

NOW THEREFORE, in connection with the investigation, the Division determined that the Respondent has engaged and is about to engage in acts or practices constituting violations of the Act and/or the Prior Act and hereby includes in this Order to Cease and Desist a statement of the civil penalty and costs of the investigation sought, a statement of the reasons for the Order, and a notice that a hearing will be scheduled if Respondent requests a hearing.

FACTUAL HISTORY

1. In Item 3.A. of Part 1.A. of each of the Forms ADV, which the Division received from Respondent on July 5, 2005, and August 9, 2006, Respondent stated that he operates his investment advisory business as a sole proprietorship.
2. In Item 1.B. of Part 1.A. of each of the Forms ADV, which the Division received from Respondent on July 5, 2005, and August 9, 2006, Respondent stated that, while operating as a sole proprietorship, he conducts his investment advisory business under the name of "Michael R. Kennedy Investment Counsel."
3. As a sole proprietor, Respondent owns, manages, and/or directs the investment advisory activities of Michael R. Kennedy Investment Counsel.
4. As a sole proprietor, Respondent is both an investment adviser and an investment adviser representative, as defined by the Act and the Prior Act, and at times has been registered as both in South Carolina.
5. Respondent, as an investment adviser and an investment adviser representative with discretionary authority over client accounts, places orders to purchase and sell securities in the securities accounts of his clients.
6. Respondent, for compensation, advises others as to the value of securities or the advisability of investing in, purchasing, or selling securities and/or, as part of his regular business, issues or promulgates analyses or reports relating to securities.

7. Respondent, as an investment adviser representative, is associated with an investment advisor and makes recommendations or otherwise gives investment advice regarding securities; manages securities accounts or portfolios of clients; determines which recommendations or advice regarding securities should be given; provides investment advice regarding securities; holds himself out as providing investment advice regarding securities; receives compensation to solicit, offer, or negotiate for the sale of or for selling investment advice regarding securities; or supervises employees who perform any of the foregoing.
8. Respondent has engaged in investment advisory activities under the names of Michael R. Kennedy, Michael Rayfield Kennedy, Michael R. Kennedy Investment Counsel, and Michael R. Kennedy/Investment Counsel.
9. Regarding clients WHK and STK:
 - a. On or about, December 29, 1991, clients WHK and STK signed a "Schwab One Account Application" to open a Charles Schwab and Company ("Schwab") account. An account number is written in the "For Charles Schwab Use Only" section of this form.
 - b. Respondent and clients WHK and STK signed a form titled "Schwab Brokerage Account Limited Power of Attorney (LPOA)." On this form, Respondent represented that he is "a professional investment advisor and will be receiving compensation for managing this account." The same account number written on the "Schwab One Account Application" is written on this limited power of attorney form.
 - c. Schwab provided to the Division the "Schwab One Account Application" signed on or about December 29, 1991, by clients WHK and STK and the "Schwab Brokerage Account Limited Power of Attorney (LPOA)" signed by Respondent and clients WHK and STK.

- d. Schwab issued account statements to clients WHK and STK for the months of October 2006 through December 2006 for the same account number that appears in the "For Charles Schwab Use Only" section of the "Schwab One Account Application" and that is handwritten on the "Schwab Brokerage Account Limited Power of Attorney (LPOA)."

10. Regarding client RB:

- a. On or about August 28, 1992, Respondent signed a form titled "Schwab Authorization to Pay Fees to Agent" indicating that "Michael Kennedy Investment Counsel" was acting as an agent to buy and sell securities for the account of client RB. This form, also signed by client RB, authorized Schwab to pay Michael Kennedy Investment Counsel from client RB's account the management fees specified in client RB's agreement with Michael Kennedy Investment Counsel.
- b. On or about November 11, 1998, Respondent and client RB signed a form titled "Schwab Brokerage Account Limited Power of Attorney (LPOA)." On this form, Respondent represented that he is "a professional investment advisor and will be receiving compensation for managing this account."
- c. Schwab provided to the Division the "Schwab Brokerage Account Limited Power of Attorney (LPOA)" form signed on or about November 11, 1998, by client RB and Respondent.
- d. Schwab issued an account statement to client RB for the month of October 2006 for the same account number that appears in the "For Charles Schwab Use Only" section of the power of attorney form referenced in paragraphs 10.b. and 10.c. above.

11. Regarding clients MRT and HET:

- a. On or about April 11, 1994, Respondent signed Schwab's form titled "Financial Advisor Agreement," representing that Michael R. Kennedy, working for Michael R. Kennedy/Investment Counsel, is the agent for clients MRT and HET, is a professional Investment Advisor, and has authority to direct trades as agent for clients MRT and HET.
 - b. On or about April 21, 1994, clients MRT and HET signed an application to open a Schwab One Account, authorizing Michael R. Kennedy/Investment Counsel to execute trades in their account and authorizing Schwab to deduct Michael R. Kennedy/Investment Counsel's fees and expenses from their account as directed by Michael R. Kennedy/Investment Counsel.
 - c. Schwab provided to the Division the "Schwab One Account Application" signed on or about April 21, 1994, by clients MRT and HET and the "Financial Advisor Agreement" signed on or about April 11, 1994, by Respondent.
 - d. Schwab issued an account statement to clients MRT and HET for the month of October 2006 for the same account number that appears in the "For Charles Schwab Use Only" section of the "Schwab One Account Application" and that is handwritten on the "Financial Advisor Agreement."
12. On January 29, 2004, the Division sent a letter to Respondent informing him that "Michael Rayfield Kennedy" has now been registered as an investment adviser and investment adviser representative in South Carolina. The Division also stated in its letter, "All registrations expire on December 31 of the year filed."
13. On December 31, 2004, Respondent's registration as an investment adviser and investment adviser representative in South Carolina expired.

