INITIAL DECISION RELEASE NO. 366
ADMINISTRATIVE PROCEEDING
File No. 3-12966

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

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| In the Matter of | : | |
| | : | INITIAL DECISION |
| EXECUTIVE REGISTRAR & TRANSFER, INC. and JOHN J. DONNELLY | : | December 18, 2008 |

APPEARANCES: Elizabeth E. Krupa for the Division of Enforcement, Securities and Exchange Commission

John J. Donnelly, pro se, for Respondents

BEFORE: Robert G. Mahony, Administrative Law Judge

## I. INTRODUCTION

### A. Procedural Background

The Securities and Exchange Commission (Commission) initiated this proceeding against Executive Registrar & Transfer, Inc. (Executive), and John J. Donnelly (Donnelly) (together, Respondents) on February 22, 2008, with its Order Instituting Administrative and Cease-and-Desist Proceedings (OIP). This proceeding was brought pursuant to Sections 17A(c)(3), 17A(c)(4), and 21C of the Securities Exchange Act of 1934 (Exchange Act).[1] On June 13, 2008, a letter from Respondents, dated May 28, 2008, was filed with the Office of the Secretary, which has been construed as their Answer. (Prehearing Tr. 3, July 1, 2008.)

During a prehearing conference held on July 1, 2008, with the Division of Enforcement (Division) and Donnelly (representing himself and Executive, pro se) in attendance, the Division requested and was granted leave to file a motion for summary disposition pursuant to 17 C.F.R. § 201.250. The Division filed its motion and accompanying exhibits on July 31, 2008, and a letter of response from the Respondents was received on September 2, 2008, to which the Division filed a reply on September 4, 2008.

[1] Any "Sections" referenced in this decision will refer to sections of the Exchange Act.

**B. Standards for Summary Disposition**

In assessing the summary disposition record, the facts, as well as the reasonable inferences that may be drawn from them, must be viewed in the light most favorable to the non-moving party. See Felix v. N.Y. City Transit Auth., 324 F.3d 102, 104 (2d Cir. 2003); O'Shea v. Yellow Tech. Svcs., Inc., 185 F.3d 1093, 1096 (10th Cir. 1999); Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999).

By analogy to Rule 56 of the Federal Rules of Civil Procedure, a factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Once the moving party has carried its burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The opposing party must set forth specific facts showing a genuine issue for a hearing and may not rest upon mere allegations or denials of its pleadings. At the summary disposition stage, the administrative law judge's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for resolution at a hearing. See Anderson, 477 U.S. at 249.

The findings and conclusions of this decision are based on the entire record, which consists of the OIP, Respondents' Answer and correspondence, and all motions, orders, and replies.[2] See 17 C.F.R. § 201.350. Official notice is taken of the Commission's public official records concerning Respondents.[3] See 17 C.F.R. § 201.323. There is no genuine issue with regard to any material fact. Thus, this proceeding may be resolved by summary disposition. See 17 C.F.R. § 201.250. Any other facts in Respondents' pleadings have been taken as true, in light

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[2] References in this decision to the Commission's Order Instituting Administrative and Cease-and-Desist Proceedings will be cited as "(OIP at ___.)" References to Respondents' letter dated May 28, 2008, replying to the Division's Motion for Default, which served as the Respondents' Answer to the OIP in the proceeding, will be cited as "(Answer at ___.)" The Division's Reply to Respondents' Answer and Motion for Leave to File for Summary Disposition will be cited as "(Mot. at ___.)" The Division's Motion for Summary Disposition and Memorandum of Law in Support will be cited as "(Div. Br. at ___.)" and the Exhibits contained therein will be cited as "(Ex. ___.)" References to the Respondents' letter dated August 29, 2008, in response to the Division's Motion for Summary Disposition and the Division's Reply in Support of Motion for Summary Disposition will be cited as will be cited "(Resp't Br. at ___.)" and "(Div. Reply Br. at ___.)," respectively. References to Respondents' letter dated June 6, 2008, replying to the Division Examiner Timothy Dunn's June 12, 2007, letter to the Respondents regarding deficiencies found at the November 2006 examination of Executive and noted in Dunn's Deficiency Letter of February 16, 2007, (Ex. 5), will be cited as "(Resp't Letter ___.)" The Division's October 28, 2008, submission of Supplemental Affidavit of Timothy Dunn to clarify Paragraph C of Division's Exhibit 2, will be cited as "(Div. Aff. ___.)"

[3] These include, but are not limited to, prior Commission releases relating to Donnelly and his former transfer agency, United Stock Transfer, Inc. (United), filings made with the Commission by United and Executive found in the Commission's EDGAR database, and filings made by the companies with state regulatory agencies.

of the Division's burden of proof. See Id. All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

**C. Allegations and Positions of the Parties**

The OIP alleges that Executive is registered with the Commission pursuant to Section 17A(c)(2) (OIP at 1) and that it has violated the following sections of the Exchange Act and various rules thereunder: Executive has not upheld its recordkeeping and reporting obligations under Section 17(a)(3) (OIP at 4); it has not fingerprinted employees as required by Section 17(f)(2) (Id.); and it has engaged in activity in contravention of Commission rules for transfer agents, thus violating Section 17A(d)(1) (OIP at 2-4).[4] The OIP further alleges that Donnelly aided and abetted in Executive's aforementioned violations, as well as similar violations of another registered transfer agent over which Donnelly had control prior to the agent's voluntary deregistration and dissolution. (OIP at 5.)

The Division requests the entry of an order requiring Executive to cease and desist from committing or causing violations of the federal securities laws pursuant to Section 21C, the imposition of civil penalties in the amounts of $10,000 and $25,000 against Donnelly and Executive, respectively, pursuant to Section 21B, the revocation of Executive's registration as a transfer agent pursuant to Section 17A(c)(3)(A), and the entry of a permanent bar on Donnelly from association with any transfer agent pursuant to Section 17A(c)(4)(C). (Div. Br. at 16-19.)

Respondents contend generally that they have not violated the securities statutes and rules as alleged by the Division. (Answer; Resp't Letter; Resp't Br.) Further, Donnelly requested a jury trial at which he would add and address complaints that he has regarding perceived failings on the part of the Commission to pursue the illicit activities of others who are not parties to this proceeding.[5] (Resp't Br. at 4.)

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[4] In its Motion for Summary Disposition, the Division asserts that Executive violated Exchange Act Rule 17Ad-5. This claim was not charged in the OIP, but has been subsequently mentioned in the Division's later filings. The claim of violation of Rule 17Ad-5 first appeared in the Division's June 19, 2008, Reply. (Mot. at 8.) In the Division's Motion for Summary Disposition, the Division notes that Executive has violated Rule 17Ad-5, but never discusses details of the violation. (Div. Br. at 13.) Finally, a short argument is made regarding the violation in the final filing by the Division on September 4, 2008. (Div. Reply Br. at 3-4.) Because the claim was not charged in the OIP, this alleged violation will not be addressed in this decision.

[5] The Division's "failure" to investigate the purported misconduct alleged by Donnelly is not properly before me, and the Commission's Rules of Practice do not provide for jury trials. Furthermore, agency decisions not to enforce statutes, rules, or regulations are presumptively unreviewable. See Heckler v. Chaney, 470 U.S. 821, 831-35 (1985); Chicago Bd. Of Trade v. SEC, 883 F.2d 525, 530-31 (7th Cir. 1989); cf. Kixmiller v. SEC, 492 F.2d 641, 644-45 (D.C. Cir. 1974). The presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. See Chaney, 470 U.S. at 832-33. However, that is not the situation presented here. The conduct of others alleged by

## II. FINDINGS OF FACT

### A. Respondents

**Executive** is a Colorado corporation with its principal place of business in Englewood, Colorado.[6] In the summer of 2004, Executive changed its name from Executive Registrar & Transfer Agency, Inc., to its current name, Executive Registrar & Transfer, Inc.[7] Executive has been registered with the Commission as a transfer agent since at least April 1982, pursuant to Section 17A(c)(2),[8] and that registration (SEC File No. 084-00866) has remained active to the present.[9] Executive is wholly-owned by Donnelly, who has been president since late 2003.[10]

**Donnelly**, a resident of Colorado, has been president of Executive at all times relevant to these proceedings. Donnelly was also president and owner of a related party, United, from

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Donnelly is neither a defense to the Respondents' alleged violations, nor would it mitigate any appropriate sanctions.

[6] Executive was incorporated in Colorado under the name Executive Registrar & Transfer Agency, Inc., through its filing of "Articles of Incorporation" on Form 200 on December 9, 2003, pursuant to the Colorado Business Corporation Act, COLO. REV. STAT. § 7-102-103. Under the leadership of Brian J. Kelley, Executive was incorporated in the State of New Mexico, according to information provided by the New Mexico Public Regulation Commission, and Executive was authorized to do business in the State of Arizona, according to information provided through the Arizona Corporate Commission, State of Arizona Public Access System. Corporate filings for Executive in New Mexico and Arizona ceased around the time of the incorporation in Colorado, and the incorporation in New Mexico and the authorization in Arizona were each subsequently revoked for failure to file required reports, according to information from the New Mexico Public Regulation Commission and the Arizona Corporate Commission.

