INITIAL DECISION RELEASE NO. 309
ADMINSTRATIVE PROCEEDING
FILE NO. 3-11972

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	
	:	INITIAL DECISION
PHILIP A. LEHMAN	:	March 20, 2006
	:	
	:	

APPEARANCES: Jerrold H. Kohn and Thomas J. Meier for the Division of Enforcement, Securities and Exchange Commission.

William B. Fecher for Philip A. Lehman.

BEFORE: James T. Kelly, Administrative Law Judge.

The Securities and Exchange Commission (SEC or Commission) issued its Order Instituting Proceedings (OIP) on July 5, 2005, pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act). Respondent Philip A. Lehman (Lehman) filed a timely answer.

By Order dated October 6, 2005, I granted the Division of Enforcement (Division) leave to file a motion for partial summary disposition. See Rule 250(a) of the Commission's Rules of Practice. The October 6 Order further provided that Lehman could file an opposition to any such motion within the time permitted by the Rules of Practice. See Rule 154(b) of the Commission's Rules of Practice.

The Division filed its motion for partial summary disposition, a memorandum, and four declarations on October 13, 2005. Lehman did not file an opposition to the Division's motion within the time allowed by the Commission's Rules of Practice. Nor did he move for an

enlargement of time to file an opposition.[1] Accordingly, I granted the Division's motion for partial summary disposition on October 26, 2005.

Liability Issues Resolved by the Division's
Motion for Partial Summary Disposition

By Order dated October 26, 2005, I found that there were no genuine issues of material fact and that the following allegations in the OIP were true:

Background. Lehman is sixty-five years old and a resident of Englewood, Ohio. From 1984 until September 2000, Lehman was the sole shareholder and president of Tower Equities, Inc. (Tower Equities), a broker, dealer, and investment adviser registered with the Commission and located in Dayton, Ohio. Lehman was also associated with Tower Equities from June 2001 until August 2002. Tower Equities is now known as Sicor Securities, Inc. (Sicor Securities).

Prior Proceedings. On September 22, 1999, the Commission instituted administrative and cease-and-desist proceedings against Lehman and Tower Equities for raising $10.1 million from Tower Equities' investment advisory clients in connection with two fraudulent schemes. The Commission and Lehman eventually settled the matter.

The Commission ordered Lehman to cease and desist from future violations of Section 17(a) of the Securities Act of 1933 (Securities Act), Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and Sections 206(1) and 206(2) of the Advisers Act. The Commission also suspended Lehman from association with any broker, dealer, investment adviser, or investment company for nine months, and ordered him to pay a civil penalty of $10,000. Lehman consented to the Order without admitting or denying its findings. Philip A. Lehman, 73 SEC Docket 580 (Sept. 7, 2000).

As a result of the Commission's Order, the State of Ohio revoked Lehman's securities sales license and his investment adviser representative license, and the State of Arizona revoked Lehman's registration as a securities salesman. Philip Allen Lehman, 2002 WL 518622 (Ohio Dept. Comm. Jan. 17, 2002); Philip A. Lehman, 2002 WL 417265 (Ariz. Corp. Comm. Feb. 22, 2002).

Relevant Entities. Ashar Endeavor I, LLC (Ashar), was an Ohio limited liability company organized in or about May 1999, with its principal place of business in Dayton. Ashar was dissolved in or about October 2002. Oberland Endeavor I, LLC (Oberland), is an Ohio limited liability company organized in or about July 2000, with its principal place of business in Dayton.

[1] Lehman did not argue that he lacked time to present, by affidavit prior to the hearing, facts essential to justify opposition to the Division's motion. See Rule 250(b) of the Commission's Rules of Practice.

