SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2253 / June 23, 2004

Admin. Proc. File No. 3-10007

In the Matter of

CLARKE T. BLIZZARD

and

RUDOLPH ABEL

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

Grounds for Remedial Action

Antifraud Violations

Associated persons of an investment adviser charged with aiding and abetting and causing investment adviser to violate antifraud provisions of the federal securities laws through its failure to disclose use of client commission dollars to obtain client referrals from brokers. Held, aiding and abetting charges are not established, and proceeding is dismissed.

APPEARANCES:

Mark B. Dorfman and Adam J. Eisner, of Foley & Lardner, for Clarke T. Blizzard.

D. Lloyd MacDonald and Portia M. Cupid, of Kirkpatrick & Lockhart LLP, for Rudolph Abel.

Linda B. Bridgman and Sandra J. Bailey, for the Division of Enforcement.

Appeal filed: June 30, 2003
Last brief received: November 17, 2003
Oral argument: May 26, 2004

I.

Clarke T. Blizzard and the Division of Enforcement (the "Division") appeal from the decision of an administrative law judge. The law judge found that Blizzard willfully aided and abetted and caused violations of Section 206(1) and 206(2) of the Investment Advisers Act of 1940 by his employer, Shawmut Investment Advisers, Inc. ("Shawmut"). The law judge found that charges that Rudolph Abel aided and abetted violations of those provisions were unproven because no primary violations by Shawmut were established during the period that Abel was employed at Shawmut. The law judge ordered Blizzard to cease and desist from committing or causing any violations or future violations of Section 206 of the Advisers Act; to disgorge commissions in the amount of $548,233, plus pre-judgment interest; to pay a civil money penalty of $100,000; and to be suspended for 90 days from association with an investment adviser. The Division asks us to find that Abel aided and abetted and caused violations by Shawmut, and that Blizzard aided and abetted and caused additional violations, to impose sanctions against Abel, and to increase the sanctions imposed on Blizzard. Blizzard asks us to find that Shawmut did not violate Section 206 of the Advisers Act or, in the alternative, that Blizzard did not aid and abet or cause those violations. Abel opposes the Division's petition. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

Shawmut was a registered investment adviser until December 31, 1995. 1/ As a registered investment adviser, Shawmut was required to file Form ADV with the Commission, and to

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1/ From its inception in 1984 until October 29, 1993, Shawmut was known as One Federal Asset Management, Inc. ("OFAM"). We refer to both entities as "Shawmut."

Shawmut withdrew its registration as investment adviser at the end of 1995 because its parent corporation was acquired by Fleet Financial Group, Inc., which had its own investment adviser subsidiary. After the acquisition, the combined entity was registered with the Commission as Fleet Investment Advisers, Inc. ("Fleet").

disclose in that form certain of its practices to clients and prospective clients. 2/

Abel was employed at Shawmut from 1985 to September 16, 1994. He served as Shawmut's president from January 1992 to October 1993. In his capacity as president, Abel signed four amendments to Shawmut's ADV. Abel was also Shawmut's chief investment officer from January 1992 until September 16, 1994, when he left Shawmut. In this capacity, Abel was responsible for guiding Shawmut's overall investment policy; supervising its investment professionals, including the trading and research staffs; and ensuring compliance with Commission rules and regulations. Among the employees who reported directly to Abel was Maureen O'Malley, Division Compliance Officer for Shawmut, who coordinated the filing of Shawmut's ADV. Abel conferred frequently with other senior management at Shawmut, seeking to keep them informed of relevant issues within his areas of responsibility. Since leaving Shawmut, Abel has continued to work in the investment advisory industry.

Blizzard began working in the investment advisory industry in 1980. He joined Shawmut on April 29, 1993, and left Shawmut's successor, Fleet Investment Advisers, Inc. ("Fleet") on May 7, 1996. At Shawmut, Blizzard held the title of Senior Vice President, then Managing Director. His responsibilities lay solely in the sales and marketing areas. Blizzard was not involved in reviewing research submitted by brokers to guide Shawmut's investment decisions, nor was he involved in preparing or reviewing Shawmut's ADV or in otherwise monitoring compliance issues. Since leaving Fleet, Blizzard has continued to work in the investment advisory industry.

