COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE SECRETARY OF THE COMMONWEALTH
SECURITIES DIVISION
ONE ASHBURTON PLACE, ROOM 1701
BOSTON, MASSACHUSETTS 02108

2010 JUN 16 AM 10:00

IN THE MATTER OF:	)	
BANC OF AMERICA INVESTMENT SERVICES, INC.	)	Docket No. 2009-0090
RESPONDENT.	)	

ADMINISTRATIVE COMPLAINT

I. PRELIMINARY STATEMENT

The Enforcement Section of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth (respectively, the "Enforcement Section" and the "Division") files this complaint (the "Complaint") in order to commence an adjudicatory proceeding against Respondent, Banc of America Investment Services, Inc. ("BAI"), for violating M.G.L. c. 110A, the Massachusetts Uniform Securities Act (the "Act"), and 950 CMR 10.00 *et seq.* (the "Regulations"). The Complaint is based upon Respondent's dishonest and unethical violations of the Act due to the misleading characterizations of the Fannie Mae and Freddie Mac federal agency step-up bonds Respondent's agents portrayed to at least one Massachusetts investor. The Division charges Respondent with failure to supervise its agents' recommendation, offer, and sale of federal agency step-up bonds. Finally, BAI failed to reasonably supervise its agents to ensure compliance with BAI's own written supervisory policies and procedures concerning, among other things, the offer and sale of federal agency step-up bonds.

The investor at the center of the allegations against BAI was originally a customer of

Bank of America and had certificates of deposit come up for renewal. In a desperate attempt to save the money from leaving the Bank of America family, a dual employee of the bank and BAI pitched the federal agency step-up bonds which had more attractive interest rates than CDs, but also came with more risks than CDs. In recommending the product, of which the dual employee was not authorized to sell, the dual employee made gross mischaracterizations as to the safety of the product. Furthermore, when the dual employee engaged a registered representative of BAI to help effectuate the purchase of the step-up bonds for the investor, the registered representative continued to misrepresent the product by promoting the product as guaranteed. Through a series of misrepresentations and failures to comply with BAI's supervisory procedures, as well as BAI's failure to ensure compliance with its supervisory procedures, the dual employee and registered representative were able to save $2,000,000 from leaving the Bank of America family.

Finally, while the misrepresentations and failure to follow internal policy were so pervasive in this case, BAI has yet to discipline either the dual employee or the registered representative. Rather, the BAI employees were given kudos for keeping money within the firm.

The Enforcement Section seeks an order of the Division requiring Respondent to permanently cease and desist from further violating the Act and requiring Respondent to pay an administrative fine in an amount and upon such terms and conditions as the Director or Hearing Officer may determine. In addition, the Enforcement Section requests that the Director or Hearing Officer take any and all other necessary action, including requiring Respondent to engage an independent compliance consultant, which may be in the public interest and appropriate for the protection of investors.

II. SUMMARY

This case is about BAI's employees "all in" effort to keep assets from leaving the bank and BAI's endorsement of the employees' actions. Two employees of Banc of America Investment Services ("BAI") sold an investor some bonds and were emphatic in their representations about the product being guaranteed. Specifically, the BAI employees were relentless in their sales pitch in order to save $2,000,000 worth of assets from leaving either Bank of America or the bank's indirect subsidiary, BAI. Through a series of misrepresentations about the product, not only did the employees save the assets, but in doing so, they were also lauded by management.

The case begins with a client manager, Reggie Aquino, a dual employee of BAI and Bank of America, who "had to think fast" to save $2,000,000 from leaving the bank's assets. Aquino's banking only client, Investor 1, had $2,000,000 worth of 9 month certificates of deposits ("CDs") that were due for renewal in early July 2008. However, Investor 1 was not interested in the low CD interest rates being offered at the time by Bank of America. So, as an alternative to the CDs, Aquino "blurted out" a BAI product, AAA rated bonds, as possible securities vehicle for Investor 1's assets. Specifically, Aquino had pitched Fannie Mae and Freddie Mac federal agency step-up bonds[1] to Investor 1. As Aquino explained to a colleague, "I had a sense this [money] was moving out of my book one way or the other that day…I had to save that money."

Aquino, a Series 6 BAI registered representative of BAI, who was not registered to recommend or sell bonds to investors, was partnered with John Keating, a BAI registered representative who possessed a Series 7, and was registered to recommend and sell bonds that

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[1] BAI describes step-up notes or bonds as "callable debt securities with interest rates that increase over time. If the notes are not called by the issuer, their coupons increase according to a predefined schedule."

included Fannie Mae and Freddie Mac federal agency step-up bonds. At the time of the step-up bond recommendation to Investor 1, BAI's business model was such that the BAI Series 7 registered representatives were partnered with employees on the Bank of America side. It just happened that one of Keating's bank partners, Aquino, was also an employee of BAI and carried a Series 6 registration. In addition, Keating and Aquino were both located at the 101 Derby Street, Hingham, MA location where both the BAI branch office and Bank of America branch office were housed under the same roof and across the customer lobby from one another.

Keating first became involved with Investor 1 when he suggested to Aquino, without knowing anything about Investor 1, that Aquino recommend the federal agency step-up bonds. Keating's involvement was followed up by providing a brief synopsis or talking points about the federal agency step-up bonds to Aquino. Aquino faxed a talking points sheet, to which both Aquino and Keating contributed, and a prohibited "internal use only" piece to Investor 1. However, Aquino's facsimile was replete with misrepresentations which BAI had opportunity to not only correct, but also prevent had the correspondence review procedures been enforced.

