaral (CRD #2381505, Registered Principal, Miami, Florida) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$7,500 and suspended from association with any NASD member in any capacity for 90 days. The fine must be paid before Amaral reassociates with any NASD member following the suspension or before requesting relief from any statutory disqualification. Without admitting or denying the allegations, Amaral consented to the described sanctions and to the entry of findings that he signed the names and initials of public customers to a Variable Annuity Disclosure document and an IRS tax withholding certificate for foreign investors.

Amaral's suspension began July 6, 2004, and will conclude October 3, 2004. (NASD Case #C07040050)

Amy Marie Amburn (CRD #4185840, Registered Representative, Dayton, Ohio) submitted a Letter of Acceptance, Waiver, and Consent in which she was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Amburn consented to the described sanction and to the entry of findings that she affixed the signatures of public customers on life insurance policies without their permission or authority. The findings also stated that Amburn failed to respond to NASD requests for information. (NASD Case #C8A040037)

Phillip Michael Atwell (CRD #2243709, Registered Principal, Naperville, Illinois) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$5,000 and suspended from association with any NASD member in any capacity for 70 days. Atwell will receive credit for the 60 days suspension that he has already served in the State of Illinois case based on the same incident. The fine must be paid before Atwell reassociates with any NASD member following the suspension or before requesting relief from any statutory disqualification. Without admitting or denying the allegations, Atwell consented to the described sanctions and to the entry of findings that he participated in private securities transactions without providing prompt written notice to, and receiving approval from, his member firm.

Atwell's suspension will begin July 19, 2004, and will conclude at the close of business July 30, 2004. (NASD Case #C8A040045)

Louis William Bedinotti (CRD #3111079, Registered Representative, Hicksville, New York) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity and ordered to pay \$10,000, plus interest, in restitution to a public customer. The restitution amount must be paid before Bedinotti requests relief from any statutory disqualification. Without admitting or denying the allegations, Bedinotti consented to the described sanctions and to the entry of findings that he engaged in a private securities transaction without providing written notice to his member firm. The findings also stated that Bedinotti made material misrepresentations and omitted material information in connection with the private offering and sale of unregistered securities in the private securities transaction. **(NASD Case #C10040049)**

Joseph Jerome Biondolillo (CRD #3082625, Registered Representative, Staten Island, New York) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$5,000 and suspended from association with any NASD member in any capacity for 10 business days. Without admitting or denying the allegations, Biondolillo consented to the described sanctions and to the entry of findings that he purchased shares of stock in the accounts of public customers without their consent or authority.

Biondolillo's suspension began June 21, 2004, and concluded at the close of business July 2, 2004. **(NASD Case #C9B040044)**

Michael Lewis Boyd (CRD #1504646, Registered Representative, Bayville, New York) was barred from association with any NASD member in any capacity. The sanction was based on findings that Boyd converted to his own use and benefit a total of \$267,525 received from public customers for investment purposes. In addition, NASD found that Boyd forged a customer's signature on several forms he submitted to his member firm, and that he failed to respond to NASD requests for information. **(NASD Case #C10030098)**

Kenneth John Bungarda (CRD #2999716, Registered Representative, San Diego, California) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Bungarda consented to the described sanction and to the entry of findings that he participated in outside business activities without providing prompt written notification to his member firm. The findings also stated that Bungarda prepared a letter stating that a commodities firm need not send duplicate statements to his member firm and signed the name of his supervisor who was not aware of the letter. NASD also found that Bungarda did not have authorization to sign his supervisor's name to the letter. **(NASD Case #C02040018)**

Perrin Fitzgerald Burse (CRD #1908857, Registered Representative, Cincinnati, Ohio) was barred from association with any NASD member in any capacity. The sanction was based on findings that Burse recommended unsuitable transactions to a public customer without having a reasonable basis for believing that his recommendations were suitable for the customer. NASD also found that Burse forged a customer's signature on a client agreement, and that he engaged in private securities transactions and failed to provide written notice to, and obtain written authorization or acknowledgement from, his member firm. In addition, the findings stated that Burse failed to respond to NASD requests for information. **(NASD Case #C8B030023)**

Anthony Joseph Calascione (CRD #2869991, Registered Representative, Staten Island, New York) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Calascione consented to the described sanction and to the entry of findings that he willfully failed to disclose material facts on his Uniform Applications for Securities Industry Registration or Transfer (Forms U4). **(NASD Case #C9B040039)**

Roger John Calhoun (CRD #2669513, Registered Principal, Atlanta, Georgia) was barred from association with any NASD member in any capacity. The sanction was based on findings that Calhoun negotiated and signed for loans totaling \$193,200 on behalf of his member firm without the knowledge or authorization of the firm's board of directors and misappropriated the loan proceeds. The findings also stated that Calhoun failed to respond to NASD requests for information. **(NASD Case #C07040007)**

Anthony Ralph Cardino (CRD #2544204, Registered Representative, Hoboken, New Jersey) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$5,000 and suspended from association with any NASD member in any capacity for 30 days. The fine must be paid before Cardino reassociates with any NASD member following the suspension or before requesting relief from any statutory disqualification. Without admitting or denying the allegations, Cardino consented to the described sanctions and to the entry of findings that he gave a personal check for \$31,035 to a public customer to settle the customer's complaint concerning the amount of margin interest in his account without the knowledge or approval of his member firm.

Cardino's suspension began July 6, 2004, and will conclude at the close of business August 4, 2004. **(NASD Case #C9B040049)**

Robert Anthony Cassino (CRD #2291855, Registered Representative, Miller Place, New York) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined

\$75,000, required to pay \$139,190, plus interest, in disgorgement of commissions in partial restitution to a public customer, and suspended from association with any NASD member in any capacity for 30 days. Without admitting or denying the allegations, Cassino consented to the described sanctions and to the entry of findings that he recommended, and caused to be entered and executed, purchase and sell transactions in the account of a customer. The findings also stated that the trading generated gross commissions of \$428,726.50, of which Cassino received \$139,190.

Cassino's suspension began June 21, 2004, and will conclude at the close of business July 20, 2004. (NASD Case #C3A040029)

Xi Chen (CRD #2961748, Registered Representative, Williamsville, New York) was barred from association with any NASD member in any capacity. The sanction was based on findings that Chen forged public customers' signatures on documents directing the transfer of funds and securities from their accounts to the accounts of Chen's relatives without the knowledge or consent of the customers. The findings also stated that Chen improperly used customers' funds and securities without the customers' knowledge or consent. NASD also found that Chen failed to respond to NASD requests for information. (NASD Case #C8B030027)

Mary Terry Councilman (CRD #2168051, Registered Representative, Greensboro, North Carolina) submitted a Letter of Acceptance, Waiver, and Consent in which she was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Councilman consented to the described sanction and to the entry of findings that, outside the scope of her employment with her member firms, she recommended and sold investments in payphones and promissory notes to a public customer without providing prior written notice to, or receiving prior written permission from, her member firms. NASD also found that Councilman falsely told the customer that a company was a financially stable company with a long track record when the company was merely a bank checking account that she had opened to receive and disburse funds she solicited for investment with third parties. The findings also stated that, to induce the sale of the promissory note to the customer, Councilman falsely told the customer that his funds were safe when, in fact, she had a reason to believe otherwise; falsely told the customer that his investment was guaranteed when, in fact, it was not guaranteed; failed to disclose to the customer that his funds had been invested in high-risk investments with third parties; and failed to conduct a reasonable independent investigation to determine the potential risks of the proposed investment and thereby failed to have a reasonable basis for determining the suitability of the investment and for recommending it to the customer. (NASD Case #C07040052)

Wade Roger Don Cruce (CRD #1553048, Registered Principal, Laguna Hills, California) was barred from association with any NASD member in any capacity. The sanction was based on findings that Cruce failed to respond to NASD requests for information. (NASD Case #C02040002)

Earl H. Dangelmaier (CRD #1610676, Registered Representative, Bellingham, Washington) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Dangelmaier consented to the described sanction and to the entry of findings that he engaged in private securities transactions without prior notice to, and approval from, his member firm. (NASD Case #C3B040018)

William Michael Deegan (CRD #2098524, Registered Representative, Scottsdale, Arizona) was barred from association with any NASD member in any capacity. The sanction was based on findings that Deegan engaged in an outside business activity and failed to provide prompt written notice to his member firm. The findings also stated that Deegan failed to respond to NASD requests to appear for an on-the-record interview and to respond completely to an NASD request for information. (NASD Case #C3A030046)

Nicholas Andrew DeNucci (CRD #1835469, Registered Representative, Denville, New Jersey) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$10,000, including disgorgement of \$2,500 in commissions, and suspended from association with any NASD member in any capacity for 15 business days. Without admitting or denying the allegations, DeNucci consented to the described sanctions and to the entry of findings that he exercised discretionary authority over the account of a public customer without prior written authorization of the customer and prior written acceptance of the account as discretionary. The findings also stated that DeNucci recommended that a public customer purchase \$462,000 of Class B shares in mutual funds without reasonable grounds for believing the Class B shares were suitable for the customer as opposed to Class A shares, for which the customer would have received breakpoints reducing the cost of the front-end sales charges, paid lower on-going expenses, and avoided contingent deferred sales charges.

DeNucci's suspension began July 6, 2004, and will conclude at the close of business July 26, 2004. (NASD Case #C9B040048)

Joseph Lee Digman (CRD #1336324, Registered Principal, Portland, Oregon) submitted a Letter of Acceptance, Waiver, and Consent in which he was suspended from association with any NASD member in any capacity for six months. In light of the financial status of Digman, no monetary sanctions were imposed. Without admitting or denying the allegations, Digman

consented to the described sanction and to the entry of findings that he engaged in private securities transactions without prior notice to, and approval from, his member firms.