III.

The Order Instituting Proceedings ("OIP") was filed on September 9, 1999. It charged Abel and Blizzard, among others, with having willfully aided and abetted and caused Shawmut's "failure to disclose that it used brokerage commissions generated from its clients' transactions to compensate brokers for client referrals, in violation of Sections 206(1) and (2) of the

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2/ Investment advisers use Form ADV to register with the Commission (Part I) and to disclose their practices to clients and prospective clients (Part II). See Section 203(c)(1) of the Advisers Act, 15 U.S.C. § 80b-3(c)(1); Advisers Act Rules 203-1 and 203-4, 17 C.F.R. §§ 275.203-1 and 275.203-4; Form ADV.

[Investment] Advisers Act [of 1940]." 3/ The OIP charged that "from mid-1993 through December 1995, [Shawmut] represented to clients in its disclosure document, Form ADV, that it selected brokers to execute its clients' transactions on the basis of research the brokers provided," but that those representations were false because Shawmut directed certain client transactions to brokers "on the basis of their ability to refer clients to [Shawmut], and not on research provided by the brokers."

IV.

As an investment adviser, Shawmut managed the portfolios of its clients by making investment decisions, which were then executed by various broker-dealers. Shawmut usually chose the broker-dealers who were to execute the transactions, unless a client had provided a direction letter telling Shawmut where to direct commissions for its accounts.

Shawmut, as an investment adviser, was required to obtain best execution when it arranged trades for its clients. 4/ If,

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3/ 15 U.S.C. §§ 80b-6(1) & 80b-6(2). Five additional respondents were also charged with violations in the OIP. Two of the respondents, Donald C. Berry and Michael Rothmeier, were associated with Shawmut. Two other individual respondents, Christopher P. Roach and Craig Janutol, were associated with East West Institutional Services ("East West"), a registered broker-dealer that did business with Shawmut and that was also named as a respondent. The proceeding ended on April 13, 2000 as to Rothmeier, Berry, and Janutol, who settled. See Michael J. Rothmeier, Advisers Act Rel. No. 1867 (Apr. 13, 2000), 72 SEC Docket 557 (Rothmeier); Michael J. Rothmeier, Advisers Act Rel. No. 1866 (Apr. 13, 2000), 72 SEC Docket 550 (Berry); Michael J. Rothmeier, Advisers Act Rel. No. 1865 (Apr. 13, 2000), 72 SEC Docket 544 (Janutol). It ended on February 28, 2002, as to Roach and East West, both of whom defaulted. See Christopher P. Roach, Exchange Act Rel. No. 45486 (Feb. 28, 2002), 77 SEC Docket 33.

4/ See Kidder, Peabody & Co., 43 S.E.C. 911, 915-16 (1968); see also Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act and Related Matters, Exchange Act Rel. No. 23170 (Apr. 23, 1986), 35 SEC Docket 905, 910 ("1986 Release"); Inspection Report on the Soft

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however, a broker-dealer provided research to Shawmut, Shawmut was permitted to pay more than the lowest price available, using a practice known as "soft dollars" whereby brokerage firms are paid for their research, as well as executions, through commission dollars rather than through direct cash payments. 5/ The research paid for in soft dollars may be proprietary to the broker, or it may originate with a third-party vendor that the broker compensates. 6/

Shawmut's written trading policy required it to direct client securities transactions to brokerage firms that provided competitive execution, with preference given to firms that provided research assistance of benefit to all of Shawmut's clients. The policy did not include client referrals received from a brokerage firm as a factor that should be considered when directing trades to brokers.

