

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

IN THE MATTER OF:	)	
	)	
FRANCIS J. WELLER, JR., AND	)	
WELLER, JR., FRANCIS J. (D/B/A WELLER	)	
ASSET MANAGEMENT)	)	
	)	
RESPONDENTS.	)	Docket No. E-2018-0144
	)	

**ADMINISTRATIVE COMPLAINT**

**I. PRELIMINARY STATEMENT**

The Enforcement Section of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth (the “Enforcement Section” and the “Division,” respectively) files this Administrative Complaint (the “Complaint”) to commence an adjudicatory proceeding against Francis J. Weller, Jr., Weller, Jr., Francis J, (d/b/a Weller Asset Management) (together, “Respondents”) for violations of MASS. GEN. LAWS ch. 110A, the Massachusetts Uniform Securities Act (the “Act”), and the regulations promulgated thereunder at 950 MASS. CODE REGS. 10.00 – 14.413 (the “Regulations”). The Enforcement Section alleges that Respondents engaged in acts and practices in violation of Sections 204 and 203A of the Act and Regulations.

The Enforcement Section seeks an order: 1) finding as fact the allegations set forth below; 2) finding that all the sanctions and remedies detailed herein are in the public interest and necessary for the protection of Massachusetts investors; 3) requiring Respondents to permanently cease and desist from further conduct in violation of the Act; 4) censuring

Respondents; 5) revoking Respondent Weller, Jr. Francis J. d/b/a Weller Asset Management's registration as an investment adviser in the Commonwealth; 6) revoking Francis J. Weller's registration as an investment adviser representative in the Commonwealth; 7) requiring Respondents to provide a verified accounting of all proceeds which were received as a result of the alleged wrongdoing; 8) requiring Respondents to disgorge all profits and other direct or indirect remuneration received from the alleged wrongdoing; 9) imposing an administrative fine on Respondents in an amount and upon such terms and conditions as the Director or Presiding Officer may determine; and 10) taking any such further action which may be in the public interest and necessary and appropriate for the protection of Massachusetts investors.

## II. SUMMARY

Since 1994, Francis Weller, Jr. has owned and operated his own investment advisory business out of Cape Cod. As a registered investment adviser, Weller and his firm, Weller Asset Management ("WAM") owes a fiduciary duty to his clients, including acting in the best interest of his clients and disclosing conflicts of interest. However, since at least 2009, Weller has failed to discharge his fiduciary duty. Weller failed to act in the best interest of his clients and failed to disclose conflicts of interest including operating his advisory business in close partnership with a registered representative ("RR") of a broker-dealer.

Weller met RR in 1994 and though RR's broker-dealer affiliation has changed over the years, Weller and his clients followed RR from firm to firm. Since 2009, RR has been affiliated with the same full-service broker-dealer ("BD") and Weller's advisory clients held their accounts at the full-service BD. While Weller purports to provide

traditional advisory services of asset allocation, stock picking, and discretionary trading, the manner in which Weller provides these services is anything but traditional. Rather than utilizing a discount broker-dealer that offers research, online trading, commissions as low as \$7.95, and electronic tools for portfolio management, Weller relies primarily on RR to provide research, recommend specific stock trades, input trades, and facilitate the electronic tools for portfolio management. In addition, Weller authorizes RR to execute trades via phone and relies on RR to send by mail or fax interim client statements versus accessing client account information in real time on the BDs website. RR is not an employee of Weller's advisory firm, but rather earns commissions from trade execution and trade recommendations. Weller's clients are paying commissions of up to \$100 per trade based on recommendations from RR.

While Weller's clients are paying full-service commissions to BD and RR in addition to 1% assets under management fee to Weller, Weller's overhead costs are subsidized by the BD and not disclosed to clients. Weller is allowed use of BD's conference rooms, receives research, and has RR manage electronic client management tools on BDs platform. Weller did not disclose to clients that similar services could be received at a lower cost from other advisers. Weller did not disclose how intertwined his services are with RR. Weller did not disclose the benefits he received from BD.

With this action, the Enforcement Section seeks to stop Respondents from continuing to engage in acts and practices that violate Massachusetts securities laws.