Sale of Ashar Units. Lehman operated and controlled Ashar. Beginning in 1999, Lehman sold, or directed others to sell, membership interests in Ashar. One of these individuals was Stephen E. Cividino (Cividino), who sold interests to at least four investors. At Lehman's direction, Cividino falsely told investors that Ashar would enter into a reserved funds transaction that could result in returns on their investments of 100% in a very short period with no risk to their principal. Lehman also directed Cividino to give the Ashar investors a copy of a document known as an Operating Agreement. The Operating Agreement represented that investors could receive a return up to 100% within sixty days. The oral and written representations to the investors in Ashar were false and misleading because the proposed reserved funds transaction or similar transaction, as described in the Operating Agreement, never existed and could not reasonably have existed. Lehman eventually raised a total of approximately $10 million on behalf of Ashar from twenty-six investors.

Periodic Status Reports. Beginning in August 1999, Cividino sent investors status reports on Ashar's efforts to invest the pool of funds. John L. Runft, an attorney who assisted Lehman in the preparation of the Ashar Operating Agreements, prepared these reports based on information he obtained from Lehman. Most of the reports claimed that Ashar was close to completing a transaction with investors' funds. However, subsequent reports always stated that the deal had fallen apart at the last minute. Ashar never entered into any "reserved funds transaction" or any other investment that produced the large returns as represented to investors.

Transfer to Oberland. In or about July 2000, Lehman created Oberland. At Lehman's direction, Cividino told at least one investor that it was necessary for him to transfer his investment from Ashar to Oberland because Ashar's confidentiality had been compromised. Lehman requested that all the investors in Ashar transfer their funds to Oberland. At Lehman's direction, Cividino falsely represented to investors that, as with Ashar, they could earn a large return on their investment in a very short time with no risk to their principal. At Lehman's direction, Cividino also gave investors a copy of Oberland's Operating Agreement. The Operating Agreement falsely stated that investors could receive a return of up to 200%, double the return represented for Ashar. All of the investors in Ashar transferred their funds to Oberland. Oberland never executed a "reserved funds transaction" or any other investment that produced the large returns as represented to investors.

On July 24, 2002, Lehman wired $1 million of investor funds from Oberland to a trust account controlled by Winston Crowder (Crowder), an attorney in Houston, Texas. Crowder had previously been found liable for breach of fiduciary duty in an unrelated, but similar, investment scheme, and ordered to pay damages of $180,500, plus pre- and post-judgment interest. Crowder v. Meyer, 1999 WL 82442 (Tex. Ct. App. Feb. 11, 1999). While Crowder wired the money back to Oberland one week later, Crowder's history demonstrates the type of risk that Lehman took with Oberland investors' funds.

Seizure of Funds. In August 2002, the Federal Bureau of Investigation (FBI) seized the funds in Oberland's account at Key Bank in Dayton, pursuant to a seizure warrant issued by the United States District Court for the Southern District of Ohio. The seizure warrant was supported by the affidavit of an FBI Special Agent who had received information that Lehman

was attempting to wire approximately $10 million from Oberland's account to an account in Switzerland.

On October 17, 2002, the United States Attorney for the Southern District of Ohio filed a complaint for civil forfeiture against the Oberland account at Key Bank, pursuant to 18 U.S.C. § 981. United States v. Contents of Key Bank, N.A., Account Number 353901001365, No. M-3-02-184 (S.D. Ohio) (official notice). The U.S. Attorney alleged in the complaint that the funds in the Key Bank account constituted proceeds traceable to violations of the federal mail fraud and wire fraud statutes. The case was dismissed after the U.S. Attorney, Oberland, and the Oberland investors, all of whom were claimants in the matter, agreed to a settlement in which all the funds in the account would be disbursed to the investors, resulting in full refund of their investments.