Unfortunately, the misrepresentations were not limited to the facsimile, but were repeatedly made orally to Investor 1. The most egregious misrepresentation by Aquino and Keating, both in writing and orally, related to allaying Investor 1's aversion to risking his money in the market. As a result, Keating and Aquino preyed on Investor 1's fears of losing his money and made unfounded representations that Investor 1's principal and interest in the Fannie Mae and Freddie Mac federal agency step-up bonds were guaranteed by the U.S. government. However, at no time did the issuers, Fannie Mae or Freddie Mac, ever state that their securities were guaranteed by the U.S. government. Rather, to the contrary, even when Fannie Mae and Freddie Mac were being bailed out by U.S. government through provisions in the *Housing and*

Economic Recovery Act of 2008, Fannie Mae's and Freddie Mac's Offering Circulars, Offering Circular Supplements, and Pricing Supplements all printed in bold that the securities were not guaranteed by the U.S. government. For example, the Fannie Mae July 10, 2008 Pricing Supplement stated: **"[t]he bonds, together with interest thereon, are not guaranteed by the United States and do not constitute a debt or obligation of the United States or of any agency or instrumentality thereof other than Fannie Mae**." (emphasis in original).

By capturing Investor 1's attention with the lure of higher interest rates and investment guarantees, Keating and Aquino were able to convert Investor 1's money, which Investor 1 was going to take elsewhere, into assets under the BAI umbrella. Through Keating, Investor 1 purchased three different Fannie Mae and one Freddie Mac step-up bonds for $500,000 each. And when Investor 1 expressed concerns about the safety of his investment after seeing the risk disclosures in the issuers' Offering Circulars, Offering Circular Supplements, and Pricing Supplements, Keating and Aquino continued the charade about Investor 1's investments being guaranteed by the U.S. government.

Despite the misrepresentations and deceptive sales practices employed by Keating and Aquino, both were applauded by BAI management and their efforts with Investor 1 were considered a success story of retaining assets within Bank of America and its indirect subsidiary, BAI. However, while showering praise on the client manager Aquino and the registered representative Keating, BAI management had turned a blind eye to its employees' lapses in adhering to BAI's compliance policies and procedures. It was BAI's failure to supervise that allowed both the client manager and registered representative to make misrepresentations about Fannie Mae and Freddie Mac step-up agency bonds that were sold to the BAI Investor 1. Had

Keating and Aquino been properly supervised, their statements about the step-up bonds being guaranteed should never have been allowed.

Finally, after Investor 1 complained about the purchase of the step-up bonds, BAI's compliance review of the transactions determined that Investor 1 was given an unbalanced presentation and that the federal agency step-up bonds should never have been recommended to Investor 1. However, despite compliance's determination, Keating's superiors at BAI have provided unwavering support for Keating's actions in recommending and selling the step-up bonds to Investor 1. BAI's policies and procedures supposedly emphasize in more than one place, that the registered representatives are to put their client's interests first. However, the facts surrounding the sale of step-up bonds to Investor 1 by Aquino and Keating put BAI first and saved assets from leaving the firm without a care for compliance.

III. JURISDICTION AND AUTHORITY

1. The Massachusetts Securities Division is a Division of the Office of the Secretary of the Commonwealth with jurisdiction over matters relating to securities as provided for by the Act. The Act authorizes the Division to regulate: 1) the offers and/or sales of securities; 2) those individuals offering and/or selling securities within the Commonwealth; and 3) those individuals transacting business as broker-dealer agents within the Commonwealth.

2. The Division brings this action pursuant to the enforcement authority conferred upon it by Section 407A of the Act and M.G.L. c. 30A, wherein the Division has the authority to conduct an adjudicatory proceeding to enforce the provisions of the Act and all regulations and rules promulgated thereunder.

3. This proceeding is brought in accordance with Sections 204 and 407A of the Act and its Regulations. Specifically, the acts and practices constituting violations of the Act occurred in The Commonwealth of Massachusetts.

4. The Division specifically reserves the right to amend this Complaint and/or bring additional administrative complaints to reflect information developed during the current ongoing investigation.

IV. RELEVANT TIME PERIOD

5. Except as otherwise expressly stated, the conduct described herein occurred during the approximate period of January 1, 2008 through present.

V. RESPONDENTS

6. Banc of America Investment Services, Inc. ("BAI") was a Financial Industry Regulatory Authority ("FINRA") registered broker-dealer with its headquarters at 100 Federal Street, Boston, Massachusetts 02110. BAI's Central Registration Depository ("CRD") identification number is 16361. In January 2010, BAI merged with CRD 7691, the identification number for Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") whose main address is One Bryant Park, New York, NY 10036.

VI. OTHER INVOLVED AND RELATED PARTIES

7. John Patrick Keating ("Keating") has been an employee of BAI, now Merrill Lynch, since February 2007 with an office located at 101 Derby Street, Hingham, MA 02043. Keating's CRD number is 2510363. Keating was registered in Massachusetts as a broker-dealer agent and investment adviser representative possessing the Series 7, 63, and 65 registrations.

8. Reggie Cajigal Aquino ("Aquino") was a premier client manager with Bank of America, N.A. and an investment services representative with BAI with an office located at 101 Derby

Street, Hingham, MA 02043. Aquino was registered in Massachusetts possessing the Series 6 and 63 registrations that only permitted him to sell Investment Company and variable contract products. Aquino's CRD number is 5139566. As of April 2, 2009, Aquino was no longer employed by Bank of America, N.A. or BAI.

VII. FACTUAL ALLEGATIONS

A. Background—Step-Up Bonds

9. Step-up notes or bonds are "callable debt securities with interest rates that increase over time. If the notes are not called by the issuer, their coupons increase according to a predefined schedule." [Exhibit 1].

10. BAI has been selling step-up notes and/or bonds since at least the 1990's.

11. Six registered representatives at the BAI 101 Derby Street, Hingham, MA branch sold step-up bonds to 19 Massachusetts investors over the age of 60 over a twenty-two month period, from January 2008 through October 2009.

12. John Keating was the registered representative of record for 8 of the 19 BAI customers that purchased step-up bonds through the Hingham branch, totally approximately two million seven hundred thousand dollars ($2,700,000). In addition, for one of the sales, Mr. Keating was partnered with Reggie Aquino, a dual employee of BAI and Bank of America.

13. When Keating was asked what type of client an agency step-up bond was appropriate for, Keating testified that "…I was talking to clients who were experienced [sic] renewals on either other bonds or CDs or they had cash on hand and they were looking for a higher interest rate than they could get on CDs and they were interested in the AAA rating with step-up agency bonds."