### **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 and the Regulations. The Act authorizes the Division to regulate: (a) the offers and/or sales of securities; (b) those individuals offering and/or selling securities within the Commonwealth; and (c) those individuals transacting business as broker-dealer agents within the Commonwealth.

2. The Division and its Enforcement Section brings this action pursuant to the authority conferred upon the Division by Section 407A of the Act, wherein the Division has the authority to conduct an adjudicatory proceeding to enforce the provisions of the Act.

3. This proceeding is brought in accordance with Section 204 of the Act.

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

#### **IV. RELEVANT TIME PERIOD**

5. Except as otherwise expressly stated, the conduct described herein occurred during the approximate time period of January 1, 2012 to the present date (the “Relevant Time Period”).

#### **V. RESPONDENTS**

6. Francis J. Weller, Jr. (“Weller”) is a resident of Massachusetts. Weller has a Financial Industry Regulatory Authority (“FINRA”) Central Registration Depository (“CRD”) number of 4852071. Weller has been registered as an investment adviser representative since December 30, 1994. Weller is an investment adviser representative and sole owner of Weller, Jr., Francis J., a registered investment adviser firm in Massachusetts.

7. Weller, Jr. Francis J. d/b/a Weller Asset Management f/k/a Weller Investments (“WAM”) is an investment adviser with its principal place of business in South Orleans, Massachusetts. WAM has a FINRA CRD number of 130474. WAM has been registered in the Commonwealth as an investment adviser since December 30, 1994. Weller operates the firm as a sole proprietor.

## VI. STATEMENT OF FACTS

### A. Weller’s Relationship with RR

8. WAM is a Massachusetts registered investment adviser, and has operated within Massachusetts as an investment adviser since December 1994.

9. WAM operates its business from South Orleans, MA.

10. Weller operates WAM as a sole proprietor and has no other employees or on-site supervisor.

11. Weller is the sole investment adviser representative of WAM.

12. WAM has 27 advisory clients, most of who are over the age of 65 and who reside in Massachusetts.

13. All 27 clients signed advisory agreements with WAM (the “WAM Advisory Agreements”) that provide, among other things, information on WAM’s asset under management (“AUM”) fee.

14. Per the WAM Advisory Agreements, WAM has discretion to make trades in client accounts without seeking prior client authorization.

15. The WAM Advisory Agreements disclose that clients of WAM will be charged an advisory fee of up to 1.00% of assets under management (“AUM”) fee.

16. In 1994, Weller was introduced to a Massachusetts-registered broker-dealer agent (“RR”).
17. Since 1994, RR has serviced all WAM client accounts.
18. Weller worked exclusively through RR between 1994 and present, and has maintained all WAM client accounts with RR as the broker of record.
19. In 2009, RR became a broker-dealer agent of a Massachusetts-registered full-service broker-dealer (“BD”). At that time, Weller moved all his client accounts to BD with RR as the agent of record.
20. Since 2009, Weller directs all WAM clients to use BD as the custodian for their accounts and all 27 clients have customer accounts with BD.
21. BD is a full-service broker-dealer firm that provides a wider variety of financial services and charges higher commissions than a discount broker-dealer.
22. WAM and Weller pay for one third-party research provider.
23. However, through RR and BD, WAM and Weller are able to get additional third party research for free.
24. BD allows WAM and Weller to utilize BD’s Cape Cod offices, including conference rooms, to conduct client meetings.
25. BD provides a variety of client account management tools, including client account information and overviews for its registered agents, including RR. Weller has access to this information through RR.

26. In exchange for access to investment research, client account information and the use of BD's physical office space, Weller requires all his clients to have accounts with BD and RR so that BD and RR can receive the commission on all trades executed in WAM clients' accounts.
27. Weller primarily generates client portfolios using pen and paper. He does not use any computer programs.
28. Weller authorizes trades in individual stocks for WAM clients by calling RR.
29. Weller rarely authorizes trades in mutual funds or exchange traded funds for WAM clients.
30. Weller receives monthly paper WAM client statements from BD, and generally relies on prior monthly statements to review account performance.
31. In between monthly paper statements, Weller does not access client accounts, but relies on RR to provide current information over the telephone.
32. If Weller needs up-to-date paper client account statements, he calls RR to request paper statements.
33. Weller does not instantly receive these statements. He either picks up the statements in person, or has the paper reports mailed by first class mail.
34. Weller does not use a discount brokerage or internet-based trading platform to place trades. Instead, Weller authorizes trades solely by telephoning the full service BD.
35. The trade blotter for RR indicates that WAM authorizes sales of commonly traded stocks. WAM clients pay a commission to RR and the BD for each stock transaction.