The Units Sold in the Offering Were Securities. Section 2(a)(1) of the Securities Act defines a security as, among other items, an investment contract. The United States Supreme Court has defined an investment contract as (1) an investment of money; (2) in a common enterprise; (3) with an expectation of profits to be derived solely from the efforts of others. SEC v. W. J. Howey Co., 328 U.S. 293, 301 (1946). The interests in Ashar and Oberland purchased by the investors are securities. The fact that the proposed "reserved funds transactions" did not exist does not alter the conclusion that the interests in Ashar and Oberland are securities. See SEC v. Lauer, 52 F.3d 667, 670 (7th Cir. 1995).

Lehman Made Material Misstatements. Lehman made material misstatements to investors in the offer and sale, and in connection with the purchase and sale, of securities by representing orally and in writing that a "reserved fund transaction" was possible and that it could earn a return as high as 100% in Ashar, and as high as 200% in Oberland, in a period of sixty days or less with no risk to principal. The lack of any opportunity to engage in reserved funds transactions was material to investors.

Lehman Acted with Scienter. Lehman acted with scienter because he knew or was reckless in not knowing that investment schemes that represent a return of 100% or more within sixty days without a risk to principal were not economically viable. While under investigation by the Division for similar spurious offerings, Lehman began raising money for Ashar. He then attempted to find a suitable "reserved funds transaction" for Ashar's investors while he was defending the administrative proceeding instituted by the Commission in September 1999.

Despite numerous unsuccessful attempts to find a suitable transaction, Lehman transferred investors' funds from Ashar to Oberland in July 2000. At that time, Lehman was in the process of settling the earlier administrative proceeding. Lehman also put investors' funds at risk when he caused Oberland to wire transfer $1 million to an attorney in Texas who had previously had a judgment entered against him in connection with a similar fraudulent scheme. Oberland investors ultimately suffered no loss of their principal investment only because the FBI intervened and seized the funds in Oberland's bank account. At a minimum, Lehman's conduct was extremely reckless and demonstrated disregard for the welfare of the investors to whom he sold or the risks to which he subjected their funds.

Antifraud Violations. As a result of the conduct described above, Lehman willfully violated Section 17(a) of the Securities Act in that he, by the use of the means or instruments of transportation or communication in interstate commerce, or by the use of the mails, directly or indirectly, in the offer or sale of securities, employed devices, schemes or artifices to defraud; obtained money or property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or engaged in transactions, practices or courses of business which operated or would operate as a fraud or deceit upon purchasers or prospective purchasers of such securities. As a part of this conduct, Lehman falsely represented to investors in Ashar and Oberland that, through fictitious transactions, they could earn high rates of return in a short period of time with no risk to principal.

As a result of the conduct described above, Lehman willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in that he, in connection with the purchase or sale of securities, directly or indirectly, by the use of the means or instrumentalities of interstate commerce, or of the mails, employed devices, schemes or artifices to defraud; made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon investors in Ashar and Oberland. As a part of this conduct, Lehman falsely represented to investors in Ashar and Oberland that they could earn high rates of return in a short period of time with no risk to principal. The transactions were fictitious.

Sanctioning Issues Resolved by the Division's Motion for Partial Summary Disposition

To protect the public interest, the Division seeks an order barring Lehman from association with any broker, dealer, or investment adviser. It also seeks an order imposing a second-tier civil penalty of $55,000. The Division does not request a cease-and-desist order or an order requiring disgorgement of ill-gotten gains.