Digman's suspension began June 7, 2004, and will conclude at the close of business December 6, 2004. (NASD Case #C3B040014)

Donald Paul Duffy (CRD #2981551, Registered Representative, Madison, New Jersey) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Duffy consented to the described sanction and to the entry of findings that he participated in a process to circumvent Regulation 60, a New York State Insurance regulation that requires a financial adviser involved in an annuity replacement transaction to, among other things, meet with a customer on at least two separate occasions. The findings stated that Duffy placed dates on Regulation 60 documents that gave the false impression that two meetings had occurred when, in fact, only one meeting had occurred. (NASD Case #C9B040040)

Howard George Einhorn, Jr. (CRD #844533, Registered Principal, Huntington, New York) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$2,500 and suspended from association with any NASD member in any capacity for 10 business days. Without admitting or denying the allegations, Einhorn consented to the described sanctions and to the entry of findings that he exercised discretionary authority in the account of a public customer without having written authorization from the customer to exercise discretionary authority in his account and without obtaining written acceptance by his member firm to exercise discretionary authority in the account.

Einhorn's suspension began June 21, 2004, and concluded at the close of business July 2, 2004. (NASD Case #CLI040009)

Michael Alan Espenlaub (CRD #1306963, Registered Representative, Atlanta, Georgia) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Espenlaub consented to the described sanction and to the entry of findings that he forged customer signatures on various forms, including variable annuity assignment forms and an insurance policy loan request. The findings also stated that Espenlaub failed to respond to NASD requests for information. (NASD Case #C07040049)

Wassim Fawsi Fakhereddine (CRD #4579963, Associated Person, Brooklyn, New York) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$5,000 and suspended from association with any NASD member in any

capacity for 20 business days. The fine must be paid before Fakhereddine reassociates with any NASD member following the suspension or before requesting relief from any statutory disqualification. Without admitting or denying the allegations, Fakhereddine consented to the described sanctions and to the entry of findings that he failed to respond timely to NASD requests for information.

Fakhereddine's suspension began June 7, 2004, and concluded at the close of business July 2, 2004. (NASD Case #CLI040010)

Howard Alan Feinstein (CRD #1207905, Registered Representative, Evanston, Illinois) submitted an Offer of Settlement in which he was ordered to pay \$19,530.60 in restitution, including \$14,530.60 in disgorgement of commissions, and a \$5,000 fine, and suspended from association with any NASD member in any capacity for six months. The restitution must be paid before Feinstein reassociates with any NASD member. Without admitting or denying the allegations, Feinstein consented to the described sanctions and to the entry of findings that he participated in private securities transactions without providing prompt written notice to, or receiving approval from, his member firm.

Feinstein's suspension began June 4, 2004, and will conclude at the close of business December 3, 2004. (NASD Case #C8A030091)

Harvey Harold Feldman (CRD #205886, Registered Principal, Maryland Heights, Missouri) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Feldman consented to the described sanction and to the entry of findings that he failed to respond to an NASD request to appear for an on-the-record interview. (NASD Case #C10040057)

Danny Elston Ford (CRD #4138953, Registered Representative, Tucson, Arizona) was barred from association with any NASD member in any capacity. The sanction was based on findings that Ford failed to file an application for approval of change of ownership and conducted a securities business without membership approval. The findings also stated that Ford failed to maintain accurate books and records. In addition, NASD found that Ford failed to respond completely to NASD requests for information and documentation. (NASD Case #C3A030047)

Matthew William Geherin (CRD #1432845, Registered Representative, Rochester, New York) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$5,000 and suspended from association with any NASD member in any capacity for six months. The fine must be paid before Geherin reassociates with any NASD member following the suspension or before requesting relief from any statutory disqualification.

Without admitting or denying the allegations, Geherin consented to the described sanctions and to the entry of findings that he executed general securities transactions in client accounts without having the proper NASD registration.

Geherin's suspension began July 6, 2004, and will conclude at the close of business January 5, 2005. (NASD Case #C9B040051)

Michael Rudolph Gerbec (CRD #2950327, Registered Representative, Barrington, Illinois) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Gerbec consented to the described sanction and to the entry of findings that he received a \$60,000 check from a public customer to be deposited in a money market account, misused the funds by depositing the funds in a checking account that he controlled, used the funds for some purpose other the benefit of the customer, and returned only \$58,883.42 to the customer. The findings also stated that Gerbec failed to respond fully to NASD requests for information. (NASD Case #C8A040043)

Harold Wayne Griffin (CRD #1955757, Registered Principal, Cliffton, Texas) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Griffin consented to the described sanction and to the entry of findings that he converted at least \$1.5 million of public customer funds to his personal use and benefit by causing the customers to invest in fictitious annuities that he offered and sold. The findings also stated that in order to conceal his misappropriation of customer funds, Griffin prepared and distributed false statements to customers that purportedly showed their annuity investments. (NASD Case #C06040016)

William Elliston Hopkins (CRD #1183119, Registered Principal, Jackson, Tennessee) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$5,000, required to pay \$43,000 in disgorgement in partial restitution to a public customer, and suspended from association with any NASD member in any capacity for two years. The fine and disgorgement must be paid before Hopkins reassociates with any NASD member following the suspension or before requesting relief from any statutory disqualification. Without admitting or denying the allegations, Hopkins consented to the described sanctions and to the entry of findings that he participated in private securities transactions without providing prior written notice to his member firm.

Hopkins' suspension began July 6, 2004, and will conclude at the close of business July 5, 2006. (NASD Case #C05040030)

James Soreide Huh (CRD #2068846, Registered Representative, Aurora, Illinois) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Huh consented to the described sanction and to the entry of findings that he received \$26,000 from a public customer to purchase a variable annuity, failed to invest the funds as directed, and used the funds for other purposes and not for the benefit of the customer. The findings also stated that Huh provided the customer with falsified documents of a fictitious variable annuity with an initial value of \$26,000, including a variable annuity certificate and statements of value for the certificate. NASD also found that Huh failed to respond to NASD requests for information. (NASD Case #C8A040042)

Paulette Rae Jensen (CRD #4137915, Registered Principal, Sioux Falls, South Dakota) submitted a Letter of Acceptance, Waiver, and Consent in which she was fined \$7,500 and suspended from association with any NASD member in any capacity for 10 business days. Without admitting or denying the allegations, Jensen consented to the described sanctions and to the entry of findings that she participated in outside business activities, for compensation, without providing prompt written notice to her member firm.

Jensen's suspension began July 6, 2004, and will conclude at the close of business July 19, 2004. (NASD Case #C04040026)

Anthony Richard Joslin (CRD #2281191, Registered Principal, Jersey City, New Jersey) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$5,000 and suspended from association with any NASD member in any capacity for 30 business days. Without admitting or denying the allegations, Joslin consented to the described sanctions and to the entry of findings that he failed to supervise reasonably a registered representative of his member firm so as to prevent violations of applicable NASD rules.

Joslin's suspension began July 6, 2004, and will conclude at the close of business August 16, 2004. (NASD Case #C9B040047)

Charles Middleton Kelley, Jr. (CRD #1708813, Registered Principal, Staunton, Virginia) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$30,000, \$20,950 of which shall be paid to public customers as restitution for the margin interest charges incurred, and suspended from association with any NASD member in any capacity for 45 days. Without admitting or denying the allegations, Kelley consented to the described sanctions and to the entry of findings that he made recommendations to public customers to purchase mutual funds and invest in a variable

annuity through the use of margin, even though the recommendations were unsuitable in light of the customers' investment objectives, income, and net worth.

Kelley's suspension began July 6, 2004, and will conclude at the close of business August 19, 2004. (NASD Case #C07040053)

Gregory Alfred Kernechel (CRD #1265486, Registered Representative, Allentown, Pennsylvania) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity and ordered to pay \$147,670 in restitution to public customers. Without admitting or denying the allegations, Kernechel consented to the described sanctions and to the entry of findings that he received \$147,670 from public customers for investments, deposited the funds into his personal bank account, and converted the funds for his own use and benefit without the authorization or consent of the customers. (NASD Case #C9A040016)

John Mark Kittle (CRD #866287, Registered Representative, Wichita, Kansas) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$5,000 and suspended from association with any NASD member in any capacity for 10 business days. Without admitting or denying the allegations, Kittle consented to the described sanctions and to the entry of findings that he recommended mutual funds to public customers. The findings also stated that based on Kittle's recommendations, the customer purchased the mutual funds, and that instead of Class B shares, Kittle should have recommended that the customers purchase Class A shares to eliminate higher annual expenses.

Kittle's suspension will begin July 19, 2004, and will conclude at the close of business July 30, 2004. (NASD Case #C04040030)

Andrew Christopher Knight (CRD #3011465, Registered Representative, Fleetwood, New York) was fined \$5,000 and suspended from association with any NASD member in any capacity for 30 business days. The National Adjudicatory Council (NAC) imposed the sanctions following review of the Office of Hearing Officers (OHO) decision. The sanctions were based on findings that Knight willfully failed to disclose material information on his Form U4.

Knight's suspension began June 7, 2004, and will conclude at the close of business July 19, 2004. (NASD Case #C10020060)

James Kulow (CRD #2796318, Registered Representative, Price, Utah) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$7,500 and suspended from association with any NASD member in any capacity for six months. The fine must be paid before Kulow reassociates with

any NASD member following the suspension or before requesting relief from any statutory disqualification. Without admitting or denying the allegations, Kulow consented to the described sanctions and to the entry of findings that he participated in private securities transactions without providing his member firm with prompt written notice.

