

# Securities & Derivative Litigation Report



## 2004 Second Quarter SEC Appellate Decisions

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To keep our clients abreast of securities law developments, Carlton Fields' Securities and Derivative Litigation Practice Group provides quarterly updates of recent securities decisions.<sup>1</sup> This Update summarizes decisions of interest within the United States SEC from April through June 2004.

### Form ADV Disclosure of Directed Brokerage

#### **In the Matter of Clarke T. Blizzard and Rudolph Abel, Admin. Proc. File No. 3-10007 (SEC 6/23/04)**

#### **Key Points:**

- It is imperative that all reasons supporting Form ADV disclosures are fully disclosed.
- Directed brokerage is a material Form ADV disclosure item, and all reasons supporting the directed brokerage must be disclosed.
- The SEC has zero tolerance for subtle omissions pertaining to mandatory Form ADV disclosure items.

#### **Summary:**

Proceedings against former associated persons of an investment adviser were dismissed following appeal from decision that they caused investment adviser to fail to disclose all reasons for directing brokerage.

#### **Facts:**

The respondents were former associated persons of an investment adviser. Blizzard was employed in the marketing and sales department as a vice president and later as a managing director and in those capacities he had championed the cause of directing brokerage to brokers who were referring business to the adviser. Blizzard never was employed in a capacity where he would have been responsible for the adviser's disclosures in its Form ADV.

Abel was the chief investment officer until his departure from the firm. Abel chaired a committee on broker allocation and was presented with the idea of directing brokerage to brokers who referred business. Abel approved of the concept provided that the brokers provided research to justify directing brokerage to brokers who would not satisfy the requirement of best execution based upon price. Abel was responsible for the contents of the adviser's Form ADV disclosures and had signed a number of amendments to that form. In dicta, the

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<sup>1</sup>This Update is intended for the general information of readers, and is not intended as legal advice or as a substitute for research and analysis of any of these issues.

SEC described Abel's failure to correct the adviser's Form ADV to disclose fully that brokerage is directed to referring brokers as "reckless."

**Holding and Reasoning:**

The proceedings were dismissed against the two individuals after the SEC used this opportunity to remind the investment advisory community how seriously it considers the failure to disclose all of the reasons for directed brokerage even if the advisor has disclosed on its Form ADV most of the reasons for directing brokerage to particular broker dealers. The SEC found that the adviser, which was not a party to these proceedings, had directly violated the antifraud provisions by failing to disclose on its Form ADV that it directed brokerage to brokers who referred clients. However, the SEC dismissed the proceedings against Abel on "equitable" grounds, finding that the proceedings were commenced one week prior to the expiration of the statute of limitations and that Abel lacked sufficient ability to correct the adviser's disclosure deficiencies during his last week of employment at the adviser. Abel's final week of employment was the only week of time available to the SEC to find actionable misconduct. Abel's failure to correct the adviser's disclosure deficiencies in his last week of employment did not constitute an awareness that he was engaging in an improper activity. To support its "equitable" decision as to Abel, the SEC cited 28 U.S.C. Section 2462, which prohibits the assessment of a penalty, fine, or forfeiture for conduct charged more than five years later, and the SEC then tossed out on limitations grounds all violations that Abel could have been liable for including the cease and desist order. As to Blizzard, the SEC found that he never was responsible for preparing or reviewing the Form ADV or for delivering it to clients, nor did he have any compliance responsibilities. Also, the SEC found that Blizzard had done all he could to ensure that the highest ranking personnel in the firm, i.e. Abel and his committee members, were aware of his recommendation that the firm direct brokerage to referring brokers and that he had made them aware that several referring brokers did make it on to the firm's allocation list. Thus, he was not found to have substantially assisted or to have aided and abetted a violation by the adviser.

