SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54892 / December 7, 2006

INVESTMENT COMPANY ACT OF 1940
Rel. No. 27593 / December 7, 2006

Admin. Proc. File No. 3-9615

In the Matter of

THE ROCKIES FUND, INC.,
STEPHEN G. CALANDRELLA,
CHARLES M. POWELL, and
CLIFFORD C. THYGESEN

OPINION OF THE COMMISSION

INVESTMENT COMPANY PROCEEDING

CEASE-AND-DESIST PROCEEDING

Redetermination of Sanctions Pursuant to Remand

The Court of Appeals affirmed Commission findings that investment company, its president, who was also a director, and two independent directors violated certain antifraud provisions by making untrue statements of material facts in the investment company's annual and quarterly reports. The Court remanded the issue of the appropriate sanctions to be imposed. Held, it is in the public interest to impose cease-and-desist orders on all respondents, to prohibit all individual respondents from associating with or acting as an affiliated person of an investment company, with right to reapply (after five years in the case of the president and after three years in the case of the independent directors), and to order president to pay a civil money penalty of $50,000 and each independent director to pay a civil money penalty of $20,000.

APPEARANCES:

Edward J. Meehan and David E. Carney, of Skadden, Arps, Slate, Meagher & Flom LLP, for Stephen G. Calandrella, Charles M. Powell, and Clifford G. Thygesen.

Robert M. Fusfeld, for the Division of Enforcement.

Case remanded: January 13, 2006
Last brief received: March 29, 2006
Oral argument: September 20, 2006

I.

This proceeding is here on remand from the U.S. Court of Appeals for the District of Columbia Circuit. On October 2, 2003, we issued an opinion finding that The Rockies Fund, Inc. ("Fund"), a closed-end investment company, and its directors Stephen Calandrella, Charles Powell, and Clifford Thygesen (collectively "Respondents") violated antifraud provisions of the Securities Exchange Act of 1934 by filing quarterly and annual reports containing material misrepresentations between June 30, 1994 and December 31, 1995; that the Fund violated provisions of the Exchange Act and Calandrella, Powell, and Thygesen aided and abetted and were a cause of reporting violations by filing reports that were not in compliance with Generally Accepted Accounting Principles ("GAAP") and that contained material misrepresentations; that Calandrella and another individual violated antifraud provisions of the Exchange Act by manipulating the price of securities through matched orders and prearranged trades; and that Calandrella violated Investment Company Act Section 57(k)(1) and Exchange Act antifraud provisions by his improper acceptance of compensation. 1/ We prohibited Calandrella, who was the president of the Fund as well as one of its directors, from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliate person of such investment adviser, depositor, or principal underwriter; prohibited Powell and Thygesen, independent directors of the Fund, from such service or action with a right to reapply after three years; issued cease-and-desist orders; and ordered Calandrella to pay a civil money penalty of $500,000 and Powell and Thygesen each to pay a civil money penalty of $160,000. 2/ On review, the Court of Appeals affirmed our findings of antifraud violations based on the filing of periodic reports containing material misrepresentations and related reporting violations, vacated our findings as to

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1/ The Rockies Fund, Securities Exchange Act Rel. No. 48590, 81 SEC Docket 703. We denied rehearing on June 1, 2004. The Rockies Fund, Exchange Act Rel. No. 49788, 82 SEC Docket 3764.

2/ This assessment was based on the findings of the law judge that a penalty should be imposed on Calandrella in an amount equal to $50,000 for each misstated filing and $100,000 for the manipulation, and on Thygesen and Powell in the amount of $20,000 each for each misstated filing.

manipulation and the acceptance of improper compensation, and remanded this matter for reconsideration of the sanctions we had imposed. 3/

II.

In affirming the Commission's findings that Respondents violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder 4/ by filing periodic reports that were not in compliance with GAAP and that contained material misrepresentations, the Court of Appeals found that those findings were based on substantial evidence. 5/ Neither the facts as found by the Commission and the Court that establish the violations in question nor the findings of violation themselves are at issue on remand; we merely summarize these factual findings here in order to provide the necessary background for our discussion of sanctions. 6/ The violations found by the Court, which serve as the basis for sanctions, are based on material misrepresentations, made with scienter, pertaining to the classification, value, and ownership of the shares of stock of Premier Concepts, Inc. ("Premier") held by the Fund. 7/

3/ The Rockies Fund, Inc. v. SEC, 428 F.3d 1088 (D.C. Cir. 2005).

