SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Rel. No. 9299 / February 27, 2012

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66469 / February 27, 2012

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3376 / February 27, 2012

Admin. Proc. File No. 3-13532

In the Matter of the Application of

ERIC J. BROWN, MATTHEW J. COLLINS, KEVIN J. WALSH, AND MARK W. WELLS

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OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

CEASE-AND-DESIST PROCEEDING

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Fraud in the Offer and Sale of Securities

Failure to Supervise

Aiding and Abetting and Causing Recordkeeping Violations

Salespersons associated with, and formerly associated with, registered broker-dealer willfully violated or were a cause of violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5 in connection with the sale of variable annuities; salesperson failed to reasonably supervise within the meaning of Exchange Act Sections 15(b)(4)(E) and 15(b)(6); and salespersons aided and abetted and caused broker-dealer's failure to keep accurate books and records in violation of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder. *Held*, for three salespersons, it is in the public interest to bar them from associating with any broker, dealer, or investment adviser (except with respect to one of the three salespersons, who should have a right to reapply in a non-supervisory capacity after two years); to impose cease-and-desist orders; to order disgorgement of illegal profits; and to assess second-tier civil penalties, and to dismiss the proceedings as to one salesperson.

APPEARANCES:

Robert G. Heim, of Meyers & Heim, LLP, for Matthew J. Collins and Mark W. Wells.

Jane Degenhardt Bruno and *Christopher M. Bruno*, of Bruno & Degenhardt, for Eric J. Brown.

Kevin J. Walsh, pro se.

Martin F. Healey and *Alix Biel* for the Division of Enforcement.

Appeal filed: September 15, 2010
Oral Argument: August 24, 2011
Last brief received: October 7, 2011

I.

Eric J. Brown and Kevin J. Walsh, formerly associated with registered broker-dealer Prime Capital Services, Inc. ("Prime Capital" or the "Firm"), and Matthew J. Collins and Mark W. Wells, currently associated with Prime Capital (collectively, "Respondents"), appeal from the decision of an administrative law judge.[1] The law judge found that, in sales of variable annuities to elderly customers, Respondents violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5 (collectively, the "antifraud provisions"),[2] and Exchange Act Section 17(a) and Exchange Act Rule 17a-3 (collectively, the "books and records provisions").[3] The law judge also found that Collins failed to reasonably supervise Brown within the meaning of Exchange Act Sections 15(b)(4)(E) and 15(b)(6).[4]

For these violations, the law judge issued cease-and-desist orders against Respondents; ordered Respondents to disgorge commissions earned from selling certain variable annuities; barred Respondents from associating with a broker, dealer, or investment adviser; and imposed a third-tier civil monetary penalty of $130,000 against each Respondent. The Division of Enforcement (the "Division") cross-appeals, contending that the law judge's imposition of civil monetary penalties "should have been significantly greater" for all four Respondents. We base

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[1] *Prime Capital Servs., Inc.*, Initial Decision Rel. No. 398 (June 28, 2010). In the proceedings below, Prime Capital and five individuals were alleged, among other things, to have failed to supervise the Respondents. These additional parties either settled or did not appeal the law judge's decision: Prime Capital and its parent company, Gilman Ciocia, Inc., agreed to a cease-and-desist order and to pay disgorgement and prejudgment interest, and a Prime Capital compliance officer, Christie A. Andersen, agreed to a suspension from association with any broker-dealer or investment adviser in a supervisory capacity for twelve months and to pay a $10,000 civil monetary penalty. *Prime Capital Servs., Inc.*, Securities Exchange Act Rel. No. 61719 (Mar. 16, 2010) (order regarding Prime Capital and Gilman Ciocia); *Prime Capital Servs., Inc.*, Exchange Act Rel. No. 61079 (Nov. 30, 2009) (order regarding Christie Andersen). The law judge barred Prime Capital's president, Michael P. Ryan, and its chief compliance officer, Rose M. Rudden, from association with a broker-dealer or investment adviser with a right to reapply after one year and assessed each a second-tier monetary penalty of $65,000. *Prime Capital Servs., Inc.*, Initial Decision Rel. No. 398 (June 28, 2010). Rudden and Ryan did not appeal their sanctions, and the decision of the law judge was declared final as to them. *Prime Capital Servs., Inc.*, Exchange Act Rel. No. 62600 (Aug. 5, 2010).

[2] 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5.

[3] 15 U.S.C. § 78q(a); 17 C.F.R. § 240.17a-3.

[4] 15 U.S.C. § 78*o*(b)(4)(E), (b)(6).

our findings on an independent review of the record, except for findings that the parties do not challenge on appeal.[5]

II.

The facts and legal issues on appeal are largely distinct for each Respondent, although overlap exists between Brown and Collins, who worked in the same office and are alleged to have conspired to defraud customers. Therefore, after providing a brief overview of variable annuities, we discuss the following findings in Sections IV through VI below:

Brown Findings:

- Brown violated the antifraud provisions by selling variable annuities to elderly customers while failing to disclose material information, including a prohibition on his insurance license against making such sales, and by effecting unauthorized transactions in customer accounts.

- Brown aided and abetted and was a cause of Prime Capital's books and records violations by falsifying customer account forms.

- It is in the public interest to bar Brown from associating with any broker, dealer, or investment adviser; to impose a cease-and-desist order; to order disgorgement; and to impose a civil penalty of $560,000.

Collins Findings:

- The record does not support a finding that Collins was a primary violator of the antifraud provisions, but does support a finding that Collins was a cause of Brown's antifraud violations for purposes of imposing a cease-and-desist order and disgorgement against Collins.

- Collins failed to adequately supervise Brown by, among other things, allowing Brown to continue selling variable annuities despite a suspended license.

- Collins aided and abetted and was a cause of Prime Capital's books and records violations by falsifying customer account forms.

- It is in the public interest to bar Collins from associating with any broker, dealer, or investment adviser; provided, however, that he may apply to become so

[5] Rule of Practice 451(d), 17 C.F.R. §201.451(d), permits a member of the Commission who was not present at oral argument to participate in the decision of the proceeding if that member has reviewed the oral argument transcript prior to such participation. Commissioner Gallagher has reviewed the transcript of the oral argument.

associated in a non-supervisory capacity after two years; to impose a cease-and-desist order; to order disgorgement; and to impose a civil penalty of $310,000.

Walsh Findings:

- Walsh violated the antifraud provisions by failing to disclose material information to his elderly customers when selling variable annuities – including concealing the very type of investment he was selling.

- The record does not establish that Walsh aided and abetted or was a cause of Prime Capital's books and records violations.

- It is in the public interest to bar Walsh from associating with any broker, dealer, or investment adviser; to impose a cease-and-desist order; to order disgorgement; and to impose a civil penalty of $255,000.

Wells Findings:

- The record does not establish that Wells violated the antifraud provisions.

- The record does not establish that Wells aided and abetted or was a cause of Prime Capital's books and records violations.

III.

The securities at issue in this matter were all variable annuities. A variable annuity is a hybrid security and life insurance product. It is a contract between an investor and an insurance company in which the investor agrees to make a lump-sum payment or a series of payments in exchange for a regular stream of payments or a lump-sum payment in the future. Variable annuities generally offer investors a range of investment options (typically mutual funds that invest in stocks, bonds, and money market instruments), and the value of variable annuities depends on the performance of the underlying investments. Income and investment gains from variable annuities are generally tax-deferred and, when withdrawn, are taxed at ordinary income tax rates.

Variable annuities generally offer a "death benefit," which provides that, if the investor dies before receiving payments from the insurance company, the investor's stated beneficiaries are guaranteed to receive a specified amount (typically at least the amount of the investor's payments to the insurance company less accumulated withdrawals). Variable annuities also generally assess surrender charges if the investor withdraws money during the early years of the investment, although contracts will often allow an investor to withdraw a certain amount of his or her account without paying a surrender charge. Variable annuities also generally contain a "free-look" period of ten or more days after the initial investment, during which investors can terminate the contract without incurring a surrender charge.

Variable annuities generally contain a "mortality and expense risk" charge to compensate the insurance company for the insurance risk that the company assumes under the annuity contract. In addition, investors in variable annuities can often obtain certain optional features (such as a stepped-up death benefit, guaranteed minimum income benefit, long-term care insurance, and up-front bonus credits) at specified charges.

Insurance companies pay broker-dealers a commission for selling variable annuities. The amount of the commission depends on the insurance company, the relationship between the broker-dealer and the insurance company, the type of annuity sold, and how much money the customer invested. Commissions can be paid in full at the time of sale, over the life of the contract, or for another defined period.

IV.

A. Eric Brown's and Matthew Collins's Alleged Violations

1. Background

Eric Brown was associated with Prime Capital from 1998 until March 2006, first working in the Firm's Delray Beach, Florida office. Matthew Collins became associated with Prime Capital in 2001. Collins also worked in the Firm's Delray Beach office, where he and Brown were the only two registered representatives during much of the relevant period. In December 2004, Prime Capital moved the Delray office to Boynton Beach, Florida.[6]

Because Collins had not sold variable annuities before coming to Prime Capital, Brown (who was one of the Firm's top producers) taught Collins about variable annuities and how to sell them. In December 2002, Prime Capital assigned Collins to be Brown's supervisor, which required Collins to review and approve all of Brown's transactions and to complete a monthly report stating client names, phone numbers, net worth, reasons for trades, and suitability issues. Prime Capital did not begin training Collins to be a supervisor, however, until several months after he began supervising Brown and, even then, Collins acknowledged that the training was "lacking."

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[6] Brown resigned from Prime Capital on March 13, 2006, while he was being investigated by Prime Capital for selling away – an allegation not at issue in this appeal. FINRA barred Brown on October 5, 2007 from association with any FINRA member in any capacity for failure to provide information to FINRA upon request. At the time of hearing, Collins was still associated with Prime Capital in the Firm's Boynton Beach office.

a. Florida Revokes Brown's Insurance License

In August 2003, the Florida Department of Financial Services (the "State") filed an administrative complaint against Brown, alleging that Brown knowingly made false or fraudulent statements in connection with the sale of variable annuities to certain elderly customers. The complaint alleged that Brown (1) guaranteed to customers Ilse Reiss and Maynard Schlager a six to eight percent return on variable annuity investments; (2) invested customer Reiss's money into a variable annuity without her approval; (3) failed to provide customers Reiss, Schlager, or Claire Elkin with a prospectus in connection with the sale of variable annuities; and (4) failed to disclose to customer Schlager the fees (including surrender fees) associated with a variable annuity Brown sold to him. Another customer, Sylvia Kirshner, filed a complaint with the State in September 2003 alleging that Brown had mishandled the sale and repurchase of certain variable annuities in her account.

The State revoked Brown's insurance license in December 2003 because Brown failed to respond to the complaint. Collins testified that, at the time, Brown told him that he had some "mishap with the state of Massachusetts" regarding his insurance licence. Because Brown assured him the issue "was no big deal," however, Collins did nothing to find out more about the issue and allowed Brown to continue discussing variable annuities at public seminars and selling them to customers. Moreover, shortly before Brown told Collins about the supposed licensing "mishap," Prime Capital's compliance department had alerted Collins that he should review a $2 million sale of variable annuities that Brown had made to a single customer. Collins, however, never investigated whether Brown's licensing "mishap" might affect this sale.

Collins learned in February 2004 that Florida had revoked Brown's license. Collins nevertheless continued to allow Brown to discuss variable annuities at public seminars and to sell them to customers. Brown appealed the license revocation, and the State reinstated his license in April 2004 pending that appeal, but did so on the condition that Brown "not market annuities to individuals over the age of 65 years, who are not currently his clients."

b. Brown Continues to Sell Variable Annuities

Brown admitted at the hearing that he continued to sell variable annuities to new, elderly customers despite Florida's prohibition against doing so. Brown explained that he and Collins concealed Brown's unlicensed sales by listing Collins as the financial representative on new customers' account forms. Brown could not recall who came up with this idea, but he testified that they agreed that Collins would get credit for these sales and that they would share the commissions.

