INITIAL DECISION RELEASE NO. 284
ADMINISTRATIVE PROCEEDING
FILE NO. 3-11762

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	INITIAL DECISION
SCHIELD MANAGEMENT COMPANY,	:	May 24, 2005
and MARSHALL L. SCHIELD	:	
	:	
	:	

APPEARANCES: Polly Atkinson and Robert M. Fusfeld for the Division of Enforcement, Securities and Exchange Commission

Edwards T. Lyons Jr. and Nathan D. Simmons for Schield Management Company and Marshall L. Schield

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

Background

The Securities and Exchange Commission ("Commission") issued an Order Instituting Proceedings ("OIP") on December 1, 2004, pursuant to Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 15(b)(6) of the Securities Exchange Act of 1934 ("Exchange Act"). The OIP alleges that the United States District Court for the District of Colorado entered a final judgment on consent that permanently enjoined Schield Management Company ("Schield Management") and Marshall L. Schield ("Marshall Schield") (collectively, "Respondents") from committing future violations of Section 204 of the Advisers Act and Rule 204-2 thereunder, and ordered them to pay civil monetary penalties. SEC v. Schield Mgmt Co., Civ. No. 03-B-1332 (D. Colo. Aug. 26, 2004).

At the public hearing held on February 28 and March 1, 2005, the Division of Enforcement ("Division") presented one witness. Respondents presented five witnesses at the hearing and an additional witness by telephone on March 7, 2005.[1] The parties filed consecutive

[1] I will use the following abbreviated references: The Division's exhibits are referenced as "(Div. Ex. __.)," and Respondents' exhibits are referenced as "(Resp. Ex. __.)." Citations to the

briefs, with the last brief filed on May 16, 2005. I have considered all the proposed findings, conclusions, and arguments raised by the parties, and I accept only those that are consistent with this decision.

Findings of Fact

My findings are based on the record and my observation of the witnesses' demeanor. I applied preponderance of the evidence as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 102 (1981).

Marshall Schield, age fifty-eight, graduated from the University of Colorado in three years with a double major in finance and accounting. (Tr. 129-30.) In 1967, he joined Thompson McKenna where, at age twenty-one, he recalls being the youngest stockbroker in the country. (Tr. 131.) He was associated with Paine Webber from early 1968 until 1972. (Tr. 131-32.) In 1972, Marshall Schield began his own investment advisory firm believing that it would be better to charge a flat fee for managing client accounts than to charge commissions for trading securities. (Tr. 131.)

In 1972, Schield Management, located in Littleton, Colorado, incorporated and registered with the Commission as an investment adviser. (Div. Ex. 5.) Schield Management changed its corporate structure to a limited partnership in 1993.[2] (Div. Ex. 5.) Early on, the firm's emphasis was on managing stock portfolios; however, as the number of mutual funds increased, the firm shifted to managing mutual-fund portfolios.[3] (Tr. 140.)

Marshall Shield claims he authored one of the first books on sector fund investing, and that he has developed a unique "tactical type of portfolio management," which is a market-driven allocation of assets based on a daily analysis of mutual funds in terms of relative strength and upward momentum. (Tr. 213, 260-61, 288-89, 321-22.) Under Marshall Schield's direction, Schield Management has devised several investment strategies that use a tactical asset allocation approach. Marshall Schield categorized the strategies as a sector allocation strategy, a vision strategy, a fund allocation strategy, and vision retirement solution. (Tr. 134-36, 260-61.) Marshall Schield disagrees with people who define tactical asset management as a type of market timing. (Tr. 220, 331.)

By 2003, Schield Management had selling group agreements with almost 200 broker-dealer firms that allowed Schield Management to provide money-management services to the

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hearing transcript are referenced as "(Tr. __.)." I was not clear at Tr. 316, so I hereby affirm my ruling that Resp. Ex. A-25 is received in evidence.

[2] From 1992 until mid-February 2005, Schield Management's general partner was Schield Colehour, Inc. ("Schield Colehour"). Marshall Schield owned seventy percent of Schield Colehour, and Corey Colehour, who has worked at Schield Management as sales director since about 1985, owned thirty percent. (Tr. 240-41.)

[3] Schield Management managed a small family of funds for about seven years. (Tr. 152.)

broker-dealer's clients.[4] (Tr. 103-04, 141-42.) Pursuant to the selling group agreement, Schield Management made sales presentations to registered representatives and investment advisers on why they should recommend that their clients use Schield Management's services. (Tr. 142.) In situations where investors agreed to use Schield Management, the firm would invest the client's assets in mutual funds according to a strategy chosen by the broker-dealer. (Tr. 142-43.) Under this arrangement, the investor pays a fee to the registered representative, to Schield Management, and to the mutual fund. (Tr. 302.)