[7] This name change was filed with the Colorado Secretary of State on June 4, 2004, and with the Commission in a Form TA-1/A on August 3, 2004. In the filings with the Commission, Executive's original name had been listed as Executive Registrar and Transfer Agency, Inc.

[8] The Division represents March 22, 1982, as the registration date for Executive Registrar and Transfer Agency, Inc. (Div. Br. at 2), and the Commission's EDGAR database shows a Form TA-1/A filed on that date. The Division also gives April 1982 as the date of registration. (Ex. 2 at 2.) However, the earliest Form TA-1 in EDGAR was from October 11, 1977. Given the age of these filings, these Forms are archived and not easily accessible, and since the exact date of Executive's registration is not relevant to this proceeding, it is sufficient to note that the agency has been registered since at least April 1982.

[9] During this period of continuous registration, the president/CEO of Executive has been Brian J. Kelley, followed by Jack D. Kelley (Form TA-1/A filed August 11, 2003), and then John J. Donnelly (Form TA-1/A filed November 3, 2003).

[10] As noted previously, Executive was not incorporated in Colorado until December 2003, which was the first time Donnelly was declared its president to a state regulatory body. However, in a Form TA-1/A filed by Donnelly with the Commission in November 2003 and dated October 20, 2003, Donnelly is listed as the president of Executive beginning in September 2003.

approximately November 1991 until its dissolution.[11] In 2001, the Commission, by consent, authorized the issuance of an administrative and cease-and-desist order against Donnelly based on his aiding and abetting and causing of violations of Exchange Act provisions pertaining to transfer agents committed by United. See 75 SEC Docket 395.

**B. Related Party**

United was a Colorado corporation formed in March 1987 and administratively dissolved in September 2004.[12] United registered with the Commission as a transfer agent on May 1, 1987, and its registration was withdrawn effective April 6, 2004.[13] Donnelly controlled United from 1991 to 2004. During that time, United was a party to two Commission proceedings both ending in settlements that included cease-and-desist orders from future violations of Sections 17(a)(3) and 17A(d)(1) of the Exchange Act and various rules thereunder. See 75 SEC Docket 395; Alpha Tech Stock Transfer Trust, 70 SEC Docket 1276 (Aug. 26, 1999).

**C. Donnelly is Subject to a Cease-and-Desist Order**

In late 2000, the Commission instituted a proceeding against Donnelly and United in response to numerous violations of federal securities statutes and rules committed by United and aided and abetted and caused by Donnelly, which were discovered in the course of five separate books and records examinations. See 75 SEC Docket at 395-396. The result of the proceeding was a settlement entered in June 2001 by United and Donnelly with the Commission. See 75 SEC Docket 395. Of relevance to the current proceeding, this settlement included a cease-and-desist order that commanded Donnelly not to cause any future violations of Sections 17(a)(3) and 17A(d)(1) and Exchange Act Rules[14] 17Ac2-1; 17Ac2-2; 17Ad-2; 17Ad-6; 17Ad-7; 17Ad-10; 17Ad-13; 17Ad-15; 17Ad-16; 17Ad-17; and 17f-2 thereunder.[15] See 75 SEC Docket at 397.

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[11] The exact date of Donnelly's assumption of United's presidency is unclear. In the Commission's 2001 proceeding against Donnelly, to which Donnelly consented to the findings, the date of November 1991 is given as the beginning of Donnelly's role as president of United. See United Stock Transfer, Inc., 75 SEC Docket 395, 395 (June 1, 2001). However, the Division's Dunn Affidavit provides a starting date of January 1992. (Ex. 2 at 2.) Further, in a Form TA-1/A filed by United with the Commission on August 14, 2000, Donnelly listed his presidency beginning in July 1992.

[12] United was administratively dissolved by the Colorado Secretary of State for failure to file annual reports as required by Colorado Business Corporation Act, COLO. REV. STAT. § 7-90-501.

[13] The Division represents April 14, 2004, as the registration withdrawal date for United. (Ex. 2 at 2-3.) However, the Form TA-W filed on February 6, 2004, in the Commission's EDGAR database shows an effective date of April 6, 2004. The April 6 effective date corresponds to the Exchange Act rule regarding withdrawal, which notes that "a notice to withdraw . . . shall become effective on the sixtieth day after the filing thereof with the Commission." See 17 C.F.R. § 240.17Ac3-1(b).

[14] All references to "Rules" in this decision refer to rules promulgated under the Exchange Act.

[15] The cease-and-desist order stipulated other Rules in addition to those listed above that are not the subject of the current proceeding. See 75 SEC Docket at 397.

In the six-year period following the cease-and-desist order, the Commission's Office of Compliance Inspections and Examinations staff (staff) performed five audits on United and/or Executive. (Ex. 2 at 2.) During these audits, deficiencies were found that violated all but one of the statutes and rules in the June 2001 cease-and-desist order. (Exs. 5, 8, 10, 11a, 11b.)

The June 2001 order also required Donnelly and United to maintain procedures to assure that:

(a) Supplemental reports on Forms TA-1 are current, accurate, and timely filed with the Commission, as required by Rule 17Ac2-1;[16]

(b) Annual reports on Forms TA-2 are current, accurate, and timely filed with the Commission, as required by Rule 17Ac2-2;[17]

(c) Items received for processing and transfer are turned around in a timely manner, as required by Rule 17Ad-2;[18]

(d) Proper records required by Rule 17Ad-6 are maintained;[19]

(e) Record retention requirements of Rule 17Ad-7 are followed;[20]

(f) Documentation setting forth required share data for each issuer is maintained and posted to the master securityholder file and control books, in accordance with Rule 17Ad-10;[21]

(g) Annual reports by an independent accountant examining agent's internal accounting controls and related procedures are prepared and timely filed with the Commission, in accordance with Rule 17Ad-13;[22]

(h) Written standards and procedures for the acceptance of signature guarantees are established, as required by Rule 17Ad-15;[23]

(i) Notice to the appropriate qualified registered securities depository is given at the assumption or termination of transfer agent services in a timely manner, as required by Rule 17Ad-16;[24]

(j) Procedures to search for lost securityholders are established and followed, as required by Rule 17Ad-17; [25] and

(k) Non-exempt employees are fingerprinted and the fingerprints are submitted for identification and processing, in accordance with Rule 17f-2.[26]

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[16] During four subsequent examinations, deficiencies related to this rule were found. (Exs. 8, 10, 11a, 11b.)

[17] During one subsequent examination, deficiencies related to this rule were found. (Ex. 8.)

[18] During one subsequent examination, deficiencies related to this rule were found. (Ex. 5.)

[19] During two subsequent examinations, deficiencies related to this rule were found. (Exs. 11a, 11b.)

[20] During three subsequent examinations, deficiencies related to this rule were found. (Exs. 10, 11a, 11b.)

[21] During one subsequent examination, deficiencies related to this rule were found. (Ex. 11b.)

[22] During two subsequent examinations, deficiencies related to this rule were found. (Exs. 5, 8.)

[23] During one subsequent examination, deficiencies related to this rule were found. (Ex. 11b.)

[24] During one subsequent examination, deficiencies related to this rule were found. (Ex. 11a.) Further, shortly following an examination, the Commission examination staff noted another deficiency related to this rule. (Ex. 7 at 4.)

[25] During one subsequent examination, deficiencies related to this rule were found. (Ex. 11b.)

See 75 SEC Docket at 397-98.

## D. Executive's Violations of Exchange Act Rules Concerning Activities of Transfer Agents

### 1. Executive's Violations of the Turnaround Rules

The Commission has established minimum performance standards for registered transfer agents in connection with the timely cancellation and issuance of securities certificates. See Regulation of Transfer Agents, 12 SEC Docket 853 (June 16, 1977). Registered transfer agents must turnaround at least ninety percent of all routine items within three business days of receipt. See 17 C.F.R. § 240.17Ad-2(a). The three-business-day turnaround requirement applies only to routine items. However, the definition of a "routine" item is stated in the negative. See 17 C.F.R. § 240.17Ad-1(i). Thus, an item received for transfer is deemed routine unless it falls within the specified exceptions enumerated in Rule 17Ad-1(i)(1)-(8).