In contrast, Collins testified that the customers were his clients, that he recommended they purchase variable annuities, that he provided prospectuses to them, and that he explained to them the costs associated with the annuities. Collins rationalized the difference between his testimony and Brown's by claiming that Brown was upset with, among other things, Collins's refusal to testify on Brown's behalf at the State administrative proceedings. Collins nevertheless

acknowledged that Brown's handwriting was on the customers' account documentation and that he had crossed out Brown's name as the customers' registered representative and put his own name instead. The law judge expressly rejected Collins's testimony, finding Collins's claims that he was the clients' representative to be "inherently incredible."

Customer testimony corroborated Brown's version of events. Lenore and Morton Jaye, Ria Skiena, Edward Bogan, and Bernice Rosenberg (all new customers in their 70s or older and described in more detail below) testified at the hearing that Brown sold them variable annuities and that they never met Collins or, if they did, it was only briefly. Moreover, Collins acknowledged that, as Brown's supervisor, he did nothing to ensure that Brown complied with the State's limitations on his license.

Additionally, branch reviews of the Delray Beach office from 2003 and 2004 found "no evidence" of supervisory review by Collins and repeatedly found that customer documents – and occasionally entire files – were missing. Collins acknowledged during the hearing that the missing documentation made any suitability assessment of Brown's customer accounts impossible. Although a subsequent review by Prime Capital of the Delray Beach office found "a marked improvement in the completeness of paperwork," the Firm nevertheless concluded that "there was [a] complete lack of supervision and evidence of OSJ [Office of Supervisory Jurisdiction] review by Matt Collins" over Brown – a conclusion Collins agreed with during the hearing.

In February 2005, the Firm put Brown on heightened supervision and, in March 2005, relieved Collins of his supervisory duties. In January 2006, Brown settled Florida's complaint against him by agreeing to a consent order, pursuant to which the State permanently revoked Brown's license to sell insurance and Brown agreed to pay restitution to the complaining customers in amounts ranging from approximately $14,000 to $84,000.

c. Brown Fails to Disclose Material Information

In addition to the allegations that Brown and Collins concealed the limitations on Brown's license, customer witnesses, all of whom first met Brown at free lunch seminars, testified that Brown failed to provide disclosure documents (such as prospectuses), that he executed transactions without their approval, and that, in some cases, he lied about the very type of investment into which he was investing their money. We summarize the customers' testimony below.

i. Claire Elkin

Claire Elkin, a retired secretary in her late 70s, first met Brown in early 2000. At Brown's recommendation, Elkin liquidated a certificate of deposit she owned in an individual retirement account ("IRA") to purchase a General Electric variable annuity in February 2000. Elkin had not been familiar with variable annuities before making this investment and relied on Brown to give her information. While recommending the variable annuity, Brown did not tell Elkin that the

investment could lose money. Elkin was aware that variable annuities "fluctuated with the market," but she "was under the impression we were getting dividends and the dividends would make up for fluctuations." As Elkin explained, "[t]he way [Brown] spoke, you just didn't lose."

Elkin also testified that, while she was generally aware that she would incur a surrender charge "[i]f I would withdraw the whole [investment]," Brown never told her that mandatory withdrawals from her IRA could also trigger surrender fees. She testified that someone also forged her signature on a document (which purported to indicate her understanding of the minimum IRA distribution requirements), noting that the forged signature misspelled her first name as "Clare" instead of "Claire." Prime Capital became aware of this forgery allegation sometime in 2004 and ordered a handwriting analysis, which concluded that it was "[h]ighly probable that [Elkin's] signature was not genuine," although added that "[n]o identification can be made as to who wrote the questionable signature." Brown received $3,506 in commissions from selling Elkin the variable annuity.

In May 2006, Elkin filed a complaint with the NASD against Prime Capital, alleging that Brown mishandled her assets by, among other things, "[f]ailing to disclose market and liquidity risks associated with variable annuities" and by "[r]ecommending that [she] purchase variable annuities within her IRA." Prime Capital settled the complaint in October 2006 by agreeing to pay Elkin $24,000.

ii. Maynard Schlager

Maynard Schlager, a retired psychologist in his early 80s, and his wife Natalie, who was in her late 70s, also met Brown sometime in 2000. During their meeting, Brown recommended that the Schlagers transfer their entire portfolio of stocks, mutual funds, and fixed-rate annuities into variable annuities. Mr. Schlager was not familiar with variable annuities, but Brown "guarantee[d] that I would not lose any principal and I would get a guarantee on the income percentage." In making his recommendations, Brown did not disclose any of the fees associated with variable annuities, telling Schlager only that the insurance companies would pay any fees.

The Schlagers purchased six variable annuities from Brown in August 2000, signing blank applications without receiving a prospectus. After later noticing a substantial decline in the value of his variable annuities, Mr. Schlager confronted Brown, who advised Schlager to invest in five additional variable annuities. The Schlagers followed Brown's advice and, in October 2001 and April 2002, withdrew part of their original variable annuity investment (incurring surrender charges when they did so) to purchase five additional variable annuities. The Schlagers again signed blank applications and did not receive a prospectus in connection with their investments. Brown received $21,639 in commissions from selling variable annuities to the Schlagers.

In December 2004, the Schlagers filed a complaint against Prime Capital with the NASD alleging that Brown had defrauded him and his wife by, among other things, promising "no loss of principal and guaranteed gains on all annuities" and failing "to provide full disclosure and representations." The Schlagers eventually received approximately $40,000 as a result of their complaint, although the record contains few details about the settlement.

iii. Lenore and Morton Jaye

Lenore Jaye, a retired customer service representative in her early 70s, and Morton Jaye, a retired electrician in his mid-70s, met Brown in early 2004. After meeting with Brown at his office, the Jayes each agreed to purchase a Jackson National variable annuity at Brown's recommendation. Although Brown did not provide them with prospectuses when they filled out their investment documentation, Lenore Jaye admitted that she understood that variable annuities had surrender periods and Morton Jaye admitted that he understood that the value of variable annuities could fluctuate. Mr. Jaye finalized the purchase of the variable annuity, but Mrs. Jaye cancelled her investment several days after signing the paperwork, explaining that "I had changed my mind."

Although Collins had become associated with Prime Capital by this time, the Jayes testified that they had very limited interactions with him. Mrs. Jaye testified that she remembered meeting Collins only once, when he "stopped in" during their meeting with Brown and "may have mentioned what his title was," but the meeting "was very brief." Mr. Jaye similarly recalled Collins introducing himself, but testified that Collins never discussed variable annuities with him. Collins earned a $1,605 commission from Brown's variable annuity sale to Mr. Jaye.

iv. Ria Skiena

Ria Skiena, a retired assistant administrator in her early 70s, also met Brown in early 2004. Skiena and her husband subsequently met with Brown to discuss transferring funds from a variable annuity in her municipal retirement account into "something that I could track daily through the newspaper, something that was self-directed." She told Brown that she "didn't want to be in an annuity type of investment. I wanted to be in a regular stock fund that was traded openly and I could track through a newspaper. I suggested [a] Wellington fund . . . ." Brown agreed with her suggestion, telling her "that he could certainly do what I had wanted and that he would . . . put [the monies] into [a] Wellington [fund]."

To complete the transaction, Skiena hurriedly signed blank forms without reading them because she was pressed for time. Brown never gave her a prospectus, and she left the meeting thinking that she had just invested in the Wellington stock fund. Skiena testified that Collins was not at this meeting and, in fact, did not recall ever meeting him. She explained that, at most, Collins may have been at the initial lunch seminar and that, during her subsequent meeting with Brown at his office, someone phoned Brown, but she never spoke with the person who called and, as far as she knew, "[i]t might have been a personal call."

Brown later sent Skiena a letter "telling [me] I was in the Wellington growth and capital appreciation." When Skiena could not find these funds listed in the paper, she spoke to Brown, who told Skiena that her investment "was like Wellington only it was their own [Gilman Ciocca] fund." In fact, Brown had invested her money in an American International Group variable annuity. Collins received a $1,310 sales commission from the sale.

v. Edward Bogan and Bernice Rosenberg

Edward Bogan, who was approximately eighty years old and retired from the printing business, first met Brown sometime in late 2004. He and his significant other, Bernice Rosenberg, an 80-year-old retired headhunter, subsequently met with Brown at his office to discuss certain Allianz annuities they held. Brown, however, instead focused their attention on the financial troubles of another variable annuity Bogan and Rosenberg held that was issued by Scudder (also known as Allmerica). They subsequently signed blank pieces of paper, which Brown told them would "make the changes [to their Allianz annuities] that we wanted." Brown refused to provide them copies of the documents, however, telling them that "by law [the paperwork] has to go directly to the home office." Unbeknown to Bogan or Rosenberg, Brown used the documents to, among other things, transfer funds from their Scudder variable annuity into a Jackson National variable annuity. Neither Bogan nor Rosenberg authorized these transactions, and, because of these unauthorized transfers, Bogan and Rosenberg incurred surrender fees of $18,443 and $45,000, respectively. The record also contains written notes – signed by Rosenberg and Bogan but otherwise filled out in Brown's handwriting – that requested their financial representative be changed from Brown to Collins.

During one of their meetings, Brown also recommended that Bogan exchange one of his son's variable annuities for a different annuity. Bogan's son was forty-five years old at the time and disabled. Bogan told Brown that he did not have authority to handle his son's assets. Brown responded, "That's ok. I'll take care of it." Bogan signed his son's name to the necessary paperwork, but Brown never obtained authorization from Bogan's son to execute the transaction. Collins allowed the transaction to go through by guaranteeing the signature on the documents based solely on Brown's word to Collins that Bogan's son had signed the document. Bogan's son incurred a $5,000 surrender fee because of the transaction.

In April 2005, Bogan wrote to Prime Capital that he had became suspicious about Brown's and Collins's dealings in his account when he saw Collins name appear on an account statement, "because I never knew a Matt Collins." Rosenberg similarly testified that she "didn't even know [Collins] existed." Bogan and Rosenberg filed a formal complaint with the NASD on December 28, 2005, claiming that, "as a result of Mr. Brown's conduct," they had "incurred penalties totaling $59,114.60, and given up growth of at least $459,000.00." Prime Capital settled the matter on September 20, 2006 for $125,000. Collins received a $2,126 sales commission from Brown's sales to Bogan and Rosenberg, but these commissions were reversed when the investments were cancelled.

2. Antifraud Violations

Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5, "prohibit the employing of fraudulent schemes or the making of material misrepresentations and omissions in offers, purchases, or sales of securities."[7] To establish liability under these provisions, the Division must show by a preponderance of the evidence that Respondents engaged in fraudulent conduct, that such conduct was in connection with the offer, sale, or purchase of securities, and that they acted with scienter.[8] Fraudulent conduct includes, among other things, (1) making an untrue statement of material fact; (2) omitting a fact that made a prior statement misleading; or (3) committing a deceptive or manipulative act as part of a scheme to defraud or employing any act, practice, or course of business which operates as a fraud or deceit.[9] A fact is material if there is a substantial likelihood that a reasonable investor would have considered the misstated or omitted fact important in making an investment decision, and if disclosure of the misstated or omitted fact would have significantly altered the total mix of information available to the investor.[10]

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[7] *SEC v. Brooks*, No. Civ. A. 3:99-CV-1326-D, 1999 WL 493052, at *2 (N.D. Tex. July 2, 1999); *see also SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 855-56 (9th Cir. 2001) (noting that the antifraud provisions "prohibit fraudulent conduct or practices" and "forbid making a material misstatement or omission" in connection with the offer or sale of securities).

[8] *Gregory O. Trautman*, Exchange Act Rel. No. 61167 (Dec. 15, 2009), 98 SEC Docket 26534, 26558 (describing requirements for liability under antifraud provisions). Scienter includes recklessness, defined as conduct that is "an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the [respondent] or so obvious that the [respondent] must have been aware of it." *Id.* at 26563 (quotations omitted). The Division may demonstrate scienter by circumstantial evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983); *Valicenti Advisory Servs., Inc. v. SEC*, 198 F.3d 62, 65 (2d Cir. 1999). We need not find, however, that an actor acted with manipulative intent in order to conclude that the respondent violated Exchange Act Section 10(b). "It is sufficient if [respondent] engaged in a course of conduct that operated as a fraud or deceit as to the nature of the market . . . ." *Richard D. Chema*, 53 S.E.C. 1049, 1054 (1998). No scienter requirement exists for violations of Securities Act Section 17(a)(2) or (3). Negligence is instead sufficient. *Aaron v. SEC*, 446 U.S. 680, 685, 701-02 (1980).