14. The limited sales and marketing materials provided by BAI indicate that the largest issuers of step-up bonds are the government sponsored enterprises Fannie Mae and Freddie Mac. [Exhibit 1, *see also* Exhibits 2 and 3 for additional BAI marketing materials].

15. The Freddie Mac step-up bond Offering Circular[2] describes its government charter along with a disclosure that its securities are not guaranteed by the government:

> Though we are chartered by Congress, our business is funded with private capital. We are responsible for making payments on our securities. *Neither the U.S. government nor any other agency or instrumentality of the U.S. government is obligated to fund our mortgage purchase or financing activities or to guarantee our securities and other obligations.*

(emphasis supplied) [Exhibit 4[3]].

16. Similarly, the Fannie Mae step-up bond April 1, 2008 Offering Circular describes its status as a government sponsored enterprise and corresponding lack of government guarantee, "[w]hile Fannie Mae is a congressionally-chartered enterprise, the U.S. Government *does not guarantee, directly or indirectly,* our securities or other obligations." (emphasis supplied) [Exhibit 5 p. 5[4]].

17. In addition, Fannie Mae pricing supplements dated July 10, 2008 that were to be read together with the April 1, 2008 Offering Circular stated further that **"[t]he bonds, together with interest thereon, are not guaranteed by the United States and do not constitute a debt or obligation of the United States or of any agency or instrumentality thereof other than Fannie Mae**." (emphasis in original) [Exhibit 6].

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[2] An Offering Circular or prospectus is utilized when offering new issues of securities to the public.

[3] The March 17, 2008 Freddie Mac, Global Debt Facility Offering Circular was produced to the Division in its entirety as part of the Offering Circular Supplement dated March 17, 2008 at Bates BOA 9867-BOA 9971. However, only the relevant portion (pages 1-19) of the March 17, 2008 Freddie Mac, Global Debt Facility Offering Circular was included and marked as Complaint Exhibit 4.

[4] The April 1, 2008 Fannie Mae Universal Debt Facility Offering Circular was produced to the Division in its entirety as part of the Offering Circular Supplement dated April 4, 2008 at Bates BOA 9972-BOA 10107. However, only the relevant portion (pages 1-25) of the April 1, 2008 Fannie Mae Universal Debt Facility Offering Circular was included and marked as Complaint Exhibit 5.

18. The BAI Hingham branch sold federal agency step-up bonds to twelve of its nineteen customers between June 1, 2008 and September 30, 2008.

19. During this June 2008 to September 2008 timeframe, the United States was in the midst of an unprecedented credit crisis and housing meltdown and resulted in Congress passing the *Housing and Economic Recovery Act of 2008*[5] on July 24, 2008 which was then enacted on July 30, 2008 when the Act was signed by President Bush.

20. Part of the *Housing and Economic Recovery Act of 2008* contained provisions to shore up the government sponsored enterprises, Fannie Mae and Freddie Mac. Specifically, the Federal Housing Finance Agency was established as a safety and soundness regulatory and was granted authority over Fannie Mae and Freddie Mac.[6]

21. In its September 9, 2008 Offering Circular Supplement, Fannie Mae described the Federal Housing Finance Agency's placing Fannie Mae into conservatorship and described three additional steps that were to be taken by the United States Department of the Treasury. For instance, the Treasury would purchase Fannie Mae's preferred stock, the Treasury would establish a new secured lending credit facility, and the Treasury would initiate a temporary program to purchase mortgage backed securities. [Exhibit 7].

22. Yet, despite being placed into conservatorship, the U.S. Treasury purchasing Fannie Mae's preferred stock, and the U.S. Treasury purchasing mortgage backed securities, the September 9, 2008 Offering Circular Supplement still *did not* provide for a guarantee of Fannie Mae's debt securities, rather the disclosure stated the opposite, "**[t]he Debt Securities, together with interest thereon, are not guaranteed by the United States and do not constitute a debt**

[5] *Housing and Economic Recovery Act of 2008*, Pub. L. 110-289, July 30, 2008.
[6] *Housing and Economic Recovery Act of 2008*, Pub. L. 110-289, § 1311, July 30, 2008

or obligation of the United States or of any agency or instrumentality thereof other than Fannie Mae." (emphasis in original) [Exhibit 7].

23. Even BAI's materials regarding federal agency step-up notes provided that "[w]hile not secured by the full faith and credit of the U.S. government, federal agency step-up notes are backed by the implicit support of the federal government as demonstrated by their authorizing legislation, essential purposes and/or ability to borrow from the U.S. Treasury." [Exhibit 3, *see also* Exhibits 1 and 2].

24. Finally, BAI's written supervisory procedures provided "[t]here must be no representation or implication that a guarantee applies to the investment return or principal value of Federal Agency Securities unless discussing GNMAs[7]." (emphasis in original) [Exhibit 8[8]].

25. Other BAI written supervisory procedures that were available in July 2008 and are still effective state:

> When recommending Federal Agency Securities, the client must be aware of the potential market risk involved. Most Federal Agency Securities are NOT guaranteed by the U.S. Government and are not as liquid as direct obligations of the U.S. Government….There must be no representation or implication that a guarantee applies to the investment return or principal value of Federal Agency Securities unless discussing GNMAs.

(emphasis in original) [Exhibit 9[9]].

26. Despite the agencies' offering circulars and BAI's own materials indicating that the step-up bonds were **not guaranteed** by the full faith and credit of the U.S. government, both Keating and Aquino at different times represented to at least one Massachusetts investor, Investor 1, that

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[7] GNMA is the Government National Mortgage Association and a wholly owned corporation of the United States within the Department of Housing & Urban Development.

[8] Counsel for BAI represented to the Division that these policies and procedures were in effect from May 6, 2008 to May 16, 2008.

[9] Counsel for BAI represented that these policies, with an effective date of 1/08/2009 were available as of April 2008.

the federal agency step-up *are guaranteed by the full faith and credit of the U.S. Government*. [*See* Exhibits 10[10] and 11].