4/ 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5. Section 10(b) and Rule 10b-5 make it unlawful for anyone, in connection with the purchase or sale of a security, "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5.

5/ Rockies Fund, 428 F.3d at 1090.

6/ See infra Section III. The ruling of the Court of Appeals is the law of this case. See, e.g., Key v. Sullivan, 925 F.2d 1056, 1060 (7th Cir. 1991) (stating that once an appellate court decides an issue, the decision will be binding on all subsequent proceedings in the same case, absent newly discovered evidence or an intervening change in the governing law); see also George Salloum, 52 S.E.C. 208, 216 n.37 (1995) (explaining the law of the case doctrine).

7/ A finding of violation of Section 10(b) and Rule 10b-5 requires a finding of scienter. Rockies Fund, 428 F.3d at 1093. With respect to scienter, the Court of Appeals found that the violations at issue could be established by a showing of "extreme recklessness," i.e., "'an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'" Id. (quoting SEC v. Steadman, 967 F.2d 636, 642 (D.C. Cir. 1992) (internal quotations omitted)). With respect to materiality, the Court of Appeals applied the standard articulated by the Supreme Court in

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Misclassification

At the time of the filings in question, the Fund held more than 100,000 restricted shares of Premier, as well as 750 unrestricted shares; together, the Court found, these Premier shares constituted between ten and forty percent of Fund assets. 8/ The restrictions on the vast majority of the Fund's holdings of Premier limited the Fund's ability to trade those shares, rendering them less valuable than unrestricted shares. In quarterly reports on Form 10-Q for the quarters ended June 30 and September 30, 1994 and January 31 and June 30, 1995, as well as an annual report on Form 10-K for the year ended December 31, 1994, the Fund stated that all of its holdings of Premier were unrestricted stock. 9/ The Court found that "[t]he Fund should have listed the shares as restricted in each filing; listed as unrestricted, the statements qualify as 'untrue' under Rule 10b-5." 10/ The Court rejected Respondents' argument on appeal that the misclassification of the Fund's holdings was not material, and affirmed the Commission's findings that

> [T]he misclassifications were material in two ways. First, the misclassifications affected the value of the Premier holdings – and, therefore, the Fund's financial statements. In addition, Premier occupied a large percentage of the Fund's total assets, magnifying the effect of any misinformation about Premier. Under these circumstances, a reasonable

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7/ (...continued)
Basic Inc. v. Levinson, holding that a misrepresentation or omission is material if there is a substantial likelihood that a reasonable investor would have viewed the misrepresentation or omission as having "significantly alter[ed] the total mix of information" made available. Id. at 1096 (quoting Basic, 485 U.S. 224, 231-32 (1988) (internal quotation marks and citation omitted)).

The Commission's findings as to reporting violations were based on its findings that the periodic reports at issue made untrue statements of material facts and did not comply with GAAP and Commission Regulation S-X, 17 C.F.R. § 210. The Court of Appeals held that these findings were supported by substantial evidence. The Rockies Fund, 428 F.3d at 1090.

8/ Rockies Fund, 428 F.3d at 1091-92; accord Rockies Fund, 81 SEC Docket at 718 n.33.

9/ The quarterly report for the quarter ended September 30, 1994 was also filed in an amended version on Form 10-Q/A. Thus, a total of six periodic reports contained this misclassification.

10/ Rockies Fund, 428 F.3d at 1096.

investor certainly would have viewed the misclassification as "significantly alter[ing] the 'total mix' of information." 11/

Concluding its analysis of the misrepresentations as to classification, the Court rejected Respondents' argument that they lacked the requisite scienter under Rule 10b-5. 12/ The Court noted the Commission's finding that it was "'implausible' that the Fund directors could have overlooked this kind of error in six separate filings." 13/ The Court found that, although "[t]he Fund weakly disputes the [Commission's] scienter determination, . . . the [Commission's] opinion has ample support. Premier represented a large part of the Fund's holdings – between ten and forty percent. An attentive director would have rectified the error absent extreme abdication of ordinary care." 14/ Furthermore, the Court found that "[i]n addition to the simple misclassification, each filing used valuation language only appropriate for unrestricted shares." 15/ Thus, the Court concluded, "substantial evidence supports the [Commission's] finding of reckless indifference and 'extreme recklessness.'" 16/

Valuation

The Court found that the Fund's 1983 prospectus ("the Prospectus"), which the Court found to be "the Fund's only public statement on valuation procedures," set forth four methods of valuing the securities held by the Fund. 17/ The Fund used none of those, the Court found, but

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11/ Id. (quoting Basic, 485 U.S. at 231-32).