[9] *See* 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5; *Trautman*, 98 SEC Docket at 26558-59.

[10] *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Indus. Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

a. Brown's Materially Misleading Omissions

We find that Brown willfully violated the antifraud provisions through material omissions in dealing with his customers.[11] Brown testified that he knowingly sold variable annuities to new customers who were sixty-five years old or older, in direct violation of Florida's prohibition against his doing so. Brown did not disclose this prohibition to these new, elderly customers, and his failure to do so was a misleading omission of information that a reasonable investor would have considered important.[12]

Moreover, Skiena, Bogan, and Rosenberg consistently testified that Brown failed to disclose material terms about their investments by rushing through the paperwork process and failing to give them prospectuses concerning their investments. Schlager testified that Brown never told him about the surrender fees associated with the six variable annuities he purchased from Brown, and Elkin testified that, although Brown explained surrender fees to her generally, he did not explain to her that the mandatory withdrawals from her IRA could trigger those fees. Surrender charges are a defining feature of variable annuities, as they limit an investor's ability to access their investment. A reasonable investor would want to know this information.[13]

We do not, however, find sufficient evidence to conclude that Brown violated the antifraud provisions in connection with his sales to Reiss and Kirshner. Although Brown's settlement with the Florida Department of Financial Services suggests that Brown's sales may have been improper, Brown did not admit liability in his settlement, and the record contains few details about the circumstances surrounding Kirshner's or Reiss's allegations, as neither customer testified at the hearing.

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[11] *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (stating that "willfully" under the federal securities laws means that the respondent "intentionally committ[ed] the act which constitutes the violation" (citation omitted)).

[12] *See Shores v. M.E. Ratliff Inv. Co.*, No. CA 77-G-0604-S, 1982 WL 1559, at *5 (N.D. Ala. Jan. 18, 1982) (holding that underwriter's failure to disclose lack of a securities license was a material omission in violation of Rule 10b-5).

[13] *See Basic*, 485 U.S. at 240 ("[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information."); *Edgar B. Alacan*, 57 S.E.C. 715, 727 (2004) ("The deceptive conduct element is met when the broker omits 'to inform the customer of the materially significant fact of the trade before it is made.'" (quoting *Sandra K. Simpson*, 55 S.E.C. 766, 791 (2002)).

b. Brown's Unauthorized Trades

Brown also willfully violated the antifraud provisions by executing unauthorized trades in his customers' accounts. Unauthorized trading violates the antifraud provisions when accompanied by deceptive conduct.[14] "The deceptive conduct element is met when the broker omits 'to inform the customer of the materially significant fact of the trade before it is made.'"[15] Here, Brown (1) invested Skiena's money into an American International Group variable annuity instead of the Wellington fund she requested; (2) switched Bogan and Rosenberg out of their Scudder variable annuities without their consent or knowledge; and (3) switched Bogan's son out of a variable annuity without the son's consent or knowledge. The customers' testimony indicates that Brown was aware that he lacked authorization to effect the transactions or, at a minimum, was recklessly indifferent to whether his customers had authorized the transactions, and we can find no evidence to the contrary.

c. Collins was a Cause of Brown's Antifraud Violations

The record does not contain sufficient evidence to find that Collins was a primary violator of the antifraud provisions, but the evidence establishes that Collins was "a cause of" Brown's antifraud violations related to the limitations on his insurance license. Collins allowed Brown to conceal (and, in fact, to circumvent) Florida's licencing restrictions by falsifying customer account forms to indicate that he, not Brown, was the customers' account representative.[16]

We also find insufficient evidence to conclude that Collins was a primary violator regarding the unauthorized transactions in client accounts. Brown, not Collins, executed the unauthorized transactions in Skiena's, Bogan's, Rosenberg's, and Bogan's son's accounts. There is also insufficient evidence to conclude that Collins was a cause of such violations. Although Brown could not have made some of those transfers without Collins's approval – nor would

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[14] *See, e.g.*, *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678 (11th Cir. 1988) (holding that salesperson's unauthorized trading violates Rule 10b-5 when "it is accompanied by an intent to defraud or a willful and reckless disregard of the client's best interests" (citing *Brophy v. Redivo*, 725 F.2d 1218, 1220-21 (9th Cir. 1984))); *Steven E. Muth*, 58 S.E.C. 770, 792 (2005) (holding that salesperson's unauthorized trading in customer accounts violated the antifraud provisions (citing *Alacan*, 57 S.E.C. at 727)).

[15] *Alacan*, 57 S.E.C. at 727 (quoting *Simpson*, 55 S.E.C. at 791).

[16] S*ee Robert M. Fuller*, 56 S.E.C. 976, 984 (2003) (finding corporate officer to be "a cause of" a company's antifraud violations where "(1) a primary violation occurred, (2) there was an act or omission by the respondent that was a cause of the violation, and (3) the respondent knew, or should have known, that his conduct would contribute to the violation"), *petition for review denied*, No. 03-1334 (D.C. Cir. Apr. 23, 2004); *Erik W. Chan*, 55 S.E.C. 715, 724-25 (2002) (same). The Order Instituting Proceedings (the "OIP") did not allege that Collins aided and abetted Brown's violations.

Brown have even been their representative without Collins's involvement in concealing Brown's role in those sales – the record contains insufficient evidence to conclude that Collins knew or should have known that his conduct would have led to unauthorized transfers.[17]

3. Books and Records Violations

The books and records provisions "require that broker-dealers registered with the Commission make and keep current, for prescribed periods, certain books and records."[18] That requirement includes the requirement that the records be accurate,[19] which applies "regardless of whether the information itself is mandated."[20] An individual can be a cause of a broker-dealer's violations of the books and records provisions "if he was responsible for an act or omission that he knew or should have known would contribute to the violation."[21]

To establish that a respondent aided and abetted a books and records violation, we must find that (1) a violation of the books and records provisions occurred; (2) the respondent substantially assisted the violation; and (3) the respondent provided that assistance with the

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[17] The Division also alleged that all four Respondents made recommendations to purchase variable annuities that were fraudulently unsuitable. To succeed on such a claim, the Division must establish that (1) the securities each Respondent recommended were unsuited to his customer's needs; (2) the Respondent knew that his recommendation was unsuitable or acted with recklessness regarding suitability in making his recommendation; and (3) the Respondent made material misrepresentations or failed to disclose material information relating to the suitability of the securities, including the associated risks. *See Muth*, 58 S.E.C. at 795-96 (citing *Brown v. E.F. Hutton Group, Inc.*, 991 F.2d 1020, 1031 (2d Cir. 1993)). The record here does not establish that Respondents knew (or were reckless in not knowing) that their recommendations were unsuitable.

[18] *Joseph John VanCook*, Exchange Act Rel. No. 61039 (Nov. 20, 2009), 97 SEC Docket 22664, 22722, *petition denied*, 653 F.3d 130 (2d Cir. 2011).

[19] *See Anthony A. Adonnino*, 56 S.E.C. 1273, 1288 (2003) (finding that "instances of inaccuracy and falsity . . . caused violations of . . . Exchange Act Rule[] l7a-3"), *aff'd*, 111 Fed. Appx. 46 (2d Cir. 2004).

[20] *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 S.E.C. 892, 901 (1993) (citing *Sinclair v. SEC*, 444 F.2d 399, 401 (2d Cir. 1971) ("Although the Commission's rules did not specifically require that the executing brokers' names be put on the order tickets, that information was obviously material and important, and, even assuming no legal obligation to furnish the names, there was an obligation, upon voluntarily supplying that information, to be truthful.")).

[21] *Stephen J. Horning*, Exchange Act Rel. No. 56886 (Dec. 3, 2007), 92 SEC Docket 207, 224, *aff'd*, 570 F.3d 337 (D.C. Cir. 2009).

requisite scienter.[22] The scienter requirement for aiding-and-abetting liability in administrative proceedings may be satisfied by evidence that the respondent knew of, or recklessly disregarded, the wrongdoing and his or her role in furthering it.[23] We have also held that one who aids and abets a primary violation is necessarily "a cause of" that violation.[24]

Here, Prime Capital committed a primary violation of the books and records provisions by maintaining new account forms that falsely indicated that Collins – and not Brown – was the associated person responsible for the Jayes', Skiena's, Bogan's, and Rosenberg's accounts. Brown and Collins substantially and knowingly assisted those violations by having Collins sign the customers' new account forms to conceal that Brown was prohibited from selling variable annuities to new, elderly customers. We consequently find that Brown and Collins willfully aided and abetted Prime Capital's violations of the books and records provisions and, as a result, were also a cause of Prime Capital's books and records violations.

4. Collins's Failure to Supervise Brown

Section 15(b)(4)(E) of the Exchange Act authorizes us to impose sanctions upon a registered representative who "has failed reasonably to supervise, with a view to preventing violations of [the federal securities laws] . . . another person who commits such a violation, if such other person is subject to his supervision." In assessing a respondent's actions, we consider whether the respondent exercised "reasonable [supervision] under the attendant circumstances."[25] As we have explained, where a supervisor, such as Collins, knows of an employee's past disciplinary history, the supervisor must ensure that rules and procedures are in place to

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[22] *See vFinance Invs., Inc.*, Exchange Act Rel. No. 62448 (July 2, 2010), 98 SEC Docket 29918, 29935 (finding that officer of a broker-dealer willfully aided and abetted broker-dealer's books and records violations); *Robert J. Prager*, 58 S.E.C. 634, 646 & n.17 (2005) (setting forth elements necessary for aiding and abetting liability and citing D.C. Circuit cases).

[23] *Compare Monetta Fin. Servs., Inc. v. SEC*, 390 F.3d 952, 956 (7th Cir. 2004) (stating that a finding that one "generally was aware or knew that his or her actions were part of an overall course of conduct that was improper or illegal" may support aiding and abetting) *with Howard v. SEC*, 376 F.3d 1136, 1143, 1149 (D.C. Cir. 2004) (holding that "extreme recklessness" may support aiding and abetting).

[24] *See Sharon M. Graham*, 53 S.E.C. 1072, 1085 n.35 (1998) (finding that respondent's willful aiding and abetting violation "necessarily makes her a 'cause' of those violations"), *aff'd*, 222 F.3d 994 (D.C. Cir. 2000).

[25] *Clarence Z. Wurts*, 54 S.E.C. 1121, 1130 (2001) (quoting *Arthur James Huff*, 50 S.E.C. 524, 528-29 (1991)).

supervise the employee properly, and that those rules and procedures are enforced.[26] Collins did none of this.

Collins was responsible for supervising only one person: Brown. In fact, Collins and Brown were, for a time, the only two employees in the Delray office. Yet, as Prime Capital's own review of Collins accurately concluded, "there was [a] complete lack of supervision . . . by Matt Collins" over Brown. The Firm's records, for example, showed that customer documents, and in some cases entire files, were missing (which Collins acknowledged made an adequate review of Brown's sales impossible), and the Firm's branch reviews found "no evidence" of any supervisory review over certain of Brown's transactions.

Even more egregiously, when Brown told Collins of a "mishap" with his Massachusetts insurance license, Collins did nothing, accepting Brown's claim that it "was no big deal." When Collins later learned that, in fact, Florida had suspended Brown's license for making material misstatements and executing an unauthorized transaction, Collins still did nothing. And when Collins learned that Florida reinstated Brown's license with restrictions, he again did nothing. Collins not only allowed Brown to continue selling variable annuities to new customers in violation of Florida's prohibition, he also actively facilitated Brown's continued sales by falsely stating on customer account forms that he, and not Brown, was the customers' registered representative. Collins also continued to defer to Brown, relying entirely on Brown's word, for instance, that Bogan's son had signed a document authorizing a transfer in Bogan's son's account.[27]

As a result, Collins's supervision of Brown was not just inadequate, but entirely absent. Collins himself admitted that his supervision of Brown was deficient and that he lacked the training and documents to review Brown adequately. We thus find that Collins failed to exercise reasonable supervision with a view to preventing Brown's antifraud violations.