Further, Rule 17Ad-2(e) provides that those routine items not within the ninety percent "must be turned around 'promptly,' which, under usual circumstances, means within one additional business day." Regulation of Transfer Agents, 20 SEC Docket 1277, 1292 (Sept. 2, 1980) (Question 56); See 12 SEC Docket at 859. While the Exchange Act Rules do not order a specific time for turnaround of these non-routine items, "[R]ule 17Ad-2(e) requires that all 'non-routine items shall receive diligent and continuous attention and shall be turned around as soon as possible.'" 20 SEC Docket at 1294 (Question 60) (quoting Rule 17Ad-2(e)). The Commission notes that "[t]his is a flexible standard dependent on the facts and circumstances of each case." Id.

Executive Fails to Exercise Diligence and Attention in Turning around Shares in Newly Merged Entity

In May 2006, Executive was engaged as the transfer agent for an issuer who had merged with another company and was responsible for the exchanging of shares in the company for shares in the issuer. (Ex. 5 at 2.) During a Commission examination of Executive conducted in November 2006 (Ex. 2 at 2), it was noted that only seventy-seven of the three hundred shareholders who were owed stock certificates had been issued them after a period of six months had passed (Ex. 2 at 4; Ex. 5 at 2). The staff explained in a deficiency letter dated February 16, 2007, that Executive's failure to turnaround the shares was a violation of Rule 17Ad-2(e)(1) and a violation of the June 2001 cease-and-desist order against Donnelly, as the control person of Executive. (Ex. 5 at 2-3.)

In replying to the deficiency letter, Respondents, through counsel in a letter dated April 11, 2007, claimed the delay was due to insufficient information from broker-dealers, compounded by a stock-split in the issuer which occurred following the merger. (Ex. 6 at 4-5.) The staff addressed Respondents' claims in a June 12, 2007, letter to Respondents' counsel. (Ex. 7.) In that letter, the staff clarified the violations cited in the deficiency letter as it appeared to the staff that Respondents "misunderstood the nature or scope of the activity required to stay in

[26] During one subsequent examination, deficiencies related to this rule were found. (Ex. 5.)

compliance." (Ex. 2 at 4.) The staff noted that their examination had shown that Executive, in fact, did have enough information to turnaround the merger shares. (Ex. 2 at 4; Ex. 7 at 2.) The staff further explained that its examination revealed that the delay in turnaround was due to Respondents' (1) "unusual requests" for broker-dealer information and (2) demand for payment from the broker-dealers. (Ex. 2 at 4-5; Ex. 7 at 3.)

Respondents failed to reply to the staff's June 2007 clarification letter until June of 2008, a year after the clarification letter was sent and three and a half months after this proceeding was instituted.[27] (Resp't Letter at 1.) Rather than address the issues raised in the staff's delinquency and clarification letters, Donnelly blames the delay in processing these items on the Depository Trust & Clearing Company (DTC), various broker-dealers participating in the transfer, the Continuous Net Settlement System (operated by DTC), and the Commission. (Answer at 3; Resp't Letter at 5-6.) Donnelly does not explain his and Executive's actions or provide proof or support for his claims. (Resp't Letter at 5-6; Answer at 3; Resp't Br. at 3.)

Because the transfer involved was in connection with an exchange, the items subject to the transfer were deemed non-routine. See 17 C.F.R. § 240.17Ad-1(i)(5). As non-routine items, the transfer of the issuer's shares was not subject to the three-day turnaround requirement, but rather needed to be turned around "as soon as possible." See 17 C.F.R. § 240.17Ad-2(e)(1). The Commission has recognized that the turnaround of such items "may involve several days." See Processing of Tender Offers within the National Clearance and Settlement System, 27 SEC Docket 1158, 1165 n.65 (April 15, 1983). Respondents took several months. (Ex. 2 at 4, Ex. 5 at 2.)

In the staff's June 2007 clarification letter, it noted that the delay in transfer was the result of requests for unnecessary information as well as payment disputes. (Ex. 7 at 3.) In his reply to the June 2007 clarification letter, Donnelly does not directly state that nonpayment was an issue in the transfer delay, nor does he respond to the staff's assertion that it was. (Resp't Letter.) However, he vaguely mentions a problem with payment from the issuer in connection with a violation of Rule 17Ad-16, discussed below. (Resp't Letter at 6-7.) If Respondents were delaying turnaround because of a payment dispute, the Commission has noted that such issues can be handled in one of two ways. See 20 SEC Docket at 1284, 1288 (Questions 26 and 40). If a transfer agent is refusing to transfer securities because of nonpayment of fees, then the transfer agent must promptly return the items to the presentor. See 20 SEC Docket at 1284 (Question 26). There is no indication that Respondents returned items. The other option available in a nonpayment situation is to retain the item, classify it as non-routine, and then "to give such non-routine items 'diligent and continuous attention,' which includes, among other things, frequent and assiduous notification to the presentor that the item is being retained pending receipt of transfer fees." 20 SEC Docket at 1288 (Question 40) (quoting Exchange Act Rule 17Ad-2(e)(1)). There is no indication that Respondents provided such notification.

[27] The Respondents' letter is dated September 27, 2007, and June 6, 2008. The letter was not filed with the Office of the Secretary until June 30, 2008.

**2. Executive's and United's Untimely and Inadequate Filing of Forms and Reports Required by the Commission**

The combination of Rules 17Ac2-1 and 17Ac2-2 creates a framework for providing the Commission with important information about the organization and activities of its registered transfer agents. See Adoption of Revised Transfer Agent Forms and Related Rules, 35 SEC Docket 679 (Mar. 27, 1986). These rules complement the Commission's registered transfer agent inspection program and allow the Commission to more effectively and efficiently monitor the activities of these registered agents. See 35 SEC Docket at 680.

Donnelly Fails to Timely Update Executive's and United's Forms
TA-1 despite Multiple Deficiency Letters

Generally, Rule 17Ac2-1(c) requires that whenever the information contained within a transfer agent's application for registration (Form TA-1) changes or becomes misleading or incomplete as stated, it is the responsibility of the agent to correct the Form TA-1 by filing an amendment within sixty days of the occurrence of the change. See 17 C.F.R. § 240.17Ac2-1(c). Form TA-1, which has been a requirement since 1975, requests "basic information" regarding the registered agent's business and activities. See Notice of Adoption of Rule 17Ac2-1 and Related Form TA-1, 8 SEC Docket 203, 205 (Oct. 22, 1975). In 1986, the information requested by Form TA-1 was modified slightly to exclude information being captured through the annual reporting process (Form TA-2) and to include the "SEC Supplement" for independent, non-issuer agents registered with the Commission, which "solicits background information for the owners and other control persons . . . with particular emphasis on whether offenses have been committed by these persons . . . [that] would have an impact on the transfer agent's ability to perform its functions properly." See 35 SEC Docket at 680. At the time of Form TA-1's revision, Rule 17Ac2-1(c) was also revised to extend the time for filing amendments to Form TA-1 from twenty-one days to sixty days. See 35 SEC Docket at 679-80, 682.

Four separate Commission examinations of United and Executive occurring from 2002 through 2006 revealed violations of Rule 17Ac2-1(c), which were noted in the deficiency letters that followed each exam. (Ex. 2 at 6; Ex. 8 at 1; Ex. 10 at 1; Ex. 11a at 1; Ex. 11b at 1.) The first of these violations was noted in the staff's August 26, 2002, deficiency letter. (Div. Aff. at 2; Ex. 2 at 6; Ex. 10 at 1.) As previously discussed, United was sanctioned on two occasions by the Commission for violations of the Exchange Act and various rules thereunder, which resulted in the issuance of two separate cease-and-desist orders. See 70 SEC Docket 1276 (1999 cease-and-desist order), 75 SEC Docket 395 (2001 cease-and-desist order). Donnelly was also subject to the cease-and-desist order issued in the Commission's 2001 administrative proceeding. See 75 SEC Docket 395. The principle purpose of the SEC Supplement is to disclose offenses committed by the transfer agent and persons associated with the transfer agent and the 1999 and 2001 proceedings against United and Donnelly include the offenses envisioned in that purpose. See 35 SEC Docket at 680. However, an amended SEC Supplement to Form TA-1 reflecting these offenses was not filed until after the Commission's August 26, 2002, deficiency letter. (Div. Aff. at 2; Ex. 2 at 6; Ex. 12 at 1.) An amendment should have been filed within sixty days of the respective Commission orders, 17 C.F.R. § 240.17Ac2-1(c), which would have been October 25, 1999, for the first cease-and-desist order against United, 70 SEC Docket 1276, and

July 31, 2001, for the orders against Donnelly and United, 75 SEC Docket 395. The amended Form TA-1 was filed on September 26, 2002. (Div. Aff. at 2; Ex. 2 at 6; Ex. 12 at 1.) This date is outside the sixty days required, and, therefore, the late filing is a violation of Rule 17Ac2-1(c).