Kulow's suspension began July 6, 2004, and will conclude at the close of business January 5, 2005. (NASD Case #C3A040027)

Mark Horace Love (CRD #1268245, Registered Representative, Scottsdale, Arizona) was fined \$25,000 and suspended from association with any NASD member in any capacity for 30 business days. The SEC affirmed the sanctions following appeal of a NAC decision. The sanctions were based on findings that Love engaged in private securities transactions without prior written notice to his member firm.

Love's suspension began June 21, 2004, and will conclude at the close of business August 2, 2004. (NASD Case #C3A010009)

Helena Ngoc Luong (CRD #2937600, Registered Representative, Honolulu, Hawaii) submitted a Letter of Acceptance, Waiver, and Consent in which she was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Luong consented to the described sanction and to the entry of findings that she obtained a \$40,000 loan in the name of an individual and used the funds to pay her own personal expenses. The findings also stated that Luong opened a \$50,000 business line of credit with a bank in the name of her aunt's business without her aunt's knowledge and consent and used the \$50,000 to pay her own personal expenses. NASD also found that Luong obtained \$24,000 from a certificate of deposit belonging to a public customer and used the funds to pay her own personal expenses. In addition, NASD found that Luong obtained a \$15,000 personal loan from a bank in her uncle's name without his knowledge or consent. (NASD Case #C01040013)

Chris Manettas (CRD #2274927, Registered Representative, Whitestone, New York) submitted an Offer of Settlement in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Manettas consented to the described sanction and to the entry of findings that, while exercising control over the accounts of public customers, he executed, or caused to be executed, an excessive number of transactions in the accounts of the customers that were unsuitable for the customers based on their financial circumstances and investment needs. The findings also stated that Manettas purchased extremely large numbers of shares of speculative securities for the accounts of public customers that were unsuitable for the customers given the size, and were incompatible with the customers' financial situation. In

addition, NASD determined that Manettas exercised discretion in the accounts of public customers without prior written authorization from the customers and without his member firm's acceptance of these accounts as discretionary. (NASD Case #C10030059)

Dennis Raymond Mathews, Jr. (CRD #3005108, Registered Representative, Grand Junction, Colorado) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Mathews consented to the described sanction and to the entry of findings that he established a joint account with a mutual fund company in his name and the name of a public customer without the customer's authorization, received \$175,000 from the customer, and caused the funds to be deposited in the account. The findings also stated that Mathews caused the funds to be withdrawn from the account and used them for his personal benefit without the customer's authorization. NASD also found that to conceal the joint account from the customer, Mathews signed the customer's name to the joint account application and prepared and provided to the customer documents purporting to be confirmations of deposits of funds into an account in the customer's name only at Mathews' member firm. In addition, NASD found that Mathews failed to respond to NASD requests for information. (NASD Case #C3A040026)

Kerry Francis McDevitt (CRD #2085044, Registered Representative, Westfield, New Jersey) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, McDevitt consented to the described sanction and to the entry of findings that he executed call option transactions in the rollover individual retirement account (IRA) of a public customer without the customer's prior knowledge, authorization, or consent. The findings also stated that McDevitt failed to respond to NASD requests to provide a written statement. (NASD Case #C9B040042)

Karen Lee McGlynn (CRD #2881080, Registered Representative, Newtown, Pennsylvania) submitted a Letter of Acceptance, Waiver, and Consent in which she was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, McGlynn consented to the described sanction and to the entry of findings that she participated in a process to circumvent Regulation 60, a New York State Insurance regulation that requires a financial adviser involved in an annuity replacement transaction to, among other things, meet with a customer on at least two separate occasions. The findings stated that McGlynn placed dates on Regulation 60 documents that gave the false impression that two meetings had occurred when, in fact, only one meeting had occurred. (NASD Case #C9B040041)

Philip Mark McPhail (CRD #2789154, Registered Representative, Minneapolis, Minnesota) was barred from association with any NASD member in any capacity. The sanction was based on findings that McPhail converted customer funds to his own use and benefit without the customer's knowledge or authorization. NASD also found that McPhail failed to respond to NASD requests for information. (NASD Case #C04030058)

Lawrence Merl (CRD #2443190, Registered Representative, Rye Brook, New York) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$52,000, including disgorgement of \$42,000 of commissions, and suspended from association with any NASD member in any capacity for five months. Without admitting or denying the allegations, Merl consented to the described sanctions and to the entry of findings that he recommended, offered, and caused to be purchased on margin for unsophisticated customers illiquid securities of real estate investment trusts (REITs) underwritten by his member firm totaling approximately \$1.1 million. The findings also stated that Merl effected these purchases without having reasonable grounds for believing that these investments and the use of margin were suitable for the customers' investment objectives and financial situations.

Merl's suspension began June 7, 2004, and will conclude November 6, 2004. (NASD Case #CAF040031)

Michael Paul Monson (CRD #2111954, Registered Principal, Antigo, Wisconsin) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any principal capacity, and suspended from association with any NASD member in any capacity for two years. Without admitting or denying the allegations, Monson consented to the described sanctions and to the entry of findings that he improperly formed and maintained a partnership in a securities account with a public customer of a firm by failing to memorialize the partnership agreement in writing; failing to have a specific agreement or understanding as to the capital contributions to be made by the partners, how and when capital contributions would be withdrawn, and how profits and losses were to be shared; and failing to provide the partner with complete periodic statements as to the complete cost to the partnership of each securities transaction. The findings also stated that Monson misused a member firm's assets by withdrawing approximately \$6,946 from the firm's account above and beyond his partnership interest in the account and using the funds for his own use and or benefit.

Monson's suspension will begin July 19, 2004, and will conclude at the close of business July 18, 2006. (NASD Case #C8A040039)

Chris Allen Nelson (CRD #2246462, Registered Representative, Sioux Falls, South Dakota) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$2,500 and suspended from association with any NASD member in any capacity for two months. Without admitting or denying the allegations, Nelson consented to the described sanctions and to the entry of findings that he engaged in outside business activities for compensation and failed to provide prompt written notice to his member firm.

Nelson's suspension began June 21, 2004, and will conclude at the close of business August 20, 2004. (NASD Case #C04040025)

Michael Nesgoda (CRD #4165475, Registered Representative, Tamaqua, Pennsylvania) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Nesgoda consented to the described sanction and to the entry of findings that he received \$104,000 from public customers to make fixed annuity investments, failed to make the investments, and converted the funds for his own use and benefit without the prior knowledge or consent of the customers. (NASD Case #C9A040011)

Lance Christopher Newby (CRD #1679777, Registered Principal, Kailua, Hawaii) was barred from association with any NASD member in any capacity. The sanction was based on findings that Newby entered into an unauthorized commitment agreement on behalf of his member firm and subsequently sent misleading communications to the firm to make them believe that he had not entered into the commitment agreement. (NASD Case #C01030019)

Robert W. Oakes, Jr. (CRD #1396707, Registered Representative, Rumson, New Jersey) submitted an Offer of Settlement in which he was fined \$25,000, including disgorgement of markdowns and commissions received of \$14,036.31, and suspended from association with any NASD member in any capacity for 45 days. Without admitting or denying the allegations, Oakes consented to the described sanctions and to the entry of findings that he participated, directly or indirectly, in undertakings involving the purchase of securities from issuers or affiliates of issuers with a view to the distribution of a security, and thereby acted as an underwriter of the unregistered securities. NASD also found that Oakes exercised discretion in the accounts of public customers and effected, or caused to be effected, transactions without a written agreement with the customers to exercise discretion and without having obtained his member firm's prior written acceptance of each account as discretionary.

Oakes' suspension began June 21, 2004, and will conclude at the close of business August 4, 2004. (NASD Case #CAF030052)

John M. Occhiogrosso (CRD #2192496, Registered Principal, Palm City, Florida) was barred from association with any NASD member in any capacity. The sanction was based on findings that Occhiogrosso converted a public customer's funds to his own use and benefit without authorization from the customer. The findings also stated that Occhiogrosso failed to respond to NASD requests for information. (NASD Case #C07030084)

David Kyle Pace (CRD #2689097, Registered Representative, Lynbrook, New York) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Pace consented to the described sanction and to the entry of findings that he shared in the losses in the account of a public customer by transferring \$5,000 from his wife's bank account to the customer's account to cover margin calls, without prior written authorization from his member firm. The findings also stated that Pace churned the accounts of a public customer by intentionally or recklessly engaging in trading that was excessive in light of the customer's financial situation and investment objectives. NASD also found that Pace falsified firm account opening documentation for a public customer concerning the customer's securities experience, income, relationship to Pace, and listed his own address rather than the customer's in order to route all confirmations and account statements to him rather than the customer. (NASD Case #CLI040011)

Daniel Karl Park (CRD #2318603, Registered Representative, McKinney, Texas) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Park consented to the described sanction and to the entry of findings that he signed the name of his wife on annuity withdrawal request forms and withdrew \$52,215 from her variable annuity, which he then converted to his own use and benefit without her authorization, knowledge, or consent. (NASD Case #C06040008)

Robert Christopher Patrick (CRD #2854687, Registered Principal, Ronkonkoma, New York) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$10,000, plus interest, and suspended from association with any NASD member in any capacity for 10 business days. The fine must be paid before Patrick reassociates with any NASD member following the suspension or before requesting relief from any statutory disqualification. Without admitting or denying the allegations, Patrick consented to the described sanctions and to the entry of findings that he received approximately \$107,069 in

commission from transactions made by another registered representative in the account of a public customer. The findings also stated that the customer's account was turned over 73 times in one year and the account had to appreciate approximately 170 percent just to break even. NASD found that at no time did Patrick ask the customer or take other steps to assure that the trading activity recommended by the individual was appropriate for the customer and consistent with the customer's financial situation and needs.