Between May 1993 and May 1996, Shawmut executed trades with numerous broker-dealers. Acting through a Commission Allocation Committee ("CAC"), which Abel chaired during his tenure as chief investment officer, Shawmut set a "budget" for allocating brokerage commissions to certain broker-dealers. The budget designated target commission amounts for Shawmut's traders

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4/(...continued)
Dollar Practices of Broker-Dealers, Investment Advisers and Mutual Funds (Sept. 22, 1998) ("1998 Soft Dollar Report").

5/ The Commission has described soft dollar practices as "arrangements under which products or services other than execution of securities transactions ('soft dollar services') are obtained by an adviser from or through a broker in exchange for the direction by the adviser of client brokerage transactions to the broker." Disclosure by Investment Advisers Regarding Soft Dollar Practices, Exchange Act Rel. No. 35375 (Feb. 21, 1995), 58 SEC Docket 2279, 2279.

6/ See generally 1998 Soft Dollar Report (discussing conditions under which research produced by third parties and provided to advisers by broker-dealers may fall within safe harbor provided by Exchange Act Section 28(e), 15 U.S.C. § 78bb(e), which protects advisers from claims that they breached their fiduciary duties by causing clients to pay more than the lowest available commission rates in exchange for research and execution if certain conditions are met); 1986 Release, 35 SEC Docket at 908 (same).

to use in selecting broker-dealers to execute transactions in client accounts. The budget provided for commission payments on an ongoing basis in order to provide an incentive for brokerage firms to submit research to Shawmut throughout the year. 7/ The amount allocated to each of these research brokers was intended to be commensurate with the value of the research provided.

Written procedures effective while Abel served as chief investment officer specified that the CAC was to include the chief investment officer, Director of Research, Heads of Institutional and Personal Portfolio Management, Manager of Trading, Head Equity Trader, and certain senior portfolio managers, all of whom reported to Abel. There were no provisions for sales or marketing personnel to be involved in the commission allocation process.

Shawmut's director of research coordinated the compilation of the research broker list for CAC review, with input from research analysts and portfolio managers. As chief investment officer and CAC chairman, Abel had ultimate responsibility for Shawmut's brokerage commission allocation and for approving research brokers who were to receive ongoing payments through the commission allocation budget.

Shortly after Blizzard began work at Shawmut, he began to make inquiries about having trades directed to brokers who had previously helped him obtain client referrals ("referral brokers"). Blizzard first attempted to persuade Shawmut's Manager of Trading, James Bixler, and Shawmut's Head Equity Trader, Daniel Willey, to direct trades to such brokers. Bixler and Willey told Blizzard that trades could be directed only to brokers who provided research to, and were approved by, Shawmut.

Blizzard also discussed with Abel his desire to have referral brokers receive commission allocations. Abel told Blizzard that Shawmut had an "open door" policy with regard to the inclusion of brokers on the research allocation list. Abel explained that, consistent with Shawmut's written policy, Shawmut would do business on the basis of net realized price plus research or trading capability, but added that, if brokers "could provide referrals, all the better."

7/ The commission allocation budget also included "chits," which were one-time payments for good ideas, and funds used to purchase specific research services.

Blizzard also asked David Rajala, Shawmut's Director of Research, about adding brokers to the research department's list of approved brokers. Like Bixler, Willey, and Abel, Rajala told Blizzard that brokers could not get on the list unless they provided research.

Having been told that commissions could be allocated only to brokers who provided research, Blizzard arranged for certain referral brokers to submit research to Shawmut. The research submitted by these referral brokers was not viewed favorably enough by Shawmut's portfolio managers and analysts to result in their inclusion on the research brokers list through the usual evaluation process. Nonetheless, by the end of 1993, Abel had approved the direction of brokerage commissions to three referral brokers, all of whom were introduced by Blizzard. By July 1994, commissions were being directed to eight such referral brokers, all at Blizzard's request.