**Collateral Industry Bar Vacated In Part**

**In The Matter of Peter F. Comas, Admin. Proc. File No. 3-9803 (SEC 6/18/2004)**

**Key Points:**

- Before the SEC can bar a registered entity or associated person from the industry segments regulated by the SEC, i.e. securities brokers, securities dealers, investment advisers, investment companies, municipal securities dealers, and securities transfer agencies, the SEC is required to bring an administrative proceeding within the industry segment for which the bar is sought. Collateral industry bars cannot be based upon proceedings brought in less than all of the industry segments regulated by the SEC.

**Summary:**

A former associated person of a broker dealer petitioned to vacate part of an industry bar he consented to in SEC proceedings in 1999. The SEC vacated the bar to permit the respondent's association with investment advisers and investment companies.

**Facts:**

In SEC proceedings brought against respondent Comas in 1999, he consented to a collateral industry bar (barring him from association with any broker, dealer, municipal securities dealer, investment company, or investment adviser, with the right to reapply after eighteen months), a cease and desist order, and payment of a civil money penalty. In the original proceedings, the SEC found, on the basis of Comas' consent, that he aided and abetted and caused fourteen instances of fraudulent violations by PaineWebber of the broker-dealer antifraud prohibitions of Section 15(c)(1) of the Securities Exchange Act of 1934 and Exchange Act Rule 15c1-2, and aided and abetted and caused eight instances of violations by PaineWebber of the fictitious quotation prohibitions of Exchange Act Section 15(c)(2) and Exchange Act Rule 15c2-7. In addition to the collateral bar, Comas consented to the imposition of a cease and desist order proscribing him from committing or causing future violations of the antifraud provisions

and ordering payment of a civil penalty in the amount of \$210,000.

**Holding and Reasoning:**

The SEC offered no reason for its decision to vacate the collateral bar to allow Comas to associate with investment advisers and investment companies. The SEC restated various policy reasons for vacating bars announced in previous applications but none appeared to apply to Comas.

The rationale, however, can be inferred from a footnote reference to a case argued by Comas, *Teicher v. SEC*, 177 F.3d 1016 (D.C. Cir. 1999) (holding that the SEC must demonstrate a nexus between the misconduct alleged and the particular securities industry branch for which a bar is sought). There having been no allegation that Comas violated laws pertaining to investment advisers or investment companies in the original proceeding, the SEC partially vacated the full collateral industry bar imposed against Comas.

**NASD National Adjudicatory Council’s Denial of Member Firm’s Application For Continued Employment of Statutorily Disqualified Associated Person Is Remanded**

**In the Matter of Reuben D. Peters and Peters Securities Co., LP, Admin. Proc. File No. 3-11277 (SEC 6/7/04)**

**Key Points:**

- Section 19(f) of the Securities Exchange Act of 1934 grants authority to the SEC to review the denial of membership or participation in a self-regulatory organization to any applicant, the barring of any person from becoming associated with a member of a self-regulatory organization, or the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization or any member thereof.
- SRO disciplinary proceedings must be conducted in accordance with the objectives of the Exchange Act.
- When the SEC specifies a date after which an application for re-entry by a conditionally barred individual may be made, the SEC upon a proper showing will generally act favorably upon the

application and will not reconsider the conduct leading up to the imposition of the conditional bar, unless: 1) there is evidence of post-bar misconduct; 2) the recent misconduct suggests a pattern similar to the prior misconduct; 3) the proposed employer’s supervisory systems appear to be inadequate to prevent the type of misconduct leading up to the imposition of the conditional bar, or 4) the nature and disciplinary history of a prospective employer suggest that misconduct is likely to reoccur. (These exceptions are not exclusive.)

**Summary:**

NASD’s National Adjudicatory Council’s (NAC) denial of broker’s application for continued association with member firm remanded based upon failure of NASD to apply NASD’s rules in a manner consistent with the purposes of the Exchange Act.