Patrick's suspension began July 6, 2004, and concluded at the close of business July 15, 2004. **(NASD Case #C3A040028)**

Michael Henry Pigott (CRD #1158008, Registered Principal, Issaquah, Washington) and Travis Michael Pigott (CRD #3045316, Registered Representative, Seattle, Washington) submitted a Letter of Acceptance, Waiver, and Consent in which Michael Pigott was barred from association with any NASD member in any capacity and Travis Pigott was suspended from association with any NASD member in any capacity for one year. In light of the financial status of Travis Pigott, no monetary sanctions were imposed. Without admitting or denying the allegations, Michael and Travis Pigott consented to the described sanctions and to the entry of findings that they engaged in private securities transactions without prior written notice to, or approval from, their member firm. The findings also stated that Michael and Travis Pigott shared, directly or indirectly, in the profits or losses in the accounts of public customers without prior written authorization from their member firm. NASD also found that Michael and Travis Pigott opened securities accounts at other member firms and placed orders with the firms for the purchase and sale of securities and, prior to the opening of the accounts or placing initial orders with the firms, they failed to notify their member firm in writing regarding the accounts.

Travis Pigott's suspension began June 7, 2004, and will conclude at the close of business June 6, 2005. **(NASD Case #C3B040016)**

Ronald Lee Rechter (CRD #2096665, Registered Representative, Franklin, Michigan) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$5,000 and suspended from association with any NASD member in any capacity for one month. The fine must be paid before Rechter reassociates with any NASD member following the suspension or before requesting relief from any statutory disqualification. Without admitting or denying the allegations, Rechter consented to the described sanctions and to the entry of findings that he failed to properly qualify and/or register in the appropriate capacity prior to effecting equity orders in the securities account of a public customer. The findings also stated that Rechter, while effecting the equity orders, held himself out to be an associated

person of his member firm who was registered as a general securities representative and who was qualified and registered to effect the equity orders.

Rechter's suspension began June 14, 2004, and concluded at the close of business July 13, 2004. **(NASD Case #C8A040032)**

Dennis A. Reiman (CRD #4295645, Registered Representative, Berlin, Pennsylvania) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Reiman consented to the described sanction and to the entry of findings that he received \$1,800 from a public customer for insurance policy payments, negotiated the checks, and failed to remit the funds to the insurance company for premium payments. **(NASD Case #C9A040015)**

Michael David Relihan (CRD #501990, Registered Principal, Wichita, Kansas) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$5,000 and suspended from association with any NASD member in any principal or supervisory capacity for 30 days. Without admitting or denying the allegations, Relihan consented to the described sanctions and to the entry of findings that he failed to adequately and properly supervise another individual, in that he failed to detect and take adequate steps to prevent excessive transactions in the account of a public customer.

Relihan's suspension began June 21, 2004, and will conclude at the close of business July 20, 2004. **(Case # C04040022)**

James Rhodes, Jr. (CRD #1692302, Registered Representative, Farmingville, New York) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$12,000, required to pay \$2,011, plus interest, in partial restitution to a public customer, and suspended from association with any NASD member in any capacity for 12 business days. Without admitting or denying the allegations, Rhodes consented to the described sanctions and to the entry of findings that he recommended that public customers purchase bonds in which he failed to perform his independent research or investigation relating to the bonds or the financial circumstances of the issuing countries. The findings stated that, as a result, Rhodes failed to fully understand the securities that he was recommending and the consequences of his recommendations. Moreover, NASD found that, under the circumstances, Rhodes did not have reasonable grounds for believing that his recommendations and the resultant transactions were suitable for each customer's financial situation, investment objectives, and needs.

Rhodes' suspension began June 21, 2004, and concluded at the close of business July 7, 2004. (NASD Case #C10040056)

Eugene Franklin Ritter (CRD #2392131, Registered Representative, Salinas, California) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$5,000 and suspended from association with any NASD member in any capacity for four months. The fine must be paid before Ritter reassociates with any NASD member following the suspension or before requesting relief from any statutory disqualification. Without admitting or denying the allegations, Ritter consented to the described sanctions and to the entry of findings that he participated in the sale of an investment contract and a security without providing notification to his member firm.

Ritter's suspension began June 21, 2004, and will conclude at the close of business October 20, 2004. (NASD Case #C01040015)

Jeffrey Scott Rubin (CRD #3238888, Registered Representative, Las Vegas, Nevada) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$27,472, including disgorgement of \$22,472 in commissions, and suspended from association with any NASD member in any capacity for six months. The fine must be paid before Rubin reassociates with any NASD member following the suspension or before requesting relief from any statutory disqualification. Without admitting denying the allegations, Rubin consented to the described sanctions and to the entry of findings that he exercised effective control over the accounts of public customers. The findings also stated that Rubin recommended and effected purchase and sale securities transactions in the customers' account without having reasonable grounds for believing that such transactions were suitable for the customers in view of the size, frequency, and nature of the recommended transactions, and in light of the customers investment objectives, circumstances, and needs.

Rubin's suspension began June 21, 2004, and will conclude at the close of business December 20, 2004. (NASD Case #C11040020)

Mark J. Schoenebaum (CRD #4317817, Registered Representative, New York, New York) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$10,000 and suspended from association with any NASD member in any capacity for two weeks. Without admitting or denying the allegations, Schoenebaum consented to the described sanctions and to the entry of findings that he attempted to obtain confidential information about the safety and effectiveness of a medication that was not publicly available by sending e-mails that he knew contained untrue statements.

Schoenebaum's suspension began June 21, 2004, and concluded July 4, 2004. (NASD Case #CAF040038)

Gary Allen Snow (CRD #1333495, Registered Representative, Pickerington, Ohio) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Snow consented to the described sanction and to the entry of findings that he affixed the signatures of public customers on requests for loans from their insurance policies without the permission or knowledge of the customers, and used the proceeds from the loans to pay premiums on other customers' policies without the permission or knowledge of the customers, thereby misusing customer funds. (NASD Case #C8A040036)

Jeffrey Schneider (CRD #2089051, Registered Representative, New Canaan, Connecticut) and David Vynereb (CRD #2866188, Registered Representative, Westport, Connecticut) submitted a Letter of Acceptance, Waiver, and Consent in which Schneider was fined \$15,000 and suspended from association with any NASD member in any capacity for 90 days. Vynereb was fined \$7,500 and suspended from association with any NASD member in any capacity for 60 days. Without admitting or denying the allegations, the respondents consented to the described sanctions and to the entry of findings that they permitted some of their joint customer accounts to be temporarily transferred to another representative so that the representative could reach a qualifying level of account assets and thereby obtain a forgivable loan from the firm. The findings also stated that Schneider and Vynereb received a portion of the forgivable loan proceeds.

Schneider's suspension began July 6, 2004, and will conclude October 3, 2004. Vynereb's suspension began July 6, 2004, and will conclude at the close of business September 3, 2004. (NASD Case #C10040059)

Jeffrey Michael Sullivan (CRD #2338939, Registered Principal, Houston, Texas) submitted an Offer of Settlement in which he was fined \$25,000 including \$11,962.22 in disgorgement of commissions, and suspended from association with any NASD member in any capacity for two years. The fine must be paid before Sullivan reassociates with any NASD member following the suspension or before requesting relief from any statutory disqualification. Without admitting or denying the allegations, Sullivan consented to the described sanctions and to the entry of findings that he caused a public customer's annuity, which was valued at approximately \$225,000, to be surrendered, and another annuity to be purchased in its place without the customer's knowledge or consent, for which Sullivan received \$11,962.22 in commissions. The findings also stated that Sullivan failed to respond timely to NASD requests for information.

Sullivan's suspension began July 6, 2004, and will conclude at the close of business July 5, 2006. (NASD Case #C06030029)

Michael Gerald Teslow (CRD #1125610, Registered Principal, Sioux Falls, South Dakota) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$2,500 and suspended from association with any NASD member in any capacity for three months. Without admitting or denying allegations, Teslow consented to the described sanctions and to the entry of findings that he participated in outside business activities, for compensation, without providing prompt written notice to his member firm.

Teslow's suspension began June 21, 2004, and will conclude at the close of business September 20, 2004. (NASD Case #C04040024)

Gary Steven Tunncliffe (CRD #2892670, Registered Representative, Ashland, Kentucky) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Tunncliffe consented to the described sanction and to the entry of findings that he converted approximately \$500,000 from public customers by having them make purported high-yield investments to a company that had no legitimate business operations and that he controlled. The findings also stated that Tunncliffe deposited the funds into bank accounts he controlled and converted the funds for his own use and benefit. (NASD Case #C9A040014)

Keith Philip Tynan (CRD #2112327, Registered Representative, Scotch Plains, New Jersey) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Tynan consented to the described sanction and to the entry of findings that he converted approximately \$182,693 from the accounts of public customers and used the funds for his own use and benefit without the customers' knowledge or consent. The findings also stated that Tynan failed to respond to NASD requests to appear for an on-the-record interview. (NASD Case #C9B040046)

Michael Thomas Vernitsky (CRD #3186489, Registered Representative, Conshohocken, Pennsylvania) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Vernitsky consented to the described sanction and to the entry of findings that he affixed the purported signatures of applicants to policy-related documents for life insurance without the prior authorization or consent of the applicants. (NASD Case #C9A040017)

Christopher Quang Vo (CRD #4626621, Associated Person, Chicago, Illinois) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$7,500 and suspended from association with any NASD member in any capacity for 18 months. The fine must be paid before Vo reassociates with any

NASD member following the suspension or before requesting relief from any statutory disqualification. Without admitting or denying the allegations, Vo consented to the described sanctions and to the entry of findings that he willfully failed to disclose material information on his Form U4.