In a memorandum dated July 21, 1994, Willey asked Abel to "give written approval to the trading desk to continue to direct trades" to the referral brokers introduced by Blizzard, pending the approval of research brokers at the next CAC meeting. The memorandum noted that the referral brokers had not been "formally approved" by either Abel, as chief investment officer, or Rajala, as Director of Research. Abel approved Willey's request. At the September 15, 1994 CAC meeting, the day before Abel left Shawmut, these eight referral brokers, plus an additional referral broker introduced by Blizzard, were added to the "research broker" list. One additional referral broker was added to the "research broker" list, at Blizzard's instigation, in 1995.

The direction of business to Blizzard's referral brokers was a controversial issue at Shawmut from the outset. Bixler knew that some institutions included marketing considerations in brokerage allocation decisions, but he was nonetheless troubled by the prospect of Shawmut's engaging in such a practice, fearing that the practice could be characterized as "buying business" and believing that it was "not consistent with [Shawmut's] historic way of doing business and was not a good direction to go." Bixler was also concerned that Shawmut's equity commission revenues would not cover allocations provided for in the existing commission budget, and that adding additional brokers would strain the budget yet further. Additionally, Bixler and Rajala were concerned that the practice could violate the Code of Ethics for Chartered Financial Analysts. Bixler, Willey, Rajala and Abel discussed these concerns.

The adequacy of the research that Blizzard's referral brokers submitted was also a focus of concern and discussion at Shawmut. Bixler felt that Shawmut needed to make sure the referral brokers were providing bona fide research, since Shawmut paid brokers "a reasonable price, not necessarily the lowest possible price," on the ground that the research brokers were providing added value. Rajala was openly critical of the research submitted by the referral brokers, regarding it as inferior to the research Shawmut obtained from brokers who had been put on the commission allocation list through the usual vetting procedures. Abel, Bixler, Willey, and Rajala met several times in June 1994 to discuss their concerns.

The possible disclosure of the allocation of commissions to brokers based in part on marketing considerations was also discussed by Bixler, Abel, and Rajala. In mid-1994, Rajala stated at a CAC meeting that, if commissions were being directed to brokers for new business, that practice should be disclosed in Shawmut's ADV. Bixler also raised the question whether the allocation of commissions to brokers based in part on marketing considerations should be disclosed. 8/

V.

Part II, Item 12 of Form ADV, the principal disclosure document provided by investment advisers to their clients, requires that, when an investment adviser or any related person has "authority to determine without obtaining specific client consent" the broker or dealer to be used, it must describe "the factors considered in selecting brokers and determining the reasonableness of their compensation." Moreover, if "the value of products, research, and services given to the [adviser] or a related person is a factor," the adviser must describe the

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8/ Despite these concerns, the record does not show that Abel, Bixler, Willey, Rajala, or Blizzard sought or received advice from counsel as to whether the practice of directing commissions to brokers based in part on marketing considerations had to be disclosed. Perry Macrohan, an attorney whose responsibilities during the relevant period included giving legal advice to people who reported to Michael Rothmeier, president and chief executive officer of Shawmut from November 1993 to December 1995, was contacted by Bixler, who asked a hypothetical question about paying commissions to brokers who referred business to Shawmut. There is no evidence that Bixler or anyone else asked Macrohan about disclosure of such a practice.

products, research and services. The instructions for completing Form ADV provide that advisers must amend Form ADV promptly if information provided in Part II becomes materially inaccurate. In its ADV, Shawmut stated that it selected brokers to execute its clients' securities transactions based on "the contribution made to its investment product by the research offered by brokers . . . whose execution is acceptable." There was no mention of client referrals as a factor considered in selecting brokers. 9/

VI.

In order to find that Abel and Blizzard are liable as aiders and abettors, we must first find a primary violation by Shawmut. 10/ The OIP charged that the primary violation

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9/ Part II, Item 13 of Form ADV requires investment advisers to disclose whether they have any arrangements to compensate any person, directly or indirectly, for client referrals, and if so, to describe those arrangements. Shawmut disclosed that it paid bonus compensation to employees who referred new business, but said nothing about selecting brokers on the basis of referrals.