Schield Management's business peaked in July or August 2003, when it had approximately forty-five employees and managed about $700 million in more than 15,000 client accounts. (Tr. 75, 140.) The average account size was $50,000. (Tr. 169.) Marshall Schield was president of Schield Management until February 14, 2005. (Tr. 146, 243.) Corey Colehour was senior vice president, until he replaced Marshall Schield as president. (Tr. 242-43.) Sandra Schield, Marshall Schield's wife, is director of marketing; his son, Troy Schield, is employed in the portfolio management department; and his brother, Michael Schield, was the director of operations until April 2003. (Tr. 146-47, 255-56.)

As a result of an examination initiated by the Commission's Office of Compliance, Inspections, and Examinations that began on May 27, 2003, and was terminated on June 6, 2003, the Commission filed a civil complaint in the United States District Court for the District of Colorado on July 23, 2003, alleging that:

> At the direction of its president, Marshall L. Schield, Schield Management Company, an investment adviser registered with the Commission, destroyed and altered documents it was required to produce during the course of a statutorily authorized Commission examination. Marshall Schield directed Schield Management personnel to destroy e-mails, tamper with logs reflecting losses suffered by clients due to trading errors, and destroy Personnel Identification Numbers (PINs) used in trading.
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> Schield Management and Marshall Schield failed to produce and destroyed documents requested by the Commission. In addition, Schield Management and Marshall Schield destroyed documents requested by the Commission.
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> After [the Commission examiners made oral and written] requests [for e-mails] Marshall Schield directed two of the firm's employees to destroy e-mails responsive to the Commission's request.

[4] Broker-dealers approve the money-management firms that their registered representatives can use. For example, Jerry L. Smith ("Smith"), of Salado, Texas, a registered representative with the registered broker-dealer GENOS, testified that he decides on a strategy that Schield Management offers to his clients and he sends the client's funds to Schield Management. (Tr. 127.) Schield Management selects the funds where Smith's clients' funds are invested. The client pays Schield Management, which then typically pays the referring registered representative or investment advisor a "solicitation fee." (Tr. 127-28, 359.)

(Tr. 45; Div. Ex. 3 at 1, 4.)

Schield Management and Marshall Schield consented to the entry of an injunction which: (1) enjoined the Respondents from failing to make all records available for examination by representatives of the Commission in violation of Section 204 of the Advisers Act and Rule 204-2 thereunder; (2) ordered Schield Management to pay a civil monetary penalty of $100,000; and (3) ordered Marshall Schield to pay a civil monetary penalty of $75,000. (Div. Ex. 1.) As part of the consent, Schield Management produced an accounting of all Schield Management's trading errors for 1999 through a portion of October 2003. (Tr. 182-83; Resp. Ex. A-17.) The accounting showed $592,400.17 in trading errors for the period. This number was in addition to the $200,000 to $250,000 that Schield Management had already paid out for trading errors. (Tr. 185.) Schield Management's policy was to reimburse only certain errors which the customer or the broker brought to its attention. (Tr. 85.) Schield Management refunded $600,000 to $650,000 plus interest, to its clients, although it was not required to do so. (Tr. 184-85, 251, 330.)

By signing the consent, Marshall Schield agreed "to comply with the Commission policy 'not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegation in the complaint or order for proceedings.' 17 C.F.R § 202.5." (Div. Ex. 1 at 4.) In this administrative proceeding, however, Marshall Schield in effect denies the allegations in the complaint by his extensive testimony explaining his position on the facts in the underlying civil action. (Tr. 171-72.) This testimony undercuts Marshall Schield's credibility. For example, Marshall Schield admitted he had many conversations with the Commission's lead examiner and that he and his lawyer met with the examiners, and senior Commission staff, yet, despite his consent to the allegations in the complaint, he claims that employees were confused and he does not know why Schield Management failed to turn over the documents the examiners requested.[5] (Tr. 59, 65-66, 176-80.)