B. A systematic breakdown in supervision in recommending securities and opening an investor's account

i. Background and Step-Up Bond Recommendation

27. Mr. Aquino, the dual employee of BAI and Bank of America, had his first interaction with Investor 1 over the phone on June 23, 2008 to let him know that his $2,000,000 worth of Certificates of Deposit ("CDs") were coming up for renewal on July 4, 2008.

28. Aquino indicated that in June 2008, the CD renewal rates of 2.70% APY were significantly less than the 4.65% APY Investor 1 had been receiving.

29. Aquino's next interaction with Investor 1 was during the week of July 7, 2008, when as an alternative renewing the CDs at a lower rate, Aquino suggested to Investor 1 that he consider federal agency step-up bonds.

30. Further, Aquino represented that Investor 1 demanded that he be sent some information regarding the step-up bonds. Keating stated that Aquino asked him to put together "a brief synopsis of what I would guess is appropriate for him."

31. Keating testified at the Division that he never directly spoke with Investor 1 prior to making a recommendation, stating, "having no knowledge of him or his specifics, I think I just guessed that [step-up bonds] may be appropriate and that should be something [Aquino] should mention to [Investor 1] in order to get a deeper understanding of what is appropriate for him."

32. While, Aquino's Series 6 registration limited the products he was authorized to recommend and sell, which included only mutual funds and variable annuities, Aquino recapped

[10] Names and other private information with respect to investors have been redacted in order to preserve confidentiality.

the step-up recommendation for Investor 1 to an associate also located at his same 101 Derby Street branch that on July 8, 2008:

> [Investor 1] didn't have time to meet and I had to think fast on what I could give him. I had a sense this was moving out of my book one way or the other that day!! I took a chance and I remembered that John Keating gave me a profile of the AAA rated bonds that he has pitched over the appointments we have had together, I mentioned that I had information and would talk to him about it. Long story short, John had the product that blurted out of my mouth and the client bought it. I had John explain the product right then and there and that client took it. Neil, I know I mentioned that I was going to get that appointment for us, but the call didn't dictate that opportunity and **I had to save that money** [$2,000,000]. I only gave this client what I knew was a product that was mentioned by John [Keating] because he's pitched it on our appointments with people who are concerned about FDIC.

(emphasis supplied) [Exhibit 12].

33. Subsequent to the initial product pitch over the phone, Keating and Aquino both indicated to BAI that Investor 1 requested written information regarding the federal agency step-up bonds.

34. Keating wrote in a statement to BAI that

> Reggie [Aquino] asked me to put together a brief synopsis of what I would guess is appropriate for him. I gave [R]eggie a printout of several talking points on AAA rated agency step up bonds. Reggie faxed this to [Investor 1] and he was very interested so he asked for a conference call to review these options. We then called him and detailed the specifics of these bonds and asked for specifics on his current situation and how these might be appropriate.[11]

35. When asked under oath about the information and writings contained in the fax that Aquino sent to Investor 1, Keating stated that some of the information on would have come from Aquino and some information, probably would have come from Keating. [*See* Exhibit 10].

36. When asked what a particular statement meant, in particular on page 2 of the facsimile, "…if called, client would receive entire principal from US government," Keating clarified for the Division that the principal would have been received from the agency, not the government.

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[11] Keating also testified before the Division that his statement to BAI regarding his interactions with Investor 1 was correct and that his amended statement to BAI just further detailed the disclosures he provided Investor 1 regarding federal agency step-up bonds.

Keating went on to explain under oath that the facsimile was not a proposal, rather a bullet point conversation piece, "[the fax] was a pre-cursor to a conversation, and obviously, *there are a lot of gaps in this that would need to be explained* further and were explained further to [Investor 1]." (emphasis supplied) [*See* Exhibit 10].

37. Keating also testified that the statement, "FDIC is the equivalent of AAA," needed to be explained more in depth and indicated that it was really "apples and oranges."[12]
[*See* Exhibit 10].

38. Keating admitted to the Division that he would have given Aquino page 3 of the facsimile that was marked *for internal use only*, however he did not expect that Aquino would pass on internal use only materials to a client. [*See* Exhibit 10].

39. The correspondence Aquino faxed to Investor 1 required approval by Aquino's manager before sending, however no evidence was produced to confirm that the facsimile was approved before being sent out.

40. After the three page fax, Keating and Aquino had a discussion with Investor 1 to go over the details of the federal agency step-up bonds.

41. Keating memorialized for BAI that:

> I detailed how these bonds [federal agency step-up bonds] were AAA rated which is the highest possible credit rating and so were categorized as extremely safe. I also detailed how that rating and government guarantee applied to the stated dividend rates and his principal upon maturity. I explained that there could be some variance between his principal and the values quoted on statements. I told him that it could show more or less but that had nothing to do with his principal and dividend guarantee it would just affect how much he would receive if he sold out earlier but he reassured us that he had no intention of that because the dividends were what he was looking for. I explained that the government could call these away at different times (I specified the dates) and if the government called them away he would receive at least his principal back. He was concerned

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[12] For instance, Keating testified during the investigation that "AAA is the best investment rating you can get on a bond," while "FDIC is an insurance on your bank balance up to $200,000."

> that he would lose the dividends until the call but I reassured him that he would not lose them.

42. When asked about the approximate seventeen pages of risk factors that were detailed in the Fannie Mae Offering Circular, Keating testified that he would have explained the risk factors in broad terms, but he typically would not have used the Offering Circular as a document to go over the risks.

43. Keating informed the Division that he did not think he had read the prospectuses for the federal agency step-up bonds recommended to and ultimately purchased for Investor 1.

ii. Investor 1's New BAI Account

44. In order to purchase the federal agency step-up bonds recommended by Keating and Aquino, Investor 1 needed to open an account with BAI.

45. The new account opening documents were faxed to Investor 1 for him and his wife to sign. [Exhibit 13[13]].

46. Keating, the registered representative for Investor 1's account, indicated to the Division that Investor 1 was not forthcoming with information for the new account documents and most likely the typed information on the new account documents was typed by his assistant with information from Aquino. [*See* Exhibit 13].

47. Keating testified that Investor 1's account was out of the norm for him.

48. Keating also testified that despite having reviewed and signed the new account documentation in July 2008, supposedly confirming that the information was accurate, that Investor 1's primary investment objective of "appreciation" was incorrect, that it should have instead been "income." [Exhibit 13].