10/ Shawmut was not charged as a respondent in this proceeding, but aiding and abetting liability is premised on a primary violation by a third party. In addition to such a primary violation, aiding and abetting liability requires a showing of substantial assistance by the aider and abettor to the primary violation and general awareness, or reckless disregard, on the part of the aider and abettor of the wrongdoing and of his or her role in furthering it. See Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000); Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1483 (9th Cir. 1991); Abraham & Sons Capital, Inc., Exchange Act Rel. No. 44624 (July 31, 2001), 75 SEC Docket 1481, 1492 & n.24.

A finding that a respondent willfully aided and abetted violations of the securities laws necessarily makes that respondent a "cause" of those violations. Abraham & Sons, 75 SEC Docket at 1492 & n.25; Sharon M. Graham, 53 S.E.C. 1072, 1085 n.35 (1998), aff'd, 222 F.3d 994 (D.C. Cir. 2000). The willfulness requirement is satisfied if a respondent intends to do the acts that constitute the violation. Feeley & Willcox Asset Management Corp.,

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committed by Shawmut was violation of Advisers Act Sections 206(1) and 206(2) by failing to disclose in its ADV the use of client commissions to compensate certain broker-dealers for actual and potential client referrals. Sections 206(1) and (2) prohibit investment advisers from employing any device, scheme, or artifice to defraud clients or prospective clients, or from engaging in any transaction, practice, or course of business that defrauds clients or prospective clients. Scienter is an element of a Section 206(1) violation, but need not be found to establish a Section 206(2) violation. 11/ Reckless behavior satisfies the scienter requirement. 12/

Section 206 imposes on investment advisers a fiduciary duty to exercise the utmost good faith in dealing with their clients, and to disclose all material facts and conflicts of interest to their clients. 13/ An investment adviser's arrangement to direct brokerage in exchange for benefits to the adviser creates a conflict of interest that is material and that must be disclosed. 14/

10/(...continued)
Securities Act Rel. No. 8249 (July 10, 2003), 80 SEC Docket 2075, 2091-92, appeal pending, No. 03-41113 (2d Cir.); Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000).

11/ Steadman v. SEC, 603 F.2d 1126, 1134 (5th Cir. 1979), aff'd, 450 U.S. 91 (1981).

12/ See, e.g., Howard v. Everex Systems, Inc., 228 F.3d 1057, 1063 (9th Cir. 2000); Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 272-73 (3d Cir. 1998).

13/ SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191-92, 194, 196; Fundamental Portfolio Advisers, Inc., Securities Act Rel. No. 8251 (July 15, 2003), 80 SEC Docket 2234, 2258; Arleen W. Hughes, 27 S.E.C. 629, 634-38 (1948).

14/ See 1986 Release, 35 SEC Docket at 909 ("when an adviser receives research as a result of allocating brokerage on behalf of clients' accounts, the Commission has long maintained that an adviser must disclose soft dollar arrangements to clients"; adviser has duty to disclose to clients all material information that is intended to expose or eliminate all potential or actual conflicts of interest that might incline adviser to render advice that is not disinterested); see also IMS/CPAs & Assocs., Securities Act
(continued...)

Although Shawmut disclosed that it considered research provided by brokers in selecting brokers to execute client transactions, it did not disclose that its selection of brokers was also influenced by the fact that brokers had referred business to Shawmut or the likelihood that they would. The referral of business was a benefit to Shawmut, not its clients, and Shawmut referred its clients' brokerage business in exchange for this benefit. That arrangement created a conflict of interest that had to be disclosed under Section 206. 15/

A company's scienter may be imputed from that of the individuals who control it. 16/ As President and later Chief Investment Officer, Abel was one of Shawmut's senior officials.