12/ Id.

13/ Id.

14/ Id.

15/ Id.

16/ Id.

17/ Id. at 1097. Our earlier opinion made more detailed findings regarding the valuation methods set forth in the Prospectus, which can be summarized as follows (see generally 81 SEC Docket at 719-20): The Prospectus provided that securities would be valued either at market value or in good faith at fair value, and defined "fair value" as the amount the Fund could expect to realize from the current sale of the securities. The four valuation methods set forth in the Prospectus were, from most favored to least favored, the "public market method" (which used the "bid" price for those securities traded on a stock exchange; the Fund's Board was to value restricted shares at a discount from the

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instead used the "quoted market price" as the value of its Premier holdings. 18/ Paraphrasing the Commission's opinion, the Court reiterated the Commission's finding that "unmoored from its prospectus, the Fund used an ad hoc process that mainly consisted of rubber-stamping Calandrella's recommendation." 19/ The Court, again paraphrasing, agreed with the Commission's conclusion that "the prospectus – and good accounting practice – would have directed a different approach: valuing restricted stock by discounting the shares from the unrestricted market price," and with the Commission's determination that "discounting would have resulted in an appreciably lower valuation." 20/ The Court affirmed the Commission's opinion as to these points, finding that Respondents "offered no evidence of a discernable reason for choosing market price as the appropriate value" and that "the [Commission's] overvaluation findings are supported by general accounting practice and the Fund's own prospectus." 21/ The use of "the quoted market price" or "quoted market value" and the resulting overvaluation of the Premier stock held by the Fund is found in the same six periodic reports that contained misrepresentations as to the classification of the Fund's Premier holdings, as well as the Fund's

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17/ (...continued)
market price for unrestricted shares of the same issuer and class), the "private market method" (which valued the stock on the basis of actual or proposed third-party transactions), the "appraisal method" (which directed the Board to value shares by an appraisal that considered events that occurred since the purchase of the stock), and finally, if no other method was feasible, the Prospectus directed the Board to value the shares at their cost to the Fund. As we previously found, "[t]hese valuation procedures described in the prospectus were the only procedures disclosed to the investing public." Rockies Fund, 81 SEC Docket at 720.

18/ Rockies Fund, 428 F.3d at 1097.

19/ Id. Cf. Rockies Fund, 81 SEC Docket at 720 ("The Fund did not follow [the valuation] procedures [described in the prospectus."); id. at 723 (stating that "[the] record establishes that the Board adopted Calandrella's proferred market price for Premier with little or no attention paid to the basis for Calandrella's recommendations"; valuation process used was "in reality . . . cursory and inconsistent").

20/ Rockies Fund, 428 F.3d at 1097. Cf. Rockies Fund, 81 SEC Docket at 723 ("The valuation of Premier at the market price resulted in the Premier valuations being materially overstated. The Board's valuation policy disclosed in the prospectus, as well as Accounting Series Release ("ASR") 113, require that restricted securities be valued at a discount from the market price for unrestricted securities. . . . We find that . . . the Premier shares should have been valued, at a minimum, at a discount from the bid price. We further find that the discount should have been substantially below the bid price.").

21/ Rockies Fund, 428 F.3d at 1097.

quarterly report for the quarter ended September 30, 1995 and its 1995 annual report, a total of eight periodic reports. 22/

The Court rejected Respondents' argument that, even if the Fund "technically overvalued" Premier stock, the overvaluation was not material and caused no actual harm. 23/ The Court found that materiality does not require a showing of actual harm to investors. 24/ The Court further found that

> the [Commission] supported its finding of materiality, concluding that an overvaluation of the Fund's largest asset would have been significant information for potential Fund investors. In addition, as the Fund's only public statement about valuation, the prospectus does contribute to the overvaluation's materiality. Because the Fund rejected its publicly stated valuation procedures and did not discount its largest holding, substantial evidence supports the [Commission's] finding. 25/