14. On March 16, 2005, the Division received a letter from Respondent in which he acknowledged that he "failed to pay the RIA fee for this office" and that he is "in the process of preparing a Form ADV and a Statement of Financial Position (Condition)" in order to register for 2005.

15. On April 12, 2005, the Division noted in its files that Respondent's application for registration as an investment adviser and an investment adviser representative is being held in pending status until the Division receives a complete application.

16. Regarding client DHS:

a. On or about May 26, 2005, client DHS signed a "Schwab One Brokerage Account Application" to open a Schwab account.

b. On or about May 26, 2005, Respondent and client DHS signed a form titled "Schwab Power of Attorney." On this form, Respondent represented that "I am an Investment Advisor and I will be acting in my capacity as an Investment Advisor with respect to this account."

c. Schwab provided to the Division client DHS' "Schwab One Brokerage Account Application" and the "Schwab Power of Attorney" form.

d. Schwab issued account statements to client DHS for the months of October 2006 through December 2006; however the "Schwab One Account Application" and the "Schwab Brokerage Account Limited Power of Attorney (LPOA)" do not include any account number.

17. On June 1, 2005, the Division received the financial statement of "Michael R. Kennedy or Cathryn W. Kennedy" as of March 31, 2005, as part of Respondent's application for 2005 registration as an investment adviser.

18. Regarding client GJH:

- a. On or about June 3, 2005, client GJH signed a "Schwab IRA Account Application" to open a Schwab IRA account.
 - b. On or about June 3, 2005, client GJH and Kennedy signed an "Investment Advisory Agreement" in which client GJH "appoint[ed] Michael R. Kennedy/Investment Counsel as advisor."
 - c. The letterhead on the Investment Advisory Agreement dated June 3, 2005, between client GJH and Respondent reads: "Michael R. Kennedy/Investment Counsel." The letterhead also includes the following statements: "Registered Investment Advisor State of S.C. and SEC" and "Investment Portfolio Management for Businesses and Individuals."
 - d. On or about June 3, 2005, Respondent and client GJH signed a form titled "Schwab Power of Attorney." On this form, Respondent represented that "I am an Investment Advisor and I will be acting in my capacity as an Investment Advisor with respect to this account."
 - e. Schwab provided to the Division client GJH's "Schwab IRA Account Application," the "Investment Advisory Agreement," and the "Schwab Power of Attorney."
 - f. Schwab issued account statements to client GJH for the months of October 2006 through December 2006; however the "Schwab IRA Account Application" and the "Schwab Power of Attorney" do not include any account number.
19. On or about July 2, 2005, Respondent signed a Schwab form titled "Investment Advisor Registration Information." On this form, Respondent represented that his name was Michael Rayfield Kennedy, that his firm's name was "Michael R. Kennedy Investment Counsel," and that "I (or the firm I am affiliated with) am registered as an investment advisor with a state securities regulator."

20. Regarding the accounts of client RB, clients MRT and HET, clients WHK and STK, and client GJH, Schwab provided to the Division the "Investment Advisor Registration Information" that was dated July 2, 2005.
21. On July 5, 2005, the Division received Parts I and II of Respondent's Form ADV, as part of his application for registration for 2005.
22. In Part 1A of the Form ADV that the Division received on July 5, 2005, Respondent represented that he maintains at his principal office and place of business any of the books and records that he is required to keep.
23. On August 10, 2005, Respondent's registration for 2005 as an investment adviser and an investment adviser representative became effective.
24. On August 11, 2005, the Division sent a letter to Respondent informing him that "Michael Rayfield Kennedy" has now been registered as an investment adviser in South Carolina and that "Michael Kennedy" has now been registered as an investment adviser representative in South Carolina. The Division also stated in its letter that "[a]ll registrations expire on December 31 of the year filed."
25. The Division has identified eight (8) trades in client accounts held by Schwab that Respondent made between January 1, 2005, and August 10, 2005. Three (3) of these trades were purchases of securities in June 2005 for new client DHS. Three (3) of these trades were purchases of securities in July 2005 for new client GJH.
26. On December 31, 2005, Respondent's registration that became effective on August 10, 2005, as an investment adviser and an investment adviser representative in South Carolina expired.
27. On August 9, 2006, the Division received, as part of Respondent's application for registration for 2006, Parts I and II of Form ADV, a check for \$210, a copy of Respondent's Investment Advisory Agreement, and a Statement of Financial Condition for "Michael R. Kennedy and

Cathryn W. Kennedy” as of December 31, 2005. In the cover letter accompanying these documents, Kennedy stated that his client contract had not changed.