14/(...continued)
Rel. No. 8031 (Nov. 5, 2001), 76 SEC Docket 669, 683 (noting that "economic conflicts of interest . . . are material facts that must be disclosed" by investment advisers and citing additional authority), petition denied sub nom. Vernazza v. SEC, 327 F.3d 851 (9th Cir.), opinion amended, 335 F.3d 1096 (9th Cir. 2003); Kingsley, Jennison, McNulty & Morse, Inc., 51 S.E.C. 904, 907 (1993) ("[T]he adviser may not use its client's assets for its own benefit without prior consent, even if it costs the client nothing extra.").

15/ The law judge found that Shawmut and the respondents "did not have fair notice that it was necessary to affirmatively disclose that commission brokerage was directed to brokers in part because they provided client referrals in addition to best execution and research." To the contrary, the requirement that investment advisers must disclose conflicts of interest is well established, see supra n.14, and the inherent conflict of interest posed by using client funds to pay for referrals of business falls well within that rule. Moreover, Form ADV explicitly requires, in Part II Items 12 and 13, that investment advisers provide information about factors used to select brokers and arrangements by which the advisers provide compensation for client referrals. Thus, the Form itself put Shawmut on notice that disclosure of its consideration of referrals in allocating brokerage was required to be disclosed.

16/ SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1096-97 nn. 16-18 (2d Cir. 1992) (imputing individuals' scienter to corporations they controlled); Kirk A. Knapp, 50 S.E.C. 858, 860 n.7 (1992) (attributing scienter of owner of firm to firm).

His responsibilities included compliance with Commission rules and regulations. Securities professionals are required to be knowledgeable about, and to comply with, requirements to which they are subject. 17/

Abel and other senior officials at Shawmut knew that Shawmut was directing brokerage based in part on client referrals. Abel and other senior officials also knew that this was a new practice for Shawmut, and therefore could not reasonably have believed it had been disclosed by Shawmut previously. The plain language of Form ADV stated that, when an investment adviser or any related person has "authority to determine, without obtaining client consent," the broker or dealer to be used and where "the value of products, research, and services given to the [adviser] or a related person is a factor in making that determination, the research, products, and services in question" must be disclosed. 18/ The plain language of Form ADV also required that

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17/ Abraham & Sons, 75 SEC Docket at 1494.

18/ In finding that Blizzard aided and abetted the violations charged, the law judge distinguished between Shawmut's direction of commissions to the referral broker that handled accounts for a union local and its direction of commissions to other referral brokers. The law judge found a primary violation by Shawmut of Sections 206(1) and 206(2) with respect to the direction of commissions to the local's broker on the basis that Shawmut failed to disclose that those commissions were so directed "for the sole purpose of obtaining and retaining" the local's accounts.

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investment advisers provide information about factors used to select brokers and arrangements by which the advisers provide compensation for client referrals. The ADV instructions specified that amendment was required if information in Part II became materially inaccurate.

Under these circumstances Abel and other members of senior manangement at Shawmut were reckless in not ensuring that the consideration of client referrals in allocating brokerage commissions was disclosed in Shawmut's ADV. The omission of that disclosure constitutes "'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'" and establishes recklessness. 19/ The state of mind of Abel and other senior officials at Shawmut thus constitutes the scienter necessary to find a primary violation of Section 206(1) by Shawmut. 20/

VII.

In this proceeding, the Division asks us, among other things, to bar Abel for at least three years from association with an investment adviser and to order him to pay a civil

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18/(...continued)
The law judge's distinction between disclosures necessary when brokerage is directed solely on the basis of referrals and disclosures necessary when brokerage is directed on the basis of best execution, research, and referrals is incorrect. Disclosure in the ADV is required when referrals are a factor in directing client business, regardless what other factors may also be involved. Moreover, the record does not support the law judge's finding that the broker for the local's accounts "provided no service except to guarantee that Shawmut would obtain and retain [the local's] accounts." The local's broker, like the other referral brokers, provided research to Shawmut, as Blizzard had been told it must.