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[26] *Wurts*, 54 S.E.C. at 1130; *see also Albert Vincent O'Neal*, 51 S.E.C. 1128, 1135 (1994) ("[T]he test is whether [the] supervision was reasonably designed to prevent the violations at issue.").

[27] *Horning*, 92 SEC Docket at 219 (noting that the Commission has "'repeatedly stressed that supervisors cannot rely on the unverified representations of their subordinates'" and that "this is especially true where the subordinates have committed misconduct in the past" (quoting *Quest Capital Strategies*, 55 S.E.C. 362, 372 (2001))).

5. Sanctions

a. Bars

Exchange Act Sections 15(b)(4)(e) and (b)(6) and Advisers Act Section 203(f) authorize us to censure, place limitations on, suspend, or bar a person associated with a broker, dealer, or investment adviser if we determine that the person has, among other things, willfully violated the federal securities laws or reasonably failed to supervise and it is in the public interest to do so.[28] In determining what sanction is in the public interest, we consider, among other things, (1) the egregiousness of the respondent's actions; (2) the degree of scienter involved; (3) the isolated or recurrent nature of the infraction; (4) the respondent's recognition of the wrongful nature of his or her conduct; (5) the sincerity of any assurances against future violations; and (6) the likelihood that the respondent's occupation will present opportunities for future violations.[29] Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive."[30]

Here, we find it appropriate to impose a bar against Brown and Collins from association with a broker, dealer, or investment adviser in any capacity (but allowing Collins the right to reapply in a non-supervisory capacity in two years). Brown and Collins engaged in highly troubling conduct that raises serious doubts about their fitness to work in the securities industry – "a business that is rife with opportunities for abuse."[31] Brown concealed from his customers and his employer that he was continuing to sell variable annuities to new, elderly customers despite

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[28] 15 U.S.C. §§ 70*o* (b)(4)(e), 70*o*(b)(6), 80b-3(f).

[29] *See, e.g.*, *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[30] *David Henry Disraeli*, Exchange Act Rel. No. 57027 (Dec. 21, 2007), 92 SEC Docket 852, 875, *petition denied*, 33 F. App'x 334 (D.C. Cir. 2008) (per curiam).

[31] *Mayer A. Amsel*, 52 S.E.C. 761, 768 (1996) (affirming NASD's imposition of a bar despite the fact that "no customer suffered as a result of any of his actions," but where applicant "exhibited a disturbing disregard for the standards that govern the securities industry").

limitations by the Florida Department of Financial Services against doing so.[32] His behavior showed not only that he was willing to commit fraud, but also that lesser sanctions by Florida did not affect his willingness to do so. In addition to concealing the limitations on his insurance license, Brown took further advantage of his customers' trust by failing to disclose material terms or to deliver prospectuses to Bogan, the Jayes, Rosenberg, and Skiena and by effecting unauthorized transactions in accounts owned by Skiena, Bogan, Rosenberg, and Bogan's son.[33]

Collins, meanwhile, was in a position to stop Brown's misconduct, but his complete failure to supervise Brown, including falsifying documents that misled his employer and the issuing insurance companies about what Brown was doing, created an environment where Brown could defraud his clients with impunity. Given these egregious supervisory violations, we impose a bar against Collins in all capacities, with a right to reapply in a non-supervisory capacity after two years. We believe the severity of the penalty is warranted in the public interest to address the severity of Collins's failure to supervise.[34]

These bars address the risk of allowing Brown and Collins to remain in the securities industry. Although Collins asserts that Prime Capital has "significantly upgraded its compliance and supervisory systems," he "cannot shift the blame for his violations to his firm."[35] The securities industry "presents continual opportunities for dishonesty and abuse, and depends

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[32] *Cf., e.g.*, *Geoffrey Ortiz*, Exchange Act Rel. No. 58416 (Aug. 22, 2008), 93 SEC Docket 8977, 8989-90 (affirming bar where representative attempted to conceal misconduct by supplying false information during an investigation); *Gregory W. Gray, Jr.*, Exchange Act Rel. No. 60361 (July 22, 2009), 96 SEC Docket 19038, 19053 (affirming imposition of sanctions by considering aggravating factors, including that applicant sought to conceal his conduct); *Fox & Co. Invs.*, 58 S.E.C. 873, 896 (2005) (finding imposition of a bar to be neither excessive nor oppressive where applicants, among other things, concealed their conduct); *Robin Bruce McNabb*, 54 S.E.C. 917, 928-29 (2000) (sustaining bar where applicant attempted to conceal his misconduct), *aff'd*, 298 F.3d 1126 (9th Cir. 2002).

[33] *See, e.g.*, *Daniel D. Manoff*, 55 S.E.C. 1155, 1165-66 (2002) (affirming bar for effecting unauthorized transactions).

[34] *See, e.g.*, *Wurts*, 56 S.E.C. at 441 (noting "the seriousness with which we view failures to supervise" and that the Commission "had suspended supervisors who failed to supervise reasonably from association with a registered entity in all capacities and imposed supervisory and proprietary bars on such persons"); *Consol. Inv. Servs., Inc.*, 52 S.E.C. 582, 591 (1996) (barring firm officers from association with a right to reapply in one year); *O'Neal*, 51 S.E.C. at 1136 (barring branch manager in all capacities, with a right to reapply in a non-proprietary, non-supervisory capacity).

[35] *John D. Audifferen*, Exchange Act Rel. No. 58230 (July 25, 2008), 93 SEC Docket 8129, 8141.

heavily on the integrity of its participants and on investors' confidence."[36] A bar will prevent Brown and Collins from putting the investing public at risk and will serve as a deterrent to others in the securities industry who might engage in similar misconduct.[37]

Collins argues that barring him from associating with an investment adviser amounts to an impermissible collateral bar. This is not correct. The Division expressly sought sanctions in the OIP under Section 203(f) of the Advisers Act, which authorizes the Commission to bar from association with an investment adviser "any person . . . at the time of the alleged misconduct, associated . . . with an investment adviser" who has "willfully violated any provision of the Securities Act of 1933 [or] the Securities Exchange Act of 1934."[38] A person "associated with an investment adviser" includes "any employee" of an investment adviser, and Respondents were all employees of Gilman Ciocia, a registered investment adviser, at the time of their misconduct.[39]

We further note that we issued the OIP against Respondents on June 30, 2009. Therefore, the five-year statute of limitations in 28 U.S.C. § 2462 would typically start on June 30, 2004 for purposes of imposing a bar or civil penalties.[40] Respondents, however, all entered into tolling agreements, with Collins, Walsh, and Wells entering into a tolling agreement that extended their limitations period to June 30, 2003, and Brown entering into tolling agreement that extended his limitations period to December 30, 2003. We accordingly do not consider conduct that occurred before those respective dates as violative conduct forming the basis for imposing a bar or civil penalties. We may, however, consider conduct that occurred outside the statute of limitations to establish Respondents' motive, intent, or knowledge in committing violations that occurred within the statute of limitations.[41] We can also consider conduct that occurred outside the

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[36] *Conrad P. Seghers*, Investors Advisers Act Release No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2304, *petition denied*, 548 F.3d 129 (D.C. Cir. 2008).

[37] *See, e.g.*, *McCarthy v. SEC*, 406 F.3d 179, 190 (2d Cir. 2005) (noting that deterrent value is a relevant factor in deciding sanctions).

[38] 15 U.S.C. § 80b-3(f) (referencing offenses enumerated in 15 U.S.C. § 80b-3(e)).

[39] 15 U.S.C. § 80b-2(a)(17).

[40] Section 2462 provides that "any proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," must be commenced "within five years from the date when the claim first accrued." *See Johnson v. SEC*, 87 F.3d 484, 492 (D.C. Cir. 1996) (holding that Section 2462's five-year limitations period applied to certain Commission administrative proceedings).

[41] *Graham*, 53 S.E.C. at 1089 n.47 (concluding that the Commission could consider time-barred conduct "as evidence of motive, intent, or knowledge"); *Terry T. Steen*, 53 S.E.C. 618, 624 (1998) (same).

limitations period when deciding whether to impose disgorgement or cease-and-desist orders (sanctions that we discuss below).[42]

Collins seeks to shorten the applicable limitations period by arguing that the law judge "presumably rejected" the tolling agreements when her initial decision failed to mention the agreements' existence when calculating the limitations period. Because the law judge's decision contains only a cursory discussion of the statute of limitations, however, her decision provides no indication about why she failed to mention the tolling agreements. Moreover, we review the record *de novo* and see no reason – nor does Collins provide any – for not considering the tolling agreements to be valid.[43] We therefore include the tolling agreements when calculating the applicable limitations period.

b. Cease-and-Desist Orders

Securities Act Section 8A, Exchange Act Section 21C, and Advisers Act Section 203(k) authorize the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" these Acts or the rules promulgated thereunder.[44] In determining whether a cease-and-desist order is appropriate, the Commission considers whether a reasonable likelihood of violations in the future exists, the seriousness of the violations, the isolated or recurrent nature of the violations, the respondent's state of mind in committing the violations, the respondent's recognition of the wrongful nature of his or her conduct, and the recency of violations.[45]

As described above, Brown's and Collins's violations were egregious. Brown repeatedly took advantage of older customers, many of whom had limited resources, and he continued to commit violations after having been sanctioned by the Florida Department of Financial Services. Collins, meanwhile, purposefully concealed Brown's misleading omission of the Florida sanction – and was thus "a cause of" Brown's antifraud violations – by inserting his name as account representative on account forms. We therefore find it appropriate to order Brown and Collins to

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[42] *Riordan v. SEC*, 627 F.3d 1230, 1234-35 (D.C. Cir. 2010) (holding that the five-year statute of limitations in Section 2462 does not apply to disgorgement and cease-and-desist orders); *Zacharias v. SEC*, 569 F.3d 458, 471-73 (D.C. Cir. 2009) (same); *Steen*, 53 S.E.C. at 624 (noting that Section 2462 does not apply when considering restitution or disgorgement).

[43] Our *de novo* review cures any errors the law judge may have made when imposing sanctions. *See, e.g.*, *Gary M. Kornman*, Exchange Act Rel. No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14260 n.44 (finding that Commission's *de novo* review cured law judge's failure to consider lesser sanctions), *petition denied*, 592 F.3d 173 (D.C. Cir. 2010).

[44] 15 U.S.C. §§ 77h-1, 78u-3, 80b-3(k).

[45] *KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1185, 1192 (2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002).

cease and desist from committing or causing any violations or future violations of the antifraud provisions.

We also find it appropriate to impose a cease-and-desist order against Brown and Collins from committing or causing any violations or future violations of the books and records provisions.[46] Their roles in Prime Capital's primary violations were significant, as the violations allowed Brown and Collins to repeatedly conceal material information from customers, their employer, and the issuing insurance companies.

c. Disgorgement

Securities Act Section 8A(e), Exchange Act Section 21C(e), and Advisers Act Section 203(j) authorize the Commission to require the disgorgement of ill-gotten gains in cease-and-desist proceedings.[47] An order for disgorgement "is not a punitive measure; it is intended primarily to prevent unjust enrichment."[48] Accordingly, "the amount of disgorgement should include all gains flowing from the illegal activities," but calculating the amount of disgorgement "requires only a reasonable approximation of profits causally connected to the violation."[49] Once the Division shows that its disgorgement figure is a reasonable approximation of the amount of unjust enrichment, the burden shifts to the respondent to demonstrate that the Division's estimate is not a reasonable approximation.[50] Here, the Division requests that we order Brown and Collins to disgorge the $41,992 and $2,915, respectively (plus prejudgement interest), in

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[46] *See, e.g.*, *vFinance*, 98 SEC Docket at 29944-45 (ordering respondents to cease and desist from committing or causing any violations or future violations of the books and records provisions); *VanCook*, 97 SEC Docket at 22690-91 (same).