28. Respondent’s letterhead on his cover letter, on his and his wife’s Statement of Financial Condition, and on his Investment Advisory Agreement that the Division received from Respondent on August 9, 2006, reads “Michael R. Kennedy/Investment Counsel” and includes the following statements: “Registered Investment Advisor State of S.C. and SEC” and “Investment Portfolio Management for Businesses and Individuals.”

29. In Part 1A of the Form ADV that the Division received on August 9, 2006, Respondent represented that he maintains at his principal office and place of business any of the books and records that he is required to keep.

30. On or about August 10, 2006, the Division sent a letter to Respondent informing him that Respondent’s applications to be registered as an investment adviser and an investment adviser representative are incomplete and that Respondent must submit a Form U4 and inform the Division if Respondent has made any changes in the investment advisory agreements with clients. In this letter, the Division also requested a sworn statement as to Respondent’s investment advisory activities in 2006, because the Respondent’s registration as an investment adviser and an investment adviser representative had expired on December 31, 2005. The letter stated that “until such time as all exhibits and inquiries are completed, your application will be held in a pending status” and that “[u]pon receipt of this information, your application will be given further consideration.”

31. The Division received a complete version of Kennedy’s Form U4 on October 11, 2006, and Respondent had informed the Division in a letter received by the Division on August 9, 2006, that his client contract had not changed. However, the Division has no record of receiving the requested sworn statement of Respondent’s investment advisory activities in 2006.

32. Regarding prospective client MEP:

- a. Kennedy sent a letter to prospective client MEP dated August 25, 2006, that included “information you requested and that we promised you.”
- b. The letterhead on the August 25, 2006, letter to prospective client MEP reads: “Michael R. Kennedy/Investment Counsel” and includes the following statements: “Registered Investment Advisor State of S.C.” and “Investment Portfolio Management for Businesses and Individuals.”
- c. The two-page document attached to the August 25, 2006, letter to prospective client MEP includes fifteen (15) numbered paragraphs. Some of the statements in this two-page document include the following:
 - i. “Over the past 100 years, stocks with dividends reinvested have averaged 10% per year.”
 - ii. “Investing cash into stocks and bonds will be a gradual process.”
 - iii. “We do not buy mutual funds.”
 - iv. “What we will do is open an account in your name. You will sign an (sic) LPOA (Limited Power of Attorney) allowing me to manage your account. Together, we will collect the information for the account opening papers and sign them. Finally, we will sign the contract between Michael R. Kennedy Investment Counsel and the account holder.”
- d. Respondent also prepared “A Suggested Long Term Investment Plan Offered By Michael R. Kennedy Investment Counsel” for prospective client MEP.

33. Regarding client REGT:

- a. Kennedy sent a letter to client REGT dated August 25, 2006, that included information about the stock and bond markets and about the economies of the United

States and some foreign countries. In this letter, Kennedy identified the following investment policy:

- i. "Continue to grudgingly sell United States stocks as they become increasingly overvalued."
 - ii. "Place the cash proceeds from these sales in 3 month Certificates of Deposit."
 - iii. "Wait on an anticipated decline in United Kingdom stocks and begin buying at that time."
 - iv. "Begin buying the stocks of home builders and building supply companies on weakness."
 - v. "Take advantage of what appears to be bargain circumstances in Germany."
- b. The letterhead on the August 25, 2006, letter to client REGT reads: "Michael R. Kennedy/Investment Counsel" and includes the following statements: "Registered Investment Advisor State of S.C." and "Investment Portfolio Management for Businesses and Individuals."
- c. Respondent sent an invoice to client REGT dated August 25, 2006, for "First Quarter 2006 Investment Counsel Fee." This invoice includes a statement that assets under management as of March 31, 2006 were \$24,714.15.
- d. The letterhead on the August 25, 2006, invoice to client REGT reads: "Michael R. Kennedy/Investment Counsel" and includes the following statements: "Registered Investment Advisor State of S.C." and "Investment Portfolio Management for Businesses and Individuals."
34. On October 4, 2006, the Division conducted an onsite audit of the Respondent's investment advisory activities.

35. During the onsite audit, Division personnel asked Kennedy if he understood that he was not registered and that he could not do any business until he provided a complete application for registration and the Division approved his completed application. Kennedy answered, "Yes."

36. During the onsite audit, the Division obtained the following information and documentation:

- a. Kennedy gave Division personnel a bag used by Blythewood Pharmacy & Home Medical Equipment in Blythewood, South Carolina, that included an advertisement for "Michael R. Kennedy Investment Counsel." This advertisement included the following statement: "Registered Investment Advisor State of S.C."
- b. Kennedy stated that he has approximately \$2,000,000 of assets under management in eleven accounts and that he has discretionary authority on these accounts.
- c. Kennedy stated that he does not recommend mutual funds.
- d. Kennedy stated that he does not discuss investment objectives with clients and does not have a suitability questionnaire to complete with clients. Kennedy also stated that he does not make notes regarding conversations with clients at any time. Kennedy does not know the ages of his clients but thinks that most are over forty and one may be younger than thirty.
- e. Kennedy stated that he does not have a written privacy policy concerning client information.
- f. Kennedy has used three off-site contract secretaries who may have had access to material, nonpublic information and who still may have client and other Respondent information in both hard and soft copy form.
- g. Division personnel observed that Respondent did not produce many of the requested documents as follows:
 - i. Respondent did not produce any investment advisory contracts with clients;