**B. Weller Breached his Fiduciary Duty to his Clients**

**i. Weller Failed to Act in the Best Interests of his Clients**

36. As a registered investment adviser Weller owes a fiduciary duty to WAM clients, including the duty to act in the best interests of his clients.

37. All of Weller's authorized transactions for WAM clients are placed through RR.

38. Between 2012 and 2017, Weller has authorized on average over 86 trades per month in roughly 80 WAM client accounts.

39. In addition to the advisory fees paid to WAM and Weller, WAM clients pay full-service commissions for each trade executed through RR and BD.

40. Despite this, in a trifold brochure provided to WAM clients, Weller states that WAM is "a fee-based advisory service designed to minimize transaction expense."

41. Full service commissions at BD can range from approximately \$84.00 to \$700.00 per trade, whereas discount brokerage transaction fees can be as low as \$7.95 per trade.

42. Since at least 2009, Weller has not utilized any brokerage services other than RR and BD to authorize or execute trades for WAM Advisory Clients.

43. Weller did not periodically evaluate his method of authorizing trades solely through BD and RR.

44. Since 2012, Weller and WAM's authorized trades on average have resulted in over \$15,000 in brokerage commissions per month in WAM clients' accounts.

45. Between 2015 and 2017, RR received \$549,802.92 in commissions from servicing WAM clients' accounts.

46. Between 2012 and 2015, RR received \$523,091.86 in commission from servicing WAM clients' accounts.



47. The majority of the trades authorized by Weller for WAM clients' accounts could have been executed at a discount broker-dealer.

**ii. Weller Failed to Disclose Conflicts of Interest to his Clients**

48. As a registered investment adviser, Weller and WAM are required to disclose in writing any material conflicts of interest before providing investment advice to clients.<sup>1</sup>

49. Investment advisers must also provide clients or prospective clients with a disclosure statement prior to or at the time of entering into a contract. This disclosure statement may be a copy of the adviser's Form ADV Part 2, and must all disclose material conflicts of interest.<sup>2</sup>

50. In addition, on an annual basis, WAM is required to file an amendment to its Form ADV within 90 days after the end of their fiscal year.

51. In 2011, Form ADV Part 2 required investment advisers to prepare narrative brochures written in plain English, which, among other things, required advisers to disclose conflicts of interest.

52. From September 4, 2007 to September 27, 2017, WAM did not update its Form ADV; a period of over 10 years. WAM's September 4, 2007 Form ADV Part 2 provided no information about Weller's relationship with RR.

53. WAM's September 4, 2007 Form ADV Part 2 states that neither WAM nor Weller buys or sells securities, other than shares of mutual funds, that it also recommends to advisory clients.

54. Despite this, Weller has purchased securities that he has recommended to WAM clients.

<sup>1</sup> 950 MASS. CODE REGS. 12.205(9)(c)(11)

<sup>2</sup> 950 MASS. CODE REGS. 12.205(8)

55. For example, in August 2017, and on May 31, 2016, Weller and WAM clients both purchased shares of Cempra, Inc. (CEMP).
56. On August 31, 2015, Weller and WAM clients both purchased shares of Ariad Pharmaceuticals (ARIA).
57. WAM does not disclose in any document that it or Weller purchase securities WAM recommends to advisory clients.
58. WAM's September 4, 2007 Form ADV Part 2 does not disclose any information about broker transaction fees.
59. WAM has never filed a Form ADV Part 2B for Weller.
60. As stated above, WAM only provided clients a one-page trifold brochure discussing its business model prior to entering into a contract to provide investment advice.
61. The trifold brochure does not disclose that Weller receives securities recommendations from RR and trades directly on investment research from BD and RR.
62. The trifold brochure does not disclose that Weller receives noncash benefits from utilizing BD and RR as the broker for WAM clients' accounts.
63. The trifold brochure does not disclose the nature of WAM's business operations whereby trades are executed exclusively through RR who receives a commission on each transaction.
64. As stated earlier, RR sends Weller third-party research that is paid for by BD.
65. RR emails and phones Weller, often multiple times a day, to give him specific securities recommendations and stock tips.