[47] 15 U.S.C. §§ 77h-1(e), 78u-3(e), 80b-3(j).

[48] *See Zacharias v. SEC*, 569 F.3d 458, 471 (D.C. Cir. 2009) (quoting *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000)).

[49] *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113-14 (9th Cir. 2006) (quotation omitted); *see also SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) (noting that, when calculating disgorgement, "separating legal from illegal profits exactly may at times be a near-impossible task").

[50] *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 2006); *see also, e.g.*, *Zacharias*, 569 F.3d at 473 (noting that, where disgorgement cannot be exact, the "well-established principle" is that the burden of uncertainty in calculating ill-gotten gains falls on the wrongdoer whose illegal conduct created that uncertainty); *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004) ("Exactitude is not a requirement; '[s]o long as the measure of disgorgement is reasonable, any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.'" (quoting *SEC v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998))).

commissions that they earned from the variable annuity sales at issue. We agree with the disgorgement amount for Collins, but not for Brown.

For Collins, the Division's request of $2,915 in disgorgement is equal to the commissions he earned from variable annuity sales to customers Morton Jaye and Skiena – sales that Brown actually made, but that Collins failed to adequately supervise. (The Division's calculation does not include $2,126 in commissions that Collins received from Bogan and Rosenberg, as those commissions were offset by the $25,000 Collins paid toward settling their complaint against Prime Capital). We believe that the Division's requested amount accurately reflects Collins's ill-gotten gains, and note that Collins does not contest the use of these commissions as a measure of disgorgement – he instead disputes the underlying findings of violations.

For Brown, the Division's request of $41,992 in disgorgement is equal to the commissions that Brown received from his sales to Elkin, Kirshner, Reiss, and Schlager. As we explained above, however, the record does not support a finding that Brown violated the antifraud provisions when selling variable annuities to Kirshner or Reiss. We also believe that any disgorgement should be offset by $13,998 in restitution that Brown paid to Schlager to settle the Florida complaint. We accordingly calculate Brown's ill-gotten gains to be $11,147.

We thus find it appropriate to order Brown to disgorge $11,147, plus prejudgement interest, and for Collins to disgorge $2,915, plus prejudgment interest.[51] We believe these amounts will deprive Brown and Collins of their unjust enrichment and deter others from similar misconduct by making illegal conduct unprofitable.[52]

d. Civil Monetary Penalties

Exchange Act Section 21B and Advisers Act Section 203(i) authorize the Commission to impose civil monetary penalties for willful violations of these Acts and the Securities Act or for

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[51] *Terence Michael Coxon*, 56 S.E.C. 934, 971 (2003) ("[E]xcept in the most unique and compelling circumstances, prejudgment interest should be awarded on disgorgement, among other things, in order to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer's victims."), *aff'd*, 137 F. App'x 975 (9th Cir. 2005); Rule of Practice 600(b), 17 C.F.R. § 201.600(b) (stating that "[i]nterest on the sum to be disgorged shall be computed at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), and shall be compounded quarterly").

[52] *See Guy P. Riordan*, Exchange Act Rel. No. 61153 (Dec. 11, 2009), 97 SEC Docket 23445, 23482 (finding that ordering respondent to disgorge commissions "will prevent him from reaping substantial financial gain from his violations and deter others from violating the federal securities laws by making illegal conduct unprofitable"), *petition denied*, 627 F.3d 1230 (D.C. Cir. 2010).

failure to supervise any person who commits such a violation.[53] In considering whether a civil penalty is in the public interest, the Commission may consider (1) whether the act or omission involved fraud; (2) whether the act or omission resulted in harm to others; (3) the extent to which any person was unjustly enriched, taking into account restitution made to injured persons; (4) whether the individual has committed previous violations; (5) the need to deter such person and others from committing violations; and (6) such other matters as justice may require.[54]

Exchange Act Section 21B(b) and Advisers Act Section 203(i)(2) specify that civil monetary penalties can be issued by the Commission "for each act or omission" in violation of the federal securities laws. For each such "act or omission," the Commission may impose one of three tiers of penalties, depending on the nature of the violation: first-tier penalties of up to $6,500 for violations of the securities laws; second-tier penalties of up to $65,000 for violations of the securities laws that "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;" or third-tier penalties of up to $130,000 for violations that satisfy the requirement for a second-tier penalty and "resulted in substantial losses or created significant risk of substantial losses to other persons or resulted in substantial pecuniary gain."[55]

The Division urges us to impose a maximum third-tier penalty for the violations affecting each of Respondents' customers. The Division contends that, given "the harm visited upon individual investor[s]," the Commission should impose a penalty that reflects that Respondents' misdeeds "were separate illegal acts, not merely a single course of action." In doing so, however, the Division states that it does not believe "the appropriate exercise of discretion in this instance" is to increase the number of violations even more by treating each misstatement as a separate act. The Division also contends that our calculation should include customers who purchased variable annuities from Respondents outside the statute of limitations because these were all part of the same "continuing course of conduct."[56]

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[53] 15 U.S.C. §§ 78u-2, 80b-3(i).

[54] 15 U.S.C. § 78u-2(c).

[55] The maximum second- and third-tier penalties depend, in part, on the date of the underlying violation. For conduct that occurred before February 3, 2001, the maximum second-tier penalty is $55,000 and the maximum third-tier penalty is $110,000. For conduct that occurred from February 3, 2001 through February 14, 2005, the maximum second-tier penalty is $60,000 and the maximum third-tier penalty is $120,000. For conduct that occurred after February 14, 2005, the maximum second-tier penalty is $65,000 and the maximum third-tier penalty is $130,000. *See* 17 C.F.R. §§ 201.1002, 201.1003.

[56] *Citing Laurie J. Canady*, 54 S.E.C. 65, 89 n.54 (1999) (stating, in *dicta*, that to consider all of respondent's fraudulent activity "both within and outside the limitations period" in assessing sanctions would be "in the public interest" because respondent's conduct "may be

(continued...)

The Division's calculation would impose a $1,430,000 penalty against Brown (reflecting a maximum third-tier civil monetary penalty for twelve customers) and a $620,000 penalty against Collins (reflecting a maximum third-tier civil monetary penalty for five customers). We agree with the Division that the penalties should be applied per customer, but we find that a second-tier (not third-tier) penalty is appropriate and that our calculation should not include sales to customers outside the applicable limitations period.[57]

Regarding the appropriate tier, both Brown's and Collins's violations support at least a second-tier penalty. Brown's violations involved fraud and a deliberate disregard of the regulatory requirements, and Collins knowingly allowed Brown to defraud customers through Collins's failure to supervise.[58] The Division and the law judge also both observed that the amount of customer losses was meaningful to those customers. At the same time, however, the Division and law judge also acknowledged that the nominal amount of customer losses was not large. Therefore, because Brown's and Collins's conduct did not expose customers to significant risk of substantial pecuniary loss or result in substantial gain, their misconduct does not support a higher, third-tier penalty.

While the nominal amount involved may not have been large, Brown's and Collins's misconduct was nevertheless egregious. Brown and Collins displayed a blatant failure to deal fairly with elderly, unsophisticated customers and exhibited a clear disregard for their customers' interests. Brown's and Collins's actions thus call for meaningful monetary penalties to encourage them and other industry participants to prioritize compliance with the securities laws in the future. We therefore find that a penalty at the maximum end of the second tier is appropriate.

Regarding the number of "acts or omissions" against which to apply the maximum second-tier penalty, we believe that imposing a penalty for each defrauded customer is appropriate. Although Brown's and Collins's misconduct followed a general pattern, their acts and omissions regarding each customer were nevertheless distinct and separate: this was not a single act that defrauded multiple customers, but rather separate interactions, where each

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[56] (...continued)
viewed as part of a continuing, interconnected scheme to take advantage of her customers' lack of sophistication and trust"), *petition denied*, 230 F.3d 362 (D.C. Cir. 2000).

[57] *See supra* notes 40-43 and accompanying text.

[58] *John A. Carley*, Exchange Act Rel. No. 888 (Jan. 31, 2008), 92 SEC Docket 1693, 1740 (stating that a supervisor's "failure to supervise involved a reckless disregard for his supervisory responsibilities in light of the numerous red flags suggesting that [subordinates] were violating the securities laws"), *rev'd in part on other grounds sub nom. Zacharias v. SEC*, 569 F.3d 458 (D.C. Cir. 2009).

customer presented a unique opportunity to violate the securities laws.[59] This is true not only for Brown's antifraud violations, but also for Collins's failure to supervise. A failure to supervise is tied to the underlying securities law violations,[60] and Collins knowingly failed to supervise Brown's fraudulent conduct toward specific customers. We also impose additional penalties against Brown for his unauthorized transfers in Bogan's son's, Rosenberg's, and Skiena's accounts. These three unauthorized transfers were distinct from each other and unrelated to Brown's concealing the limitations on his license, thus constituting additional "acts or omissions."

We do not believe, however, that imposing civil penalties for customers to whom Brown sold variable annuities outside the statute of limitations period is appropriate. The Division argues that we should include such customers because they were part of Brown's continuing course of conduct.[61] This position contradicts the Division's earlier argument that we should view each customer separately for purposes of determining how many penalties to apply. We see no reason for taking such an inconsistent approach.

We therefore find that the following civil monetary penalties are appropriate:

- **Brown**: $560,000 (reflecting a maximum second-tier civil monetary penalty for each of the six customers that Brown defrauded within the limitations period, plus three additional second-tier penalties for the three unauthorized transfers).

- **Collins**: $310,000 (reflecting a maximum second-tier civil monetary penalty for each of the five customers that Brown defrauded because of Collins's failure to supervise).

In imposing these penalties, we note that Collins argued that the $620,000 penalty the Division sought would violate the Eighth Amendment, which prohibits, among other things, the

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[59] *Cf. Muth*, 58 S.E.C. at 813 (concluding that separate third-tier penalties for each of seven customers was appropriate where respondent misrepresented and omitted material facts and engaged in unauthorized trading).

[60] 15 U.S.C. § 78*o*(b)(4)(E) (stating that the Commission may sanction an associated person for failing "reasonably to supervise, with a view to preventing violations of the federal securities laws and rules and regulations thereunder, another person who commits such violations if such person is subject to the individual's supervision").

[61] *Citing Canady*, 54 S.E.C. at 89 n.54 (holding that respondent had waived statute of limitations argument, but noting that, even if limitations period applied, the Commission would still consider all of respondent's fraudulent activity in assessing sanctions because it would be in the public interest when imposing sanctions to consider all of respondent's misconduct – both within and outside the limitations period).

imposition of excessive fines.[62] To the extent Collins continues to advance this argument regarding the lower $310,000 penalty we now impose, we note that substantial deference is granted to the legislature when determining whether a fine is excessive under the Eighth Amendment.[63] The three-tier penalty structure was established by Congress, and the penalties we impose are well within the limits set forth in the statute and are consistent with the seriousness of Brown's and Collins's misconduct.

* * *

During oral argument before the Commission, Brown's counsel stated that Brown engaged in "a blatant scheme to defraud aimed at vulnerable victims," but argued that we should impose lower sanctions because he voluntarily cooperated with the Division's investigation in "good faith" reliance that the Division would credit his cooperation when seeking penalties against him. Brown contended that the Division, by seeking higher penalties, did not honor its agreement and asked that we credit his supposed cooperation by imposing only a single third-tier penalty of $130,000.