- ii. Respondent produced only three of the quarterly fee statements sent to clients;
- iii. Respondent did not produce an income statement of Respondent's investment advisory business;
- iv. Respondent did not produce any signed power of attorney forms or any other forms granting Respondent discretionary authority with respect to client funds, securities, or transactions;
- v. Respondent did not produce any written information about each investment advisory client that was the basis for Respondent making any recommendation or providing any investment advice to such client;
- vi. Respondent did not produce Schwab account agreement forms;
- vii. Except for three letters, Respondent did not produce correspondence with clients or notes made about advice given to clients;
- viii. Respondent did not produce a memorandum of each order given by the Respondent for the purchase or sale of any security for a client;
- ix. Respondent did not produce a journal that provided a detail of deposits made or revenue earned;
- x. Respondent did not produce written procedures reasonably designed to achieve compliance with applicable securities laws and regulations; and
- xi. Respondent did not produce a written policy and procedure that was reasonably designed to prevent the misuse of material, nonpublic information by Respondent, as required by 15 U.S.C. § 80b-4a and S.C. Regulation 13-502A(17).

h. Kennedy stated that many of the documents that he could not provide had been “inadvertently destroyed” because Kennedy did not believe that he needed to keep documents more than three years old.

i. Kennedy gave Division personnel a business card that reads “Michael R. Kennedy Investment Counsel” and includes the following statement: “Registered Investment Advisor State of S.C.”

37. During the onsite audit, Kennedy gave to Division personnel his Form U4, one of the three requested items in the Division’s August 10, 2006, letter.

38. On October 11, 2006, the Division received from Respondent a page that was missing from the Form U4 that Kennedy gave to the Division on October 4, 2006.

39. On the Form U4 that was received by the Division on October 11, 2006, Kennedy represented that the firm’s name is “Michael R. Kennedy Investment Counsel”; he was registered from August 1, 1988, through December 31, 2005; and he had not been registered from January 1, 2006, to the present. Kennedy signed page fourteen (14) of Form U4 on September 6, 2006.

40. The Division has identified twenty-four trades in client accounts held by Schwab that Respondent made from January 19, 2006, through October 26, 2006.

41. The Division has not received an application for registration as an investment adviser or investment adviser representative for 2007 from Respondent.

APPLICABLE LAW

42. Pursuant to S.C. Code Ann. § 35-1-703 of the Act, the Act took effect on January 1, 2006.

43. Pursuant to S.C. Code Ann. § 35-1-701(a) of the Act, the Prior Act governs actions or proceedings that are initiated based on conduct occurring before January 1, 2006.

44. Pursuant to S.C. Code Ann. § 35-1-102(15) of the Act and S.C. Code Ann. § 35-1-20(8) of the Prior Act, an investment adviser is a person that, for compensation, engages in the business of advising others as to the value of securities or the advisability of investing in, purchasing, or selling securities, or that, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.

45. Pursuant to S.C. Code Ann. § 35-1-403(a) of the Act and S.C. Code Ann. § 35-1-420(1) of the Prior Act, it is unlawful for a person to transact business in South Carolina as an investment adviser unless that person is registered in South Carolina as an investment adviser or is exempt from registration.

46. Pursuant to S.C. Code Ann. § 35-1-102(16) of the Act, an investment adviser representative is an individual employed or associated with an investment adviser and who makes recommendations or otherwise gives investment advice regarding securities, manages securities accounts or portfolios of clients, determines which recommendation or advice regarding securities should be given, provides investment advice regarding securities, holds himself out as providing investment advice regarding securities, or performs certain other investment-related activities.

47. Pursuant to S.C. Code Ann. § 35-1-20(9) of the Prior Act, an investment adviser representative is, with respect to an investment adviser registered or required to be registered, any partner, officer, director, or other person occupying a similar status or performing similar functions or other individual who is employed by or associated with an investment adviser and who

- a. Makes recommendations or otherwise gives investment advice regarding securities;
- b. Manages accounts or portfolios of clients;
- c. Determines which recommendation or advice regarding securities should be given;

- d. Solicits, offers, or negotiates for the sale of or sells investment advisory services; or
 - e. Supervises employees who perform any of the foregoing.
48. Pursuant to S.C. Code Ann. § 35-1-404(a) of the Act and S.C. Code Ann. § 35-1-420(1) of the Prior Act, it is unlawful for an individual to transact business in South Carolina as an investment adviser representative unless that individual is registered in South Carolina as an investment adviser representative or is exempt from registration.
49. Pursuant to S.C. Code Ann. § 35-1-460 of the Prior Act, registration as an investment advisor or investment adviser representative became effective when the Commissioner so ordered.
50. Pursuant to S.C. Code Ann. § 35-1-430 of the Prior Act, the registrations of an investment adviser and investment adviser representative that became effective after approximately June 4, 2003, expired at midnight on December 31 of the calendar year in which the registrations became effective, unless renewed.
51. Pursuant to S.C. Code Ann. § 35-1-406(a) of the Act, investment advisers and investment adviser representatives register with the Division by filing an application and a consent to service of process, passing one or more required examinations, and paying the fee required by statute and any reasonable filing fee imposed by the Commissioner.
52. Pursuant to S.C. Code Ann. § 35-1-406(a) of the Act, the application for registration must contain:
- a. The information or record required for the filing of a uniform application; and
 - b. Upon request by the Commissioner, any other financial or other information or record that the Commissioner determines is appropriate.
53. Pursuant to S.C. Code Ann. § 35-1-406(c) of the Act, if an order is not in effect and a proceeding is not pending under S.C. Code Ann. § 35-1-412, registration becomes effective