In late 2003 through early 2004, the Commission performed another examination on United and its first examination of Executive since Donnelly's assumption of its ownership. (Ex. 2 at 2.) These separate examinations both resulted in the issuance of deficiency letters sent from the staff on March 5, 2004. (Ex. 2 at 3; Ex. 11a; Ex. 11b.) These letters noted the occurrence of the following events, which required an amended Form TA-1 to be filed for each agent: (1) Donnelly's common control of United and Executive (Div. Aff. at 2; Ex. 11a at 1; Ex. 11b at 1), (2) the existing cease-and-desist order against Donnelly (Div. Aff. at 2; Ex. 11b at 1.), and (3) the removal of Jack Kelley as CEO and Teresa Kelley as owner of Executive (Ex. 11b at 1), with events (2) and (3) applicable only to Executive.

In addressing the issue of common control of United and Executive, Donnelly has made repeated claims that the staff was wrong with regard to the business transaction that occurred between United and Executive. (Answer at 2, 4; Resp't Br. at 1.) He claims not to have controlled two registered transfer agents, and he claims not to have acquired Executive, only its records. (Id.) However, regardless of the form of the acquisition or the kind of business transaction Donnelly thought he was conducting, the fact is that United and Executive were two separately registered transfer agents and Donnelly was in control of both. (Ex. 2 at 2-3.) A review of the filings made with the Commission shows that Donnelly filed forms under the two separate registrations (084-01522 for United and 084-00866 for Executive), and Donnelly used the same registration for Executive that was used prior to the "acquisition." On November 4, 2003, the Commission received a Form TA-1 for Executive signed by Donnelly, which was an "Amendment to Registration." This form listed Donnelly as the president, owner, and control person of Executive since September 2003 and with Executive's principal office in Englewood, Colorado. Prior to the receipt of the November 2003 form, the most recent Form TA-1 was received on August 19, 2003, listing the address of the agency's principal office as Phoenix, Arizona, Jack Kelley as its CEO, and Teresa Kelley as its owner, with both Kelleys as control persons. On January 24, 2004, the Commission received another Form TA-1 from Donnelly listed as an "Amendment to Registration," in which the Kelleys were listed in the "Deleted" section of previously reported persons.

Donnelly contends that United acquired only the records of Executive and then subsequently decided to change United's name to Executive Registrar & Transfer, Inc. (Answer at 2; Resp't Br. at 1). However, this is inconsistent with the corporate records for each company, filed both with the Commission and the State of Colorado. According to the records on file with the State of Colorado, United and Executive were incorporated separately, as noted above in Parts II.A. and II.B. of this decision. Further, when Executive was incorporated in Colorado in December 2003, the name given was Executive Registrar & Transfer Agency, Inc. It was not until June 2004 that Executive filed a change of name with Colorado. As also noted above, each company had its own registration with the Commission. Therefore, until United withdrew its registration in the Form TA-W filed with the Commission on February 6, 2008, Donnelly, as the control person for each company, was in common control of two registered transfer agents. No

amendment to either United's or Executive's Forms TA-1 was ever filed and certainly none was filed within the required sixty days. Thus, both United and Executive violated Rule 17Ac2-1(c).

As for the other two events cited in the March 5, 2004, deficiency letter to Executive, the cease-and-desist order against Donnelly and the removal of the Kelleys as officer and owner, Donnelly responded to these deficiencies in a reply letter to the staff on April 2, 2004. (Ex. 13 at 1.) In that letter, Donnelly admitted his oversight in failing to include his cease-and-order on the Form TA-1 that he filed on November 4, 2003, when he took over Executive, and he stated that he had been unaware of the Kelleys' August 11, 2003, filing of an amended Form TA-1. (Id.) Donnelly was made aware of these two deficiencies during the Commission's examination of Executive from November 18, 2003, through January 14, 2004 (Ex. 2 at 2), and on January 24, 2004, he filed an amended Form TA-1. However, as with the previous deficiencies relating to the filing of Form TA-1 amendments, this filing was at least fifty-four days past[28] the sixty days required by Rule 17Ac2-1(c) and was a violation of this rule.

Lastly, during a Commission examination of Executive performed May 15-18, 2006, another violation of Rule 17Ac2-1(c) was noted by the staff. (Ex. 2 at 2, 6-7.) In that instance, Marguerite Donnelly, who according to Commission records had been added as a Director of Executive in a Form TA-1/A, filed on August 3, 2004, had since ceased to be a Director. (Ex. 2 at 6-7; Ex. 8 at 1.) The staff noted during the examination and in a deficiency letter dated June 27, 2006, that Executive had failed to file timely an amended Form TA-1 noting this change. (Ex. 8 at 1.) Donnelly replied to the letter on November 14, 2006, recognized the error, and made assurances that future oversight would not occur. (Ex. 9 at 1.) An amended Form TA-1 removing Marguerite Donnelly as a Director was filed on May 19, 2006, forty-seven days past the deadline for filing such amendments. (Div. Aff. at 2; Ex. 8 at 1.)[29]

From 2002 through 2006, the Commission examination staff found seven violations of Rule 17Ac2-1(c). (Ex. 2 at 6-7.) These violations were caused by Donnelly's failure, as the control person for Executive, to file amended Forms TA-1 when events, such as the issuance of the 1999 and 2001 cease-and-desist orders, changes in leadership, and common control of agencies, occurred that required amendments to be made. (Ex. 8 at 1; Ex. 10 at 1; Ex. 11a at 1; Ex. 11b at 1.) Additionally, each of these violations constitutes a separate violation of the 2001 cease-and-desist order against Donnelly, 75 SEC Docket at 397, requiring that he not further violate Rule 17Ac1-2 and that he assure that supplemental reports to Form TA-1 are timely filed. (Div. Aff. at 2.)

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[28] The amendments should have been filed within 60 days of Donnelly's assumption of control of Executive, which he lists in Executive's Form TA-1 as occurring in September 2003. Thus, given the latest possible assumption date of September 30, 2003, the amendments were due by November 29, 2003, which as a Saturday would be pushed by the Commission's rules to December 1, 2003.

[29] The Division provides a filing date of May 16, 2006, for this amended Form TA-1; however, the Commission's records in the EDGAR database show a May 19, 2006, filing date. Regardless of which date is correct, the Form TA-1 was submitted after the allowed time.

Executive Fails to File Annual Reports (Form TA-2)

Rule 17Ac2-2(a) requires that every registered transfer agent file an annual report of its activities on a Form TA-2 by March 31 following the end of the reporting year. See 17 C.F.R. § 240.17Ac2-2(a). As originally adopted, this rule allowed agents until August 31 to file the report. See 35 SEC Docket at 682. However, the current March 31 deadline was established in 2000 when the Commission realigned the end of the reporting period to coincide with the end of the calendar year. See Revised Transfer Agent Form and Related Rule, 72 SEC Docket 1722, 1723 (June 2, 2000). The Commission notes that the completion of the Form TA-2 "require[s] a minimal dedication of resources," as the Form can be completed without the assistance of an accountant or attorney and requests information that is already maintained by transfer agents because of other Commission or Federal regulations. See 35 SEC Docket at 681. Furthermore, the information collected on the Form TA-2 helps the Commission more effectively monitor agent activities. See 35 SEC Docket at 680.

During the Commission examination of Executive conducted on May 15-18, 2006, the examination staff noted that Executive had failed to file an annual report on Form TA-2 by the March 31, 2006, deadline. (Ex. 2 at 7; Ex. 8 at 1.) At the time of the examination, no report for 2005 had been filed. (Ex. 8 at 1.) Executive's Form TA-2 for the period ending December 31, 2005, was subsequently filed, following the examination, on May 19, 2006, according to the files in the Commission's EDGAR database.

A deficiency letter noting the failure to timely file its Form TA-2 was sent to Executive on June 27, 2006. (Ex. 8 at 1.) That letter requested a response within thirty days of receipt. (Ex. 8 at 2.) However, it was not until Executive was in the midst of another Commission examination from November 13-15, 2006 (Ex. 2 at 2), that Donnelly replied to the previous deficiency notice (Ex. 9). In his reply, dated November 14, 2006, Donnelly claimed that the filing was late owing to an "oversight of the change in filing date," but he promised that "[f]uture filings [would] be processed on time." (Ex. 9 at 1.) Donnelly reiterated his claim that the delay in filing was due to a lack of knowledge regarding the due date change in his Answer to the institution of these proceedings. (Answer at 4.)

As noted above, the Commission's change in filing date was not new; it was announced in June 2000, with the first filing under the new deadline coming in March 31, 2001. See 72 SEC Docket at 1722, 1723. Furthermore, since the change took effect, Donnelly, as the control person of United and then Executive, managed to timely file Executive's 2003 annual report and United's 2002 and 2001 annual reports; according to the Commission's EDGAR database, these reports were filed on March 30, 2004, March 31, 2003, and March 28, 2002, respectively.