[13] Names and other private information with respect to investors have been redacted in order to preserve confidentiality.

49. Investor 1's new account documentation indicated that a physical review of original identifications had occurred. [*See* Exhibit 13].

50. Yet Keating informed the Division that while he may have seen a copy of Investor 1's license, he would have relied on banking side to have checked Investor 1's wife's identity. When asked if Keating was relying on the bank side for verification if he should have marked "no" next to "Did you physically review original ID," Keating responded that he was "not sure what it should be." [*See* Exhibit 13].

51. From the account opening documents, Investor 1 was assigned an account number and on the same day, Keating entered four $500,000 federal agency step-up bond orders.

52. Keating indicated that the "Accepted Time" on the Order Detail page is the time that Investor 1 would have told him to purchase the securities and the "Time(ET)" was the time Keating entered the trades. [Exhibit 14[14]].

53. The Order Detail pages provide the mark-up assessed on the purchase order, of which Keating received approximately thirty one percent (31%) of the five thousand dollars ($5,000) markup. [Exhibit 14].

54. In addition to Keating receiving a commission, his banking partner indirectly was compensated. Keating testified that if the bank, in this case the dual employee Aquino, introduced a client to him that part of his commission, between five percent (5%) and ten percent (10%) was kicked back to Bank of America. Keating further explained that a portion of his commission that was kicked back would go into a pool of money that would then be paid out to his banking partners.

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[14] The Order Detail pages for Investor 1's purchases of federal agency step-up bonds also indicate that Investor 1 was assessed a $5.00 postage amount. [Exhibit 14]. Keating explained the postage amount to the Division saying, "[t]hat's a BS term that all brokerage firms throw five dollars on every trade. It's annoying….I may have omitted that from [Investor 1], being that there was a postage fee of $20 on a $2,000,000 purchase."

55. The trade confirmations and federal agency step-up bonds Offering Circulars, Offering Circular Supplements, and Pricing Supplements were sent to Investor 1 after the orders were placed. [*See* Exhibits 5, 6, 11, and 15].

56. Investor 1 called Keating after he received the issuer's offering materials because of the risks disclosed in the Offering Circular and that the documents clearly stated that there are no guarantees by the government.

57. Investor 1 complained to Aquino that he did not agree to buy a bond or invest in the federal agencies that were all over the newspapers. (*See supra* §VII.A ¶¶ 19, 20, 21).

58. Keating confirmed to BAI that Investor 1 called subsequent to receiving the federal agency step-up bond prospectuses, and that to allay Investor 1's concerns about no guarantee on the investment, Keating reiterated to Investor 1 that his investments were AAA guaranteed with an implied US government guarantee, but the Paulson Proposal would and did make an explicit guarantee.

59. Investor 1 had an in person meeting with Keating at the Hingham branch on July 22, 2008.

60. During the in person meeting, Keating wrote on Keating's Fannie Mae Offering Circular Supplement's front page, "Paulson proposal early…July makes full guarantee explicit…Govt. has said probable passage…Govt. full faith now + has said they will + do back bonds but technically implied now." [Exhibit 11].

61. Keating explained to the Division that he found the information he wrote on Investor 1's Offering Circular on the internet.

62. Keating further informed the Division that he did not know if at any time Fannie Mae, the issuer of some of Investor 1's bond purchases, Offering Circulars, supplements, or pricing sheets ever stated that there was backing by the full faith and credit of the government.

63. Keating testified that Investor 1 left the meeting comfortable and added that he orally told Investor 1 that there was an implied guarantee right now, but that the government will back the federal agencies.

64. Investor 1 called Keating again, in the beginning of August 2008 after he received his July 2008 statement, expressing concern about the "not FDIC insured", "May Lose Value", and "Not Bank Guaranteed" disclosures on the bottom of the account statement that reflected his federal agency step-up bond holdings.

65. Keating informed BAI in a written statement that again he reiterated to Investor 1 that the "…principal and interest was guaranteed by the US government…"

iii. *Investor 1's Complaint*

66. Finally, in October 2008, Investor 1 submitted a written complaint to BAI.

67. Investor 1 complained that he had made it clear to both Aquino and Keating that he emphasized his need to have liquidity and no risk.

68. Investor 1 also complained that that he did not know the long term maturity of the bonds and that he would never have agreed to purchase the federal agency step-up bonds had he known the specifics.

69. Subsequent to receiving the complaint, a banking compliance manager was assigned to Investor 1's complaint and requested a signed statement from Keating and Aquino that detailed: a chronological summary of communications with clients, the basis for any investment

recommendation, replies to any specific allegations made in the complaint, and a listing of any marketing materials provided to the Investor. [Exhibit 16].

70. Both Keating and Aquino provided written statements in response to the compliance manager's request.

71. Another compliance manager, Shannon Noonan, also investigated Investor 1's complaint.

72. Ms. Noonan noted,

> -granted client may have been fully disclosed that price would fluctuate which I am not so sure of since this complaint arise when he pulled $100k out for [personal matter] + bond sold slightly below par
>
> -Regardless-FA should have never recommended Fannie/Freddie Bonds
>
> -think MD, AM + FA are hanging their hat on implicit gov't guarantee which is how it was sold to client –unbalanced presentation

[Exhibit 17].

73. When asked if anyone at BAI had ever expressed to Keating whether he should have sold the federal agency step-up bonds to Investor 1, Keating testified in part that "[e]veryone has told me that I did the exact right thing for [Investor 1] and there was nothing else that he wanted."

74. Emails from July 2008 demonstrate that Keating and Aquino were applauded for saving $2,000,000 worth of assets from leaving the BAI/Bank of America entities, calling Aquino's and Keating's actions a "success story." [Exhibit 18].

C. BAI's Failure to Ensure that Aquino and Keating Complied with BAI's Written Supervisory Policies and Procedures

75. *Banc of America Investment Services Inc. Series 6 ISR Compliance Manual* ("ISR Compliance Manual") addresses "legal, regulatory and internal policies and procedures for BAI Investment Services Representatives ("ISRs") who are dual employees of Bank of America (the "Bank") and BAI." [Exhibit 19[15]].