Paragraphs II.C.6, II.D.34, and II.D.35 of the OIP allege that Lehman engaged in fraudulent conduct "from about April 1999 to at least August 2000." This language in the OIP arguably implicates 28 U.S.C. § 2462, because it involves a period more than five years before the Commission issued the OIP. Under 28 U.S.C. § 2462, as interpreted by Johnson v. SEC, 87 F.3d 484, 488-90 (D.C. Cir. 1996), and 3M Co. v. Browner, 17 F.3d 1453, 1456-61 & n.14 (D.C. Cir. 1994), evidence of misconduct occurring more than five years before the Commission issued an OIP may not be used to impose associational bars or a civil penalty. See Terry T. Steen, 53 S.E.C. 618, 623-25 (1998) (holding that the Commission will look only to wrongful conduct within the five-year period before the OIP to establish liability, but stating that it may consider a respondent's earlier conduct, when relevant, to establish the respondent's motive, intent, or knowledge); see also Edgar B. Alacan, 83 SEC Docket 842, 869-70 & nn.69-70 (July 6, 2004); Wheat, First Secs., Inc., 80 SEC Docket 3406, 3432 n.63 (Aug. 20, 2003); Terence Michael Coxon, 80 SEC Docket 3288, 3313 n.59 (Aug. 21, 2003), aff'd, 137 Fed. Appx. 975 (9th Cir. June 29, 2005); Feeley & Willcox Asset Mgmt. Corp., 80 SEC Docket 2075, 2098-2100 (July 10, 2003). Lehman, who has been represented by counsel throughout this proceeding, did not

raise the statute of limitations as an affirmative defense in his Answer to the OIP. He has thus waived the issue. See Rule 220(c) of the Commission's Rules of Practice. Notwithstanding Lehman's waiver, I have considered misconduct occurring only after July 5, 2000, in imposing associational bars and a civil penalty in this proceeding.

By Order dated October 26, 2005, I found that associational bars were warranted under Section 15(b)(6) of the Exchange Act, Section 203(f) of the Advisers Act, and the criteria set forth in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981). I also found that a civil penalty of $55,000 was warranted under the criteria of Sections 21B(b)-(c) of the Exchange Act and Sections 203(i)(1)-(3) of the Advisers Act. The underlying violations involved fraud and second tier penalties are appropriate. Lehman acted with a high degree of scienter. He has committed prior violations and the need for deterrence is strong. The lack of financial harm to others and the absence of unjust enrichment are due to the diligent work of the FBI.

Matters Still to be Determined
After Hearing

Lehman sought to reduce or eliminate a civil monetary penalty on the grounds that he lacks the ability to pay. See Section 21B(d) of the Exchange Act; Section 203(i)(4) of the Advisers Act; Rule 630 of the Commission's Rules of Practice. Lehman provided the Division with a financial disclosure statement and other evidence in support of this claim. I held a one-day public hearing in Dayton on October 31, 2005. At the hearing, Lehman testified under oath about his financial circumstances, and the Division cross-examined him on that issue.[2] This was the sole hearing issue.

DISCUSSION AND CONCLUSIONS

Under Section 21B(d) of the Exchange Act and Section 203(i)(4) of the Advisers Act, in any proceeding in which the Commission may impose a civil penalty, a respondent may present evidence of his ability to pay the penalty. The Commission may, in its discretion, consider such evidence in determining whether a civil penalty is in the public interest. Such evidence may relate to the extent of the respondent's ability to continue in business and the collectability of the penalty, taking into account any other claims of the United States or third parties upon the respondent's assets and the amount of the respondent's assets.

The Division contends that Lehman has the burden of proving his inability to pay (Div. Br. at 1, 7; Div. Reply Br. at 1-2). Lehman acknowledges that he has a burden of production, but maintains that the Division retains the burden of proof (Resp. Br. at 4; Resp. Reply Br. at 2).

[2] The hearing transcript will be cited as "Tr. __." Respondent's and the Division's hearing exhibits will be cited as "RX __" and "DX __," respectively. The Division's Opening and Reply Briefs will be cited as "Div. Br." and "Div. Reply Br." Respondent's Opening and Reply Briefs will be cited as "Resp. Br." and "Resp. Reply Br."

The Commission has distinguished between the burden of proof and the burden of production in certain areas. See Gerald James Stoiber, 53 S.E.C. 448, 450 n.4 (1998); Jay Houston Meadows, 52 S.E.C. 778, 786-87 & n.27 (1996), aff'd, 119 F.3d 1219 (5th Cir. 1997). It has not addressed the distinction with respect to a claimed inability to pay a financial sanction.