Vo's suspension began July 6, 2004, and will conclude at the close of business January 5, 2006. (NASD Case #C8A040040)

Dennis Ray Ward (CRD #1362644, Registered Representative, Jerseyville, Illinois) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$10,000 and suspended from association with any NASD member in any capacity for six months. The fine must be paid before Ward reassociates with any NASD member following the suspension or before requesting relief from any statutory disqualification. Without admitting or denying the allegations, Ward consented to the described sanctions and to the entry of findings that he participated in outside business activities for which he received compensation and failed to provide prompt written notice to his member firm.

Ward's suspension began July 6, 2004, and will conclude at the close of business January 5, 2005. (NASD Case #C8A040044)

Jeffrey Lynn Watt (CRD #2582699, Registered Representative, Madina, Tennessee) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$5,000, required to pay \$20,000 in disgorgement in partial restitution to a public customer, and suspended from association with any NASD member in any capacity for 18 months. The fine and disgorgement must be paid before Watt reassociates with any NASD member following the suspension or before requesting relief from any statutory disqualification. Without admitting or denying the allegations, Watt consented to the described sanctions and to the entry of findings that he participated in private securities transactions without providing prior written notice to his member firm.

Watt's suspension began July 6, 2004, and will conclude at the close of business January 5, 2006. (NASD Case #C05040031)

Scott Michael Weier (CRD #1967544, Registered Representative, Windsor Heights, Iowa) submitted a Letter of Acceptance, Waiver, and Consent in which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Weier consented to the described sanction and to the entry of findings that he recommended that public customers purchase variable annuities totaling \$425,147.32 and engage in option transactions. The findings stated that Weier made these recommendations without having reasonable grounds for believing that his

recommendations and resulting transactions were suitable for the customers on the basis of their financial situations, investment objectives, and needs. (NASD Case #C04040029)

Curtis Larry Williams, Jr. (CRD #3142719, Registered Representative, Lake Charles, Louisiana) was suspended from association with any NASD member in any capacity for two years. In light of the financial status of Williams, no monetary sanction has been imposed. The sanction was based on findings that Williams misused customer funds by depositing customer checks totaling \$84,300 into his personal bank account and later investing the funds in his name. The findings also stated that Williams engaged in private securities transactions without providing prior written notice to his member firm.

Williams' suspension began June 7, 2004, and will conclude at the close of business June 7, 2006. (NASD Case #C05030010)

Kevin Wayne Williams (CRD #3231694, Registered Representative, Channahon, Illinois) submitted a Letter of Acceptance, Waiver, and Consent in which he was suspended from association with any NASD member in any capacity for one year. In light of the financial status of Williams, no fine has been imposed. Without admitting or denying the allegations, Williams consented to the described sanction and to the entry of findings that he failed to disclose material information on his Form U4. NASD also found that Williams failed to respond completely and timely to NASD requests for information.

Williams' suspension began July 6, 2004, and will conclude at the close of business July 5, 2005. (NASD #C8A040041)

Jim Jun Xu (CRD #2959010, Registered Representative, Edison, New Jersey) submitted a Letter of Acceptance, Waiver, and Consent in which he was fined \$10,000 and suspended from association with any NASD member in any capacity for one year. Without admitting or denying the allegations, Xu consented to the described sanctions and to the entry of findings that, as a trader in the Latin American Equity Derivatives desk (LAEQD), he participated in three types of securities transactions in violation of the anti-money laundering procedures and other written supervisory procedures of his member firm, in that he effected transactions that had no business or apparent lawful purpose; failed to observe all applicable regulations while operating in a foreign market; failed to obtain approval from designated senior management personnel prior to effecting transactions that were executed at prices that were off-market; failed to contact senior management to ascertain reasons for off-market transactions and exchange correspondence documenting such reasons; failed to ensure that confirmations sent contained the legend "This transaction was effected at a non-standard settlement price at the customer's request. The market price at the time of dealing was xxx"; and failed to have new products

or structures of products validated and approved prior to trading and to confine trading to firm-approved products.

Xu's suspension began July 6, 2004, and will conclude at the close of business July 5, 2005. (NASD Case #C05040032)

Brad Louis Zigler (CRD #1263008, Registered Principal, Santa Rosa, California) was barred from association with any NASD member in any capacity. The sanction was based on findings that Zigler failed to respond to NASD requests to appear for an on-the-record interview. (NASD Case #C01030030)

Rosanne Stevens Horan (CRD #1286586, Registered Principal, St. Louis, Missouri) submitted a Letter of Acceptance, Waiver, and Consent in which she was censured and fined \$15,000. The fine must be paid before Horan reassociates with any NASD member or before requesting relief from any statutory disqualification. Without admitting or denying the allegations, Horan consented to the described sanctions and to the entry of findings that she, on behalf of her member firm, failed to file disclosure events, customer complaints, and written customer grievances in its quarterly statistical and summary information, and failed to file written customer grievances on a timely basis in accordance with NASD Conduct Rule 3070. (NASD Case #C04040027)

Decisions Issued

The following decisions have been issued by the District Business Conduct Committee (DBCC) or the OHO and have been appealed to or called for review by the NAC as of June 4, 2004. The findings and sanctions imposed in the decisions may be increased, decreased, modified, or reversed by the NAC. Initial decisions whose time for appeal has not yet expired will be reported in the next *Notice to Members*.

Jacques Marcel Curtiss (CRD #3226449, Registered Representative, Bronx, New York) was fined \$10,000 and suspended from association with any NASD member in any capacity for one year. The fine is due and payable when or if Curtiss seeks to return to the securities industry. The sanctions were based on findings that Curtiss willfully failed to disclose material information on his Form U4.

This decision has been appealed to the NAC, and the sanctions are not in effect pending consideration of the appeal. (NASD Case #C10030072)

Ram Kampara (CRD #2589146, Registered Representative, Brooklyn, New York) was barred from association with any NASD member in any capacity and ordered to pay \$831,000 in restitution to public customers. The sanctions were based on findings that Kampara failed to respond to NASD requests for information and to appear for on-the-record interviews. The

findings also stated that Kampara submitted a copy of his purported signed resignation letter bearing a date that was false and misleading to NASD. NASD also found that Kampara exercised discretion in the account of a public customer without the customer's written authorization and Kampara's firm's written acceptance of the account as discretionary. In addition, NASD found that Kampara made material misrepresentations to public customers in connection with the sale of securities to public customers. Moreover, NASD found that Kampara effected private securities transactions and failed to provide prior written notice to his member firm describing the proposed transaction, his proposed role therein, and stating whether he had or might receive compensation for it.

This decision has been appealed to the NAC, and the sanctions are not in effect pending consideration of the appeal. (NASD Case #C10030110)

Anthony John Orlando, Jr. (CRD #2497838, Registered Principal, New York, New York) and Philip Anthony Orlando (CRD #2839212, Registered Principal, Pelham, New York) were barred from association with any NASD member in any capacity. The sanctions were based on findings that Anthony Orlando and Philip Orlando failed to respond to NASD requests to appear for an on-the-record interview and to provide documents.

This decision has been appealed to the NAC, and the sanctions are not in effect pending consideration of the appeal. (NASD Case #CMS030269)

Michael Frederick Siegel (CRD #1001893, Registered Representative, Metairie, Louisiana) was fined \$30,000 and suspended from association with any NASD member in any capacity for six months. The sanctions were based on findings that Siegel engaged in private securities transactions without prior written approval from his member firm. The findings also stated that Siegel made recommendations to public customers to purchase securities without reasonable grounds to believe the recommendations were suitable for the customers upon the basis of the facts disclosed by the customers regarding security holdings, financial situation, and need.

This decision has been appealed to the NAC, and the sanctions are not in effect pending consideration of the appeal. (NASD Case #C05020055)

Complaints Filed

The following complaints were issued by NASD. Issuance of a disciplinary complaint represents the initiation of a formal proceeding by NASD in which findings as to the allegations in the complaint have not been made, and does not represent a decision as to any of the allegations contained in the complaint.

Because these complaints are unadjudicated, you may wish to contact the respondents before drawing any conclusions regarding the allegations in the complaint.

