

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 57380 / February 26, 2008

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 2791 / February 26, 2008

ADMINISTRATIVE PROCEEDING
File No. 3-12970

In the Matter of

DUANE HIGGINS, CPA,

Respondent.

**ORDER INSTITUTING PUBLIC
ADMINISTRATIVE PROCEEDINGS
PURSUANT TO RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that public administrative proceedings be, and hereby are, instituted against Duane Higgins, CPA (“Respondent” or “Higgins”) pursuant to Rule 102(e)(1)(ii) of the Commission’s Rules of Practice.¹

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Public

¹ Rule 102(e)(1)(ii) provides, in pertinent part, that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in unethical or improper professional conduct.

Administrative Proceedings Pursuant to Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds² that:

A. SUMMARY

This Order concerns the conduct of Duane Higgins, an audit partner at Deloitte & Touche LLP ("D&T"), in connection with fiscal year 2000 and 2001 audits of the financial statements of Delphi Corporation ("Delphi"). On October 30, 2006, the Commission brought actions against Delphi and 13 individuals in connection with their role in widespread accounting violations at Delphi. Higgins, then an audit partner on the Delphi audits, engaged in improper professional conduct as detailed below.

B. RESPONDENT

Duane Higgins, 41, a resident of Clarkston, Michigan, has been an audit partner at D&T since 1999 and served as the second engagement partner for the fiscal year 1999-2002 audits of Delphi's financial statements. Higgins has been licensed as a CPA in the State of Ohio since 1992 and in the State of Michigan since 2000.

C. FACTS

1. Higgins' Review and Audit of the Sale and Repurchase of Precious Metals

In November of 2000, Delphi learned that Delphi's former parent company would not be acquiring Delphi's inventory of precious metals before year-end 2000, despite Delphi's understanding that it had a commitment to do so. Thereafter, on December 28, 2000, Delphi agreed to sell substantially all its precious metals inventory to a bank ("the Bank"). On the same day, Delphi entered into a forward purchase agreement to acquire metals of the same specifications in the same quantities from the Bank for delivery on January 29, 2001. The delivery in January was intended to coincide with Delphi's postponed transfer to its former parent company of Delphi's precious metals inventory. The price specified for Delphi's purchase of the metals in the forward agreement exceeded the sales price for the same quantities in the sales agreement by \$3.26 million. Under Generally Accepted Accounting Principles ("GAAP"), the transactions should have been accounted for together as a financing, but Delphi accounted for the sale and purchase separately. Delphi recognized the disposition of the metals inventory and a \$6 million gain on the sale in December 2000, as well as a "LIFO liquidation gain" of \$54 million included in fiscal year 2000 earnings. On January 29, 2001, Delphi repurchased the metals from the Bank as agreed. Delphi disclosed the last in, first out ("LIFO") gain as part of Delphi's yearly total LIFO gain of \$96 million. The transactions caused the financial statements to falsely portray more income,

² The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

greater operating cash flows and reduced inventories and contributed to results that Delphi, in its Form 10-K for 2000, attributed in part to “aggressive inventory management.”

In November 2000, Delphi consulted Higgins about transactions that would allow Delphi to move the precious metals off Delphi’s balance sheet before year end and then repurchase the same quantity of metals in early 2001 in time to sell them to Delphi’s former parent company pursuant to a prior agreement. Higgins sought the advice of a D&T partner serving as a regional professional practice director, regarding three alternative forms of a hypothetical precious metals transaction, one of which contemplated executing an agreement to sell metals at current market prices, and make delivery of them, contemporaneous with an agreement to repurchase the metals at futures market prices. The other D&T partner concurred that this hypothetical structure could be accounted for as a sale followed by a separate purchase. Because the consultation was hypothetical, however, it did not include all of the facts of the transactions, as discussed below. Delphi arranged the sale of the metals to the Bank shortly before year-end along with a contemporaneous agreement according to which the Bank would sell the same quantities of the metals back to Delphi a month later. In the week before the agreements were executed, one or more drafts were shared with Higgins, and he furnished comments on the effects of one or more provisions on Delphi’s accounting for the transactions.