**Facts:**

Petitioner Reuben D. Peters had been subjected to heightened supervision following his statutory disqualification based upon the entry against him of an SEC injunction. In 2001 the NAC permitted Peters to remain associated with his firm provided that he had no supervisory responsibilities and was subjected to the supervision of another broker in the office and because the NAC found no other acts of misconduct or circumstances of record bearing adversely on the firm’s or Peters’ fitness to continue in the securities industry. Peters Securities also ceased further retail brokerage operations.

In 2002, a number of employers departed from Peters Securities, which then notified the NAC that Peters would be supervised from another office which would monitor his transactions in a “real time” manner. NASD Department of Member Regulation recommended that Peters continue to be associated. A hearing was held, and the NAC rejected Peters Securities’ application for Peters to remain associated. Peters Securities appealed the denial to the SEC.

**Holding and Reasoning:**

The SEC remanded the proceedings to NAC. The standard for review of SRO proceedings is set forth in

Exchange Act Section 19(f), which provides that SRO decisions will be sustained if the SEC finds that the decision: (1) was based on specific grounds that exist in fact; (2) was made in accordance with the SRO's rules; and (3) that these rules were applied in a manner consistent with the purposes of the Exchange Act. Because the NAC misapplied certain balancing tests described in SEC precedent, which affect the analysis of the third factor in Section 19(f), the SEC remanded the appeal to NAC for reconsideration.

**Investment Company Sanctioned and Its Directors Barred For Disclosure and Securities Valuation Violations**

**In the Matter of The Rockies Fund, Inc., Stephen G. Calandrella, Charles M. Powell, Clifford C. Thygesen, and John C. Power, Admin. Proc. File No. 3-9615 (SEC 6/1/04)**

**Key Points:**

- Independent directors of investment companies cannot be lax in their oversight of the investment companies' accurate reporting of material company information.
- An investment company is expected to conduct its methods of investment valuation consistent with the methods disclosed in its prospectus.
- Investment companies are required to accurately report when they own and when they dispose of assets material in value.
- Proper classification and valuation of restricted and free-trading securities is not optional.
- Directors of investment companies who violate the above points should expect to be barred from association with an investment company for at least three years and required to pay substantial monetary penalties.

**Summary:**

Investment company and its directors violated antifraud provisions of the Exchange Act by filing periodic reports containing material misstatements; investment company violated provisions of the Exchange Act and directors aided and abetted and were a cause of reporting violations by filing reports not in compliance with GAAP and containing material

misstatements; director of investment company and another individual violated antifraud provisions of the Exchange Act by manipulating the price of securities through matched orders and prearranged trades; and director violated Investment Company Act Section 57(k)(1) and Exchange Act antifraud provisions by improper acceptance of compensation.

**Facts:**

The Rockies Fund, Inc. ("Rockies Fund" or "Fund"), a closed-end investment company that elected to be a business development company, owned restricted securities of Premier Concepts, Inc. ("Premier"), a financially distressed company of which Rockies Fund president and director Stephen G. Calandrella controlled.

The SEC found that The Rockies Fund:

- Misclassified its holdings of Premier stock. In 1994, the Fund's June and September Forms 10-Q and its Form 10-K stated that all of its holdings of Premier were unrestricted stock. This representation was false and was repeated in the first two Forms 10-Q filed by the Fund in 1995. In fact, all but 750 of the Premier shares held by the Fund were restricted.
- Valued the Premier shares at market prices rather than at discounted values appropriate for a restricted security.
- Violated The Rockies Fund's policies disclosed in its prospectus concerning the method of valuing securities.
- Improperly reported ownership in the third quarter of 1995 of restricted securities not authorized by the Fund's board of directors for acquisition until the fourth quarter of 1995 and not paid for until the fourth quarter of 1995.

The SEC also found that Calandrella, on behalf of the Fund, entered into an agreement to pay the Fund's former chief operating officer \$85,000 for 85,000 Premier shares in return for his agreement to forgo a potential legal claim against Calandrella and Premier, without disclosing this arrangement to the independent members of the Fund's Board or any other independent representative of the Fund.