However, a review of EDGAR also reveals that Executive never filed a Form TA-2 for the 2004, 2006, or 2007 annual periods.[30] (Ex. 2 at 7.) The May 19, 2006, Form TA-2, filed

[30] The Division does not include the 2004 annual report among Executive's list of violations; however, a review of the Commission's files in the EDGAR database clearly shows that no Form TA-2 was filed by March 31, 2005. Further, a review of the Forms TA-2 that were filed by Executive contain no information for the period ending December 31, 2004.

only after the staff noted the missing 2005 report, was the last annual report filed for Executive. (Id.) Thus, despite Donnelly's assurances that Executive would become up-to-date in its Forms TA-2 and would not miss required future reports (Ex. 9 at 1), Executive has no Forms TA-2 on file for the years 2004, 2006, or 2007 (Ex. 2 at 7).

Including the late filing of Executive's 2005 annual report, Executive, through Donnelly, has a total of four violations of Rule 17Ac2-2(a). As was the case with the violations of Rule 17Ac2-1, these violations of Rule 17Ac2-2 also constitute violations of the cease-and-desist order currently imposed on Donnelly. See 75 SEC Docket at 397.

**3. Executive's Failure to Comply with Rules to Ensure Accurate Settlement of Securities Transactions and Proper Controls of the Agent's Processes**

After almost ten years of operating the regulatory program for transfer agents, the Commission determined that additional requirements were necessary for investor protection and the efficient operation of the national clearance and settlement system. See Maintenance of Accurate Securityholder Files and Safeguarding of Funds and Securities by Registered Transfer Agents, 28 SEC Docket 81, 82 (June 10, 1983). "The Commission noted that whenever transfer agents fail to perform their activities promptly, accurately, and safely, the securities clearance and settlement process suffers." Id. It was at this time that the Commission adopted several rules including Rules 17Ad-10 and 17Ad-13 relating to creation and maintenance of securityholder files, id. at 84-88, and the annual study of an agent's internal controls, id. at 91-94.

Executive's Control Books Out-of-Balance with Master Securityholder Files

In relevant part, Rule 17Ad-10 holds that transfer agents shall (1) "promptly and accurately" post all debits and credits to a master securityholder file, (2) keep control books "current" and "accurate," and (3) "exercise diligent and continuous attention to resolve all record differences." See 17 C.F.R. § 240.17Ad-10(a), (b), (e). Rule 17Ad-9 provides clarification to this rule noting that "[a] record difference occurs when . . . [t]he total number of shares or total principal dollar amount of securities in the master securityholder file does not equal the number of shares or principal dollar amount in the control book." See 17 C.F.R. § 240.17Ad-9(g)(1).

During a Commission examination of Executive which started on November 18, 2003 (Ex. 2 at 2), the examination staff reviewed Executive's master securityholder files and control book for accuracy and agreement (Ex. 11b at 3). In this review, the staff discovered three instances where security issuers listed in Executive's control book could not be reconciled to the master securityholder files. (Ex. 2 at 7-8; Ex. 11b at 3.) A deficiency letter, sent on March 5, 2004, following the examination, noted these three out-of-balance conditions. (Ex. 11b at 1, 3-4.) In a letter dated April 2, 2004, Donnelly responded to the deficiency letter with conflicting statements that Executive's books were accurate and in balance, but that any inaccuracy was due to the condition the books were in when Donnelly received them from the former owners of Executive and that one of the deficiencies was irrelevant because Executive was no longer the transfer agent for the out-of-balance issuer. (Ex. 13 at 2.) Later, in his Answer to these

proceedings, Donnelly simply claimed that he could not recall any out-of-balance issuers. (Answer at 4.) Finally, in his response to the Division's Motion for Summary Disposition, Donnelly argued that the claimed violations were incorrect because he was later able to balance the two issuers who had not discharged Executive. (Resp't Br. at 2.)

However, despite Donnelly's conflicting rebuttals, the fact remains that, during the examination, the records for three issuers were out-of-balance. (Ex. 2 at 7-8; Ex. 11b at 3; Ex. 14 at 3.) The staff replied to Donnelly's April 2 letter on June 2, 2004. (Ex. 14 at 1.) In this letter, the staff noted that while Donnelly was able to balance the control book with the master securityholder files for these issuers, he did so only after the staff alerted him to the out-of-balance conditions. (Ex. 14 at 3.) Further, the staff noted that the necessary documents to complete the balancing were in Executive's possession but the control book and master securityholder files were not balanced because Donnelly failed to properly inventory the files and records when he took possession of them from the former owners of Executive. (Id.) Thus, Executive, through Donnelly, violated Rule 17Ad-10 by failing to "promptly and accurately" post items, by failing to have its control book "current" and "accurate," and by failing to give "diligent and continuous attention" to record differences. See 17 C.F.R. § 240.17Ad-10(a), (b), (e). These failures are evidenced by the fact that, during the Commission's examination, there were three out-of-balance conditions. (Ex. 2 at 7-8; Ex. 11b at 3; Ex. 14 at 3.)

This violation of Rule 17Ad-10 is compounded by the fact that the 2001 cease-and-desist order in place against Donnelly forbade further violations of this exact rule. See 75 SEC Docket at 397. Thus, when the staff found deficiencies relating to Rule 17Ad-10, Donnelly was in violation of the cease-and-desist order as well.

Executive Fails to Complete and File Annual Study and Evaluation of Internal Controls for Four Years

Rule 17Ad-13 requires that registered transfer agents annually file a report prepared by an independent accountant that details that accountant's study of the agent's internal accounting controls and related record-keeping and securities safeguarding procedures. See 17 C.F.R. § 240.17Ad-13(a). This report must be submitted within ninety days after the date of the study. Id. Executive was warned in two separate deficiency letters that it was not in compliance with this rule. (Ex. 5 at 2; Ex. 8 at 2.) Executive has failed to file annual reports for the past four years, 2004-2007. (Ex. 2 at 5; Ex. 7 at 2.)

Even though these deficiencies occurred over several years, Donnelly and Executive blamed the failure to file the reports on the misunderstanding and loss of Executive's accountant. (Answer at 4; Resp't Letter at 5; Ex. 6 at 3; Ex. 9 at 1.) Donnelly, himself, admitted that he should have just hired a new accountant. (Answer at 4.) Executive still has yet to file any of its delinquent annual studies. (Ex. 2 at 5.)

Furthermore, Donnelly had already been ordered to cease and desist from violating Rule 17Ad-13. See 75 SEC Docket at 397. However, Donnelly contends that he does not "recall having a problem with [the] internal audit" in the past, and, thus, he does not "understand how [the failure to file the report for four years] was a violation of the cease-and-desist order."

(Resp't Letter at 5.) The administrative proceeding against United and Donnelly resulted in a settlement which clearly states that Donnelly consented to the finding that United failed to timely and properly file annual reports in accordance with Rule 17Ad-13 and that Donnelly, as the principal person in charge of United's compliance, did willfully aid and abet and cause these failures. See 75 SEC Docket 396-97. His lack of recollection notwithstanding, Donnelly was ordered to cease and desist from future violations of Rule 17Ad-13. Executive has clearly violated this rule. As control person for Executive, Donnelly is responsible for Executive's violation and, therefore, is in violation of the cease-and-desist order. (Ex. 2 at 5.)

**4. Executive's and United's Failures to Notify the Depository Trust & Clearing Company of Termination as Transfer Agent.**

Rule 17Ad-16(a) requires that when a registered transfer agent stops servicing a given issuer, the agent must send written notice of termination to the "qualified registered securities depository" ten days prior to the effective date of the termination or on the day the agent is notified of the effective date, whichever date is later. See 17 C.F.R. § 240.17Ad-16(a). "Rule 17Ad-16 [wa]s designed to address a current and continuing problem of transfer delays due to unannounced transfer agent changes, including the change of a transfer agent for a particular issue." See Notice of Assumption or Termination of Transfer Agent Services, 58 SEC Docket 409, 409 (Dec. 1, 1994).

This rule was violated by United and aided and abetted by Donnelly, according to the June 2001 cease-and-desist order consented to by Donnelly. See 75 SEC Docket at 396. Because of this previous violation, the 2001 order required that Donnelly and United cease-and-desist from committing further violations of Rule 17Ad-16 and required that procedures be created to assure that depositories are notified in a timely manner. Id. at 397-98. Despite the cease-and-desist order, the staff noted in a March 5, 2004, deficiency letter that United had failed to inform the DTC of its termination as to two issuers. (Ex. 2 at 9; Ex. 11a at 3-4.)

In the first of these two instances, United was informed by the terminating issuer on October 16, 2003, that its services were being discontinued. (Ex. 11a at 4.) United, acting through Donnelly, withheld the issuer's documentation and its own written notice of termination until a certain fee was paid. (Id.) According to the staff's review of the contract between the issuer and United, the fee was not contemplated under the terms of the contract. (Id.) United failed to file its written notice of termination with the DTC within the regulated time allowed. (Id.)