Joseph Charles Broyles (CRD #2834483, Registered Representative, Centereach, New York) was named as a respondent in an NASD complaint alleging that he participated in unauthorized transactions in the account of a public customer without the customer's knowledge, authorization, or consent. The complaint also alleges that Broyles failed to respond to NASD requests for information. (NASD Case #CL1040014)

Lindie Lou Byers (CRD #4492094, Associated Person, Millington, Tennessee) was named as a respondent in an NASD complaint alleging that she directed checks totaling \$56,078.41 made payable to third parties be issued from the account of a public customer and given to Byers without the knowledge or consent of the customer or the account's trustees. The complaint also alleges that Byers failed to respond to NASD requests for information. (NASD Case #C05040028)

Edward Joseph Jakubik, Jr. (CRD #2682625, Registered Representative, New York, New York) was named as a respondent in an NASD complaint alleging that he purchased shares of stock for the accounts of public customers without their prior authorization or consent. (NASD Case #C9B040043)

Brian Craig Klein (CRD #2723977, Registered Representative, Roslyn, New York) was named as a respondent in an NASD complaint alleging that when Klein made recommendations to purchase a common stock, either intentionally or recklessly, he did not disclose to customers that his compensation would include a sales credit. The complaint also alleges that Klein, while using the means and instrumentalities of interstate commerce to offer securities for sale, omitted to state material facts necessary in order to make the statements made in connection with such offers, in light of the circumstances in which they were made, not misleading. The complaint further alleges that Klein recklessly or intentionally represented that the price of a stock would increase notwithstanding that the stock was a speculative security. In addition, the complaint alleges that Klein, while using the means and instrumentalities of interstate commerce to offer securities for sale, made material misrepresentations in the form of price predictions to induce transactions and transactions did occur. (NASD Case #C3A040023)

Israel Elias Lozada (CRD #2984203, Registered Representative, Chestnut Ridge, New York) was named as a respondent in an NASD complaint alleging that he either intentionally or recklessly failed to disclose material information in his recommendations to public customers to purchase shares of a common stock that his compensation would include a sales credit. The complaint also alleges that Lozada, while using the means and instrumentalities of interstate commerce to offer

securities for sale, omitted to state material facts necessary in order to make the statements made in connection with such offers, in light of the circumstances in which they were made, not misleading. In addition, the complaint alleges that, in connection with his recommendations to customers, Lozada predicted the future price of the stock in order to induce customers to purchase the stock. (NASD Case #C3A040025)

John M. Meyers (CRD #2580153, Registered Principal, St. James, New York) was named as a respondent in an NASD complaint alleging that he either intentionally or recklessly failed to disclose material information in his recommendations to public customers to purchase shares of a common stock and that his compensation would include a sales credit. The complaint also alleges that Meyers, while using the means and instrumentalities of interstate commerce to offer securities for sale, omitted to state material facts necessary in order to make the statements made in connection with such offers, in light of the circumstances in which they were made, not misleading. In addition, the complaint alleges that in connection with his recommendations to customers, Meyers predicted the future price of the stock in order to induce customers to purchase the stock. (NASD Case #C3A040024)

Thomas Socco (CRD #1712524, Registered Representative, Tinley Park, Illinois) was named as a respondent in an NASD complaint alleging that he received \$580,350 in checks from a public customer to invest in corporate bonds and failed to follow the customer's instructions, in that he used the funds for some purpose other than the benefit of the customer and failed to return any of the funds to the customer. The complaint also alleges that Socco failed to respond to NASD requests for documents and information. (NASD Case #C8A040038)

Suspensions Lifted

NASD has lifted the suspension from membership on the date shown for the following firms because they have complied with formal written requests to submit financial information.

Bio-IB, Inc.
New York, New York
(June 3, 2004)

International Capital Markets Group, Inc.
Des Plaines, Illinois
(May 24, 2004)

Individuals Barred Pursuant to NASD Rule 9544 for Failure to Provide Information Requested Under NASD Rule 8210.

(The date the bar became effective is listed after the entry.)

Bottomly, Van B.
Emerald Isle, North Carolina
(June 2, 2004)

Geniton, Edward J.
Staten Island, New York
(June 7, 2004)

Yeninas, Michael S.
Brooklyn, New York
(June 10, 2004)

Zemlyansky, Mikhail
Brooklyn, New York
(June 3, 2004)

Individuals Suspended Pursuant to NASD Rule 9541(b) for Failure to Provide Information Requested Under NASD Rule 8210.

(The date the suspension began is listed after the entry. If the suspension has been lifted, the date follows the suspension date.)

Cantalupo, Richard
Farmingdale, New York
(June 8, 2004)

DeMaria, Matthew L.
Brooklyn, New York
(May 27, 2004)

NASD Sanctions Investment Banks for IPO Violations Bear Stearns, Deutsche Bank and Morgan Stanley to Pay Over \$15 Million

NASD censured three major investment banks and imposed monetary sanctions of more than \$15 million for engaging in improper Initial Public Offering (IPO) allocation practices. NASD found that the firms violated NASD rules when they received unusually high commissions from certain customers on listed agency trades—without inquiry and within one day of allocating shares in “hot” IPOs to those same customers.

The actions against Bear, Stearns & Co. Inc., Deutsche Bank Securities, Inc., and Morgan Stanley & Co. Inc., are part of NASD's continuing regulatory focus on abuses in the IPO allocation process. Bear Stearns was ordered to pay \$4.95 million; Deutsche Bank, \$5.29 million; and Morgan Stanley, \$5.39 million.

"None of these firms was providing unusual or extraordinary services to justify these very high commissions," said Mary L. Schapiro, NASD Vice Chairman and President of Regulatory Policy and Oversight (RPO). "There was no legitimate reason to pay these firms millions of dollars more than other firms would charge to carry out routine trades. By accepting high payments under those circumstances, these firms failed to observe the high standards of commercial honor and just and equitable principles of trade demanded by NASD rules."

NASD found that in late 1999 and early 2000, each of the firms acted as the lead or co-lead manager in various hot IPOs. Many of these IPOs opened for trading at substantial premiums of 50 percent or more over their public offering price. Customers who obtained shares in these IPOs stood to make significant profits by selling those shares in the aftermarket. Each of the firms accepted very high commission payments for executing institutional-sized agency trades in liquid listed securities. Those commissions were far in excess of a typical rate of six cents per share. Within one day of accepting those high payments, each firm allocated hot IPO shares to those customers.

For example, in November 1999, Bear Stearns allocated 125,000 hot IPO shares to one of its customers. The share price increased over 84 percent on the first day of trading, providing the customer over \$1 million in profits. On that same day, the customer sold 50,000 shares of a highly liquid listed security through Bear Stearns and paid the firm \$2 per share for a total commission of \$100,000 when a typical charge of six cents per share would have been only \$3,000.

Similarly, in March 2000, Deutsche Bank allocated to a customer 25,000 shares of Fairmarket, Inc., a hot IPO that increased over 185 percent, from \$17.00 to \$48.50, on its first day of trading. Within one day of receiving these shares, this customer paid Deutsche Bank \$1 per share to execute five listed agency trades and 40 cents per share for the execution of five additional listed agency trades. The customer paid the firm \$800,000 for these trades, which is \$737,000 more than a typical commission rate of six cents per share.

Also, Morgan Stanley allocated 1,000 shares of a hot IPO to a customer at the offering price of \$35 per share. At the close of the first day of trading, the share price had increased to \$212.625, providing for profits of \$177,625. On that same day,

the customer paid Morgan Stanley \$3 per share to execute an agency trade of 20,000 shares of a listed security. This payment was \$58,800 more than would have been paid at a typical rate of six cents per share.

Selected internal e-mails noted unusually high commissions on or near the days the firms allocated the IPO shares to these customers. For example, a broker at Bear Stearns noted that the customer is "paying \$1 per today on [150,000 shares]. Happy with [hot IPO] allocation of 25,000." A Deutsche Bank e-mail noted, "Dave @[BR] thanks you for the Foundry allocation. He is giving us a \$1.00 commission on a hundred thousand shares this morning." And a Morgan Stanley e-mail noted, "[Customer] was very appreciative of his [hot IPO] allocation. By way of other business, he bought 90,000 shares of [liquid listed security] in the aftermarket today and paid the firm .30 per share. Many thanks for your help." In settling with NASD, the firms neither admitted nor denied NASD's findings.

NASD Fines Davenport & Co. in First Case of Deceptive Market Timing in Variable Annuities Firm Fined \$450,000, Ordered to Pay More Than \$288,000 in Restitution; Probe into Activities of Individual Brokers, Other Entities Is Continuing; Improper Trading Benefited Davenport's Hedge Fund Clients

In the first case ever brought against a broker-dealer for facilitating deceptive market timing in variable annuities, NASD fined Davenport & Co. LLC of Richmond, VA \$450,000 and ordered the company to pay more than \$288,000 in restitution to the affected funds. The fine also includes Davenport's failure to establish and maintain a reasonable supervisory system and written supervisory procedures designed to prevent late trading of mutual funds.

"Deceptive market timing in variable annuity sub-accounts can dilute the value of those shares, raise transaction costs and thus harm other annuity investors," said Mary L. Schapiro, NASD Vice Chairman and President of RPO. "This is an improper and objectionable trading practice that rises to a higher level of abuse when the firm not only knows that its clients intend to deceive the variable annuity companies, but is complicit in carrying out that deception."

From at least April 2002 through September 2003, Davenport helped two hedge funds carry out deceptive market timing in the sub-accounts of variable annuities. The brokers handling the accounts and managers at the firm were aware that the clients were engaging in market timing techniques and that the annuities' prospectuses stated that they were designed for long-

term investors, and not for professional market timers. Nevertheless, Davenport enabled these clients to carry out frequent transfers among variable annuity sub-accounts without being detected by the affected insurance companies and mutual fund managers who were attempting to enforce restrictions on market timing to protect the interests of long-term investors.

Moreover, Davenport continued to sell variable annuity policies to the clients' investment partnerships even after receiving notice that some of the variable annuity companies considered the clients' trading strategy to be disruptive and contrary to the interests of long-term investors. As a result, Davenport's clients were able to realize profits in excess of \$288,000, at the expense of long-term investors. This conduct was contrary to the high ethical standards required by NASD rules.