**Holding and Reasoning:**

The SEC concluded that:

- The misclassification of the Premier shares in the periodic reports was material. The SEC stated that "correct classification of securities can have a material impact on financial statements. In addition to having an impact on the value of the securities, misclassification can affect the validity of financial statements by making a portfolio appear more liquid by presenting shares as freely saleable when, in fact, they are not. Where, as here, the number of shares incorrectly classified is material to the Fund's total assets, the misclassification is material."
- The valuation of Premier, a substantial holding of the Fund, was important information for potential investors in the Fund and was material.
- The Rockies Fund recklessly disregarded the accuracy of the valuations of Premier reported in the Fund's periodic reports and recklessly disregarded the correct classification of Premier stock, which has a significant impact on the proper valuation method.
- The statement in the Fund's third quarter 1995 Form 10-Q that it owned when it did not own a quantity of Premier restricted stock was a material misstatement because the reported value of the shares was 46% of the Fund's total Premier holdings and 11% of the Fund's total reported investments in securities.
- Calandrella used Fund assets to reach a settlement with the Fund's former COO concerning his claims against Calandrella. The release from liability was a form of compensation to Calandrella; it benefited Calandrella by ensuring that he would not be held liable to the COO in the event of a lawsuit. Calandrella, therefore, willfully violated Investment Company Act Section 57(k)(1), which makes it unlawful for any person associated with a BDC, other than a broker or underwriter, "to accept from any source any compensation (other than a regular salary or wages from the business development company) for the purchase or sale of any property to or for such business development company."

The SEC then (1) barred Calandrella from all capacities from association with an investment company; (2) barred the Fund's independent directors from associat-

ing with an investment company for three years; (3) ordered all of the respondents to cease and desist from committing or being a cause of any violations or future violations of the provisions that they are held to have violated or to have aided and abetted; (4) ordered Calandrella to pay a civil money penalty of \$500,000; and (5) ordered the independent directors each to pay a civil money penalty of \$160,000.

### NASD National Adjudicatory Council's Denial of Waiver of Testing Requirement Affirmed

#### **In the Matter of Gina M. Guzzone, Admin. Proc. File No. 3-11358 (SEC 5/19/04)**

#### **Key Points:**

- Associated persons of broker dealers have the responsibility to keep their NASD licenses current and to confirm that their license transfer paperwork is properly processed by new employers.
- An associated person cannot delegate these responsibilities to his or her employer.
- For a request for waiver of the testing requirement based upon lapse of a license, the applicant must demonstrate that he or she was employed in a registered capacity while not knowing of the lapse in the license.
- For the two-year period within which new employment must be secured, the time will be tolled if within the two-year period the applicant was employed in the capacity for which he or she previously was registered, and the applicant believed that he or she was properly registered.

#### **Summary:**

The NASD National Adjudicatory Council denied the application by a member firm for a waiver from the testing requirement for an associated person whose license had lapsed. The SEC affirmed the denial.

#### **Facts:**

Gina M. Guzzone was an associated person of Parker Financial Corp. She first became registered in 1996, and last took a licensing examination in March 2000. On October 30, 2000, Guzzone became a registered representative with Abel/Noser Corp., a

NASD member firm, where she was licensed as a general securities representative and equity trader limited representative. On June 6, 2001, Guzzone terminated her employment with Abel/Noser Corp. From that time until August 2002, Guzzone was unemployed.

Pursuant to Rule 1031(c), Guzzone had two years from the date of her termination from Abel/Noser Corp. to reinstate her securities licenses without being required to retake the Series 7 and Series 55 qualification examinations, by obtaining employment with another member firm. On August 5, 2002, Parker Financial hired Guzzone as an equity trader. On August 14, 2002, Parker Financial filed Guzzone's Form U4 with NASD to register Guzzone as a general securities representative and equity trader limited representative at Parker Financial.

On November 7, 2002, however, Parker Financial filed with a Form U-5 for Guzzone as a result of her layoff. At the time of her termination from Parker Financial, Guzzone's securities licenses had not yet been transferred to the Firm.