66. Weller authorizes trades based directly on advice and research provided by RR and BD.
67. RR and BD earn a commission each time Weller acts on RR's securities recommendations and authorizes a trade on behalf of WAM clients.
68. In addition, RR sends Weller public information, such as articles by MSNBC and Jim Cramer.
69. RR had a financial incentive to continue recommending specific securities sales for Weller to authorize because of the commissions earned from WAM clients' accounts.
70. Despite the financial incentive RR has in providing Weller securities trading advice, Weller does not disclose to WAM clients that he frequently acts on RR's stock tips and authorizes trades on behalf of WAM clients.
71. Weller also acted on the specific directions of RR to purchase common and preferred stock on behalf of WAM clients.
72. On August 23, 2017, RR emailed Weller an article on the rising price of ULTA Beauty (ULTA).
73. On August 25, 2017, Weller authorized RR to make trades in WAM clients' accounts for the purchase of ULTA Beauty (ULTA).
74. WAM clients' accounts were assessed commissions of \$84.00 on the transactions.
75. On December 7, 2016, RR sent Weller an email stating "Sell [NIKE.]"
76. On December 8, 2016, Weller authorized RR to make trades in WAM clients' accounts to sell 700 shares of NIKE.
77. WAM clients' accounts were assessed commissions of \$521.20 on the transactions.

78. On December 23, 2016, RR sent Weller an email with the subject line “[Boston Private Financial Holdings, Inc.] up 50 cents on volume[.]”

79. On December 23, 2016, Weller authorized RR to make trades in WAM clients’ accounts to purchase 500 shares of Boston Private Financial Holdings, Inc.

80. WAM clients’ accounts were assessed commissions of \$184.32 on the transactions.

81. In 2015, 89% of RR’s commissions came from servicing WAM clients. In 2016, 53% of RR’s commissions came from servicing WAM clients. In 2017, 59 % of the RR’s commissions came from servicing WI clients.

<b>Year</b>	<b>Total Commission Earned by RR</b>	<b>Commission Assessed on WI Client Accounts</b>	<b>Percentage of Commission Derived from WI Client Accounts</b>
2015	\$294,402.10	\$261,987.00	89%
2016	\$263,895.51	\$139,593.77	53%
2017	\$251,043.76	\$148,222.15	59%
<b>Total:</b>	<b>\$809,341.37</b>	<b>\$549,802.92</b>	<b>68%</b>

82. Since 2012, WAM clients have been a significant source of revenue for RR.

83. In total, between 2012 and 2017, RR received \$1,072,894.78 in commissions from servicing WAM clients’ accounts.

<b>Year</b>	<b>Commission Assessed on WAM Clients’ Accounts</b>
2012	\$151,013.67
2013	\$187,562.71
2014	\$184,515.48
2015	\$261,987.00
2016	\$139,593.77
2017	\$148,222.15
	<b>Total: \$1,072,894.78</b>

84. The commissions assessed on WAM clients' accounts were over and above the AUM fee WAM and Weller assessed on their clients' accounts.

## **VII. VIOLATIONS OF LAW**

### **Count I – Violation of MASS. GEN. LAWS ch. 110A, § 204(a)(2)(G)**

85. Section 204 of the Act provides:

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 [.]

MASS. GEN. LAWS ch. 110A, § 204(a)(2)(G).

86. The Enforcement Section herein re-alleges and re-states the allegations of fact set forth in Section VI above.

87. The conduct of Respondents, as described above, constitutes violations of MASS. GEN. LAWS ch. 110A, § 204(a)(2)(G).

### **Count II – Violation of MASS. GEN. LAWS ch. 110A, § 204(a)(2)(G)**

88. Section 204 of the Act provides:

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 [.]