For example, one of the hedge fund clients purchased a Western Reserve Life "Freedom Access" annuity on June 10, 2002. The limited partnership engaged in market timing in the sub-accounts of the Freedom Access annuity until, on July 26, 2002, Western Reserve Life required all future transfer requests to have an original signature and to be transmitted by standard United States postal delivery service. In a letter, Western Reserve Life cited concerns about the "disruptive" effects of the market timing and transfers of "very large dollar amounts." Western Reserve Life's action had the practical effect of precluding continued market timing, since market timing cannot be accomplished effectively without the ability to trade rapidly.

After one of the Davenport brokers informed the client that its market timing activity had been restricted, the client instructed that Davenport broker to submit an application using a different entity and tax identification number. An e-mail from the client to the Davenport brokers dated July 26, 2002 stated:

We will plan on liquidating. Also, let's put them [Western Reserve Life] on our hit list once we get the new investment partnership set up with the new tax ID and registration. We would like to get back in there ["smiley face" icon omitted].

On October 31, 2002, Davenport purchased another Western Reserve Life "Freedom Access" annuity on behalf of another hedge fund managed by the same client, with a virtually identical name and a different tax identification number. Davenport did not disclose the fact that the new account was managed by the same investment advisor that had previously been restricted by Western Reserve for engaging in market timing, that the investment partnership would be engaging in the same type of excessive market timing, or that the client had put Western Reserve Life on a "hit list" for such improper trading activity. Davenport's client then engaged in market timing in the sub-accounts of the Freedom Access annuity using the new account until it, too, was detected by Western Reserve Life and similarly restricted.

Davenport similarly facilitated deceptive practices by its hedge fund clients regarding variable annuities offered by other insurance companies, agreeing to change the annuitants, brokers of record, or the particular name of the hedge fund on the account in order to evade the attempts of the insurance companies and mutual funds to detect and prevent excessive market timing.

Davenport was also cited for supervisory deficiencies regarding excessive market timing. After April 2002, Davenport received at least 10 letters from insurance companies expressing concern about excessive trading in the sub-accounts of variable annuities and restricting the trading in annuities held by Davenport's clients. Davenport management did not take effective steps to stop market timing activity on the part of its representatives or clients. Davenport, in fact, had no clear procedure to ensure that designated departments or personnel would receive copies of these letters from insurance companies. Davenport's supervisors also failed to respond to clear "red flags" that would have alerted them to the improper practices carried out by the hedge fund clients and Davenport's brokers—such as references in emails by those brokers and their clients to using different entities with different account numbers, tax ID numbers, and annuitants in response to letters from insurance companies.

Failure to Supervise Late Trading

Late trading occurs when a broker-dealer receives and executes mutual fund orders after 4 p.m. Eastern Standard Time (EST) without observing the "forward pricing" requirements of Section 22(c) of the Investment Company Act of 1940, and Rule 22c-1. Beginning on or about July 2002, Davenport converted its trading platform to a new system. In an effort to lessen the impact of certain disruptions associated with the conversion, the firm decided to set the new system to accept mutual fund trades until 4:30 p.m. EST. During the 30-minute period after the close of the market, the firm placed no restrictions on the ability of its representatives to enter orders, regardless of when such orders were received. This permitted and enabled Davenport's retail customers to enter trades after the close of the market at the previous day's net asset value (NAV).

Despite these opportunities for late trading presented by Davenport's flawed system, the firm did not establish, maintain, or enforce any reasonable procedures to prevent such misconduct. In fact, the firm's written procedures did not even instruct representatives that late trading was prohibited. The firm's written procedures also did not require representatives to enter orders promptly after receipt, nor did they prohibit the cancellation and modification of orders after the close of the market, thereby enabling the firm's customers to potentially manipulate their mutual fund trading activity based on information received after the close of the market.

Between at least July 2002 and September 2003, Davenport routinely received trading instructions from customers after 4 p.m. EST and executed those trades as if the instructions had been received prior to 4 p.m. EST. On hundreds of occasions, trades received and executed after 4 p.m. EST received the previous day's NAV.

In settling these matters, Davenport neither admitted nor denied the allegations or findings. The investigation of individual brokers and other entities involved in this market timing activity is continuing.

NASD Expels Continental Broker-Dealer Corp. for Sales Practice, Supervision Violations Firm's "De Facto" Owner Barred, Others Disciplined for Related Misconduct

NASD announced that Continental Broker-Dealer Corp. of Carle Place, NY has been expelled from the securities industry for a wide range of securities violations, including sales practice abuses, supervisory failures, registration violations, auditor independence violations, books and records falsification, and making false filings to the Securities and Exchange Commission (SEC) and to NASD.

Continental is also being required to establish an escrow account to pay partial restitution to customers known to have been victimized by the firm's sales practice abuses and to satisfy other customer complaints, arbitration claims, civil judgments, and regulatory enforcement proceedings.

In addition, Gregory M. Hasho, Continental's de facto owner and operator during the relevant period (2000 to 2003), has been barred from association with any NASD regulated firm. Hasho was also ordered to sell his ownership interest in Continental.

The settlements announced today also resolve charges against four former Continental brokers—one of whom has been barred from the securities industry, while the three others have been suspended. Three are being required to pay restitution to victims of their sales practice abuses.

In its September 2003 complaint against Continental, NASD charged the firm with widespread violations of securities laws, including allowing Hasho to be its de facto owner and operator despite a previous SEC order that barred him from holding a supervisory or proprietary position in any securities firm.

NASD's investigation revealed that Continental, at Hasho's direction, devised an unsuitable options trading strategy designed to generate excessive commissions from customers. The promotion of this strategy, along with the lapse in proper supervision by the firm, resulted in pervasive and egregious sales practice abuses by numerous Continental brokers. The sales

practice violations included unsuitable and excessive trading in customer accounts and the excessive use of margin. As a result, many customers lost most or all of their original investments, resulting in approximately \$5 million in total losses, while the firm and its registered representatives reaped commissions in excess of \$5.3 million.

NASD found that Continental failed to ensure that designated principals performed their supervisory duties to prevent these activities. In fact, NASD found that some of the principals who were responsible for preventing such abuses were instead promoting and permitting the improper trading by the firm's representatives.

This pervasive lack of supervision and compliance with NASD rules and federal securities laws enabled Hasho to run Continental from 2000 to 2003, even though the SEC had barred him in 1995 from acting as a supervisor and from having a proprietary interest in the firm. The SEC had given Hasho the right to reapply for those rights after three years. In 1999, Continental filed an application on Hasho's behalf with NASD, but NASD's NAC rejected that application, citing Continental's disciplinary history and the absence of an adequate structure at the firm to supervise Hasho's activities. Nevertheless, NASD's investigation revealed that Hasho actively managed and supervised Continental by participating in firm management decisions, directing substantial payments from Continental's bank accounts to third parties, and by reviewing customer accounts.

Continental also failed to have its 2001 and 2002 annual audits performed by an independent accountant, as required by NASD rules. The auditing firm's accountant was not independent because he had an outstanding \$500,000 personal loan from Continental. To conceal the existence of that loan, Continental employees posted false entries in the firm's general ledger and filed false financial reports with the SEC and NASD.

NASD, which previously announced actions against 12 other Continental executives and brokers (see NASD Press Release dated October 9, 2003, www.nasdr.com/news/pr2003/release_03_041.html), also has settled disciplinary actions with the following four Continental registered representatives who were charged with engaging in unsuitable recommendations, excessive trading in customer accounts, and excessive use of margin:

- ▶ Rahman Rose was permanently barred from the securities industry.
- ▶ Alan Frankel was suspended for one year, fined \$15,000, and ordered to pay \$135,417 in restitution to customers.

- ◆ Daniel M. Spalango, Jr. was suspended for six months, fined \$10,000, and ordered to pay \$38,067 in restitution.
- ◆ Gabriel F. Migliano, Jr., was suspended for one month, fined \$5,000, and ordered to pay restitution in the amount of \$22,508.

Continental and all individuals involved in settlements relating to this case agreed to the sanctions while neither admitting nor denying the allegations.

NASD Charges Investprivate, Inc. and Its Chairman with Fraudulently Raising Millions NASD Alerts Investors to Potential for Abuse in Broker-Dealer Self-Offerings

NASD charged Investprivate, Inc., of New York, NY and its Chairman and CEO, Scott L. Mathis, with securities fraud and other violations in connection with two securities offerings. Investprivate raised money for itself, its parent, Diversified Biotech Holdings Corporation, and an affiliate, Investbio, Inc. These “self-offerings” raised a total of approximately \$17.6 million between June of 2000 and February of 2003.

To raise capital, brokerage firms sometimes sell their own or an affiliate’s securities. Such broker-dealer self-offerings (BDOs) can take the form of registered public offerings or private placements. While private BDOs can be legitimate investments, recent NASD and SEC enforcement actions have highlighted the potential for abuse in private BDOs. To help investors understand what private BDOs are, the risks involved, and telltale signs of fraud or other misconduct, NASD has issued the Investor Alert Brokerage Firm Private Securities Offerings: Buying Your Brokerage. It can be accessed at www.nasd.com/Investor/Alerts/bdos.htm.

In the current enforcement action, NASD charged that in various rounds of the offerings, Investprivate used private placement memoranda that contained material misrepresentations and omitted material facts concerning Mathis’s regulatory history, management experience, and history of tax liens; incentive compensation paid to the firm’s brokers to induce them to sell the self-offerings, and use of offering proceeds to pay undisclosed commissions to Mathis through Investprivate and to pay Mathis’s personal expenses. These rounds raised approximately \$12.3 million. NASD’s complaint also charges that Investprivate and Mathis violated the Securities Act of 1933 by engaging in the offer and sale of unregistered securities in connection with the entire \$17.6 million raised.