Brown's first mention of this purported cooperation arrangement with the Division was during oral argument. Brown had not raised this claim with the law judge or in his petition for review, and he never filed any briefs in support of his petition for review. Because Brown had not raised the issue previously, we ordered additional briefing in the interest of fairness, stating that "the parties shall be permitted to file additional briefs clarifying the extent of Brown's cooperation with the Division in this matter and how that cooperation, if any, should affect the imposition of sanctions."[64]

In his supplemental brief, Brown explained that he approached the Division approximately six months before his hearing testimony about a "desire[] to accept responsibility for his conduct and [to state] that he would voluntarily cooperate as a witness at the hearing against other culpable individuals." Brown claimed that he "offered to settle" under terms in which the Division would "utilize Brown's cooperation in the form of testimony in [its] direct case against other respondents" in exchange for Brown's consenting to a bar and paying both disgorgement and a civil penalty equal to that disgorgement. Brown asserted that he lived up to his end of the bargain by attending two "proffers" and a "prep session," during which he claimed

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[62] U.S. Const. amend. VIII.

[63] *See United States v. Bajakajian*, 524 U.S. 321, 336 (1998); *Rockies Fund, Inc.*, Exchange Act Rel. No. 54892 (Dec. 7, 2006), 89 SEC Docket 1517, 1529 n.44, *petition denied*, 298 F. App'x 4 (D.C. Cir. 2008).

[64] *Eric J. Brown*, Exchange Act Rel. No. 65207 (Aug. 26, 2011) (the "August 26 Order").

to have "unequivocally detailed his role and that of others in the scheme [to defraud customers]," and then testifying truthfully at the hearing.[65]

In its cross-brief, the Division acknowledged that Brown "opened a dialogue" about resolving the matter without litigation six months before the hearing, but argued that no cooperation agreement ever existed, "either informal, implicit, in concept or in writing." The Division added, "Any suggestion to the contrary is wishful thinking at best, and a false representation at worst." We agree.

Although Brown offered the Division terms on which he was willing to settle (claiming an inability to pay higher penalties), the record contains no evidence that Brown ever submitted a written offer to settle, as required by our rules, or submitted the necessary financial information to support his claimed inability to pay.[66] The Division also made clear to Brown, in writing, that his proposed terms of settlement were "not binding on or admissible against the Commission in any judicial or administrative proceeding [and] any terms . . . must be approved by the Commission for any settlement to be effective." In fact, our rules are clear on this point: an offer to settle is binding only if formally submitted to, and approved by, the Commission – neither of which happened here.[67]

The same day the Division sent Brown the email emphasizing that Brown's offer to settle was not binding on the Commission, Brown's counsel – who has represented Brown in these proceedings since he first responded to the OIP – informed the law judge during a pre-hearing conference that the parties "have been having discussions [about settlement] . . . and anticipate filing a joint motion to stay proceedings." When asked, however, whether the settlement

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[65] On January 13, 2010, the Commission announced a series of measures to encourage greater cooperation from individuals and companies in the agency's investigations and enforcement actions. *See* 17 C.F.R. § 202.12 (setting forth Commission policy regarding cooperation by individuals during investigations and related enforcement actions). That initiative is not implicated here, as Brown's alleged cooperation occurred before the Commission announced the initiative. Even if that initiative were to apply, Brown does not present evidence of sufficient cooperation to warrant a reduced sanction.

[66] Rule of Practice 240(b), 17 C.F.R. §§ 201.240(b) ("An offer of settlement shall state that it is made pursuant to this rule; shall recite or incorporate as a part of the offer the provisions of paragraphs (c)(4) and (5) of this rule [relating to waiver]; shall be signed by the person making the offer, not by counsel; and shall be submitted to the interested division."); *see also* Rule of Practice 630(b), 17 C.F.R. § 201.630(b) (noting that "[a]ny respondent who asserts an inability to pay disgorgement, interest or penalties may be required to file a sworn financial disclosure statement); 17 C.F.R. § 209.1 (Form D-A).

[67] Our Rule of Practice 240 specifies that "[f]inal acceptance of any offer of settlement will occur only upon the issuance of findings and an order by the Commission." 17 C.F.R. § 201.240.

discussions had "gotten to the point you could file a joint motion orally" to stay the proceedings, Brown's counsel's told the law judge only that she believed that a request for a stay was "imminent, within the next day to two days." Neither Brown nor the Division ever requested such a stay.

Once the hearing began, and after several of Brown's customers had already testified against him, Brown and his lawyer met with the Division, during which the Division evaluated Brown's proffered testimony. The Division then subpoenaed Brown to testify, but states that it "warned him and his counsel several times that it could make no promises about what credit, if any, Brown would receive for [his testimony] in any settlement the Commission might consider."[68] Brown's lawyers, in fact, admit as much, acknowledging in their supplemental brief that "[i]t is beyond dispute that . . . the nature and degree of any credit would be based upon the Division's discretion after the hearing." Brown even testified at the hearing that the Division had made no representations or promises to him and that he was appearing pursuant to a subpoena. These two concessions alone effectively undercut all of Brown's claims that he believed the Division had made any promises about crediting his testimony.

In fact, Brown learned quickly that the Division had no intention of crediting his testimony. After the hearing, the Division asked the law judge to impose essentially the maximum sanctions allowable against Brown, more than for any other Respondent. Brown and his lawyers could have objected at that point if they believed the Division's sanction request violated some type of agreement. Instead, Brown and his lawyers did nothing. Brown filed no post-hearing briefs with the law judge opposing the maximum penalties sought by the Division. Nor did Brown otherwise inform the law judge that he had been cooperating with the Division or that such a factor should be mitigating. Although Brown later filed a petition for review with the Commission, his filing did not mention any supposed cooperation and stated only vaguely that the law judge had erred by "fail[ing] to give individual consideration, including mitigating circumstances, relative to Respondent when imposing sanctions." Brown filed no briefs in support of this short, vaguely worded petition nor any briefs in response to the Division's petition in which it again sought nearly maximum sanctions against Brown. Brown instead waited until the last minute, at oral argument, to raise his cooperation claim.

In other words, Brown asks us to believe that the Division had promised to credit his testimony despite (1) no evidence that Brown ever submitted a formal offer to settle under Rule 240; (2) Brown's failure to request a stay of the proceedings to finalize such an agreement despite the law judge's express invitation to do so; (3) Brown's statement, under oath, that the Division had made no representations or promises to him in exchange for his testimony; (4) Brown's acknowledgment in his supplemental brief that "the nature and degree of any credit" for his testimony was within the Division's discretion; and (5) Brown's complete failure to mention

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[68] Six of the original respondents also listed Brown as a witness in pre-hearing filings.

any agreement or otherwise object to the Division's repeated and consistent attempts to seek maximum penalties against him until oral argument.

Nor has Brown demonstrated a level of cooperation that, even without a formal agreement or settlement, might warrant "lesser sanctions than [he] otherwise might have received based on pragmatic considerations such as avoidance of time-and-manpower-consuming adversary proceedings."[69] Instances warranting such lesser sanctions involve far different circumstances than present here. In *Leo Glassman*, for example, we reduced the suspension imposed by a law judge based on respondent's cooperation with the Division in reconstructing records he had destroyed and our rejection of the law judge's finding of fraud in the transactions at issue.[70] Similarly, in *Raymond L. Dirks*, we reduced the law judge's imposition of a suspension to a censure because of respondent's role "in bringing [a] massive [insider trading] fraud to light."[71]

Here, in contrast, Brown's supposed cooperation essentially consisted of only his testimony about defrauding elderly investors and his kickback arrangement with Collins – testimony that he gave pursuant to a subpoena, under penalty of perjury, and that, as the Division accurately describes, was "at best" only "marginally beneficial to the Division's case." Brown was unable to recall such basic details as who came up with the scheme of sharing commissions with Collins; how they came up with that scheme; or where they devised their plan. In a particularly curious exchange, the Division asked Brown whether his conversation with Collins was "in person or over the telephone," to which Brown responded: "In person. Excuse me, I don't remember." During cross-examination, Collins's attorney then highlighted the stark differences between Brown's investigative testimony (where he denied defrauding customers) and his hearing testimony (where he admitted his misconduct). The law judge also expressly discredited some of Brown's testimony, rejecting his statement that Prime Capital's president had known about Brown's scheme.

Brown claims his cooperation also included proffer sessions, but neither the record nor Brown's supplemental briefs in response to our August 26 Order contain any evidence that the proffer sessions yielded information beyond what Brown testified to at the hearing. At best, Brown claims only that, "during the course of the formal proffer, counsel and the Division discussed a strategy for anticipated cross-examination that could 'open the door' to additional incriminating evidence against certain respondents." Brown, however, does not explain what that additional incriminating evidence might have been, and statements allegedly made during

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[69] *Stonegate Sec., Inc.*, 55 S.E.C. 346, 355 (2001) (internal quotation marks omitted) (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973)).

[70] 46 S.E.C. 209, 211 (1975).

[71] 47 S.E.C. 434, 448 (1981), *aff'd*, 681 F.2d 824 (D.C. Cir. 1982), *rev'd on other grounds*, 463 U.S. 646 (1983).

negotiations are not part of the administrative record.[72] Instead, "[t]he penalties we impose are based on Respondents' conduct as established by the record."[73]

Brown does not make clear whether he still claims to be unable to pay, but to the extent he does, we note that an inability to pay is only one factor that informs our determination regarding penalties and is not dispositive.[74] Even when a respondent demonstrates an inability to pay – which Brown has never done – "we have discretion not to waive the penalty, . . . particularly when the misconduct is sufficiently egregious."[75] Here, for the reasons described earlier, Brown's misconduct was egregious and plainly warrants the sanctions that we have imposed against him.

Collins and Wells filed a Motion Requesting Additional Briefing and Oral Argument on September 29, 2011, citing Brown's unsubstantiated claims. In that motion, Collins and Wells allege that the Division failed to disclose Brown's supposed cooperation agreement and speculate that the Division may have "called other witnesses pursuant to undisclosed cooperation agreements." However, Collins and Wells cite no evidence to support their allegations, and the Division represents in its opposition to Collins and Wells' motion that "[t]he only cooperation agreement in this matter was an undertaking by Respondent Christie Andersen" – which was publically disclosed – and that "the Division had no undisclosed cooperation agreements with . . . any other witnesses."[76] We have repeatedly warned that respondents are "not 'entitled to conduct

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[72] *Cf. Phlo Corp.*, Exchange Act Rel. No. 55562 (Mar. 30, 2007), 90 SEC Docket 1089, 1113 n.84 (citing Rule of Practice 240(6), 17 C.F.R. § 201.240(6)) (rejecting respondents' argument that the Commission should consider their offer to settle when imposing sanctions); Fed. R. Evid. 408 (stating that evidence of "conduct or statements made in compromise negotiations" is not admissible).

[73] *Phlo Corp.*, 90 SEC Docket at 1113 n.84.

[74] *See, e.g.*, *SEC v. Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008) (per curiam) (stating that "[a]t most" a defendant's ability to pay is one factor to be considered in imposing a civil money penalty or disgorgement for violations of the federal securities laws); *Robert L. Burns*, Advisers Act Rel. No. 3260 (Aug. 5, 2011), 101 SEC Docket 44807, 44825 & n.57 (noting that ability to pay a penalty is but one factor to consider in determining whether a penalty is in the public interest), *petition dismissed*, No. 11-2161 (1st Cir. Dec. 22, 2011) (per curiam); *Brian A. Schmidt*, 55 S.E.C. 576, 597-98 (2002) (same).

[75] *Burns*, 101 SEC Docket at 44825 (quoting *Philip A. Lehman*, Exchange Act Rel. No. 54660 (Oct. 27, 2006), 89 SEC Docket 536, 543).

[76] *See Prime Capital Servs., Inc.*, Exchange Act Rel. No. 61079 (Nov. 30, 2009) (order imposing remedial sanctions as to Andersen); *cf.* Rule of Practice 153, 17 C.F.R. § 201.153 (stating that counsel's signature on a filing constitutes a certification that, "to the best

(continued...)

a fishing expedition . . . in an effort to discover something that might assist [them] in [their] defense' … or 'in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory.'"[77] Having found no basis for Collins's and Wells's assertions, we deny the motion.

V.