MASS. GEN. LAWS ch. 110A, § 204(a)(2)(G).

89. 950 MASS. CODE REGS. 12.205(9) provides in pertinent part:

(9) Fraudulent Practices/Dishonest or Unethical Practices.

[...]

(c) The following practices are a non-exclusive list of practices by an adviser which shall be deemed "dishonest or unethical conduct or practices in the securities business" for purposes of M.G.L. c. 110A, § 204(a)(2)(G):

[...]

8. Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the adviser, its representatives, or any employees, or misrepresenting the nature of the advisory services beings 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 by are made, not misleading.

90. The Enforcement Section herein re-alleges and re-states the allegations of fact set forth in Section VI above.

91. The conduct of Respondents, as described above, constitutes violations of MASS. GEN. LAWS ch. 110A, § 204(a)(2)(G).

**Count III – Violation of MASS. GEN. LAWS ch. 110A, § 203A(a)**

92. Section 203A of the Act provides in pertinent part:

(b) Each investment adviser and each of its representatives registered under this chapter shall disclose to each client before a purchase or sale is effected on behalf of the client:

(1) the total amount of sales commissions or other fees that may reasonably be expected to be charged or deducted in connection with the purchase or sale[.]

MASS. GEN. LAWS ch. 110A, § 203A(b).

93. 950 MASS. CODE REGS. 12.205(8) provides in pertinent part:

(8) Disclosure Requirements.

[...]

(e) Disclosure obligations under M.G.L. c. 110A, § 203A(b):

[...]

1. Before the purchase or sale of a security with respect to which investment advice has been rendered, the investment adviser or investment adviser representative shall disclose to each client in Massachusetts:

[...]

c. The existence of any compensation arrangement with an issuer of securities or other third parties, including sales incentives (e.g. special bonuses, discounts, premiums or prizes), or arrangements which bestow soft-dollar or other such indirect benefits to the investment adviser or investment adviser representative.

94. The Enforcement Section herein re-alleges and re-states the allegations of fact set forth in Section VI above.

95. The conduct of Respondents, as described above, constitutes violations of MASS. GEN. LAWS ch. 110A, § 203A(b).

### **VIII. STATUTORY BASIS FOR RELIEF**

Section 407A of the Act provides, in pertinent part:

(a) If the secretary determines, after notice and opportunity for 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 such affirmative action, including the imposition of an administrative fine, the issuance of an order for an accounting, disgorgement or rescission or any other such relief as in his judgment may be necessary to carry out the purposes of [the Act].

MASS. GEN. LAWS ch. 110A, § 407A.

## **IX. PUBLIC INTEREST**

For any and all of the reasons set forth above, it is in the public interest and will protect Massachusetts investors for the Director to enter an order finding that such “action is necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of this chapter [MASS. GEN. LAWS ch. 110A].”

## **X. RELIEF REQUESTED**

The Enforcement Section of the Division requests that an order be entered:

- A. Finding as fact all allegations set forth in Section VI of the Complaint;
- B. Finding that all the sanctions and remedies detailed herein are in the public interest and necessary for the protection of Massachusetts investors;
- C. Requiring Respondents to permanently cease and desist from further conduct in violation of the Act and the Regulations in the Commonwealth;
- D. Censuring Respondents;
- E. Revoking Respondent Weller, Jr. Francis J. d/b/a Weller Asset Management’s registration as an investment adviser in the Commonwealth;
- F. Revoking Francis J. Weller’s registration as an investment adviser representative in the Commonwealth;
- G. Requiring Respondents to provide a verified accounting of all proceeds which were received as a result of the alleged wrongdoing;
- H. Requiring Respondents to disgorge all profits and other direct or indirect remuneration received from the alleged wrongdoing;



- I. Imposing an administrative fine on Respondents in an amount and upon such terms and conditions as the Director or Presiding Officer may determine; and
- J. Taking any such further action which may be in the public interest and necessary and appropriate for the protection of Massachusetts investors.

**MASSACHUSETTS SECURITIES DIVISION  
ENFORCEMENT SECTION**

By and through its attorneys,



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Dated: December 19, 2018