The Court noted that Respondents disputed the Commission's finding that their valuation method was "inconsistent and slipshod" by claiming that they relied on counsel for procedures adopted in 1994. 26/ The Court rejected Respondents' argument, finding that

> much of the testimony showed that the Fund used no set procedure – whether developed by counsel or not – for valuing its holdings, instead generally relying on Calandrella's recommendation to the board. Such a haphazard process for valuing the largest holding of the Fund constitutes an "extreme departure from the standards of ordinary care" that should have been obvious to all the Fund's directors. 27/

22/ See Rockies Fund, 81 SEC Docket at 719-21 (finding misstatements as to valuation in Fund's quarterly and annual reports from June 30, 1994 through December 31, 1995, including specifically in "[the] third quarter and annual reports for [1995] (the two reports that correctly classify Premier shares as restricted)").

23/ Id.

24/ Id. (citing Graham v. SEC, 222 F.3d 994, 1001 n.15 (D.C. Cir. 2000)).

25/ Id.

26/ Id. (paraphrasing Commission opinion, which found valuation process "haphazard, following no consistent methodology").

27/ Id.

Thus, the Court concluded that Respondents acted with scienter with respect to the misrepresentations regarding valuation.

Ownership

Finally, in the Form 10-Q filed by the Fund for the quarter ended September 30, 1995, the Fund reported ownership of 200,000 shares of Premier offered as part of a private placement. The purchase was not authorized by the Fund's Board of Directors until November 15, 1995, and the Fund did not pay for the shares or sign a written contract for them until December 1995. The Court rejected Respondents' argument on appeal that the Fund could properly report ownership of the shares in its September 1995 quarterly report pursuant to an oral agreement, finding that "the Fund did not establish ownership until its directors approved the purchase amount and price in November 1995, well after the September filing." 28/ The Court affirmed the Commission's finding as to materiality, finding that "[t]he 200,000 shares comprised 46% of the Fund's Premier holdings and 11% of its total securities holdings. The [Commission] substantiated its finding that the ownership error was material based on the magnitude of the impact such a purchase would have on the Fund." 29/ The Court of Appeals also affirmed the Commission's finding as to scienter: "Calandrella, as agent, personally participated in the negotiations and knew the status of the purchase agreement. When he approved the quarterly report and its associated misrepresentation, he acted with at least extreme recklessness. Accordingly, substantial evidence supports the [Commission's] finding of a Section 10(b) and Rule 10b-5 violation." 30/

III.

When we first considered this matter, we determined that it was in the public interest to prohibit Calandrella, Powell, and Thygesen from associating with or acting as an affiliated person of an investment company, while allowing Powell and Thygesen the right to reapply in three years; to impose civil money penalties against Calandrella, Powell, and Thygesen; and to issue cease-and-desist orders against all Respondents. Because the Court of Appeals reversed our determination as to certain violations by Calandrella, we now consider whether sanctions should be imposed on the basis of the remaining violations, which were affirmed by the Court.

In determining whether administrative sanctions serve the public interest, we are guided by factors such as the egregiousness of a respondent's actions, the isolated or recurrent nature of

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28/ Id. at 1098.

29/ Id.

30/ Id.

the violation, the degree of scienter, the sincerity of a respondent's assurances against future violations, the respondent's recognition that the conduct was wrongful, and the opportunity for recurring violations. 31/ Respondents' conduct with respect to the antifraud violations was egregious. Their misconduct involved multiple misrepresentations pertaining to factual issues that could easily have been described accurately. 32/ The violations were recurrent, involving misstatements repeated in periodic filings for more than a year. Although Respondents assert that they "voluntarily exited the line of business that involved the violations at issue here," there is nothing to preclude their entering the securities industry again at some future point.

Respondents' actions were, at the least, highly reckless. The Court of Appeals stated that Respondents acted with "reckless indifference and 'extreme recklessness'" with regard to the misrepresentations about classification; that Respondents' "haphazard process" for valuing the largest holding of the Fund constituted "an 'extreme departure from the standards of ordinary care' that should have been obvious to all the Fund's directors"; and that Calandrella acted "with at least extreme recklessness" in approving the September 1995 quarterly report and the misrepresentation it contained regarding the Fund's ownership of Premier shares. 33/

31/ See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd, 450 U.S. 91 (1981).