“The use of fraudulent or misleading offering materials in connection with a stock offering is a very serious violation of both the federal securities laws and NASD rules,” said NASD Vice Chairman Mary L. Schapiro. “That a registered firm would

engage in such egregious conduct when selling its own securities is an affront to the investing public, to the securities industry and to the fundamental principles of fair dealing embodied in our rules of conduct.”

Additionally, NASD charged Mathis with failing to disclose to NASD that the IRS had filed five tax liens against him—totaling over \$600,000—for failing to fully pay personal income taxes for six years between 1993 and 2000.

Donald Geraghty, Investprivate’s Director of Compliance, was charged with supervisory and other violations. Ronald Robbins, Executive Vice President of Investprivate’s parent company, was charged with participating in the management of Investprivate without being registered with NASD in any capacity.

Under NASD rules, the individuals and firms named in a complaint can file a response and request a hearing before an NASD disciplinary panel. Possible sanctions include a fine, an order to pay restitution, censure, suspension, or bar from the securities industry.

Recent NASD and SEC enforcement actions involving private BDOs include:

- ◆ SEC v. Tecumseh Holdings Corporation, et al. (July 25, 2003)
- ◆ SEC v. Discover Capital Holdings Corp., et al. (July 10, 2003)
- ◆ SEC v. Thomas Fletcher & Co. Inc. et al. (November 22, 2002)
- ◆ NASD Regulation Sanctions Providential Securities, Inc. and Bars Principal, Henry Fahman (December 15, 2000)
- ◆ SEC v. Aron O. Bronstein et al. (February 17, 2000)

NASD Fines Five Firms \$625,000 for Supervisory System Failures Relating to Late Trading of Mutual Funds; Sanctions Part of Ongoing NASD Efforts to Curb Abusive Trading

NASD censured and fined five brokerage firms a total of \$625,000 for failing to implement adequate supervisory systems and written procedures reasonably designed to detect and prevent “late trading” of mutual funds.

The firms and their respective fines are:

- ◆ D.A. Davidson & Co. (\$150,000)
- ◆ TD Waterhouse Investor Services, Inc. (\$150,000)

- ◆ Stifel Nicolaus & Company (\$125,000)
- ◆ National Planning Corp. (\$100,000)
- ◆ SII Investments, Inc. (\$100,000)

“Late trading” refers to the practice of placing mutual fund orders after the fund has calculated its daily NAV—typically 4 p.m. EST—but receiving the price based upon that earlier, 4 p.m. calculation. Firms that permit late trades can provide customers with an information advantage, allowing them to trade based on news that breaks after the market close that could affect the value of the mutual fund’s holdings, but which is not reflected in the NAV for that day. SEC and NASD rules prohibit late trading to ensure that all purchasers of mutual fund shares are on equal footing as to price and information on any given day.

“To help ensure that illegal late trading does not occur firms must implement systems to guarantee that all mutual fund orders processed after the close of the market were received during normal trading hours,” said NASD Vice Chairman Mary L. Schapiro. “NASD will be vigilant about sanctioning firms for failing to have adequate supervisory systems in place designed to prevent manipulative late trading, regardless of whether such trading in fact occurs.”

Each of the firms sanctioned today permitted its registered representatives to process mutual fund orders after the close of the market, but none of the firms had adequate systems in place to ensure that only orders received prior to that day’s market’s close received that day’s NAV. One firm, D.A. Davidson & Co., was also cited for failing to comply with a new record-keeping rule that went into effect in May 2003 requiring firms to record the time of receipt of orders to buy or sell mutual fund shares.

NASD reminded firms last year that, while there may be situations where firms legitimately receive orders prior to the close of trading but enter such orders after the market’s close, firms bear the burden of demonstrating that they have procedures designed to prevent the occurrence of late trading. See September 2003’s *Special Notice to Members 03-50* at www.nasdr.com/pdf-text/0350ntm.pdf.

In settling with NASD, the firms neither admitted nor denied NASD’s findings.

Eight Brokerage Firms Pay over \$610,000 to Settle NASD Charges of Municipal Price Violations

NASD ordered eight firms to pay fines totaling \$310,000 and restitution to customers of \$300,000 in connection with certain municipal bond trades where customers did not receive a fair price for their bonds, in violation of Municipal Securities Rulemaking Board (MSRB) rules.

The eight firms named in these actions, and the amounts they are paying in fines and restitution, are:

Firm	Fines	Restitution
Charles Schwab & Co, Inc.	\$30,000	\$30,869
Edward Jones	\$15,000	\$10,181
First Trust Portfolios L.P Merrill Lynch, Pierce	\$60,000	\$58,680
Fenner & Smith Inc.	\$55,000	\$54,527
Morgan Stanley DW Inc.	\$20,000	\$18,312
Prudential Equity Group, LLC	\$10,000	\$7,306
UBS Financial Services Inc.	\$100,000	\$100,666
Wachovia Securities, LLC.	\$20,000	\$19,486

NASD found that some customers of these firms received below-market prices when selling their municipal bonds to the eight firms, as evidenced by the fact that the bonds were subsequently resold by other dealers—often in same-day transactions—at markedly higher prices, in violation of MSRB Rules G-30 and G-17. Those rules require municipal bond dealers, regardless of the compensation received by the dealers, to deal fairly with their customers and to buy and sell bonds at fair prices.

One of the factors firms must consider in determining a fair price is the fair market value of the bonds at the time of the transaction. When selling a bond for a client, dealers have the responsibility to make an accurate determination of the value of the specific bond. In many instances, including the cases at issue here, when customers ask dealers to sell their bonds, the dealer contacts what is known as a “broker’s broker” to seek bids from other dealers for the customer’s bonds. When the broker’s broker conveys bids from other dealers for the customer’s bonds, the customer’s dealer sells the customer’s bonds to the broker’s broker. The broker’s broker then sells the bonds to the firm that had expressed an interest in buying the customer’s bonds.

In these cases, NASD found that in subsequent trading of the customers’ bonds, the prices paid were higher than the prices the customers had originally received, which indicated that the customers had not received fair prices for the bonds the customers sold. By relying solely on the prices provided by the broker’s broker to determine the fair market value of the bonds, the customers’ dealer breached their duty to ensure that their customers received a price for their bonds that was reasonably close to fair market value.

"Unlike a traditional mark-up case involving unfair profits to the dealer, these cases involve dealers who failed to take reasonable steps to obtain fair prices for their customers," said Mary Schapiro, NASD Vice Chairman. "Dealers in municipal bonds are obligated to make requisite efforts to ensure that the transaction prices are reasonably related to market value, regardless of the amount of compensation they receive."

NASD is currently investigating the conduct of the broker's brokers involved in these transactions and their compliance with MSRB Rules. The rules require broker's brokers to make a reasonable effort to obtain a price for a firm selling its customers' bonds that is fair and reasonable in relation to prevailing market conditions.

In concluding these settlements, the firms neither admitted nor denied the charges.

NASD Bars Scott W. Ryan, Expells Ryan & Company for Failure to Cooperate in Short Sale Probe **NASD Investigation into Short Selling Activity for Hedge Funds Continues**

An NASD Hearing Panel barred Scott W. Ryan of Bryn Mawr, PA, and has expelled Ryan & Company, LP (RYCO) of West Conshohocken, PA, for failure to cooperate in an ongoing investigation into whether Ryan and the firm engaged in a widespread scheme of impermissible short selling activity on behalf of three hedge fund clients.

As part of the investigation, NASD requested that Ryan and RYCO produce certain documents and information pertaining to short-selling and options transactions under review. NASD also requested copies of Ryan's and RYCO's tax returns and RYCO's certified financial statements for fiscal years 1999 through 2003. Ryan and RYCO refused to provide all but a small portion of the requested documents and information, claiming NASD's requests were burdensome and irrelevant.

The Hearing Panel found that Ryan's and RYCO's objections were without merit and were not raised "in a good faith attempt to resolve their concerns in a timely and complete manner."

Instead, the Hearing Panel said, Ryan and RYCO "made no effort to comply with portions of the document requests... assumed a hostile stand, challenging the (NASD) staff's motives... (and) obdurately stalled the staff's efforts to complete the investigation by repeatedly raising meritless objections."

The Hearing Panel's decision will become final on Aug. 4, 2004, unless it is appealed to NASD's National Adjudicatory Council (NAC), or called for review by the NAC. If the decision is appealed or called for review, the sanctions may be increased, decreased, modified or reversed.

A Hearing Panel consists of an NASD Hearing Officer, along with two members of the securities industry. The NAC is a 14-person committee composed of seven industry and seven non-industry members that decides appeals from disciplinary, membership and exemption decisions; rules on statutory disqualification applications; and advises on other policy matters.

NASD's investigation into the suspected short selling scheme by Ryan and RYCO is continuing.

Can your network play well with others?



NASD Member Benefits -
Helping you save on everyday business needs.



AT&T MANAGED SERVICES. Can your network keep up with your changing business requirements? Can it do as you say, when you say? AT&T helps NASD® members of all sizes stay on top of their game with a complete portfolio of managed solutions – from networking and security, to business continuity and beyond. Our team will design, deploy, manage and evolve your network, so your team can stay focused on winning new customers. And when your business needs change, we can help make sure your network adapts – while minimizing new technology investments. You can even choose to put selected AT&T services together into one easy bundle, with one point of contact and a single monthly bill. Can your network do this? **For one that can, just call 1 800 326-6720.**



The world's networking companySM

att.com/nasd