In the second instance, the issuer informed United of its termination on December 4, 2003, and set an effective date of December 9, 2003. (Ex. 11a at 3.) United did not send notice of its termination to the DTC until December 23, 2003. (Ex. 11a at 4.) Not only was this notice late under the terms of Rule 17Ad-16, but again, United withheld documentation and claimed it was owed an unwarranted fee. (Ex. 11a at 3.) When United did send its notice to the DTC, it listed an incorrect effective date of December 31, 2003. (Ex. 11a at 4.)

Donnelly never replied to the staff regarding the deficiency letter noting these failures. (Ex. 14 at 3.) In his Answer to these proceeding, Donnelly claimed that it was his policy not to

notify the DTC or to return an issuer's documents until he received payment that he deemed he was owed. (Answer at 4.) Later, Donnelly claimed that it was United, not the issuers, who terminated services and that these terminations were because the issuers refused to sign an updated contract with United. (Resp't Br. at 2.) Nowhere in the language of the rule or in the Commission release adopting Rule 17Ad-16 does it allow for such a delay. Regardless of what Donnelly thought he was owed, he was obligated to notify the DTC in a timely fashion when he was terminated by the above referenced issuers. See 17 C.F.R. § 240.17Ad-16. United and Donnelly did not send the notices within the allowed time period and, therefore, violated Rule 17Ad-16 and the cease-and-desist order against them.

Donnelly's deficiencies with Rule 17Ad-16(a) continued when he was in control of Executive, as noted by the staff in correspondence following the November 2006 examination of Executive. (Ex. 7 at 4.) In a letter dated June 12, 2007, the staff noted that Executive had been terminated by an issuer on December 19, 2006, effective December 29, 2006. (Id.) Executive failed to notify the DTC until January 12, 2007. (Id.) Similar to previous failures, Donnelly claimed that he was withholding the notice of termination until past due invoices were paid. (Resp't Letter at 6-7.) As noted before, this is not allowed by the rule; therefore, Executive and Donnelly violated Rule 17Ad-16 by failing to submit the written notice of termination on time and Donnelly violated the 2001 cease-and-desist order.

**5. Executive's and United's Lack of Established Written Procedures**

The rules regulating transfer agents contain several provisions which call for the establishment and maintenance of certain written procedures relating to how the agent transacts certain business and handles certain requests. Of particular relevance to this proceeding are Rules 17Ad-15(c), 17Ad-17(c), and 17Ad-19(b). They generally require written procedures for the acceptance of signature guarantees, the methodology for conducting lost securityholder searches, and the handling and disposition of securities certificates, respectively.

Rule 17Ad-15(c) requires transfer agents to establish written standards for the acceptance of guarantees of securities transfers and written guidelines to ensure that those standards are used in the acceptance or rejection of such guarantees. See 17 C.F.R. § 240.17Ad-15(c). The Commission adopted this rule in 1992 in order to ensure the equitable treatment of eligible guarantor institutions and to facilitate the monitoring of agent compliance to the rule. See Acceptance of Signature Guarantees from Eligible Guarantor Institutions, 50 SEC Docket 1054, 1059 (Jan. 6, 1992). Despite requests by those commenting on the rule, the Commission declined to set uniform standards or take a role in approving standards. Id.

Rule 17Ad-17(c) commands transfer agents to maintain written procedures which describe the transfer agent's methodology for searching for lost securityholders in compliance with the other provisions of this rule. See 17 C.F.R. § 240.17Ad-17(c). Because transfer agents are often the custodians of securityholder information for issuers, they often aid in the dissemination of issuer information to securityholders; as such, it is vital that agents have up-to-date information about securityholders for issuers they service. See Lost Securityholders, 65 SEC Docket 1957, 1957 (Oct. 1, 1997). To facilitate the locating of lost securityholder information, the Commission has espoused minimum search procedure standards, id., which

include the conducting of two database searches within the first year and follow-up searches conducted several months later, 17 C.F.R. § 240.17Ad-17(a)(1)(i)-(ii). Furthermore, the rule requires that the agent's search procedures be written and that the agent is able to demonstrate its compliance with the rule. See 65 SEC Docket at 1960.

Rule 17Ad-19(b) holds that every registered transfer agent "shall establish and implement written procedures for the cancellation, storage, transportation, destruction, or other disposition of securities certificates." See 17 C.F.R. § 240.17Ad-19(b). This rule was established to improve the safety and efficiency of processing securities certificates. Until cancelled certificates are disposed of, they can be used for fraudulent purposes; better procedures help reduce the risk of fraud. See Processing Requirements for Cancelled Security Certificates, 81 SEC Docket 3265, 3265 (Dec. 16, 2003).

On July 22-23, 2002, the staff conducted a books and records review of United. (Ex. 2 at 2.) Following that review, the staff sent a detailed letter on August 26, 2002, outlining ways in which United's written procedures for searching for lost securityholders were deficient as to the minimum standards set by Rule 17Ad-17(a)(1)(i)-(ii). (Ex. 10 at 2.) Further, the letter noted that United was also deficient with regard to Rule 17Ad-17(c), as it could not produce records to demonstrate compliance with the minimum search requirements. (Ex. 10 at 2-3.) Failure to maintain such records is also a violation of Section 17(a)(3) of the Exchange Act, which is discussed below in Part II.E. of this decision.

Donnelly replied to the staff's letter on September 25, 2002, noting that he had amended United's written search procedures and included a section on retaining records of the searches conducted, as required by Rule 17Ad-17. (Ex. 12 at 1-2.) United's violation of this rule was not specifically addressed by Donnelly in any of his writings submitted during this proceeding. Donnelly's September 2002 response acquiescing to the staff's deficiency letter established that United, through Donnelly, violated Rule 17Ad-17. This was also a violation of the cease-and-desist orders in place for United and Donnelly. See 75 SEC Docket at 397.

Starting in November 2003 and continuing through January 2004, the staff conducted a review of Executive. (Ex. 2 at 2.) During this review, the staff noted that Executive was deficient in its maintenance of written procedures relating to Rules 17Ad-15(c) and 17Ad-17(c). (Ex. 2 at 8, 9; Ex. 11b at 4.) In a deficiency letter dated March 5, 2004, to Executive and Donnelly, the staff explained that Executive's written standards and procedures were reviewed and the staff determined that no written procedures existed for Executive with regard to signature guarantee acceptance standards or procedures for searching for lost securityholders. (Ex. 11b at 4.)

On April 2, 2004, Donnelly replied to the staff's letter. (Ex. 13.) In his reply, he stated that he did not recall the staff asking for these written standards and procedures and he felt he was in compliance with these rules. (Ex. 13 at 2.) To this, the staff noted on June 2, 2004, that the examinations of United and Executive, conducted during overlapping periods in 2003 to 2004, revealed that while United had such written standards and procedures, none existed explicitly for Executive. (Ex. 14 at 3.) Executive was, therefore, in violation of Rules 17Ad-15(c) and 17Ad-17(c). The staff noted that because United and Executive were separately

registered agencies, they needed separately written standards and procedures. (Ex. 2 at 8, 9-10, Ex. 14 at 3.)

During this proceeding, Donnelly's explanation of why these deficiencies occurred changed. In his Answer he claimed the written procedures for acceptance of signature guarantees were misplaced at the time of the examination and that the written procedures for lost securityholder searches had been in the process of being written. (Answer at 4, 5.) Donnelly also claimed that if there was a deficiency with written procedures for lost securityholder searches, it was because he was not provided any recommendations by the staff as to how to write the procedures. (Resp't Br. at 1.) However, Rule 17Ad-17 does provide minimum standards as to what search procedures an agent should undertake in searching for lost securityholders. See 17 C.F.R. § 240.17Ad-17; 50 SEC Docket at 1059.

Donnelly claims that both written procedures are now in place (Answer at 4, 5), as they should have been at the time of the examination. Regardless of whether the written procedures are in place now, the fact remains that, at the time of the examination, Donnelly admitted that the written procedures were not available, and, thus, Executive was in violation of Rules 17Ad-15(c) and 17Ad-17(c). Additionally, Donnelly violated the 2001 cease-and-desist order by causing, as control person for Executive, the violations of these rules. 75 SEC Docket at 397.

From May 15 to 18, 2006, the staff performed another review of Executive. (Ex. 2 at 2.) At this review, deficiencies were found with Executive's written procedures relating to the handling and disposition of securities certificates required under Rule 17Ad-19(b). (Ex. 2 at 11; Ex. 8 at 2.) In particular, the staff noted that Rule 17Ad-19(c) sets forth minimum standards that must be included in the agent's written procedures required under Rule 17Ad-19(b) and that Executive's written procedures failed to cover all of those minimum standards. (Ex. 8 at 2.) Rule 17Ad-19(c)(5) requires that an agent's written procedures include information on the process for physical transportation of cancelled certificates and the maintenance of a record of all CUSIP and certificate numbers in transit.[31] See 17 C.F.R. § 240.17Ad-19(c)(5). Executive's procedures failed to include this minimum information. (Ex. 8 at 2.)