at noon on the forty-fifth day after a completed application is filed, unless the registration is denied.

54. Pursuant to S.C. Code Ann. § 35-1-404(c) of the Act, the registration of an investment adviser representative is not effective while the investment adviser representative is not employed by or associated with an investment adviser registered under the Act.
55. Pursuant to S.C. Code Ann. § 35-1-411(c) of the Act, subject to Section 222 of the Investment Advisers Act of 1940, an investment adviser registered or required to be registered under the Act shall make and maintain the accounts, correspondence, memoranda, papers, books, and other records required by rule or order issued under the Act.
56. Pursuant to S.C. Code Ann. § 35-1-590 of the Prior Act, subject to Section 222 of the Investment Advisers Act of 1940, a licensed investment adviser shall make and keep such accounts, correspondence, memoranda, papers, books, and other records as the Commissioner prescribes by rule or order.
57. Pursuant to S.C. Code of Regulations 13-408(A) of the Act and Order Number 98001 adopted under the Prior Act, some of the books and records that every investment adviser registered or required to be registered under the Act shall make and keep include the following:
 - a. A journal or journals, including cash receipts and disbursement records, and any other records of original entry forming the basis of entries in any ledger;
 - b. General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income, and expense accounts;
 - c. A memorandum of each order given by the investment adviser for the purchase or sale of any security; of any instruction received by the investment adviser from a

- client concerning the purchase, sale, receipt or delivery of a particular security; and of any modification or cancellation of any such order or instruction;
- d. All bills or statements or copies of such bills or statements, paid or unpaid, relating to the investment adviser's investment advisory business;
 - e. All trial balances, financial statements, and internal audit working papers relating to the investment adviser's investment advisory business;
 - f. Originals of all written communications received and copies of all written communications sent by the investment adviser relevant to:
 - i. Any recommendations made or proposed to be made and any advice given or proposed to be given;
 - ii. Any receipt, disbursement, or delivery of funds or securities; or
 - iii. The placing or execution of any order to purchase or sell any security.
 - g. A copy of all powers of attorney and any other documents that provide evidence of the granting of any discretionary authority by any client to the investment adviser;
 - h. A copy in writing of each agreement entered into by the investment adviser with any client, and all other written agreements otherwise relating to the investment adviser's investment advisory business;
 - i. Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client; and
 - j. Written procedures to supervise the activities of employees and investment adviser representatives that are reasonably designed to achieve compliance with applicable securities laws and regulations.

58. Pursuant to S.C. Code of Regulations 13-408(E)(1) adopted under the Act and Order Number 98001 adopted under the Prior Act, all of the books and records required to be made,

including the ones listed in paragraph 57 above, shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on the record. During the first two years, these books and records shall be maintained and preserved in the principal office of the investment adviser.

59. Pursuant to S.C. Code Ann. § 35-1-501 of the Act and S.C. Code Ann. § 35-1-1210 of the Prior Act, it is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

- a. To employ a device, scheme, or artifice to defraud;
- b. To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- c. To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

60. Regarding fraud or deceit in advising as to securities under the Act:

- a. Pursuant to S.C. Code Ann. § 35-1-502(a) of the Act, it is unlawful for a person that advises others for compensation, either directly or indirectly, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities:
 - i. To employ a device, scheme, or artifice to defraud; or
 - ii. To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

- b. Pursuant to S.C. Code Ann. § 35-1-502(b) of the Act, a rule adopted under the Act may define an act, practice, or course of business in connection with giving investment advice regarding securities as fraudulent, deceptive, or manipulative.
- c. Pursuant to S.C. Code of Regulations 13-502(A) adopted under the Act, each investment adviser and investment adviser representative shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business. Some of the acts and practices that are contrary to these principles and may constitute grounds for denial, suspension, or revocation of registration, imposition of administrative fines, or such other action authorized by statute include the following:
 - i. Recommending to a client to whom investment supervisory, management, or consulting services are provided the purchase, sale, or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished to the client after reasonable inquiry concerning the client's investment objectives, financial situation, and needs, and any other information known or acquired by the adviser after reasonable examination of the client's records as may be provided to the adviser;
 - ii. Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the adviser, its representatives, or any employee, or misrepresenting the nature of the advisory services being offered or fees to be charged for such services, or omitting to state a material fact necessary to make the statements made regarding qualifications, services, or fees, in light of the circumstances under which they are made, not misleading;