32/ The Court of Appeals noted our finding that it was implausible that Fund directors could have overlooked an error like the misrepresentation as to classification of the Fund's Premier holdings in six separate filings. Rockies Fund, 428 F.3d at 1096; see also id. at 1097 (stating that the valuation process was "ad hoc" and "haphazard").

33/ Rockies Fund, 428 F.3d at 1096 (classification); id. at 1097 (valuation) (citing Steadman, 967 F.2d at 641-42); id. at 1098 (ownership).

Respondents argue that their reliance on the advice of counsel and on the Fund's auditors should mitigate sanctions. As noted above, the Court of Appeals found that the "haphazard" valuation process used to value the Fund's premier holdings constituted "an 'extreme departure from the standards of ordinary care' that should have been obvious to all the Fund's directors." The Rockies Fund, 428 F.3d at 1097 (citing Steadman, 967 F.2d at 641-42). Respondents point to no record evidence showing that they received contemporary advice from attorneys or auditors that the valuations of Premier contained in the periodic reports in question were reasonable. Subsequent testimony that the valuations were, in the auditor's view, not unreasonable, cannot establish reliance. Under these circumstances, we see nothing in the interaction between respondents and their auditor or counsel that would mitigate the sanctions imposed on them. See also supra notes 26-27 and accompanying text.

The dissemination of false and misleading financial information, such as in the periodic reports at issue, causes serious harm to investors and the marketplace. Investors need accurate information so that they may sensibly evaluate past and potential investments. Thus, the dissemination of inaccurate information to the investing public via false and misleading public disclosures harms investors by compromising the quality of their decisionmaking. Additionally, revelation that inaccurate information has been disseminated erodes public confidence in the marketplace. 34/ Particularly where the disclosure of such false and misleading information has been occasioned by conduct with the high degree of recklessness found by the Court here, the protection of investors that the federal securities laws are designed to provide compels a sanction that send a strong message of deterrence to these Respondents, as well as other members of the securities industry.

By overvaluing the Premier holdings, the Respondents distorted the actual performance of the Fund. As we have previously stated, "It is critically important that an investment company properly value its portfolio securities. ... [A]ny distortion in the valuation of a restricted security held by an investment company will distort the price at which the shares of the investment company are sold or redeemed." 35/ Valuation of the Premier holdings was especially important because those holdings represented between ten and forty percent of the Fund's overall holdings. The Premier stock should have been discounted substantially below the bid price. Factors such as the poor financial condition of Premier and the uncertainty of the company's survival were not even considered in the valuation process. Premier was valued at prices substantially higher than the Fund's own recent acquisition costs, even though no new developments justified appreciation in that value. Assigning these higher values to stock that comprised such a large percentage of the Fund's holdings would have made the Fund more attractive to investors than it would have been if a more accurate valuation had been used.

Respondents argue that they have learned their lesson. However, they characterize the misrepresentations regarding classification and valuation as technical violations and contend that, because the Court of Appeals vacated some of our findings of violation, this proceeding is "merely a shadow of the original matter as instituted by the Commission." These attempts to downplay the seriousness of actions found by the Court of Appeals to constitute fraud fall far short of a recognition that the conduct in question was wrongful. Such attitudes do little to assure us that the likelihood of future violations is low.

34/ See, e.g., Dresser Indus., Inc. v. SEC, 628 F.2d 1368, 1377 (D.C. Cir. 1980).

35/ Restricted Securities, Accounting Series Release 113 (Oct. 21, 1969), at 3.

Based on these findings, we conclude that it is in the public interest to prohibit Calandrella from associating with or acting as an affiliated person of an investment company, subject to a right to reapply after five years, and to prohibit Powell and Thygesen from associating with or acting as an affiliated person of an investment company, subject to a right to reapply after three years. 36/

Section 9(d) of the Investment Company Act of 1940 authorizes the Commission to impose a civil money penalty when such a penalty is in the public interest. 37/ In determining whether a penalty is in the public interest, the statute provides that we may consider (1) whether the violation involved fraud or deceit, (2) the resulting harm to other persons, (3) any unjust enrichment, (4) the respondent's prior regulatory record, (5) the need to deter the respondent and other persons, and (6) such other matters as justice may require. 38/

As discussed above, Calandrella, Powell, and Thygesen repeatedly violated antifraud provisions by making multiple misrepresentations in a series of periodic reports over a period of more than a year. Respondents' level of scienter was at least extreme recklessness, as the Court of Appeals found with respect to each type of misrepresentation. 39/ Moreover, dissemination of false and misleading financial information by its nature causes serious harm to investors and the marketplace. As we have already found, there is a strong need for deterrence. We therefore find it in the public interest to impose civil money penalties.