On November 14, 2006, Donnelly replied to the staff's deficiency letter sent June 27, 2006, which had noted this lack of compliance to Rule 17Ad-19. (Ex. 9.) In his reply, Donnelly did not claim that the staff was incorrect in its assessment of the failure of Executive's procedures (Ex. 9 at 2); rather, he recited what he claimed was Executive's procedure for handling securities certificates. (Answer at 5; Ex. 9 at 2.) However, the staff was not provided evidence of written procedures that met the requirements of Rules 17Ad-19(b) and (c)(5) when requested during its examination of Executive, thus violating Rule 17Ad-19. (Ex. 8 at 2.)

[31] Rule 17Ad-19(a)(5) defines the term CUSIP number as "the unique identification number that is assigned to each securities issue." 17 C.F.R. § 240.17Ad-19(a)(5).

**E. Executive's and United's Violations of Exchange Act Rules Concerning Records and Reports**

Section 17(a)(3) requires transfer agents registered under Section 17A to "make and keep for prescribed periods such records, furnish such copies thereof, and make such reports as the [Commission], by rule, prescribes as necessary." See 15 U.S.C. § 78q(a)(3). Rules 17Ad-6 and 17Ad-7 work in tandem to describe the records that transfer agents must maintain and lay out for how long these records must be kept. See Recordkeeping Requirements for Registered Transfer Agents, 81 SEC Docket 3310, 3310 (Dec. 18, 2003). Of relevance to this proceeding, Rules 17Ad-6(a)(6) and (8) hold generally that an agent must maintain all written inquiries and the agent's responses thereto and must maintain all writings supporting the agent's appointment and termination by an issuer. See 17 C.F.R. § 240.17Ad-6(a)(6) and (8). Relatedly, Rules 17Ad-7(a) and (c) require retention for two years for records kept pursuant to Rule 17Ad-6(a)(6) and permanent retention for Rule 17Ad-6(a)(8) records, with these records being "easily accessible" for six months and one year, respectively. See 17 C.F.R. § 240.17Ad-7(a) and (c).

Starting on November 18, 2003, the staff conducted overlapping examinations of Executive and United, which were both operating under separate Commission registration numbers and both under Donnelly's control at the time. (Ex. 2 at 2.) The examination continued on Executive until January 14, 2004, and took place on United from December 10, 2003, through February 24, 2004. (Id.) Following these examinations, the staff sent two deficiency letters on March 5, 2004, one to United and one to Executive. (Exs. 11a, 11b.) The staff found deficiencies with both agencies with regard to Rules 17Ad-6 and 17Ad-7, as certain records were not made available to the staff during the examinations and, therefore, violated the rules both requiring records and their retention. (Ex. 2 at 10-11; Ex. 11a at 2-3; Ex. 11b at 2-3.) The deficiency letters cited or described United's and Executive's failures in keeping records required under Rules 17Ad-6(a)(2), (6), (7), and (8) and the related violations of Rule 17Ad-7 caused by those failures. (Ex. 11a at 2-3, 4; Ex. 11b at 2-3.) The OIP charges only violations of Rules 17Ad-6(a)(6) and (8) and 17Ad-7(a) and (c). (OIP at 4.)

The March deficiency letters noted that when records of corporate correspondence required by Rule 17Ad-5 were requested, such records were not produced by United for two issuers (Ex. 11a at 2) or by Executive for five issuers (Ex. 11b at 1-2), in violation of Rule 17Ad-6(a)(6). Further, the letters noted that, as a result of the recordkeeping deficiencies, United and Executive violated Rule 17Ad-7. (Ex. 11a at 3; Ex. 11b at 3.) Similarly, in discussing deficiencies relating to Rule 17Ad-16, the March letter to United observed that United did not maintain a copy of an issuer's October 16, 2003, letter of termination (Ex. 11a at 4), in violation of Rules 17Ad-6(a)(8) and 17Ad-7(c). Lastly, the March letter to Executive noted that the agency had failed to maintain copies of letters of appointment for five of its issuers in violation of Rules 17Ad-6(a)(8) and 17Ad-7(c). (Ex. 11b at 2, 3.)

Donnelly responded to the staff's deficiency letters on April 2, 2004, in a letter that admitted wrongdoing. (Ex. 13 at 1-2.) Donnelly stated that not every call was noted in his correspondence log. (Ex. 13 at 1.) But with regard to other deficiencies, Donnelly claimed that all of the documents were in the office's cabinets. (Ex. 13 at 1, 2.) However, the staff noted that Donnelly was unable to produce the documents when the staff requested them. (Ex. 14 at 2-3.)

Additionally, Donnelly's inability to provide the requested records and demonstrate compliance with Rules 17Ad-6 and 17Ad-7 was in violation of the cease-and-desist order imposed on him in 2001.

Furthermore, United violated Rule 17Ad-7(i) by failing to maintain documentation of (1) its searches for lost securityholders in order to demonstrate compliance with Rule 17Ad-17 and (2) its written procedures, as required by Rule 17Ad-17(c), a violation already discussed above in Part II.D.5. (Ex. 10 at 3.) Rule 17Ad-7(i) requires retention of this documentation for at least three years with the most recent year's search records being "easily accessible." See 17 C.F.R. § 240.17Ad-7(i). Donnelly admitted the lack of documentation in a September 25, 2002, letter to the staff, though he disavowed any blame on the part of himself or United, placing it instead on the janitorial staff. (Ex. 12 at 2.) The janitorial staff, however, was not in control of United and, therefore, was not responsible, as Donnelly was, for United's compliance with the Commission's rules for the maintenance of required documents. The failure to maintain the documents was a violation of Rule 17Ad-7(i), which also violated the cease-and-desist orders against United and Donnelly, 75 SEC Docket at 397.

**F. Executive's Violations Concerning Employee Fingerprinting**

Section 17(f)(2) states that a transfer agent registered under Section 17A "shall require that each of its . . . employees be fingerprinted and shall submit such fingerprints . . . for identification and appropriate processing." See 15 U.S.C. § 78q(f)(2). Further, Rule 17f-2(a), promulgated under the authority of Section 17(f)(2), requires that all employees be fingerprinted, but provides some exceptions to this rule. See 17 C.F.R. § 240.17f-2(a).

Following an examination of Executive conducted on November 13-15, 2006 (Ex. 2. at 2), the staff noted a deficiency with regard to Executive's failure to process fingerprint cards for three of its employees (Ex. 5 at 3). The deficiency letter sent February 16, 2007, also noted that the failure to process the fingerprint cards was a violation by Donnelly of the cease-and-desist order imposed on him by the Commission. (Id.) Respondents replied to the staff in an April 11, 2007, letter from their attorney and they noted that the failure to process fingerprint cards was the result of a misunderstanding of the rule on fingerprinting. (Ex. 6 at 5.) The attorney also submitted the names of five employees whose fingerprint cards were submitted to NASD for processing. (Id.)

Respondents claimed that, in light of these submissions combined with their mistaken belief that such cards were unnecessary because the employees only worked for Executive for a short time, there was no violation of the cease-and-desist order and that Executive was in compliance. (Answer at 5; Resp't Letter at 6; Ex. 6 at 5.) However, of the exemptions to the fingerprinting requirement found in Rule 17f-2(a), length of employment is not among them. See 17 C.F.R. § 240.17f-2(a). The exemptions relate to the nature of the employee's job duties not length of employment. See id. Therefore, the evidence submitted established that the submission of the cards was untimely and that it did not alter the fact that a violation did occur. (Ex. 7 at 3.)

## III. CONCLUSIONS OF LAW

In instituting its rules for transfer agents, the Commission noted that these rules are intended, among other things "to assure that registered transfer agents perform their functions in a prompt and accurate manner" and to require that records be maintained that would allow the Commission to monitor compliance with the rules, so that transfer agents that perform inadequately can be detected early. See 12 SEC Docket at 853-54. Respondents Executive and Donnelly appear to have little regard for the importance the Commission places on the need for reporting and accurate recordkeeping in its rules for transfer agents. During the five examinations performed by the staff from 2002 through 2006, numerous deficiencies were found at Executive and Donnelly's other registered transfer agent, United. Year-after-year, Donnelly, as the control person for each company, seemed incapable or unwilling to comply with Commission rules, as judged by the repeated deficiencies found at agencies under his control. This situation is further aggravated by the fact that Donnelly was, at the time of these examinations, and still is, subject to a cease-and-desist order barring him from further violations of the Commission's statutes and rules involving transfer agents. By virtue of these numerous deficiencies and Donnelly's failure to correct them, Donnelly is in violation of the previous cease-and-desist order.