After Parker Financial terminated Guzzone's employment, she worked for a temporary employment service in a non-investment related capacity. On June 6, 2003, the applicable two-year period for the reinstatement of Guzzone's registrations as a general securities representative and equity trader limited representative expired without their reactivation. On August 1, 2003, Guzzone was hired by Gagnon Securities, a member firm, but was terminated on August 13, 2003. On August 25, 2003, however, Parker Financial rehired Guzzone.

On August 26, 2003, Parker Financial requested, on Guzzone's behalf, a waiver of re-examination pursuant to NASD Membership and Registration Rule 1070(d). The request stated that Guzzone had not done any securities related business during the period between June 6, 2002 and November 7, 2002 when the transfer of her license was being effected.

On September 15, 2003, NASD's Department of Testing and Continuing Education ("the Department")

denied Parker Financial's request for an examination waiver for Guzzone. The Department concluded that neither Parker Financial's representations on Guzzone's behalf, nor the official registration record, warranted a waiver. On November 14, 2003, NASD's National Adjudicatory Council (the "NAC") affirmed the Department's denial of Parker Financial's waiver request. The NAC found that Parker Financial did not represent, as required for a "filing error" waiver, that Guzzone functioned as a representative and an equity trader, in good faith, with a member firm during the time that her registration was not reflected in the CRD. The NAC found that Parker Financial had not established the circumstances required to warrant a waiver of the qualification examinations. Guzzone then sought review of the NAC's decision.

#### **Holding and Reasoning:**

The Commission rejected as an excuse Guzzone's argument that the lapse in registration was not her fault. The Commission focused on the admission that Guzzone had not functioned as a general securities representative or an equity trader for over two years. The Commission concluded that because there have been changes in the securities laws in the last two years, Guzzone should become familiar with them (although there was no mention in the opinion that Guzzone had not kept current on legal requirements) and that requiring her to retake the qualification examinations is fully consistent with the statutory goal of ensuring the requisite levels of knowledge and competency of associated persons. The Commission also held that the NASD's registration and waiver rules were applied by NASD in a manner consistent with the purposes of the Exchange Act. Guzzone's appeal was dismissed.

#### **Registered Securities Association - Review of Denial of Member's Continuance Application**

#### **In the Matter of the Application of Citadel Securities, Inc., Admin. Proc. File No. 3-11329 (SEC 5/7/04)**

#### **Key Points:**

- Section 19(f) of the Securities Exchange Act of 1934 grants authority to the SEC to review the

denial of membership or participation in a self-regulatory organization to any applicant, the barring of any person from becoming associated with a member of a self-regulatory organization, or the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization or any member thereof.

- If the NASD denies a member firm's application to remain a member firm while employing a statutorily disqualified associated person, the NASD's decision will be sustained provided that the NASD followed the requirements of Exchange Act Section 19(f).
- Exchange Act Section 19(f) requires the SEC to dismiss the review proceeding if it finds that the specific grounds on which such denial, bar, or prohibition or limitation is based exist in fact, that such denial, bar, or prohibition or limitation is in accordance with the rules of the self-regulatory organization, and that such rules are, and were applied in a manner, consistent with the purposes of this title.

**Summary:**

The NASD denied a member firm's application to retain its membership if it employed an individual who is subject to statutory disqualification because a permanent injunction was entered against the individual for violation of the securities laws. The SEC dismissed the member firm's appeal.

**Facts:**

Citadel Securities Corp. ("Citadel"), a NASD member firm, appealed the denial by NASD of Citadel's Membership Continuation Application to remain an NASD member if Michael T. Studer is associated with Citadel. Studer is subject to a statutory disqualification because he was enjoined from violation of the antifraud and securities registration provisions of the securities laws by a federal district court in 2003. The Application sought to continue Studer's association as Citadel's general securities principal, general securities representative, municipal securities principal, municipal securities representative, and FINOP. At the hearing, Studer, then Citadel's president, testified that Citadel had no customers, had stopped making markets, that Citadel had limited its activities to selling its

remaining proprietary securities positions, and that Studer would be replaced as president and sole director of Citadel and would be supervised by an individual who had a FINOP license and a clean record.