Several Commission opinions support the Division's argument. See Brian A. Schmidt, 76 SEC Docket 2255, 2273 (Jan. 24, 2002) ("the respondent carries the burden of demonstrating inability to pay"); Steen, 53 S.E.C. at 627 ("The burden of proving financial inability to pay disgorgement falls upon the respondent."); cf. William J. Gallagher, 79 SEC Docket 3071, 3076 & n.11 (Mar. 14, 2003) (collecting cases, reviewing an NASD disciplinary action for failure to honor an arbitration award, and holding that the registered representative "had the burden of proof to establish his inability to pay the award.").

Lehman's argument finds support in judicial opinions reviewing other statutory schemes. See Dazzio v. FDIC, 970 F.2d 71, 75 (5th Cir. 1992); Merritt v. United States, 960 F.2d 15, 18 (2d Cir. 1992); Stanley v. Bd. of Gov. of Fed. Reserve Sys., 940 F.2d 267, 274 (7th Cir. 1991); Premex, Inc. v. CFTC, 785 F.2d 1403, 1409-10 (9th Cir. 1986); Bosma v. U.S. Dept. of Agriculture, 754 F.2d 804, 810 (9th Cir. 1984). However, those judicial opinions are distinguishable. Ability to pay is not one of the six public interest criteria that the Commission "may consider" under Section 21B(c) of the Exchange Act and Section 203(i)(3) of the Advisers Act. Rather, Congress separately addressed ability to pay under Section 21B(d) of the Exchange Act and Section 203(i)(4) of the Advisers Act. A respondent "may present" such evidence and the Commission "may, in its discretion, consider such evidence." At times, the Commission has concluded that the seriousness of the proven violations trumps even undisputed evidence of inability to pay. See Charles Trento, 82 SEC Docket 785, 793 n.22 (Feb. 23, 2004); Schmidt, 76 SEC Docket at 2273-76 (dictum).

On this record, I conclude that Lehman has failed to satisfy his burden of producing a complete and accurate financial disclosure statement. I further conclude that Lehman has failed to provide credible supporting testimony. On that basis, I decline to exercise my discretion to reduce the assessed penalty of $55,000.

Lehman's sworn financial statement shows a net worth of $56,824, with assets of $192,539, and liabilities of $135,715 (RX 1). If I were to give full credence to this evidence, the record might warrant a reduction, but not elimination, of the assessed civil penalty. See JCC, Inc. v. CFTC, 63 F.3d 1557, 1572 (11th Cir. 1995) (affirming a civil penalty that equaled 71% of a respondent's version of his net worth). However, because I find Lehman's financial presentation unworthy of belief, I will not make any reduction in the assessed penalty.

Lehman's financial disclosure statement was incomplete in several material respects. It also conflicted with the supporting documents he and the Division provided. As an illustration, Lehman, doing business as Byers Acquisition Group, Inc., made an installment sale of several assets to BriMic, LLC, in March 1999 (Tr. 15, 31; DX 5). The transaction, which involved the operation of a tavern in Dayton, was memorialized by a promissory note for $170,000, plus interest at 9% per year (Byers Note) (Tr. 48; DX 5). The installment contract required BriMic to make monthly interest-only payments for two years, and then to make monthly payments of

principal and interest (DX 5, ¶ 3). On their federal income tax returns, Lehman and his wife reported that they received interest income of $13,379 and $12,807 on the Byers Note during 2003 and 2004, respectively (DX 3, DX 4). On that basis, I infer that payments on the Byers Note were current through 2004. Notwithstanding this evidence, Lehman listed the Byers Note in the asset column of his sworn financial statement with a value of "to be determined." Lehman testified that the unpaid balance on the Byers Note is $112,000. Although Lehman alluded to a dispute over the note, I find that it should have been valued at $112,000 in the financial disclosure statement.[3] Lehman also testified that Byers Acquisition Group owns a liquor license (Tr. 15, 48). He did not value the liquor license or list it on his financial disclosure statement.