- iii. Publishing, circulating, or distributing any advertisement that does not comply with 17 C.F.R. § 275.206(4)-1, which states that it is a fraudulent, deceptive, or manipulative act, practice, or course of business for any investment adviser registered or required to be registered, directly or indirectly, to publish, circulate, or distribute any advertisement that, among other things, contains any untrue statement of a material fact, or that is otherwise false or misleading;
 - iv. Disclosing the identity, affairs, or investments of any client to any third party unless required by law to do so, or unless consented to by the client;
 - v. Failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information in violation of Section 204A of the Investment Advisers Act of 1940;
 - vi. Engaging in any act, practice, or course of business which is fraudulent, deceptive, or manipulative in contravention of Section 206(4) of the Investment Advisers Act of 1940;
 - vii. Employing any device, scheme, or artifice to defraud or engaging in any act, practice or course of business which operates or would operate as a fraud or deceit; and
 - viii. Engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for such person to do directly under the provisions of this Act or any rule or order thereunder.
- d. Pursuant to S.C. Code of Regulations 13-502(B) adopted under the Act, engaging in conduct such as non-disclosure, incomplete disclosure, or deceptive practices by an investment adviser or investment adviser representative shall be grounds for denial,

suspension, or revocation of registration, imposition of administrative fines, or such other action authorized by statute.

61. Regarding fraud or deceit in advising as to securities under the Prior Act:

- a. Pursuant to S.C. Code Ann. § 35-1-1220 of the Prior Act, it is unlawful for a person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise:
 - i. To employ any device, scheme, or artifice to defraud the other person;
 - ii. To engage in any act, practice, or course of business which would operate as a fraud or deceit upon the other person; or
 - iii. To engage in dishonest or unethical practices as the Commissioner may define by rule.
- b. Pursuant to S.C. Code of Regulations 113-23 adopted under the Prior Act, dishonest and unethical practices shall include, but not be limited to, the following:
 - i. Recommending to a client to whom investment supervisory, management, or consulting services are provided the purchase, sale, or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished to the client after reasonable inquiry concerning the client's investment objectives, financial situation, and needs, and any other information known or acquired by the adviser after reasonable examination of the client's records as may be provided to the adviser;
 - ii. Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the adviser, its representatives, or any employee, or

- misrepresenting the nature of the advisory services being offered or fees to be charged for such services, or omitting to state a material fact necessary to make the statements made regarding qualifications, services, or fees, in light of the circumstances under which they are made, not misleading;
- iii. Publishing, circulating, or distributing any advertisement that does not comply with 17 C.F.R. § 275.206(4)-1, which states that it is a fraudulent, deceptive, or manipulative act, practice, or course of business for any investment adviser registered or required to be registered, directly or indirectly, to publish, circulate, or distribute any advertisement that, among other things, contains any untrue statement of a material fact, or that is otherwise false or misleading;
 - iv. Disclosing the identity, affairs, or investments of any client to any third party unless required by law to do so, or unless consented to by the client;
 - v. Failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information in violation of Section 204A of the Investment Advisers Act of 1940;
 - vi. Engaging in any act, practice, or course of business which is fraudulent, deceptive, or manipulative in contravention of Section 206(4) of the Investment Advisers Act of 1940;
 - vii. Employing any device, scheme, or artifice to defraud or engaging in any act, practice or course of business which operates or would operate as a fraud or deceit; and

viii. Engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for such person to do directly under the provisions of this Act or any rule or order thereunder.

62. Pursuant to S.C. Code Ann. § 35-1-602(a)(1) of the Act, the Commissioner may conduct public or private investigations within or outside South Carolina which the Commissioner considers necessary or appropriate to determine whether a person has violated, is violating, or is about to violate the Act or a rule adopted or order issued under the Act, or to aid in the enforcement of the Act or in the adoption of rules and forms under the Act.

63. Regarding administrative remedies under the Act:

a. Pursuant to S.C. Code Ann. § 35-1-604(a)(1) of the Act, if the Commissioner determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of the Act or a rule adopted or order issued under the Act, the Commissioner may issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with the Act.

b. Pursuant to S.C. Code Ann. § 35-1-604(b) of the Act, a cease and desist order issued under S.C. Code Ann. § 35-1-604(a)(1) must include a statement of any civil penalty or costs of investigation the Securities Commissioner will seek, a statement of the reasons for the order, and notice about a hearing.

64. Regarding administrative remedies under the Prior Act, pursuant to S.C. Code Ann. § 35-1-1475 of the Prior Act, the Commissioner may impose an administrative fine against any person found to have violated any provision of the Prior Act or any rule or order promulgated by the Commissioner in an amount not exceeding \$5,000 for each violation.