Once a public interest determination is made, a three-tier system establishes the maximum civil money penalty that may be imposed for each violation found. 40/ During the relevant period, the first tier provided for a maximum penalty against an individual of $5,000 for each willful violation of the securities acts or rules thereunder. The second tier set a maximum penalty of $50,000 for each willful violation involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. The third tier provided for a maximum of $100,000 for each willful violation if the conduct (a) involved fraud, deceit, manipulation, or

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36/ We originally imposed these prohibitions on October 2, 2003. The Court of Appeals issued its mandate on January 13, 2006, at which time the sanctions ceased to be effective. The time that the prohibitions were already in effect is to be counted towards the three- and five-year prohibitions we impose today.

37/ 15 U.S.C. § 80a-9(d).

38/ Investment Company Act Section 9(d)(3), 15 U.S.C. § 80a-9(d)(3).

39/ See supra notes 14, 16, 27, 30 & 33 and accompanying text.

40/ Investment Company Act Section 9(d)(2), 15 U.S.C. § 80a-9(d)(2).

deliberate or reckless disregard of a regulatory requirement and (b) resulted in, or created a significant risk of, substantial loss to others or resulted in substantial pecuniary gain to the person who committed the act or omission. Within the bounds of this system, we have discretion in setting the level of penalty.

As discussed above, the Court of Appeals affirmed our earlier findings that Respondents' conduct involved fraud, deceit, and a deliberate or reckless disregard of the antifraud provisions of the securities laws. The findings of violation of Section 10(b) and Rule 10b-5, antifraud provisions, were affirmed by the Court of Appeals, which also found Respondents' actions to constitute, at the least, extreme recklessness. 41/ As discussed above in connection with our consideration of the statutory factors underlying our analysis of the public interest, the conduct created a significant risk of substantial loss to those who traded on the basis of the misinformation. 42/

In an exercise of our discretion, we impose only a second-tier penalty. 43/ We find that imposing penalties of $20,000 each on Powell and Thygesen and a penalty of $50,000 on

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41/ See supra notes 14, 16, 27, 30 & 33 and accompanying text.

42/ Where conduct creates a significant risk of substantial loss to others, third-tier penalties may be imposed without a showing that the conduct in question resulted in substantial pecuniary gain to the person who committed the act or omission. Investment Company Act Section 9(d)(2)(C)(ii), 15 U.S.C. § 80a-9(d)(2)(C)(ii).

43/ Respondents' fraudulent conduct involved multiple instances of dissemination into the marketplace of numerical representations that were wholly lacking in factual basis. Such conduct, repeated as it was over the course of more than a year, by its nature created a significant risk of substantial loss to investors, even though no actual losses were proven. In our view, this type of conduct falls within the circumstances contemplated by Congress when it authorized the imposition of third-tier penalties.

Respondents contend that the Court of Appeals "categorically rejected the imposition of third-tier sanctions." This misstates the Court's opinion. The Court required us to explain more fully our reasoning, but it placed no restrictions on our choice of civil money penalties in this proceeding.

Calandrella is appropriate. 44/ These penalties are near the middle or at the top of the second tier, consistent with our discussion of the seriousness of the misconduct.