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[15] A copy of BAI's Compliance Manual for Series 6 was produced to the Division encompassing Bates

76. BAI's corresponding *Banc of America Investment Services, Inc. Compliance Manual for Full Service* ("Full Service Compliance Manual") addresses "the legal, regulatory and internal policies and procedures for BAI *Series 7 Registered Representatives*, including but not limited to, Registered Representatives, Registered Sales Assistants, Registered Call Center Personnel and Registered Representatives, and *Registered Representatives who are dual employees of the Private Bank of America* (the "Private Bank") and BAI." (emphasis supplied) [Exhibit 20].[16]

77. Both of BAI's ISR Compliance Manual and Full Service Compliance Manual state as a general standard that all customers are to be dealt with fairly and honestly and that the ISR/Registered Representative is to act in the best interests of their customers. [*See* Exhibit 19, *see also Full Service Compliance Manual* Exhibit 20].

78. Both Compliance Manuals go on to state that the obligation to put our customers' interest first is basic to our business and is required by applicable laws and regulations. [*See* Exhibit 19, *see also Full Service Compliance Manual* Exhibit 20].

79. However, Aquino and Keating put BAI's interests first in saving two million dollars ($2,000,000) from leaving the brokerage/banking business.

80. Both Compliance Manuals require the BAI employees to adhere to suitability obligations. The ISR Compliance Manual provides:

> ISRs may not recommend to a customer the purchase, sale or exchange of any security or account without reasonable grounds to believe the recommendation is suitable for the customer. *The suitability of the recommendation should be based on information furnished by the customer, after a reasonable inquiry* concerning the customer's investment objectives, financial situation, prior investment experience, risk tolerance and any other information relative to suitability is made.

BAI 10275-BAI 10690. However, Exhibit 19 comprises the portions of BAI's Compliance Manual for Series 6 relevant to this Complaint.

[16] A copy of BAI's Compliance Manual for Full Service was produced to the Division encompassing Bates BOA 4517-BOA5417. However, Exhibit 19 comprises the portions of BAI's Compliance Manual for Full Service relevant to this Complaint.

(emphasis supplied) [Exhibit 19, *see also Full Service Compliance Manual* Exhibit 20].

81. In this case, Aquino, thinking fast in an effort to save money from leaving BAI and/or Bank of America "blurted" out the federal agency step-up bonds as a recommendation for Investor 1 only knowing that Investor 1 did not like the CD renewal rates. [*See* Exhibit 12].

82. As Keating testified before the Division, he made the federal agency step-up bond recommendation without knowing anything about Investor 1, rather he just guessed at what would be appropriate.

83. The ISR Compliance Manual also refers to NASD Conduct Rule 2110, stating that it is BAI's responsibility to "observe high standards of commercial honor and just and equitable principles of trade" and "may not effect any transaction in or induce the purchase or sale of any security by means of any manipulative, deceptive or other fraudulent device or contrivance." [Exhibit 19, *see also Full Service Compliance Manual* Exhibit 20].

84. In this same vein, in listing unsound business practices, BAI states that with the limited scope of the Series 6 license, an ISR may not "[s]olicit or transact business in securities for which the ISR is not properly registered and not licensed." [Exhibit 19].

85. Aquino was only registered as a Series 6 and did not have the proper registration to solicit purchases in federal agency step-up bonds.

86. However, Aquino did solicit and recommend the federal agency step-up bonds to Investor 1.

87. Another unsound business practice in the ISR Compliance Manual is for an ISR to "[e]xpress opinions about the possible implications political events will have on the market." [Exhibit 19, *see also Full Service Compliance Manual* Exhibit 20].

88. In this case, Keating made written representations to Investor 1 that then Secretary of the Treasury of the United States Henry Paulson's proposal during the summer of 2008 to back the federal agencies, Fannie Mae and Freddie Mac, was an explicit guarantee of Investor 1's investment in the Fannie and Freddie step-up bonds. [*See* Exhibit 11].

89. However, the issuers of Investor 1's step-up bonds did not provide for any explicit guarantee by the U.S. government in any of their Offering Circulars, Offering Circular Supplements, or Pricing Supplements. To the contrary, those documents, after the "Paulson Proposal," continued to state that the investments were not backed by the full, faith, and credit of the U.S. Government. [*See* Exhibits 4, 5, 6, and 7].

90. Another part of the Compliance Manuals prohibit deceptive acts, omissions of material facts, and misrepresentations including misrepresentations about risk factors and guarantees. [Exhibit 19, *see also Full Service Compliance Manual* Exhibit 20].

91. In recommending the federal agency step-up bonds to Investor 1, Keating and Aquino omitted to disclose risk factors, guaranteed the principal, and compared FDIC to AAA. [*See* also Exhibit 10].

92. Keating even testified that there were gaps in the information on the fax provided to Investor. [*See* Exhibit 10].

93. Both of BAI's Compliance Manuals state that "[ISRs/Registered Representatives] may not warrant or guarantee the present or future value or price of any security, or that any issuer of securities will meet its promises or obligations, or guarantee the customer against loss." [Exhibits 19 and 20].

94. Both Keating and Aquino made representations to Investor 1 that his principal that went to purchase of the Fannie Mae and Freddie Mac step-up bonds was guaranteed.

(*See supra* §VII. B).

95. Counsel for BAI represented to the Division that correspondence sent by a Series 6 registered representative needs to be approved prior to its use.

96. BAI also represented that Exhibit 10 sent by Aquino to Investor 1 was not approved.

97. BAI's ISR Compliance Manual states that oral or written communications must not:

- Contain any untrue statement or omission of a material fact.
- Be false or misleading.
- Make promises of specific results, or exaggerated or unwarranted claims.
- Make comparisons, which are misleading or irrelevant to investing or specific securities
- State opinions for which there is no reasonable basis in fact

[Exhibit 19].

98. In addition to the above, the Full Service Compliance Manual adds that communications must not "[u]se language which is flamboyant or contain or contains unwarranted superlatives or exaggerations," and "[c]ontain projections or forecasts which are not clearly identified as such." [Exhibit 20].