Lehman listed the value of a parcel of real estate he owns on Lexington Avenue in Dayton as $5,000, although the assessed value of the property is $26,270 (Tr. 12, 43; RX 1 at 3, RX 4). He also listed the value of another parcel of real estate he owns on Lexington Avenue in Dayton as $55,000, although the assessed value of the property is $95,630 (Tr. 12, 43; RX 1 at 3, RX 4). Lehman has not appealed the assessed valuations of these properties because, in his judgment, such appeals would be futile (Tr. 43). He has not had the properties appraised (Tr. 46). I found Lehman's efforts to low-ball the value of these two properties to be incredible. I reject Lehman's argument that the Division must prove that the assessed values could be obtained in sales of the two properties.

Lehman and his wife live on Robinwood Court in Englewood. In his financial disclosure statement, Lehman estimated the fair market value of that property at $95,000 (RX 1 at 3). At the hearing (six days later), he estimated its fair market value at $92,000 (Tr. 13). A first mortgage and a line of credit on the property total approximately $81,000 (Tr. 14; RX 6). The Division does not dispute the $95,000 valuation (Div. Br. at 6 n.3).[4]

Lehman also failed to include two properties located on North Main Street in Dayton (Main Street Properties) among the assets identified in his financial disclosure statement. The Main Street Properties are owned by Cundiff Investments LLC (Cundiff) (Tr. 56-57; DX 9, DX 10). I find as a fact that Lehman was a member of Cundiff at the time of the hearing (Tr. 56-

[3] Lehman testified that the face amount of the Byers Note was initially $160,000, not $170,000. He also testified that, subsequent to March 1999, he verbally agreed to reduce the amount owed to $112,000 (Tr. 47-48). Lehman provided no documentation to substantiate either of these claims.

[4] Lehman's valuations (whether $95,000 or $92,000) undercut his credibility. Lehman and his wife valued their residence at $150,000 when they claimed an expense for the business use of their home on their 2004 federal income tax return (DX 3, Form 8829, line 35). Of course, Lehman offered the $150,000 valuation as of December 31, 2004, while he offered his financial disclosure statement and hearing testimony as of October 2005. Absent some evidence of a major depression in the Dayton area real estate market during that nine month interval, it is doubtful that all three valuations can be correct.

57).[5] Lehman and his wife listed the rental income and depreciation expenses from the Main Street Properties on their 2003 and 2004 federal income tax returns (DX 3, DX 4). The Main Street Properties' combined assessed values total $655,690 (DX 9, DX 10).

Other aspects of Lehman's financial disclosure statement had a hit-or-miss quality to them. For example, cross-examination showed that Lehman failed to disclose the value of the Rolex watch he wore to the hearing (Tr. 30), the existence of Reynolds and Reynolds securities whose dividends he reported on his federal tax returns (Tr. 40), or any assets owned by his wife (Tr. 27).[6] Lehman's wife has an ownership interest in S & P Business Trust, which owns the holding company that owns at least 75% of Lehman's former broker-dealer, Sicor Securities (Tr. 25-26, 52-55, 78; DX 7; RX 8). That ownership was not included on Lehman's financial disclosure statement. Lehman also failed to identify as an asset $4,000 in his checking account at a credit union (Tr. 26), or to include $1,500 he earned during 2005 through the sale of reverse mortgages (Tr. 64).

I find it implausible that Lehman has "no clue" regarding his wife's financial circumstances (Tr. 24, 26-27). I come to this conclusion from the fact that Lehman is well aware of many of his wife's expenses (Tr. 65-68; RX 1), the fact that they file jointly for federal income tax purposes (DX 3, DX 4), and the fact that their business dealings are often related (Tr. 55-57, 62-63; DX 6, DX 8, DX 13). In the absence of complete information regarding his wife's assets and income, Lehman should, at a minimum, have deducted one-half of the joint expenses from his sworn financial statement.