**Holding and Reasoning:**

Section 19(f) of the Exchange Act provides the standards that govern the review of appeals from SRO decisions. If the SEC finds that (1) "the specific grounds" on which the SRO based its action "exist in fact," (2) the SRO's prohibition of association is in accordance with its rules, and (3) such rules were applied in a manner consistent with the purposes of the Exchange Act, the SEC must dismiss the member firms' appeal unless a finding is made that the SRO's action imposes an undue burden on competition.

Under Article III, Section 3 of NASD's By-laws, NASD may bar a person from becoming associated with or continuing in association with a member if such person is subject to a "statutory disqualification." Studer is subject to statutory disqualification by virtue of the injunction entered against him by the federal district court. The SEC found that the NASD followed its own rules and applied those rules in a manner consistent with the purposes of the Exchange Act and with the public interest in ensuring the integrity of the securities industry. Studer's appeal was dismissed.

**NASD Disciplinary Sanctions Sustained Against Associated Person In Selling Away Case**

**In the Matter of the Application of Anthony Barkate, Admin. Proc. File No. 3-11250 (SEC 4/8/04)**

**Key Points:**

- Selling Away transactions are prohibited by NASD Conduct Rule 3040.
- Selling Away is misconduct because it deprives investors of a brokerage firm's oversight, due diligence, and supervision, protections that investors have a right to expect.
- Conduct Rule 3040 is designed not only to protect investors from unmonitored sales, but also to protect securities firms from loss and liability in connection with sales made by persons associated with them.

**Summary:**

An associated person of a NASD member firm engaged in private securities transactions without prior written notification and approval. The SEC sustained the NASD's findings of violations and imposition of sanctions.

**Facts:**

Anthony H. "Andy" Barkate, formerly a general securities principal with Securities Service Network, Inc. ("SSN"), a member of NASD, appealed from the sanctions imposed in a NASD disciplinary action. The NASD found that Barkate engaged in private securities transactions in violation of NASD Conduct Rules 3040 and 2110 and barred Barkate from associating with any member firm in any capacity.

Barkate failed to inform SSN of approximately 93 private securities transactions, in which he sold \$6.8 million worth of instruments and received \$400,144 in selling compensation from an outside source. The investors to whom Barkate sold those instruments incurred substantial losses. Barkate created the impression that SSN sanctioned the sale of TLC instruments. Barkate sold the TLC instruments from his office, which was an OSJ for SSN. He kept TLC marketing materials, sales awards, and files in that office. Barkate personally offered and sold the TLC instruments to his existing customers, many of whom were also SSN clients. Barkate has admitted violating

Conduct Rule 3040 and stipulated to the facts. However, Barkate contended on appeal that a bar is excessive in light of certain factors that mitigated his actions: 1) he did not know the TLC instruments were securities; 2) he relied on the issuer's counsel's opinion that the instruments were not securities, and 3) he provided notice of his TLC sales activities to SSN.

**Holding and Reasoning:**

The SEC rejected Barkate's mitigation argument. The SEC found that the TLC instruments were investment contracts and therefore were securities, that a registered representative cannot rely on issuer's counsel to determine whether or not an instrument is a security, and that Barkate did not provide notice of his TLC sales activities to SSN. Thus, Barkate failed to establish mitigating circumstances.

The SEC stressed that selling away is a serious violation, and Conduct Rule 3040 is designed not only to protect investors from unmonitored sales, but also to protect securities firms from loss and liability in connection with sales made by persons associated with them. Such misconduct deprives investors of a brokerage firm's oversight, due diligence, and supervision, protections investors have a right to expect. Barkate's misconduct illustrates the potential for harm to public investors through private securities transactions. The SEC sustained the sanctions against Barkate.

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