A combination of factors unique to this case militates, however, against the imposition of higher penalties. The violations at issue occurred more than ten years ago. The record fails to identify any actual losses to investors resulting from Respondents' misconduct; it similarly shows no unjust enrichment to Respondents. Moreover, although we made no explicit findings as to these facts in our previous opinion, the record contains Forms 10-K showing that the Fund was relatively small, with net assets of approximately $1.7 million as of December 31, 1994 and $1.3 million as of December 31, 1995, and counsel for Respondents stated in Respondents' brief and at oral argument, and the Division conceded in its brief, that the Fund was thinly traded. Additionally, the Forms 10-K show that Calandrella received a salary of only $48,000 annually in 1994 and 1995 for his service to the Fund, and Powell and Thygesen testified that they received only $500 for each quarterly meeting of the Fund's board of directors that they attended. Considered individually, none of these factors is dispositive, but considering them as a unique whole, we impose only the $20,000 and $50,000 penalties set forth above, without multiplying them by the number of filings that contained false and misleading financial information, as the law judge did, or by the total number of misrepresentations at issue. 45/

44/ These penalties correspond to the numbers used as the basis for the penalties we imposed in our October 2, 2003 opinion. To reach the penalties previously imposed, we multiplied those numbers by the number of filings containing misrepresentations, eight, resulting in penalties of $160,000 and $400,000. (The penalty imposed on Calandrella also included $100,000 for the manipulation we originally found.) Respondents argue that those original penalty amounts violate the Eighth Amendment, which prohibits, among other things, the imposition of excessive fines. U.S. Const. amend. VIII. To the extent they continue to advance this argument with reference to the lower penalties we now impose, we observe that the Supreme Court has held that, in determining whether a fine is excessive under the Eighth Amendment, substantial deference is granted to the legislature. See United States v. Bajakajian, 524 U.S. 321, 336 (1998). The three-tier structure for determining appropriate civil penalties was established by Congress, and, as noted, the penalties we impose are well within the limits set forth in the statute.

45/ In our assessment of sanctions, we have also taken into consideration Respondents' cooperation with the Commission's investigation which, they assert, should be regarded as a mitigating factor.

Respondents contend that the Court "appeared to reduce the number of filings at issue from eight to only six" (citing Rockies Fund, 428 F.3d at 1092, 1096-97). The Court's explicit references to six filings appear in discussions of the misrepresentations regarding

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We find the imposition of a higher penalty on Calandrella warranted because he was the president of the Fund as well as a director. As a member of the Fund's management, he should have been thoroughly familiar with the classification and value of the Premier shares held by the Fund, yet he generated the misleading valuation figures and presented them to the other directors for approval. Moreover, we have found only Calandrella, not Powell or Thygesen, liable for the misstatement as to the Fund's ownership of the 200,000 Premier shares in the September 1995 quarterly report. 46/

Exchange Act Section 21C(a) authorizes the Commission to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate" any provision of the Exchange Act or any rule or regulation thereunder, or against any person who "is, was, or would be a cause of [a] violation, due to an act or omission the person knew or should have known would contribute to such violation." 47/ In determining whether a cease-and-desist order is an appropriate sanction, we analyze the risk of future violations. 48/ The existence of a violation raises an inference that the violation will be repeated, and where the misconduct that results in

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45/ (...continued)
classification of the Fund's Premier shares. As set forth above, see supra note 9 and accompanying text, those misrepresentations appeared in only six filings. Misrepresentations as to valuation were made in those six plus two more, for a total of eight filings, one of which also contained the misrepresentation regarding the Fund's ownership of Premier shares. See supra notes 17-27 and accompanying text. The Court specifically affirmed the Commission's findings of violation regarding all the misrepresentations at issue.

46/ Respondents contend that the sanctions we initially imposed "were based on a misstated record of Calandrella's experience in the securities industry." They support this argument by citing only to the law judge's initial decision. Our earlier decision did not rely on the challenged assertions regarding Calandrella's experience in the securities industry, and we do not base these sanctions on those assertions.

As noted above, see supra text accompanying note 3, the Court of Appeals vacated our findings as to manipulation and the acceptance of improper compensation. Thus, the sanctions imposed here are based solely on our findings of antifraud violations based on the filing of periodic reports containing material misrepresentations and the related reporting violations, which were affirmed by the Court of Appeals.

47/ 15 U.S.C. § 78u-3(a).

48/ KPMG Peat Marwick, 54 S.E.C. 1135, 1185 (2001), reconsideration denied, 55 S.E.C. 1 (2001), petition for review denied, 289 F.3d 109 (D.C. Cir. 2002).

the violation is egregious, the inference is justified. 49/ We also consider whether other factors demonstrate a risk of future violations. Beyond the seriousness of the violation, these may include the isolated or recurrent nature of the violation, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, the respondent's state of mind, the sincerity of assurances against future violations, the opportunity to commit future violations, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions sought in the proceeding. 50/ Not all of these factors need to be considered, and none of them, by itself, is dispositive.