The Internal Revenue Service (IRS) has audited Lehman's income tax returns for the years 2000-2002. Shortly before the hearing in this proceeding, an IRS revenue agent prepared an examination report (DX 14). Lehman has the option of requesting a meeting with the revenue agent's supervisor and the IRS's Appeals Office (DX 14). He can also petition the United States Tax Court (DX 14).

If the revenue agent is correct, Lehman and his wife could owe the IRS $248,574 in federal taxes and penalties, plus $76,958 in interest, for underreporting their taxable income for the years 2000-2002 (DX 14). Lehman testified that he does not agree with the proposed IRS assessment (Tr. 18). He asserted that the IRS has already admitted that one item, a transfer of $10,000 that the IRS accredited to Lehman's income in 2000, was a bookkeeping error and not

[5] In light of this testimony, I give little weight to Lehman's argument that his wife was the only member of Cundiff in 2000-2002 (Resp. Reply Br. at 6, citing DX 14 at 31). I also give little weight to Lehman's claim that the omission of the Cundiff assets from his financial disclosure statement is immaterial because the property is subject to a mortgage and there are delinquent real estate taxes (Tr. 19, 73; DX 9; Resp. Reply Br. at 6).

[6] Lehman has been married for ten years, but testified that he did not even know if his wife has a checking account (Tr. 24, 26-27). The directions for completion of the financial disclosure statement required Lehman to "[l]ist all assets owned by you, your spouse, or any other member of your household, directly or indirectly, and all assets which are subject to your or your spouse's possession, enjoyment, or control" (RX 1).

actually part of Lehman's income (Tr. 70-71). Lehman may well be correct that the revenue agent's examination report is too aggressive. The dispute remains unresolved, thus, the potential tax, penalty, and interest amounts could be reduced. At this time, it is impossible to determine the liability of Lehman and his wife to the IRS. There is no evidence of any tax liens. If Lehman so chooses, he can attempt to use the penalty imposed in this proceeding during his negotiations with the IRS.

Lehman does not oppose the Division's request to bar him from association with any broker, dealer, or investment adviser. As a result of that sanction, his ability to conduct business as a securities industry professional will end. However, Lehman has recently started a new business selling reverse mortgages. He was confident enough in this venture that he withdrew a large amount of money from a pension fund to get the business started (Tr. 32-33). I conclude that Lehman has the ability to pay a $55,000 civil penalty within a reasonable time. Taking that into account, along with the incompleteness of his sworn financial statement, I conclude that Lehman has failed to satisfy his burden of production here.

Lehman is reminded of the need to keep current his financial disclosure statement in the event that the Commission reviews this Initial Decision. See Rules 410(c) and 630(b) of the Commission's Rules of Practice.

RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on December 13, 2005.

ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED THAT, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Philip A. Lehman is barred from association with any broker, dealer, or investment adviser; and

IT IS FURTHER ORDERED THAT, pursuant to Section 21B(b) of the Securities Exchange Act of 1934 and Section 203(i) of the Investment Advisers Act of 1940, Philip A. Lehman shall pay a civil penalty of $55,000.

Payment of the civil penalty shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by wire transfer, certified check, United States Postal money order, bank cashier's check, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying Respondent and the proceeding designation, shall be delivered to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia, 22312. A copy of the cover letter and the instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may file a motion to correct a manifest error of fact within ten days of the Initial Decision pursuant to Rule 111 of the Commission's Rules of Practice. If a motion to correct manifest error of fact is filed by party, then the party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files petition for review or a motion to correct manifest error of fact, or unless the Commission determines on its own initiative to review this Initial Decision as to any party. If any of these events occur, the Initial Decision shall not become final as to that party.

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James T. Kelly
Administrative Law Judge