A. Kevin Walsh's Alleged Violations

1. Background

Kevin Walsh was a registered representative associated with Prime Capital in the Firm's Melbourne, Florida, office from 1998 to 2007. A majority of Walsh's business involved selling variable annuities to retirees or soon-to-be retirees he met through free lunch seminars. At issue here are Walsh's sales to five customers. Because Walsh did not testify at the hearing, the evidence regarding what he did, or did not, tell his customers consists largely of their testimony, which we describe below.[78]

a. Harold and Barbara Koenig

Harold Koenig was a retired management consultant in his late 70s, and his wife, Barbara Koenig, was in her late 60s. Mrs. Koenig was unable to testify at the hearing, but Mr. Koenig testified that his wife had discussed all aspects of her investments with him and that he had been

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[76] (...continued)
of his or her knowledge, . . . the filing is well grounded in fact"). Respondents cite no evidence that contradicts the Division's representation.

[77] *Richard G. Cody*, Exchange Act Rel. No. 64565 (May 27, 2011), 101 SEC Docket 41887, 41912 n.61 (internal citations omitted) (quoting *Scott Epstein*, Exchange Act Rel. No. 59328 (Jan. 30, 2009), 95 SEC Docket 13833, 13860 n.54); *cf. Orlando Joseph Jett*, 52 S.E.C. 830, 830 (June 17, 1996) (order vacating order to produce memoranda for *in camera* review) ("[I]t is well established that the Supreme Court's *Brady* decision does not authorize respondents to engage in 'fishing expeditions' through confidential Government materials in hopes of discovering something helpful to their defense." (citation omitted)).

[78] Walsh did not testify at the hearing, he cross-examined only Denise Merrill, and he did not file a post-hearing brief. On appeal, Walsh filed only a petition for review, *pro se*, in which he listed thirty-one brief exceptions to the law judge's findings and conclusions. On September 16, 2010, two days after briefs were due, Walsh filed a "letter of explanation and apology" with the Commission in which he asked for "for leniency with my lack of timeliness" in filing his brief and promised "to work at providing a final document" by September 20, 2010. Walsh, however, never filed a brief in support of his petition nor did he appear at oral argument.

present for most of her discussions with Walsh. The Koenigs attended a free lunch seminar at which Walsh was speaking sometime in late 2004 or early 2005. They did so, Mr. Koenig explained, because they were looking for someone who could advise Mrs. Koenig in the event Mr. Koenig died before she did. Variable annuities were not a major topic of Walsh's lunch seminar. In later meetings at Walsh's office (meetings that Mr. Koenig attended), however, Walsh recommended variable annuities as a "good fit" for Mrs. Koenig.

At Walsh's recommendation, Mrs. Koenig purchased two AXA Equitable Accumulator variable annuities. When making his recommendation, Walsh did not discuss the fees associated with the annuities, nor did Walsh discuss the "free-look" period during which Mrs. Koenig could cancel the investment at no cost. Mr. Koenig was also "absolutely" certain that Walsh did not discuss the seven-year surrender periods contained in each annuity. Nor did Mr. Koenig recall Walsh ever explaining the guaranteed monthly income benefit rider that came with the annuities, for which Mrs. Koenig paid extra.

The process of purchasing the annuities was rushed. Mr. Koenig explained that they "were pressed to get out of there to . . . pick our kids up at school. So my wife was and myself, we were under a lot of pressure time-wise, we kept telling Carmen [Walsh's assistant] we got to get out of here, maybe we ought to come back. No, we can do it all now [responded Carmen]. So the papers came to my wife and she signed as fast as she could." When asked whether Walsh or his assistant explained the documents his wife was signing, Mr. Koenig responded, "Not really." Mr. Koenig also did not see Mrs. Koenig read any of the documents she was signing, and he testified that some forms his wife signed contained blanks that were not yet filled out. Mr. Koenig acknowledged, however, that he was out of the room for part of the time, "making telephone calls and going to the bathroom, but I saw most of the documents that my wife got involved with."

Mr. Koenig also testified that his wife's account forms were completed in a way that did not accurately reflect her investment goals. For example, Mrs. Koenig's new account form listed her overall investment objective as "Aggressive Growth" – which was the most aggressive option of four choices provided and which the account form described as "Maximum growth of assets with a tolerance for a correspondingly higher degree of volatility." Mr. Koenig testified that this choice "probably would have been mine but not hers" and that the account form "probably" should have been marked "Conservative Growth" – which the form described as "Moderate growth of assets and income with lower than average risk and fluctuation in value" and was the least aggressive option.

Similarly, the new account form listed Mrs. Koenig's risk tolerance as "Concerned" – which was the second least aggressive option and which the account form described as a customer who is "more interested in my total return over a three to five year period." When asked which risk tolerance choice was appropriate for his wife, Mr. Koenig responded that he thought his wife's tolerance was "Extremely Concerned" – which the account document described as a customer who "cannot accept even temporary loss of principal" and was again the least aggressive option. Mr. Koenig added that her tolerance was "[c]ertainly not what is

checked" and that his wife had explained to Walsh that her investment goal "was to protect her principal and to have an opportunity at a reasonable safe return without much risk but always with hoping and counting other principal being protected."

Mrs. Koenig did not receive a prospectus until approximately five months after purchasing the variable annuities, and then only after Mr. Koenig "g[o]t on my hands and beg[ged]" the issuer to send one. Almost immediately after receiving the prospectuses, Mrs. Koenig wrote to the issuer, asking that AXA refund her investments because she was not satisfied with the products. AXA initially declined to return Mrs. Koenig's investment, claiming that the free-look period had expired, but AXA later unwound her investments at no cost to her. Walsh had received approximately $6,000 in sales commissions from his sales to Mrs. Koenig, but these commissions were reversed when AXA cancelled Mrs. Koenig's investment.

b. Stanley and Barbara Hannon

Stanley Hannon, a retired airline pilot and World War II veteran, first did business with Walsh sometime in the early 2000s, when he purchased about $25,000 worth of penny stocks from Walsh. In September 2004, Mr. Hannon began discussing another investment with Walsh. Mr. Hannon was in his early 80s at the time and was supporting himself and his wife, Barbara Hannon (since deceased), on an annual income of approximately $30,000. Walsh mentioned annuities to Mr. Hannon when discussing options for the new investment, but Mr. Hannon responded, "[D]efinitely no, I did not want an annuity because it ties up your money and at my age at that time I didn't feel like the money should be tied up since it was to be used for emergency funds."

On September 15, 2004, the Hannons met Walsh and Walsh's assistant, Carmen, to discuss the investment. Walsh told the Hannons that no rooms were available at Walsh's temporary office space, so they met in the parking area near Walsh's car. Walsh told Mr. Hannon that the proposed investment "would pay about 13 percent . . . and [Mr. Hannon] said that sounds good to me." Mrs. Hannon then wrote a check for $100,000, and the Hannons put the investment in Mrs. Hannon's name – at Walsh's recommendation – because she was the younger of the two.

In discussing the investment, Walsh never told Mr. Hannon about surrender fees or about any other fee or commission associated with the investment product the Hannons were purchasing from Walsh. Mr. Hannon also stated that "there was no mention of the fact [Walsh] was contemplating an annuity." Mr. Hannon instead "thought I was getting a mutual fund, which I had asked him to do." Mr. Hannon testified that he did not have sufficient opportunity to read or understand the purchase documents before signing them.

Mr. Hannon did not realize his wife had signed a contract for a variable annuity until he received a prospectus from the issuer a month after purchasing the annuity. Because he received the prospectus so late, Mr. Hannon feared that he was past the time his wife could cancel the contract without incurring a penalty. Mr. Hannon called Walsh repeatedly to discuss the investment, but it took several weeks for Mr. Hannon to arrange a meeting. At their eventual

meeting, Mr. Hannon told Walsh "that I was not satisfied and I want my money back," but Walsh refused and, according to Mr. Hannon, "looked at me in complete disgust." Walsh allegedly told Mr. Hannon: "Are you kidding? If I gave you your money back, I would lose ten grand" (although the record indicates that Walsh received only a $2,520 commission for selling Mrs. Hannon the variable annuity). Unable to cancel the annuity contract through Walsh, Mr. Hannon contacted the issuer, General Electric, which also denied Mr. Hannon's request. Mrs. Hannon held her variable annuity until April 2007, when she finally liquidated it.

c. Allan Chambers

Allan Chambers was a seventy-seven-year-old retiree who had been managing his own investments when he met Walsh in 2004 at a free lunch seminar, where he hoped to get advice on increasing his investment income. Chambers had twenty-five years of investment experience with stock, bonds, and mutual funds at the time, but had no experience investing in variable annuities.

After the free seminar, Chambers met Walsh at his office, where Walsh recommended that Chambers invest in a variable annuity. Chambers subsequently purchased a Manulife variable annuity from Walsh on or about March 18, 2004. (Manulife later changed its name to John Hancock as the result of a merger.) According to Chambers, Walsh told him that the annuity had an annual administrative charge of $30 and a surrender penalty, but did not tell him about any other fees associated with the variable annuity, such as those related to mortality and expense risk or riders.

The annuity contract Chambers signed contained a representation that he received a copy of the most recent prospectus during Walsh's sales presentation, but Chambers testified that he did not receive a prospectus until approximately thirty days after purchasing the annuity. Documents in the record corroborate Chambers's testimony, as disclosure forms that explained some of the annuity's key terms and contained a representation that Chambers received a prospectus were not signed and dated until June 2005 – fifteen months after Chambers purchased the investment.

In June 2005, Chambers bought another variable annuity (issued by Genworth Life & Annuity Company) from Walsh. As with the first annuity, the record contains discrepancies about what disclosures Walsh provided to Chambers. In particular, the record contains two versions of a switch letter authorizing the transfer of some of Chambers's investments into the Genworth annuity. The two versions are identical except that one form adds a more expansive explanation for why Chambers was authorizing the switch, adding that Chambers understood that the annuity's benefits "require additional expenses," that Chambers "understood the use of annuitization," and that "penalties and liquidity were explained." Chambers, however, could not remember Walsh mentioning any fees related to the Genworth variable annuity other than a $30 administrative fee and testified that the additional language on the letter was not his handwriting (the handwriting does, in fact, look different from other handwriting on the forms).

Shortly after buying the second variable annuity, Chambers noticed that an annual service fee had been withdrawn from his account. Chambers called Walsh to complain, and "lo and behold for the first time ever in our conversation [I] find out that I was paying him a fee for his advice." Chambers decided that Walsh "was not being straight with me and I wanted to get out." Chambers complained to both John Hancock and Genworth that Walsh had deceived him and asked that the issuers waive their surrender fees. Neither did so. Chambers nevertheless liquidated his variable annuities, incurring approximately $12,000 in surrender charges. Walsh earned $7,712 in commissions from selling variable annuities to Chambers.

d. Denise Merrill

Denise Merrill and her husband, Rodney Merrill, met Walsh in 2006. Mr. Merrill , who was unable to testify, had recently inherited money, and Walsh was the first person they consulted about what to do with that money. The Merrills thought that Walsh seemed knowledgeable and personable and, after several meetings, jointly purchased three variable annuities from him.

During the purchasing process, Walsh never mentioned the term "variable annuity." Mr. Merrill "asked repeatedly" about fees before purchasing the annuities, but Walsh "would change the subject." Walsh rushed through the signature process, and Walsh's assistant told the Merrills that she would fill in certain blanks on the signature forms later. The Merrills asked Walsh to see the signature documents before their meeting with Walsh, but Walsh did not provide them. Instead, the Merrills got copies of the paperwork only after requesting them directly from Prime Capital's parent firm, Gilman Ciocia. Walsh earned $8,400 in commissions from selling the variable annuities to the Merrills.

A year after investing with Walsh, the Merrills withdrew some money to fund their daughter's wedding. They were surprised to learn that the withdrawals incurred penalties and taxes. Mr. Merrill tried to contact Walsh, but was told by his assistant that Walsh was "unavailable." The Merrills sent complaints to Walsh, Prime Capital' s compliance department, and the State of Florida. Prime Capital refused to reverse the Merrills' investments, contending that the Merrills had signed a disclosure form indicating that they understood their investments. Due to the high surrender penalties, the Merrills still held their variable annuity investments at the time of the hearing.