19/ Steadman v. SEC, 967 F.2d at 641-42 (quoting definition of recklessness from Sunstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033, 1035 (7th Cir.) (citation omitted), cert. denied, 434 U.S. 875 (1977)).

20/ As noted above, scienter need not be found to establish a violation of Section 206(2).

penalty of $50,000. Title 28 of the United States Code, Section 2462, is a statute of general applicability that provides, in relevant part, that an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture "shall not be entertained unless commenced within five years from the date when the claim first accrued." Shawmut's failure to disclose the use of brokerage commissions in consideration for client referrals at issue began in late 1993 and continued until December 31, 1995, when it withdrew its registration as an investment adviser. The OIP in this proceeding was filed on September 9, 1999.

VIII.

Abel and Blizzard can be found liable as aiders and abettors if we find that they aided and abetted the primary violations charged. Thus, they are liable if they rendered substantial assistance to Shawmut's failure to disclose in its ADV the arrangements to direct brokerage to reward brokers for actual or potential referrals, and were generally aware of, or recklessly disregarded, Shawmut's wrongdoing and their role in it. 21/

21/ See supra n.10.

The parties' briefs deal at length with the legality of the practice of using brokerage allocation to pay for client referrals. Since the OIP charged aiding and abetting the failure to disclose, not the legality of this use of brokerage allocation, we concern ourselves only with the former issue. In this regard, the Division's contention that the law judge erred in refusing to admit designated portions of the prior sworn testimony of Gunnar S. Overstrom, Jr., former president of Shawmut's parent corporation, who was deceased at the time of the hearing, is beside the point. The Division offered this testimony to rebut Abel's assertion that Shawmut knew about, and approved of, the practice of considering referrals in allocating brokerage fees, an issue related to the legality of the practice rather than the failure to disclose the practice. Similarly, arguments raised by the parties as to whether Shawmut's conduct fell within the safe harbor provided by Section 28(e) of the Exchange Act, see supra n.6, are irrelevant, since the OIP did not charge that Shawmut violated the securities laws by using referrals as a factor in allocating commissions, or by paying commissions too high to be justified by the value of the research received.

A. Abel

Abel contends that he cannot be liable as an aider and abettor of any disclosure violations by Shawmut because he was not aware that his behavior was part of an activity that was improper. 22/ We have already determined that Abel's conduct contributed to our finding that Shawmut was reckless in failing to disclose the consideration of client referrals in allocating brokerage. In determining whether to impose sanctions on Abel, however, we are mindful of the potential applicability of the Section 2462 statute of limitations. Although Abel was still employed by Shawmut on September 9, 1994, he left the firm on September 16. The record establishes that Abel briefed management on issues within his areas of responsibility, and that he knew Shawmut management, and some compliance personnel, were aware that referrals were being taken into consideration in the allocation of brokerage commissions. It would have been desirable for Abel to have followed up more aggressively to see that senior management or compliance ensured that the necessary disclosures were made, and, if a longer period of conduct were considered, we might analyze his liability differently. Under all the circumstances of this case, however, we do not find that Abel's failure to do more than he did during the one-week period between September 9 and September 16 constitutes awareness that, during that brief period, his behavior was part of an activity that was improper. In light of the potential applicability of Section 2462 to all but a week of the particular misconduct with which Abel is charged, and in light of our conclusion that, on this record, the week's conduct is insufficient to find Abel liable, we exercise our equitable discretion to dismiss the charges that Abel aided and abetted Shawmut's primary violations. Accordingly, we express no opinion on the law judge's rulings regarding which sanctions could appropriately have been imposed on Abel. 23/

22/ Abel does not concede that there was a primary violation by Shawmut, but argues that, even if there was, he cannot be held liable as an aider and abettor.

23/ Our disposition of the charges against Abel makes it unnecessary to address his contention that our disqualification of his attorney from representing both Abel and any witness to be called against Abel in the proceeding rendered the proceeding unfair. See Clarke T. Blizzard, Advisers Act Rel. No. 2032 (Apr. 24, 2002), 77 SEC Docket 1515 (disqualification order).