The Commission requested PINs as soon as it learned that Schield Management was using them to make trades, and that a registered representative associated with a broker-dealer had complained about being asked for a PIN.[6] (Tr. 61, 187.) The Commission requested Marshall Schield and two employees for all client PINs and never received them. (Tr. 61.) Again, despite his consent to the allegations in the complaint, Marshall Schield claims an employee told him that the Commission examiners had been given the PINs they requested, but the employee's e-mail shows that he only requested Schield Management staff to return PINs on June 4, 2000, two days before the Commission terminated the examination. (Tr. 192; Resp. Ex. A-14.) The record shows that Marshall Schield's sworn testimony that he advised certain

[5] The Commission requested documents for the time period October 31, 2001, to the date of the examination, May 27, 2003, that included: a list of trading errors (item 24), copies of all e-mail correspondence (item 32), and complaint files (item 33). (Resp. Ex. A-1.)

[6] A broker-dealer has a PIN with a mutual fund or custodian that allows access to the client's accounts. (Tr. 186.)

employees to delete only personally embarrassing e-mails and that he does not understand how the two employees could have told the Commission he directed them to delete e-mails concerning two large accounts is implausible. (Tr. 165-71.)

Marshall Schield's explanation for the firm's failures during the examination is that he is deficient in administrative skills; however, the unequivocal testimony of the Commission's examiner, which I find to be credible, is that Marshall Schield controlled the flow of information and that he knowingly caused the firm to fail to comply with the Commission's information requests necessary to perform the examination.[7] (Tr. 47-48, 180.)

The 2004 injunction was not Respondents first encounter with an enforcement action by the Commission. On May 31, 2000, the Commission: (1) censured Schield Management and Marshall Schield; (2) ordered each of them to cease and desist from committing or causing future violations of Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder; (3) ordered Schield Management to pay a $50,000 civil monetary penalty; and (4) ordered Marshall Schield to pay a $35,000 civil monetary penalty. (Div. Ex. 5.)

Schield Management entered two agreements with Clarke Lanzen Skalla Investment Firm, LLC, ("Clarke Lanzen"), an asset management firm, on December 16, 2003. The first was an Asset Purchase Agreement by which it sold its client accounts for the stated purchase price of $5 million, with adjustments based on the value of the client accounts transferred to Clarke Lanzen. (Tr. 197-98; Resp. Ex. A-16.) The evidence is that 4,000 to 8,500 clients of Schield Management's total 15,000 client accounts consented to transfer to Clarke Lanzen, which became the registered investment adviser on those accounts.[8] (Tr. 202-03, 247, 297.) Schield Management ceased opening new accounts in January 2004, and canceled accounts that did not consent to a transfer to Clarke Lanzen by June 30, 2004. (Tr. 200-01.) Schield Management has no authority over investments in the accounts transferred to Clarke Lanzen, and Schield Management no longer manages any investments.[9] (Tr. 202.) At the end of February 2005, Schield Management had seven employees and its only client was Clarke Lanzen. (Tr. 203.)

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[7] Marshall Schield claims that Schield Management no longer has back office or client recordkeeping problems, and it has installed software that does not allow e-mails to be erased resolving all Schield Management's problems. (Tr. 204.)

[8] Robert Steele ("Mr. Steele") was with Rydex Investments ("Rydex") from its formation in 1993 until he retired as executive vice president in April 2004. Rydex was the first family of funds available to active asset allocators like Schield Management. (Tr. 220.) Mr. Steele testified that about 4,000 accounts transferred from Schield Management to Clarke Lanzen, which used Rydex. (Tr. 297.) Marshall Schield testified that roughly 8,500 accounts transferred to Clarke Lanzen, and Corey Colehour put the number at 8,000 accounts. (Tr. 202, 247.)

[9] Corey Colehour believed that Schield Management needed to give Clarke Lanzen "buy and sell orders when it's appropriate for them to execute the trade to move our former clients' money." (Tr. 264.) Marshall Schield acknowledged, however, that Clarke Lanzen was not obligated to follow Schield Management's recommendations for changes in model or allocation. (Tr. 202-03.)

The second agreement with Clarke Lanzen was a ten-year investment research agreement by which Schield Management agreed to provide Clarke Lanzen with research on the strategies developed by Schield Management for a fee based on the market value of the assets in the accounts. (Tr. 199; Resp. Ex. B-19.) The investment research fee depends on former Schield Management clients staying with Clarke Lanzen and Clarke Lanzen utilizing strategies designed by Schield Management. (Tr. 238.) At the hearing on March 1, 2005, Corey Colehour estimated that Schield Management had received a little more that $300,000 per quarter from Clarke Lanzen. (Tr. 269.)