2. Antifraud Violations

We find that Walsh willfully violated the antifraud provisions through material misstatements and misleading omissions in communications to Chambers, the Hannons, the Koenigs, and the Merrills.[79] Walsh's customers consistently testified that he failed to inform them of key aspects of the investments he was recommending.[80] Mr. Koenig, for instance, testified that Walsh never told Mrs. Koenig about surrender periods and never gave her a prospectus. Chambers similarly testified that Walsh made "no mention of any cost" and that he did not learn about the various fees until they were withdrawn from his account. Mrs. Merrill testified that Walsh would not answer her husband's direct questions about the existence of fees and, in fact, never told her she was purchasing a variable annuity. The customers' testimony also shows that Walsh knew he was making investments contrary to his customers' directions, as Mr. Hannon testified that Walsh used Mrs. Hannon's money to purchase a variable annuity despite a direct instruction against doing so. Customers also testified that Walsh rushed them through the purchasing process (and in some cases did not give them prospectuses or other disclosure documents), further confirming that Walsh's conduct was intentional.

3. Books and Records Violations

We find that the record contains insufficient evidence to conclude that Walsh aided, abetted, or was a cause of Prime Capital's books and records violations. The primary evidence against Walsh is Mr. Koenig's testimony that his wife's new account forms did not accurately reflect her investing preferences. Mr. Koenig's testimony, however, was equivocal, and Mrs. Koenig did not testify. The evidence, therefore, is insufficient to conclude that Walsh purposefully – or even recklessly – misrepresented Mrs. Koenig's investment wishes on an account document. The only other evidence against Walsh was the alteration in Chambers's switch letter, but the record contains no evidence that Walsh was responsible for or even knew about the alteration.

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[79] The Division also alleged that Walsh violated the antifraud provisions in connection with another customer, Ralph Angelillo, claiming that Angelillo had not approved a transfer that Walsh effected in his account in 2001. Angelillo, however, did not testify, and the record contains too little evidence on which to base a finding that Walsh's sales to Angelillo violated the antifraud provisions.

[80] *Alacan*, 57 S.E.C. at 727 ("The deceptive conduct element is met when the broker omits 'to inform the customer of the materially significant fact of the trade before it is made.'" (quoting *Simpson*, 55 S.E.C. at 790-91)).

4. Sanctions

a. Bar

We find it to be in the public interest to impose a bar against Walsh from association with a broker, dealer, or investment adviser in any capacity. Walsh engaged in egregious conduct that raises serious doubts about his fitness to work in the securities industry. Walsh failed to disclose key terms of variable annuities he was recommending to his customers and, in some cases, lied to customers about the fact that they were purchasing a variable annuity. The record also shows that Walsh acted with scienter. A bar will address the risk of allowing Walsh to remain in the securities industry, prevent Walsh from putting the investing public at risk, and serve as a deterrent to others in the securities industry who might engage in similar misconduct.[81]

b. Cease-and-Desist Order

The record establishes that ordering Walsh to cease and desist from committing or causing any violations or future violations of the antifraud provisions is appropriate. As noted above, Walsh's violations were egregious. He repeatedly took advantage of and defrauded older customers, many of whom had limited resources. These repeated violations show a reasonable likelihood that Walsh will commit future violations.

c. Disgorgement

We find it appropriate to order Walsh to disgorge $18,632, plus prejudgment interest. This amount equals the commissions Walsh earned from his fraudulent variable annuity sales to Chambers, Mrs. Hannon, and Mrs. Merrill, and Walsh made no effort to show that this amount is not a reasonable approximation of his ill-gotten gains. Ordering this disgorgement will prevent Walsh from profiting from his violations and will deter others from violating the federal securities laws.

d. Civil Monetary Penalty

The Division urges the Commission to impose a $630,000 penalty against Walsh, which would represent a maximum third-tier penalty for each of Walsh's customers, including Angelillo.[82] As with Brown and Collins, however, we believe that a maximum second-tier (not third-tier) penalty is appropriate for Walsh and, although the penalty should be applied per

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[81] Because Walsh was an employee of Gilman Ciocia at the time of the misconduct, barring him from associating with an investment adviser does not raise a collateral bar issue. *See supra* notes 38-39 and accompanying text.

[82] *See supra* note 79 (discussing Angelillo).

customer, the calculation should not include customers who fall outside the applicable limitations period.

Walsh's egregious violations involved a failure to disclose material information to his customers and thus support a maximum second-tier penalty. Walsh's violations, however, did not expose his customers to significant risk of substantial loss or result in substantial pecuniary gain to Walsh, and therefore do not support a third-tier penalty. As for the number of "acts or omissions" against which to apply the maximum second-tier penalty, we believe that imposing a penalty for each defrauded customer is appropriate. Although Walsh's misconduct followed a general pattern, his acts and omissions toward each customer were nevertheless distinct. We therefore order Walsh to pay $255,000 in civil penalties, reflecting a maximum second-tier civil monetary penalty for each of the four customers (Chambers, Mrs. Hannon, Mrs. Koenig, and Merrill) that we find Walsh defrauded.

VI.

A. Mark Wells's Alleged Antifraud Violations

Mark Wells has been a registered representative associated with Prime Capital since May 2001. In 2002, Wells was the biggest producer in Prime Capital's Boca Raton, Florida, office, which had eighteen registered representatives. At issue here are Wells's sales of variable annuities to five elderly customers.[83]

The Division alleges that Wells violated the antifraud provisions by, among other things, material misstatements and misleading omissions in communications to customers regarding the potential returns of variable annuities or the ability to withdraw money from such annuities without penalty. Although the record raises questions about Wells's sales practices, we believe the record, taken as a whole, falls short of establishing that Wells violated the antifraud provisions. Wells's customers testified that they were often confused about, or even unaware of, certain aspects of the variable annuities they purchased from Wells. The customers' testimony, however, contains too many gaps and contradictions to be sure what occurred during Wells's sales presentations.[84]

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[83] Wells is still employed by Prime Capital, but Prime Capital and Gilman Ciocia agreed to prohibit Wells from selling variable annuities to anyone more than 59 ½ years old until an independent compliance consultant had completed its review and new policies and practices were put in place. *See Prime Capital Servs., Inc.*, Securities Act Rel. No. 9113 (Mar. 16, 2010).

[84] The law judge did not make specific credibility findings regarding Wells or his customers.

The record is unclear, for example, about whether Wells failed to disclose the fees and risks associated with variable annuities he recommended. One customer testified that Wells did not tell her about key terms of her investments, including the existence of surrender fees. The customer acknowledged, however, that Wells had "explained many things" to her, that she signed various documents that disclosed the annuities' material terms, and that she expressly chose not to read those materials. Furthermore, although the record contains evidence that one of the customer's account forms was altered after she signed it, the changes were not material and the record contains no evidence that Wells was responsible for those changes. Another customer testified that she understood – incorrectly – that her principal was "absolutely" safe, but she did not explain what Wells told her that made her believe this. This second customer also acknowledged signing documents that disclosed her annuities' terms and that she never felt rushed during the purchasing process.

The record is also unclear about whether Wells failed to disclose commissions he earned from selling variable annuities to his customers: one customer did not testify about whether Wells disclosed his commissions, and another customer stated that she "knew [Wells] was making a good commission on the things he was selling." Although the record contains an arbitration complaint against Prime Capital alleging that Wells failed to disclose his commissions, the customer who had made that complaint did not repeat this allegation in her testimony and instead testified only that, to the extent Wells was earning commissions, he was entitled to them. Evidence of settlements that Prime Capital and Wells reached with some customers over allegations of improper sales practices offer some support for finding that Wells's annuity sales were improper, but the record contains few details about the circumstances surrounding those settlements.

The admission by Nicole Loffredo (Wells's assistant) during the hearing that she signed customers' initials for customers during the sales process is troubling. However, the evidence does not establish that Wells knew about this practice given all the uncertainty about what occurred during the sales process. The evidence also fails to connect Wells's practice of listing variable annuities as liquid assets with a fraudulent intent. Wells readily acknowledged that he completed forms this way, but claimed that he had been trained to do so, and that he had not been told it was wrong until he testified before the Division. The law judge accepted Wells's testimony in this regard, finding that there was "no evidence in the record that [Wells] was aware that his role [in completing the account forms incorrectly] was part of an overall activity that was improper." We accordingly find that the record contains insufficient evidence to find that Wells violated the antifraud provisions.

B. Wells's Alleged Books and Records Violations

The Division also argues that Wells was a cause of Prime Capital's books and records violations because his customers' new account forms were "erroneous and created a distorted picture of customers' financial situations." We disagree. Although Wells does not dispute that he filled out his customers' new account forms incorrectly, the record does not establish that Wells knew or should have known that he was completing the forms incorrectly at the time.

Wells testified that he had been trained to complete the forms as he did, and he acknowledged that he had done so for a long time. We can find no evidence to contradict Wells's claim, and the law judge appears to credit Wells's testimony, noting that there was "no evidence in the record that [Wells] was aware that his [conduct] was part of an overall activity that was improper."

The Division also alleges that Wells added entries and information to customer forms without customer knowledge or consent. As noted in the antifraud discussion above, however, although one customer's account documents appear to have been altered after she signed them, the changes were minor, and we can find no evidence that Wells was responsible for those changes. Wells's assistant also admitted that she signed customers' initials on forms, but the evidence does not establish that Wells knew or should have known of this practice. We accordingly find that the record contains insufficient evidence to find that Wells was a cause of Prime Capital's books and records violations.

An appropriate order will issue.[85]

By the Commission (Chairman SCHAPIRO and Commissioners PAREDES, AGUILAR and GALLAGHER); Commissioner WALTER not participating.

Elizabeth M. Murphy
Secretary

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[85] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 9299 / February 27, 2012

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66469 / February 27, 2012

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3376 / February 27, 2012

Admin. Proc. File No. 3-13532

In the Matter of the Application of

ERIC J. BROWN, MATTHEW J. COLLINS, KEVIN J. WALSH, AND MARK W. WELLS

c/o Robert G. Heim, Esq.
Meyers & Heim LLP
444 Madison Ave., 30th Floor
New York, NY 10022

and

Jane Degenhardt Bruno, Esq.
Bruno & Degenhardt
10615 Judicial Drive, Suite 703
Fairfax, VA 22030

and

Kevin J. Walsh
160 Deland Ave.
Indialantic, FL 32903

ORDER IMPOSING REMEDIAL SANCTIONS (CORRECTED)

On the basis of the Commission's opinion issued this day, it is

ORDERED that Eric J. Brown, Matthew J. Collins, and Kevin J. Walsh be, and they hereby are, barred from association with any broker, dealer, or investment adviser; provided, however, that Collins may apply to become so associated in a non-supervisory capacity after two years; and it is further

ORDERED that Brown, Collins, and Walsh cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933; Section 10(b) of the Securities Exchange Act of 1934; and Exchange Act Rule 10b-5; and it is further

ORDERED that Brown and Collins cease and desist from committing or causing any violations or future violations of Exchange Act Section 17(a) and Exchange Act Rule 17a-3; and it is further

ORDERED that Brown disgorge $11,147, plus prejudgment interest of $8,065.24, such prejudgment interested calculated beginning from November 1, 2001, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Collins disgorge $2,915, plus prejudgment interest of $1,324.74, such prejudgment interested calculated beginning from March 1, 2005, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Walsh disgorge $18,632, plus prejudgment interest of $6,775.08, such prejudgment interested calculated beginning from March 1, 2006, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Brown pay a civil money penalty of $560,000; and it is further

ORDERED that Collins pay a civil money penalty of $310,000; and it is further

ORDERED that Walsh pay a civil money penalty of $255,000; and it is further

ORDERED that the proceedings against Mark W. Wells be, and they hereby are, dismissed.

Payment of the amounts to be disgorged and the civil money penalties shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, 100 F Street NE, Mail Stop 6042, Washington, DC 20549; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding. A copy of the cover letter and check shall be sent to Alix Biel, Division of Enforcement, Securities and Exchange Commission, 3 World Financial Center, 4th Floor, New York, NY 10281-1022.

By the Commission.

Elizabeth M. Murphy
Secretary