The arrangement nominally transferred title to the metals to the Bank, but did not transfer the risks of ownership. Because Delphi was committed to purchase like metals 32 days after the sale to the Bank at a fixed, but slightly higher price, the Bank had no market risk and was assured a profit. Delphi was bailee and custodian of the metals, and, as such, agreed to indemnify the Bank for all risks of storing the metals. As a result, the Bank incurred risks no different than if it had only loaned Delphi an amount equal to the proceeds from the purported sale. In addition, the sale agreement included no fixed date for physical delivery of the metals. Although Higgins noted that the sale agreement gave the Bank the right to direct transfer of metals delivered by Delphi, Delphi had the right under the bailment agreement not to deliver the amount specified in the agreement, and, instead, pay cash equal to a fixed rate per troy ounce for the undelivered metals. Conversely, the Bank could satisfy its delivery obligation by furnishing a bill of sale for “quantities constitut[ing] all of such metals remaining in the custody of [Delphi] pursuant to the bailment provisions” in the sale agreement. The quantities of metals also well exceeded amounts that could be quickly traded at quoted prices. Some of the metals purported to be sold pursuant to the agreement were in the custody of Delphi’s suppliers for their use in coating catalytic converters on Delphi’s behalf. These suspect facts were not addressed sufficiently in the audit memo written by Higgins to document his concurrence with Delphi’s accounting for the transactions.

In assessing these transactions, Higgins considered SFAS No. 49, “Accounting for Product Financing Arrangements,” which addresses agreements where an entity sells a product to another entity and, in a related transaction, agrees to repurchase that product or a substantially identical product. SFAS No. 49 indicates that a sale and repurchase should not be accounted for as a financing unless, among other things, the amounts to be paid on the repurchase “will be adjusted, as necessary to cover substantially all fluctuations in costs incurred by the other entity in purchasing and holding the product (including interest).” Higgins believed separate treatment of the sale and repurchase by Delphi could be appropriate because the agreed forward purchase price

was a fixed amount per troy ounce, and therefore would not fluctuate to cover the Bank's costs. He did not take due note of an example in SFAS No. 49 that applies financing treatment to a sale and repurchase with fixed repurchase prices that were "adequate to cover all financing and holding costs of the other entity." Higgins did not recognize that no adjustment of the repurchase price would be necessary over the 32-day period that the Bank had title to the metals. The Bank had no holding costs, other than interest cost and the fixed bailment fee it paid Delphi to retain custody of the metals. The Bank's assured margin on the transaction of \$3.26 million equated to interest earned at an annualized rate of almost 20%, well in excess of any interest cost the Bank would reasonably incur to purchase and hold the metals.

In addition, Higgins' review of a pricing analysis prepared by Delphi, which falsely justified the prices as being appropriately discounted from market, was deficient. Higgins believed that he was sufficiently competent to evaluate the overall reasonableness of the pricing model developed by Delphi without consulting with capital markets experts at D&T. Delphi's formula predicted that each metal would trade at a different discount, but the sale and repurchase agreements indicated an identical discount for each metal. Higgins accepted Delphi's contrived calculations as evidence that the transactions occurred at fair value. Higgins also did not question why the sale and repurchase prices for at least one of the metals fell outside the range that Delphi's investment bank advisers considered reasonably likely.

Moreover, Higgins failed to revise D&T's assessment of risk of material misstatement due to fraud in light of the above-described problematic aspects of the precious metals transaction. In May 2000, he had assessed the risk as "normal," but, by January 2001, Higgins should have realized that the risk of material misstatement was higher and conducted his audit work thereafter with more careful scrutiny in light of that risk.

For the above reasons, Higgins' review and testing of the precious metals transaction did not conform to Generally Accepted Auditing Standards ("GAAS").