B. Blizzard

Blizzard also was charged with aiding and abetting Shawmut's failure to disclose in its ADV the use of client commissions to compensate broker-dealers for client referrals. However, Blizzard's position at Shawmut was that of a salesperson. He was not involved in preparing or reviewing Shawmut's ADV. In addition, the record does not indicate that he was responsible for delivering Form ADV to clients or explaining its contents. It is undisputed that his job entailed no compliance oversight responsibilities. He disclosed to Abel and many others at Shawmut all necessary information concerning his desire that Shawmut consider client referrals in directing brokerage commissions. Given Blizzard's openness in seeking to have trades sent to brokers who helped him with referrals, the level of discussion at Shawmut regarding the desirability of engaging in such a practice, and the concerns expressed about the research provided by the brokers recommended by Blizzard, there can be no doubt that Blizzard adequately informed Shawmut senior management that commissions were going to brokers selected largely on the basis of client referrals. Moreover, Blizzard was present at the CAC meeting when Rajala raised the issue of the possible need for ADV disclosure of the direction of commissions to brokers based on referrals. Thus, Blizzard had reason to believe that the question of disclosure was being handled appropriately.

Blizzard tried hard to ensure that referrals were a factor in choosing brokers, and the referrals were a very significant factor in the direction of business to the referral brokers. Senior management discussed openly that the research provided by the referral brokers was inadequate to justify directing business to those firms based on Shawmut's stated policy. But Blizzard had no involvement in preparing or reviewing any information disclosed in the ADV. Based on these facts, we find that the record does not establish that Blizzard substantially assisted in the conduct that constituted the primary violation charged and thus, on this record, we do not find him to have aided and abetted that violation. 24/

24/ The Division asks us to ensure that four exhibits are part of the certified record. The exhibits are: (1) an October 23, 1996 letter from Fleet Financial Group to Blizzard regarding Blizzard's compensation; (2) an excerpt from Blizzard's investigative testimony, taken May 27, 1997, in which Blizzard repeatedly invokes the fifth amendment in response to questions that do not address Shawmut's ADV

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24/(...continued)
disclosures; (3) designated portions of Christopher Roach's grand jury testimony, dated January 25, 2001, which do not address Shawmut's ADV disclosures, and (4) a January 24, 1996 letter from Fleet Financial Group to Blizzard regarding severance in the event of termination. After the hearing concluded, the parties stipulated to the admission of these four exhibits, which were not admitted during the hearing, and they included the exhibits on the joint exhibit list. The law judge, however, did not admit the exhibits. Because the law judge did not admit them, these proposed exhibits are not part of the record. We have, however, reviewed the proposed exhibits, and their inclusion in the record would not have altered our decision in this proceeding because they are irrelevant to the question whether Abel and Blizzard aided and abetted Shawmut's failure to disclose the use of brokerage allocation at issue in its ADV.

(continued...)

Accordingly, the proceeding is dismissed.

An appropriate order will issue. 25/

By the Commission (Chairman DONALDSON and Commissioners GOLDSCHMID and ATKINS); Commissioners GLASSMAN and CAMPOS not participating.

Jonathan G. Katz
Secretary

24/(...continued)
The record suggests that Blizzard's interactions with the trustees of the union local may have involved other disclosure issues. These were not charged, however, and therefore cannot support a finding of violation against him in this proceeding.

25/ We have considered all of the parties' contentions. We have rejected or sustained 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

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2253 / June 23, 2004

Admin. Proc. File No. 3-10007

In the Matter of

CLARKE T. BLIZZARD

and

RUDOLPH ABEL

ORDER DISMISSING PROCEEDINGS

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

ORDERED that proceedings instituted September 9, 1999 against Clarke T. Blizzard and Rudolph Abel be, and they hereby are, dismissed.

By the Commission.

Jonathan G. Katz
Secretary