DIVISION'S DETERMINATION

65. WHEREAS, based on the foregoing, the Division has determined that Respondent has engaged, is engaging, and/or is about to engage in an act, practice, or course of business constituting a violation of the Act or a rule adopted or order issued under the Act as follows:

- a. Respondent is an investment adviser pursuant to S.C. Code Ann. § 35-1-102(15) and is not exempt from registration in South Carolina under S.C. Code Ann. § 35-1-403(b);
- b. Respondent is an investment adviser representative pursuant to S.C. Code Ann. § 35-1-102(16) and is not exempt from registration in South Carolina under S.C. Code Ann. § 35-1-404(b);
- c. The Division did not receive a complete application for registration for 2006 pursuant to S.C. Code Ann. § 35-1-406(a); therefore, Respondent was not registered as an investment adviser in 2006;
- d. Even after the Division received Respondent's Form U4 on October 11, 2006, Respondent's registration as an investment adviser representative was not effective in 2006 pursuant to S.C. Code Ann. § 35-1-404(c) because Respondent was not registered as an investment adviser;
- e. Respondent is not registered as an investment adviser or investment adviser representative in 2007;
- f. Respondent has violated S.C. Code Ann. §§ 35-1-403(a) and 404(a) by placing orders to trade securities in client accounts in 2006 while not being registered as an investment adviser or investment adviser representative, by managing securities accounts or portfolios of clients in 2006 while not being registered as an investment adviser or investment adviser representative, by soliciting the business of a

prospective client in 2006 while not being registered as an investment adviser or investment adviser representative, and by holding himself out as providing investment advice in 2006 while not being registered as an investment adviser or investment adviser representative;

- g. Respondent is likely to violate S.C. Code Ann. §§ 35-1-403(a) and 404(a) because he is not registered as an investment adviser and investment adviser representative in 2007, he still has investment advisory clients and discretionary authority over existing securities accounts, and he has previously engaged in investment advisory activities while not being registered;
- h. Respondent failed to make, maintain, and preserve adequate books and records in an easily accessible place for the required time as required by S.C. Code Ann. § 35-1-411(c) and S.C. Regulation 13-408 by, for example, not being able to produce during the October 4, 2006, onsite audit investment advisory contracts with clients, powers of attorney granting discretionary authority over client accounts, and written information about each investment advisory client that is the basis for making recommendations or providing investment advice to such client;
- i. Respondent omitted, in violation of S.C. Code Ann. § 35-1-501, to state a material fact, that he was not registered with South Carolina as an investment adviser or investment adviser representative during 2006, to existing clients before he placed orders to trade securities in client accounts and otherwise managed the portfolio of securities in client accounts; and
- j. Respondent engaged in an act, practice, or course of business that operated and would operate as a fraud or deceit upon prospective and existing advisory clients and

Schwab in violation of S.C. Code Ann. § 35-1-502(a) and S.C. Regulation 13-502(A) by, among other things:

- i. Recommending to clients to whom investment advisory supervisory, management, or consulting services are provided the purchase, sale, or exchange of any security without reasonable grounds to believe that the recommendations are suitable for the client and without making a reasonable inquiry concerning each client's investment objectives;
- ii. Misrepresenting to advisory clients and prospective advisory clients the qualifications of the investment adviser or its representative by stating on Respondent's letterhead and business cards and on forms submitted to Schwab that Respondent was registered in South Carolina and/or with the Securities and Exchange Commission ("SEC") when Respondent was not registered; and
- iii. Omitting to state a material fact about qualifications, that Respondent was not registered in South Carolina and/or with the SEC, when soliciting a prospective client, when managing the securities accounts of clients, and when ordering trades in clients' securities accounts.

66. WHEREAS, based on the foregoing, the Division has determined that Respondent has engaged in an act, practice, or course of business constituting a violation of the Prior Act or a rule adopted or order issued under the Prior Act as follows:

- a. Respondent is an investment adviser pursuant to S.C. Code Ann. § 35-1-20(8) and is not exempt from registration in South Carolina under S.C. Code Ann. 35-1-420(1);
- b. Respondent is an investment adviser representative pursuant to S.C. Code Ann. § 35-1-20(9) and is not exempt from registration in South Carolina under S.C. Code Ann. 35-1-420(1);

- c. Respondent was not registered as an investment adviser and investment adviser representative pursuant to S.C. Code Ann. §§ 35-1-440 and 35-1-460 from January 1, 2005 through August 9, 2005;
- d. Respondent has violated S.C. Code Ann. §§ 35-1-420(1) by placing orders to trade securities in client accounts in 2005 while not being registered as an investment adviser or investment adviser representative, by managing securities accounts of portfolios of clients in 2005 while not being registered as an investment adviser or investment adviser representative, by accepting new investment advisory clients in 2005 while not being registered as an investment adviser or investment adviser representative, and by holding himself out as providing investment advice in 2005 while not being registered as an investment adviser or investment adviser representative;
- e. Respondent failed, in violation of S.C. Code Ann. § 35-1-590, to make and keep such accounts, correspondence, memoranda, papers, books, and other records as the Commissioner prescribed by rule or order, by, for example, not being able to produce investment advisory contracts with clients, powers of attorney granting discretionary authority over client accounts, and written information about each investment advisory client that is the basis for making recommendations or providing investment advice to such client;
- f. Respondent omitted, in violation of S.C. Code Ann. § 35-1-1210, to state a material fact, that he was not registered with South Carolina as an investment adviser or investment adviser representative during part of 2005, to existing clients before he placed orders to trade securities in client accounts and otherwise managed the portfolio of securities in client accounts; and