2. Higgins' Response to New Information Concerning the Repurchase of Generator Cores and Batteries from the Consulting Company

In a December 27, 2000, transaction, Delphi purported to sell \$70 million of bulk inventories consisting of substantially all of Delphi's inventories of generator cores and finished automotive batteries to a company that was primarily engaged in providing consulting assistance to troubled automotive industry suppliers and automotive companies engaged in turnaround efforts (the "Consulting Company"). The written agreement between Delphi and the Consulting Company expressly stated that it constituted the entire agreement, and that any oral discussions in connection with the agreement were not enforceable. The written agreement contained no commitment to repurchase the cores or batteries. Nevertheless, pursuant to an oral side agreement made at the time of the original sale and not revealed to D&T or Higgins, Delphi purchased the identical inventory of cores and batteries back from the Consulting Company on January 5, 2001, at its original price, plus a transaction fee. Because Delphi committed to repurchase the cores and batteries at a price that covered the Consulting Company's costs and paid it a fee, GAAP required the arrangement to be accounted for as a product financing under SFAS No. 49, but Delphi

improperly accounted for the transactions as a separate sale and purchase. Delphi did not recognize any revenue or direct profit on the sale, but nevertheless recognized \$27 million in LIFO inventory liquidation gains, which were included by Delphi as part of its year-end disclosure of \$96 million in LIFO gains.

In connection with D&T's annual audit of Delphi's financial statements, Higgins reviewed the Consulting Company sales agreement and concluded that its terms were not abnormal and that Delphi had no obligation to repurchase the inventory, either written or oral (per Delphi representations).

Later, however, likely in the course of D&T's review of Delphi's first quarter 2001 financial statements, in April or May 2001, Higgins became aware that at least a significant portion of the generator cores sold in the final days of 2000 had been repurchased during the first quarter. As part of his quarterly review, the lead D&T engagement partner asked senior members of Delphi's management why a repurchase had occurred, and was told that Delphi had changed its view as to its need for possession of the cores in light of its plans regarding the sale of the generator business. Delphi management also orally reaffirmed to the lead D&T engagement partner that there had been no prior repurchase commitment to the Consulting Company. The lead D&T engagement partner did not document his consideration of this issue, and performed no additional procedures. Higgins relied on the lead D&T engagement partner's inquiry of Delphi management concerning the matter.

The response of Higgins to the discovery of inventory repurchased in the first quarter so soon after the year-end bulk sale, particularly in the face of a prior management representation that there was no obligation to repurchase the inventory, was inadequate. It indicated insufficient concern about facts that could have contradicted important management representations or otherwise indicated the possible presence of fraud. Higgins recalls knowing that "some" inventory was repurchased at some time in the first quarter, but had no recollection that the sale or repurchase also involved batteries. Higgins had a duty in those circumstances to learn more about the unexpected repurchase so that the inquiries of management could be sufficiently probative, but he did not seek out additional facts. D&T's work papers showed that the repurchase comprised all, or substantially all, of the original bulk sale of both generator cores and batteries. The invoice for the repurchase, which D&T neither requested nor received, showed that it occurred nine days after the sale. The invoice price, compared to the original sale price, showed that the purported value of the inventory increased over those nine days (representing the fee to the Consulting Company). In addition, Delphi's records reveal that Delphi itself had provided the cash with which the Consulting Company purchased the inventories. In light of facts which were known to him, GAAS required Higgins to make additional inquiries or conduct additional procedures.

D. VIOLATIONS

Rule 102(e)(1)(ii) provides that the Commission may temporarily or permanently deny an accountant the privilege of appearing or practicing before it, if it finds, after notice and opportunity for hearing, that the accountant engaged in "improper professional conduct." Such improper professional conduct includes, as applicable here, negligent conduct, defined as "repeated instances

of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.” Rule 102(e)(1)(iv)(A)-(B). Higgins failed (i) to obtain sufficient competent evidential matter to afford a reasonable basis for the opinion rendered, Auditing Standards §AU 326, (ii) to exercise due professional care in the planning and performance of the audit, Auditing Standards § AU 320, and (iii) in performing the audit to identify material departures from GAAP in the financial statements, Auditing Standards § AU 410. As a result of the actions detailed above, for Delphi’s fiscal year 2000 and 2001, Higgins engaged in improper professional conduct on the precious metals and batteries and cores transactions.

E. FINDINGS

Based on the foregoing, the Commission finds that Higgins engaged in improper professional conduct pursuant to Rule 102(e)(1)(ii) of the Commission’s Rules of Practice.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Higgins’ Offer.

Accordingly, it is hereby ORDERED, effective immediately, that:

A. Higgins is denied the privilege of appearing or practicing before the Commission as an accountant.

B. After two years from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company’s financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent’s work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board (“Board”) in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms

of or potential defects in the respondent's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Nancy M. Morris
Secretary