We have already found that Respondents' conduct was egregious, justifying an inference of repeated violations. The antifraud violations were recurrent, affecting eight filings made over the course of more than a year. We have already discussed the harm to the marketplace caused by the type of conduct at issue here: Respondents' disregard of their obligations to the investing public allowed false and misleading information to be disseminated, causing serious harm to investors and to the marketplace. Respondents' state of mind was at least highly reckless. Their characterization of the misrepresentations as technical violations does not suggest that the likelihood of future violations is low. Respondents may enter the securities industry again at some future point, and although the Fund has terminated its registration status, it apparently continues to operate, so that opportunity to commit future violations is not foreclosed. Although

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49/ See Geiger v. SEC, 363 F.3d 481, 489 (D.C. Cir. 2004) and cases cited therein.

50/ KPMG Peat Marwick, 54 S.E.C. at 1192.

the violations are not recent, our weighing of this factor together with the others discussed above leads us to find that it is also in the public interest to order that Respondents cease and desist from committing or causing violations of the statutes they were found to have violated. 51/

An appropriate order will issue. 52/

By the Commission (Chairman COX and Commissioners ATKINS, CAMPOS, NAZARETH, and CASEY).

Nancy M. Morris
Secretary

51/ Respondents contend that the facts of this case are comparable to those in Parnassus Investments, Initial Decision Rel. No. 131 (Sept. 3, 1998), 67 SEC Docket 2760, and that the sanctions imposed here should therefore be commensurate with those imposed in Parnassus. We have consistently held that the appropriate sanction depends on the facts and circumstances of each case and cannot be precisely determined by comparison with action taken in other proceedings. See, e.g., Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); see also, e.g., Anthony A. Adonnino, Exchange Act Rel. No. 48618 (Oct. 9, 2003), 81 SEC Docket 981, 999; Jonathan Feins, 54 S.E.C. 366, 380 (1999). Moreover, in Parnassus the law judge found that the conduct in question "did not involve fraud, but rather violations of technical provisions of the securities laws." Parnassus Investments, 67 SEC Docket at 2789. In this case, in contrast, we found, as did the Court of Appeals, that respondents acted at least recklessly in violating antifraud provisions of the securities laws. See supra note 41 and accompanying text.

52/ We have considered all of the contentions advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54892 / December 7, 2006

INVESTMENT COMPANY ACT OF 1940
Rel. No. 27593 / December 7, 2006

Admin. Proc. File No. 3-9615

In the Matter of

THE ROCKIES FUND, INC.,
STEPHEN G. CALANDRELLA,
CHARLES M. POWELL, and
CLIFFORD C. THYGESEN

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Stephen G. Calandrella be, and he hereby is, prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, subject to a right to reapply after five years; and it is further

ORDERED that Charles M. Powell and Clifford C. Thygesen be, and they hereby are, prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, subject to a right to reapply after three years; and it is further

ORDERED that the Rockies Fund, Inc., Stephen G. Calandrella, Charles M. Powell, and Clifford C. Thygesen cease and desist from committing or causing any violations or future violations of Sections 10(b) and 13(a) of the Securities Exchange Act of 1934 and Rules 10b-5, 12b-20, 13a-1, and 13a-13 thereunder; and it is further

ORDERED that Stephen G. Calandrella is assessed a civil money penalty of $50,000; and it is further

ORDERED that Charles M. Powell and Clifford C. Thygesen each is assessed a civil money penalty of $20,000.

Payment of the civil money penalty shall be: (a) made by United States postal money order, certified check, bank cashier's check, or bank money order; (b) made payable to the Securities and Exchange Commission; (c) delivered by hand or courier to the Office of Financial Management, Securities and Exchange Commission, 6432 General Green Way, Alexandria VA 22312; and (d) submitted under cover letter that identifies the respondent in this proceeding, as well as the Commission's administrative proceeding file number. A copy of the cover letter and money order or check shall be sent to Robert M. Fusfeld, Counsel for the Division of Enforcement, Securities and Exchange Commission, Central Regional Office, 1801 California Street, Suite 4800, Denver, Colorado 80202-2648.

By the Commission.

Nancy M. Morris
Secretary