Marshall Schield was associated with Schield Securities, a registered broker-dealer, during the Commission's examination in May 2003. (Tr. 71.) According to Marshall Schield, Schield Securities withdrew its broker registration in the summer of 2004, and Marshall Schield is no longer associated with any broker or dealer. (Tr. 204-05.)

On February 14, 2005, Marshall Schield sold his interest in Schield Management to Colehour Acquisition, LLC, owned by Corey Colehour, for $4 million subject to several conditions.[10] (Tr. 257; Resp. Ex. B-20.) The Stock and Partnership Interest Sale Agreement specifies that the closing shall occur three years from the date of the agreement, and there is a provision for a promissory note payable in six years for the unpaid balance. (Tr. 227, 268; Resp. Ex. B-20.) A condition for completion of the sale is that Schield Management continues to be a registered investment adviser. (Tr. 208.)

As of the end of February 2005, Marshall Schield held no positions with Schield Management, and had divested himself of any voting control. (Tr. 205, 207.) In a separate agreement, also dated February 14, 2005, Marshall Schield agreed to perform certain consulting services as an independent contractor for Schield Management at a rate of $12,500 per month, plus expenses, office space, computers, and health insurance for Marshall Schield, his family, and his former wife. (Resp. Ex. B-21.)

Legal Conclusions

Allegations in the OIP

Based on the evidence set forth above, I find the allegations in the OIP to be true. Specifically:

> On August 26, 2004, a final judgment was entered by consent against Schield Management Company and Marshall L. Schield permanently enjoining them from future violations of Section 204 of the Advisers Act and Rule 204-2 thereunder, in the civil action entitled SEC v. Schield Management Co., Civ. No. 03-B-1332, in the United States District Court for the District of Colorado. The judgment

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[10] According to Marshall Schield, $4 million represents seventy percent of the $5.7 million estimated value of the assets transferred to Clarke Lanzen. (Tr. 237.)

> included orders that Schield Management Company and Marshall L. Schield pay civil money penalties pursuant to Section 209(e) of the Advisers Act.
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> The Commission's complaint alleged that Schield Management Company, at the direction of Marshall L. Schield, destroyed and altered documents it was required to produce during the course of a statutorily authorized Commission examination of Schield Management Company. Specifically, Marshall L. Schield directed Schield Management Company personnel to destroy e-mails, tamper with logs reflecting losses suffered by clients due to trading errors, and destroy . . . PINs used in trading.

During the Commission's examination, Schield Management was a registered investment adviser, and Schield Securities was a registered broker-dealer, and Marshall Schield was associated with Schield Management and Schield Securities.

Legal Challenge to 17 C.F.R. § 202.5(e)

The Commission's regulations specify that:

> The Commission has adopted the policy that in any civil lawsuit brought by it or in any administrative proceeding of an accusatory nature pending before it, it is important to avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed when the conduct alleged did not, in fact, occur. Accordingly, it hereby announces its policy not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings.

17 C.F.R. § 202.5(e).

I reject Respondents' position that the Commission's long-standing enforcement policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegation in the complaint or order for proceedings" puts them in a "straightjacket . . . with respect to the factual allegations in the complaint." (Tr. 42; Div. Ex. 1 at 4, Div. Ex. 2 at 4.) There is nothing inherently unfair about the Commission's policy, and Marshall Schield signed consents for himself and Schield Management that stated they agreed to comply with this policy. (Div. Ex. 1, Div. Ex. 2.) In addition, the consents signed by Marshall Schield specified that Marshall Schield and Schield Management understood that they "shall not be permitted to contest the factual allegations of the [civil] complaint" in any "disciplinary action before the Commission based on entry of the injunction." (Div. Ex. 1 at 3-4, Div. Ex. 2 at 3-4.)

Marshall Shield and Schield Management were represented by counsel in the civil action. (Div. Ex. 1, Div. Ex. 2.) Respondents here challenge a policy the Commission affirmed a month before the consents were signed. See Melton, 80 SEC Docket 2812, 2824 (July 25, 2003) (stating that in an administrative proceeding that follows on a consent injunction "we will not permit a respondent to contest the factual allegations of the injunctive complaint.")