- g. Respondent engaged in an act, practice, or course of business that operated and would operate as a fraud or deceit upon prospective and existing advisory clients and Schwab and engaged in dishonest and unethical practices in violation of S.C. Code Ann. § 35-1-1220 and S.C. Regulation 113-23 by, among other things:
- i. Recommending to clients to whom investment advisory supervisory, management, or consulting services are provided the purchase, sale, or exchange of any security without reasonable grounds to believe that the recommendations are suitable for the client and without making a reasonable inquiry concerning each client's investment objectives;
 - ii. Misrepresenting to advisory clients and prospective advisory clients the qualifications of the investment adviser or its representative by stating on Respondent's letterhead and business cards and on forms submitted to Schwab that Respondent was registered in South Carolina and/or with the SEC when Respondent was not registered; and
 - iii. Omitting to state a material fact about qualifications, that Respondent was not registered in South Carolina and/or with the SEC, when soliciting prospective clients, when managing the securities accounts of clients, when ordering trades in clients' securities accounts, and when accepting new clients.

67. The Division seeks a civil penalty of \$20,000 if this Order becomes effective by operation of law, or, if Respondent seeks a hearing and a hearing officer or any other legal authority resolves this matter, an amount not to exceed \$10,000 for each violation of the Act by the Respondent, an amount not to exceed \$5,000 for each violation of the Prior Act by Respondent, and the actual cost of the investigation.

CEASE AND DESIST ORDER

68. NOW THEREFORE, pursuant to S.C. Code Ann. § 35-1-604(a)(1) of the Act, IT IS **HEREBY ORDERED** that Respondent:

- a. Cease and desist from transacting business, in violation of S.C. Code Ann. §§ 35-1-403(a) and 404(a), in South Carolina as an investment adviser and investment adviser representative while not registered;
- b. Cease and desist from representing in any way, in violation of S.C. Code Ann. § 35-1-502(a), in or from South Carolina that Respondent is registered as an investment adviser or investment adviser representative by the State of South Carolina, by the Securities and Exchange Commission, or by any other regulatory body when Respondent is not registered;
- c. Cease and desist from engaging, in violation of S.C. Code Ann. § 35-1-502(a), in other fraudulent acts in connection with his investment advisory activities in South Carolina;
- d. Cease and desist from engaging, in violation of S.C. Code Ann. § 35-1-501, in fraudulent activities in connection with the offer, sale, or purchase of securities;
- e. Is barred from acting as an IA and/or an IAR in South Carolina for six (6) months and, if Respondent thereafter seeks to register as an IA or an IAR in South Carolina, Respondent shall obtain the assistance of a professional services firm experienced in assisting IAs in complying with all applicable laws; and
- f. Pay \$20,000 if this Order becomes effective by operation of law, or, if Respondent seeks a hearing and a hearing officer or any other legal authority resolves this matter, an amount not to exceed \$10,000 for each violation of the Act by Respondent, an

amount not to exceed \$5,000 for each violation of the Prior Act by Respondent, and the actual cost of the investigation.

**REQUIREMENT OF ANSWER AND
NOTICE OF OPPORTUNITY FOR HEARING**

69. Respondent is hereby notified that he has the right to a hearing on the matters contained herein. To schedule such a hearing, a Respondent must file with the Securities Division, Post Office Box 11549, Rembert C. Dennis Building, Columbia, South Carolina, 29211-1549, attention: Thresechia Navarro, within thirty (30) days of notification of the issuance of this Order to Cease and Desist a written Answer specifically requesting a hearing therein.
70. In the written Answer, Respondent, in addition to requesting a hearing, shall admit or deny each factual allegation in this Order, shall set forth specific facts on which the Respondent relies, and shall set forth concisely the matters of law and affirmative defenses upon which the Respondent relies. A Respondent without knowledge or information sufficient to form a belief as to the truth of an allegation shall so state.
71. Failure by the Respondent to file a written request for a hearing in this matter within the thirty-day (30) period stated above shall be deemed a waiver by the Respondent of the right to such a hearing. Failure of the Respondent to file an Answer, including a request for a hearing, shall result in this Order, including the stated civil penalty, becoming final as to the Respondent by operation of law.
72. CONTINUING TO ENGAGE IN ACTS DETAILED BY THIS ORDER AND/OR SIMILAR ACTS MAY RESULT IN THE DIVISION'S FILING ADDITIONAL ADMINISTRATIVE ACTIONS AND/OR SEEKING FURTHER ADMINISTRATIVE FINES. WILLFUL VIOLATION OF THIS ORDER COULD RESULT IN CRIMINAL PENALTIES UNDER S.C. CODE ANN. § 35-1-508 OF THE ACT OR S.C. CODE ANN. § 35-1-1590 OF THE PRIOR ACT. REGARDING MATTERS DESCRIBED HEREIN, THIS

ORDER DOES NOT PRECLUDE THE FILING OF PRIVATE CAUSES OF ACTION OR
THE FILING OF CRIMINAL CHARGES UNDER S.C. CODE ANN. § 35-1-508 OF THE
ACT OR S.C. CODE ANN. § 35-1-1590 OF THE PRIOR ACT.

IT IS SO ORDERED.

This 18th day of June, 2007



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