99. Aquino's facsimile to Investor 1 on July 8, 2008 omitted to disclose risk factors which mislead the investor that the principal of the bonds would be paid by the government, and made misleading comparisons relating to FDIC and AAA. (*See supra* §VII.B.) [*See* Exhibit 10].

100. BAI also requires that any advertisements regarding non-deposit products, such as the federal agency step-up bonds, must include disclosures that the investment products provided by BAI "Are Not FDIC Insured", "May Lose Value", and "Are Not Bank Guaranteed". [Exhibit 19, *see also Full Service Compliance Manual* Exhibit 20].

101. Absent from any of the pages of Aquino's July 8, 2008 facsimile to Investor 1 is the above required disclosure. [*See* Exhibit 10].

102. Aquino's July 8, 2008 also omitted BAI's required confidentiality language disclosure. [*See* Exhibits 10, 19, and 20].

103. BAI's Full Service and ISR Compliance Manuals also prohibit any BAI "internal use only" materials from being distributed or shown to the public." [Exhibit 19, *see also Full Service Compliance Manual* Exhibit 20].

104. Yet, page three of Aquino's July 8, 2008 facsimile to Investor 1 is a BAI "internal use only" document Keating provided to Aquino. [*See* Exhibit 10].

105. BAI's written supervisory procedures explicitly state that "[p]roducts offered by BAI ARE NOT covered by the Federal Deposit Insurance Corporation ("FDIC"). Under no circumstances are non-insured products to be represented as insured." (emphasis in original) [Exhibits 20 and 21].

106. However, Aquino's facsimile to Investor one alludes to the fact that the step-up bonds are FDIC insured when he wrote that "FDIC is the equivalent of AAA." [Exhibit 10].

107. BAI's ISR Compliance Manual states that each Registered Representative needs to obtain specific client information and that the ISR should not rely upon data from a pervious account for the same client. The policy further states that an ISR should not open brokerage accounts for clients who refuse to provide suitability information. [Exhibit 19].

108. As Keating testified, this account was out of the norm for him and that Investor 1 refused to provide him information. Rather, Investor 1 relied on Keating to get the information from Aquino on the banking side that that was approximately nine months old and was received when the two million dollars ($2,000,000) worth of bonds were purchased.

109. Finally, the Full Service Compliance Manual provides policies for various products offered and sold by BAI. [Exhibit 20].

110. The Full Service Compliance Manual provides a policy for Governments-Federal Agency Securities. This policy covers the federal agency step-up bonds purchased by Investor 1. [Exhibit 20, *see also* Exhibits 8 and 9].

111. The BAI Federal Agency Securities policy explicitly states "[w]hen recommending Federal Agency Securities, the client must be aware of the potential market risk involved. Most Federal Agency Securities are NOT guaranteed by the U.S. Government and are not as liquid as direct obligations of the U.S. Government." (emphasis in original) [Exhibit 20].

112. In this case, Keating and Aquino took liberties in recommending the federal agency step-up bonds to Investor 1 and falsely promoted the idea that the securities were guaranteed by the U.S. Government.

113. BAI's Federal Agency Securities policies also state that purchase orders when the bonds are not long in the customer's account of one million dollars ($1,000,000) or more, then the purchase must be pre-approved by a manager. [Exhibit 20].

114. Investor 1 was not long in federal agency securities and based on the policy, his purchase of two million dollars ($2,000,000) worth of federal agency step-up bonds should have been pre-approved.

115. However, Keating testified in recommending or putting in an order for agency step-up bonds, the transactions did not need to be pre-approved by a manager.

116. Despite the plethora of written supervisory procedures not complied with by Keating, Keating was not disciplined by BAI, rather his supervisors endorsed his lapses and informed him

that he had done the right thing with respect to the recommendation and sale of step-up bonds to Investor 1.

VIII. <u>VIOLATIONS OF SECURITIES LAWS</u>

A. COUNT I: VIOLATIONS OF § 204(a)(2)(G)

117. Section 204 (a)(2)(G) of the Act provides in pertinent part:

> (a) The secretary may by order impose an administrative fine or censure or deny, suspend, or revoke any registration or take any other appropriate action if he finds (1) that the order is in the public interest and (2) that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser:–
>
> (G) has engaged in any unethical or dishonest conduct or practices in the securities, commodities or insurance business.

118. 950 CMR § 12.204 (1)(a)(4) provides in pertinent part :

> (1) <u>Dishonest and unethical practices in the securities business</u>.
> (a<u>) Broker-Dealers</u>. Each broker-dealer shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business. Acts and practices, including, but not limited to the following, are considered contrary to such standards and constitute dishonest or unethical practices which are grounds for imposition of an administrative fine, censure, denial, suspension or revocation of a registration or such other appropriate action:
> …
> 4. Recommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer.

(emphasis in original)

119. The Division herein re-alleges and restates the allegations and facts set forth in

paragraphs 1-116 above.

120. The conduct of Respondent, as described above, constitutes a violation of M.G.L. c. 110A, § 204(a)(2)(G).

B. COUNT II: VIOLATIONS OF § 204(a)(2)(G)

121. Section 204 (a)(2)(G) of the Act provides in pertinent part:

> (a) The secretary may by order impose an administrative fine or censure or deny, suspend, or revoke any registration or take any other appropriate action if he finds (1) that the order is in the public interest and (2) that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser:–
>
> (G) has engaged in any unethical or dishonest conduct or practices in the securities, commodities or insurance business.

122. 950 CMR § 12.204 (1)(a)(18) provides in pertinent part :

> (1) Dishonest and unethical practices in the securities business.
> (a) Broker-Dealers. Each broker-dealer shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business. Acts and practices, including, but not limited to the following, are considered contrary to such standards and constitute dishonest or unethical practices which are grounds for imposition of an administrative fine, censure, denial, suspension or revocation of a registration or such other appropriate action:
> …
> 18. Making any advertising or sales presentation, either in written or oral form, in such a fashion as to be deceptive or misleading, including, but not limited to, the following:
> a. Distributing any nonfactual data, material or presentation based on conjecture, unfounded or unrealistic claims or assertions in any brochure, flyer, or display by words, pictures, graphs or otherwise designed to supplement, detract from, supersede or defeat the purpose of effect of any prospectus or disclosure.
> b. Using supplementary materials in connection with the offer of a particular security where the

> information in such materials is not consistent with, or adequately supported by, the prospectus or is not filed as part of the registration statement.