Public Interest

Sections 203(e) and 203(f) of the Advisers Act direct the Commission to censure, place limitations on the activities, functions or operations of, suspend for a period not exceeding twelve months, or revoke the registration of an investment adviser and to censure or place limitations on the activities, or suspend for a period not exceeding twelve months, or bar any person who was associated with an investment adviser at the time of the misconduct where it is in the public interest to impose a sanction and the investment adviser or associated person has been enjoined from conduct associated with the activity of an investment adviser. Similarly, Section 15(b)(6)(A) of the Exchange Act, by incorporation of Section 15(b)(4)(C), directs that where a person was associated with a broker or dealer at the time of the misconduct, the Commission shall censure, place limitations on the activities or functions, or suspend for a period not exceeding twelve months, or bar a person from being associated with a broker or dealer, if it is in the public interest to impose a sanction and the person has been enjoined from engaging in certain conduct.

A United States district court has enjoined Schield Management and Marshall Schield from committing violations of Section 204 of the Advisers Act and Rule 204-2 thereunder.

In making public interest determinations, the Commission has used the factors identified by the court in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

> [T]he egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Id. at 1140; See Joseph J. Barbato, 69 SEC Docket 178, 200 n.31 (Feb. 10, 1999); See also Donald T. Sheldon, 51 S.E.C. 59, 86 (1992), aff'd, 45 F.3d 1515 (11th Cir. 1995).

I attribute Marshall Schield's actions to Schield Management. See C.E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1435 (10th Cir. 1988); A.J. White & Co. v. SEC, 556 F.2d 619, 624 (1st Cir. 1977). Marshall Shield knew that his actions were unlawful. I reach this conclusion based on the knowledge Marshall Schield exhibited at the hearing, his education, his accomplishments in more than thirty years in the securities industry, and the settlement he entered with the Commission in 2000. Following the Commission's policy regarding consent injunctions, I rely on the factual allegations in the complaint in determining the appropriate remedial action that is in the public interest. See Melton, 80 SEC Docket at 2824 (July 25, 2003)

Schield Management's violations were not isolated. It admits knowing before the examination began on May 27, 2003, that it had serious, unresolved books and records problems. (Tr. 245, 252.) Marshall Shield's actions with respect to the examination were egregious. This was the first time the Commission's experienced lead examiner found it necessary to have supervisors in the Commission's Office of Compliance, Inspections, and Examinations and a

representative of the Commission's Division of Enforcement inform a registered investment adviser that it was required to provide records for an examination promptly. (Tr. 19, 65, 67.) The consent and additional evidence in this record each independently establishes that Marshall Schield prevented the examination, destroyed e-mails, and forced the Commission to spend approximately $100,000 to preserve Schield Management records. (Tr. 46-48, 50, 58-60, 65-67, 71-72, 99, 103, 107.)

I find that Marshall Schield's remorse at the impact of his actions on Schield Management, its employees, and his family is sincere. However, his claims that he no longer wants to manage money, and that he has taken steps so that he is not in a position to commit future violations are not credible. (Tr. 204, 207, 213.) I reach this conclusion in light of the fact that Marshall Schield continues to insist that he was cooperating during the Commission's examination, despite: (1) signing a consent in a civil proceeding; and (2) persuasive evidence in this administrative proceeding that he caused the Commission to conclude it could not adequately examine the books and records of Schield Management. (Tr. 58-59; Div. Ex. 1, Div. Ex. 2.) Moreover, there is a strong likelihood that Marshall Schield will retain his controlling interest in Schield Management. Corey Colehour intends to pay $4 million for Marshall Schield's stock in Schield Management from Schield Management's earnings; however, Schield Management has lost considerable business because of the consent injunction. (Tr. 250-51, 268.) In the event that Corey Colehour is unable to make the payments under the agreement and the promissory note, the controlling stock of Schield Management will revert back to Marshall Schield. (Tr. 267-68.)

Based on this record, I conclude that it is in the public interest to revoke the investment adviser registration of Schield Management, and to bar Marshall Schield from association with any investment adviser or broker-dealer. See Feeley & Willcox Asset Management Corp., 80 SEC Docket 2075, 2099-100 (July 10, 2003).

Record Certification

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I certify that the record includes the items described in the record index issued by the Secretary of the Commission on April 7, 2005.

Order

Based on the findings and conclusions set forth above:

I ORDER, pursuant to Section 203(e) of the Investment Advisers Act of 1940, that the investment adviser registration of Schield Management Company is hereby REVOKED;

I FURTHER ORDER, pursuant to Section 203(f) of the Investment Advisers Act of 1940, that Marshall L. Schield is BARRED from association with any investment adviser; and

I FURTHER ORDER, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, that Marshall L. Schield is BARRED from association with any broker or dealer.

This order shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. 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 also 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, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that 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 a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Brenda P. Murray
Chief Administrative Law Judge