(emphasis in original)

123. The Division herein re-alleges and restates the allegations and facts set forth in paragraphs 1-116 above.

124. The conduct of Respondent, as described above, constitutes a violation of M.G.L. c. 110A, § 204(a)(2)(G).

C. COUNT III: VIOLATIONS OF § 204(a)(2)(G)

125. Section 204 (a)(2)(G) of the Act provides in pertinent part:

> (a) The secretary may by order impose an administrative fine or censure or deny, suspend, or revoke any registration or take any other appropriate action if he finds (1) that the order is in the public interest and (2) that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser:–
>
> (G) has engaged in any unethical or dishonest conduct or practices in the securities, commodities or insurance business.

126. 950 CMR § 12.204 (1)(a)(4) provides in pertinent part :

> (1) Dishonest and unethical practices in the securities business.
> (a) Broker-Dealers. Each broker-dealer shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business. Acts and practices, including, but not limited to the following, are considered contrary to such standards and constitute dishonest or unethical practices which are grounds for imposition of an administrative fine, censure, denial, suspension or revocation of a registration or such other appropriate action:
> …
> 28. Failing to comply with any applicable provision of the NASD Rules of Fair Practice or any applicable fair practice or ethical standard promulgated by the SEC or by a self-regulatory organization approved by the SEC.

(emphasis in original)

127. The NASD/SRO rules provide in pertinent part:

NASD Rule 2210. Communications with the Public

(a) Definitions

For purposes of this Rule and any interpretation thereof, "communications with the public" consist of:
…
(3) "Correspondence" as defined in Rule 2211(a)(1).[17]

(d) Content Standards
(1) Standards Applicable to All Communications with the Public
(A) All member communications with the public shall be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in the light of the context of the material presented, would cause the communications to be misleading.
(B) No member may make any false, exaggerated, unwarranted or misleading statement or claim in any communication with the public. No member may publish, circulate or distribute any public communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading.
(C) Information may be placed in a legend or footnote only in the event that such placement would not inhibit an investor's understanding of the communication.
(D) Communications with the public may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast. A hypothetical illustration of mathematical principles is permitted, provided that it does not predict or project the performance of an investment or investment strategy.

NASD Rule 2310. Recommendations to Customers (Suitability)

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[17] 2211. Institutional Sales Material and Correspondence
(a) Definitions
For purposes of Rule 2210, this Rule, and any interpretation thereof:
(1) "Correspondence" consists of any written letter or electronic mail message and any market letter distributed by a member to:
(A) one or more of its existing retail customers; and
(B) fewer than 25 prospective retail customers within any 30 calendar-day period.

> (a) In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

128. The Division herein re-alleges and restates the allegations and facts set forth in paragraphs 1-116 above.

129. The conduct of Respondent, as described above, constitutes a violation of M.G.L. c. 110A, § 204(a)(2)(G).

D. COUNT IV: VIOLATIONS OF §204(a)(2)(J)

130. Section 204(a)(2)(J) of the Act provides in pertinent part:

> The secretary may by order, deny, suspend, or revoke any registration if he finds (1) that the order is in the public interest and (2) that the applicant of registrant
>
> (J) has failed to reasonably to supervise agents, investment adviser representatives, or other employees to assure compliance with this chapter.

131. The Division herein re-alleges and restates the allegations and facts set forth in paragraphs 1-116 above.

132. Respondent failed to supervise its agents or other employees to assure compliance with the Act.

133. The conduct of Respondent, as described above, constitutes a violation of M.G.L. c. 110A, § 204(a)(2)(J).

IX. STATUTORY BASIS FOR DIVISION ACTION

Section 407A of the Act relates to Violations, Cease and Desist Orders and Costs and it provides in pertinent part that:

> (a) If the secretary determines, after notice and opportunity for a hearing, that any person has engaged in or is about to engage in

> any act or practice constituting a violation of any provision of this chapter or any rule or order issued thereunder, he may order such person to cease and desist from such unlawful act or practice and may take affirmative action, including the imposition of an administrative fine, the issuance of an order for accounting, disgorgement or rescission or any other relief as in his judgment may be necessary to carry out the purposes of [the Act].

X. PUBLIC INTEREST

For any and all of the reasons set forth above, it is in the public interest and will protect Massachusetts investors to: 1) obtain a permanent cease and desist order barring the Respondents from further violating the Act; 2) require Respondents to pay an administrative fine in an amount and upon such terms and conditions as the Director or Hearing Officer may determine; and 3) for the Director or Hearing Officer take any and all other necessary actions, including requiring Respondent to engage an independent compliance consultant, which may be in the public interest and appropriate for the protection of investors.

XI. RELIEF REQUESTED

WHEREFORE, the Enforcement Section of the Division requests that the Director or Hearing Officer take the following actions:

A. Find that all the sanctions and remedies detailed herein are in the public interest and necessary for the protection of Massachusetts investors;

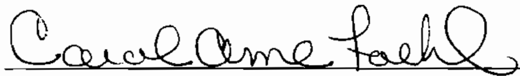
B. Find as fact the allegations set forth in paragraph 1-116, inclusive, of the Complaint;

C. Enter a permanent Order against Respondents ordering them to cease and desist from further violations of the Act;

D. Impose an administrative fine on Respondents in such amount and upon such terms and conditions as the director or Hearing Officer may determine; and

E. Take such further action, such as requiring Respondent to engage an independent compliance consultant as may be deemed just and appropriate for the protection of investors as provided by M.G.L. c. 110A, § 407A.

ENFORCEMENT SECTION
MASSACHUSETTS SECURITIES DIVISION
By its attorneys,



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Dated: June 16, 2010