### A. Primary Liability

The OIP alleges that Executive willfully violated Sections 17(a)(3), 17(f)(2), and 17A(d)(1) of the Exchange Act and Exchange Act Rules 17Ac2-1, 17Ac2-2, 17Ad-2, 17Ad-6, 17Ad-7, 17Ad-10, 17Ad-13, 17Ad-15, 17Ad-16, 17Ad-17, 17Ad-19, and 17f-2. (OIP at 4.) Willfulness is shown where a person intends to commit an act that constitutes a violation. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965). There is no requirement that the actor must also be aware that it is violating any statutes or rules. Id.

#### 1. Sections 17A(d)(1) and 17(a)(3) of the Exchange Act and Rules thereunder

Section 17A(d)(1) states that no registered transfer agent shall engage in any activity as a transfer agent in contravention of any Commission statute or rule. See 15 U.S.C. § 78q-1(d)(1). The result is that any violation of the Commission's rules for transfer agents is an automatic violation of Section 17A(d)(1). See Alpha Tech Stock Transfer, 77 SEC Docket 976, 984 (Apr. 1, 2002), final, 77 SEC Docket 1970 (May 13, 2002). A showing of scienter is not required to sustain a violation of Section 17A(d)(1) or the Commission's implementing statutes and rules. Id. As shown in the aforementioned facts and discussed below, Executive has violated several of the rules for transfer agents and, therefore, is in violation of Section 17A(d)(1).

In concert with Section 17A, Section 17(a)(3) requires every registered transfer agent to "make and keep for prescribed periods such records, furnish such copies thereof, and make such reports as the [Commission], by rule, prescribes as necessary or appropriate in furtherance of the purposes of [Section 17A]." 15 U.S.C. § 78q(a)(3). As also shown in the aforementioned facts and discussed below, Executive has violated several of the rules relating to the Commission's recordkeeping requirements and, therefore, is also in violation of Section 17(a)(3).

Exchange Act Rule 17Ac2-1

Rule 17Ac2-1(c) requires that when information contained in a transfer agent's Form TA-1 changes or becomes misleading as stated, the agent must correct the Form TA-1 by filing an amendment within sixty days. 17 C.F.R. § 240.17Ac2-1(c). On several occasions Donnelly claims to have been unaware that filing amendments to the Form TA-1 was necessary for the given events that occurred at Executive. (Answer at 4; Ex. 9 at 1; Ex. 13 at 1.) This explanation is not a defense to the violations, since it is Donnelly's responsibility, as the control person for Executive, to know the rules and regulations to which Executive is subject by virtue of its registration with the Commission. Further, this explanation is unpersuasive because Executive and United had both been previously cited for deficiencies of the rule and Donnelly was subject to a cease-and-desist order which compelled him not to further violate the rule. The order also required Donnelly to assure that "current, accurate, and timely" Form TA-1 Supplements were filed with the Commission. See 75 SEC Docket at 397.

Donnelly states in his Answer that "[i]t amazes [him] that even after correcting a violation the SEC can continue to bring up the same thing year after year!" (Answer at 4.) The reason the allegations regarding the Form TA-1 were brought up "year after year" was because United and then Executive continually failed to file timely updates. (Ex. 8 at 1; Ex. 10 at 1; Ex. 11a at 1; Ex. 11b at 1.)

The Division has clearly demonstrated through deficiency letters noting Executive's violations of Rule 17Ac2-1 that Executive, aided by its control person, Donnelly, failed to file timely required amendments to its Commission registration statement, Form TA-1. (Ex. 8 at 1; Ex. 11b at 1.) Furthermore, a review of the filings made with the Commission contained in the EDGAR database clearly corroborates Executive's many untimely filings of amendments to its Form TA-1. Therefore, I conclude that Executive willfully violated Rule 17Ac2-1.

Exchange Act Rule 17Ac2-2

As noted earlier, Rule 17Ac2-2(a) requires that every registered transfer agent file an annual report of its activities. 17 C.F.R. § 240.17Ac2-2(a). If the rule has been followed, then the registered transfer agent will have a Form TA-2 on file by March 31, following the December 31 end of the annual reporting period.

A deficiency letter sent to Executive on June 27, 2006, noted that Executive had failed to file its 2005 annual report by the March 31, 2006, deadline. (Ex. 8 at 1.) Furthermore, the Division notes that Executive has also failed to file timely annual reports for the 2006 and 2007 annual reporting periods. (Ex. 2 at 7.) A review of the filings contained in the EDGAR database establishes that these reports were never filed.

Each of the three years (2005-2007) in which Executive failed to file or filed late its annual report represents a violation of Rule 17Ac2-2. I conclude, therefore, that Executive willfully violated Rule 17Ac2-2.

Exchange Act Rule 17Ad-2

As a registered transfer agent, Executive is obligated to comply with the federal transfer agent provisions. This obligation includes the central transfer agent duty to provide timely turnaround of items received for processing and to give "diligent and continuous attention" to non-routine items, to ensure that these items are turned "as soon as possible." See 17 C.F.R. § 240.17Ad-2(a), (e)(1).

The Division's evidence demonstrates that, at the time of the Commission examination conducted on Executive from November 13-15, 2006 (Ex. 2 at 2), Executive failed to give "diligent and continuous attention" to the turnaround of non-routine items owed to several hundred shareholders in a newly merged entity. (Ex. 2 at 4; Ex. 5 at 2.) Respondents argue that the failure to turnaround the shares (if, according to Respondent's Letter, such failure ever existed) was the fault of others. (Answer at 3; Resp't Br. at 3; Resp't Letter at 5-6; Ex. 6 at 4.)

Further, Respondents claim that they had insufficient information to process the turnarounds. (Ex. 6 at 4.) However, the Division and examination staff assert that the information requested by Executive was improper (Ex. 7 at 3), unauthorized (Ex. 2 at 4; Ex. 7 at 1), and unnecessary for the turnaround (Ex. 7 at 2). During the examination, the staff noted that Executive did, in fact, have the necessary information to proceed with the turnaround, but chose for its own reasons not to proceed. (Ex. 7 at 2-3.) Respondents offer no facts or reasons to dispute what the staff noted during its examination.

I conclude that Executive willfully violated Rule 17Ad-2 by failing to give "diligent and continuous attention" to the non-routine items noted by the Commission examination staff and by failing to ensure that these items were turned around "as soon as possible."

Exchange Act Rule 17Ad-6

Rule 17Ad-6 requires registered transfer agents to maintain and keep current various documents and reports. 17 C.F.R. § 240.17Ad-6. Subsection (a)(6) requires agents to keep the following: all written inquires, copies of responses to inquires, and a telephone log showing the date and substance of any telephone conversation regarding inquiries. See 17 C.F.R. § 240.17Ad-6(a)(6). Similarly, Subsection (a)(8) holds that agents must maintain all writings (documents, contracts, letters, etc.) concerning appointment and termination by an issuer. See 17 C.F.R. § 240.17Ad-6(a)(8). Rule 17Ad-6 was promulgated in accordance with the Commission's authority under Section 17(a)(3). See 12 SEC Docket at 865.

In March 2004, the staff noted that, during their examination of Executive, Donnelly was unable to produce correspondence required by Rule 17Ad-6(a)(6) and unable to produce appointment letters for five issuers as required by Rule 17Ad-6(a)(8). (Ex. 11b at 1-2.) In reply to the staff's letter noting these failures, Donnelly admitted that not all calls were in the telephone log as they should be. (Ex. 13 at 1.) Thus, he admitted violating Rule 17Ad-6(a)(6), since this rule requires such telephone logs. While Donnelly, in his reply letter and in filings for this proceeding, generally denies failing to maintain required records (Answer at 5; Resp't Br. at

1-2; Ex. 13 at 1, 2), he fails to rebut the staff's assertions that he did not produce the records when requested.

It is the agent's obligation to produce records required by the Commission when requested. See 15 U.S.C. § 78q(b)(1). That Donnelly, on behalf of Executive, could not produce such records evidencing his compliance with these rules is a failure to follow the agent's statutory obligations. Because Executive failed to produce or to properly maintain records required under Rules 17Ad-6(a)(6) and (8), I conclude that Executive willfully violated Rule 17Ad-6.

Exchange Act Rule 17Ad-7

Rules 17Ad-7(a) and (c) require retention for two years for records kept pursuant to Rule 17Ad-6(a)(6) and perpetual retention for records kept pursuant to Rule 17Ad-6(a)(8). See 17 C.F.R. § 240.17Ad-7(a) and (c). Further, these rules require that the records be "easily accessible" for six months for Rule 17Ad-6(a)(6) records and one year for Rule 17Ad-6(a)(8) records. Id.

By virtue of the violations for failure to maintain and produce records required by Rules 17Ad-6(a)(6) and (8), Executive also violated the corresponding time retention requirements of Rules 17Ad-7(a) and (c). Thus, I conclude that Executive willfully violated Rule 17Ad-7.

Additionally, Executive's violations of Rules 17Ad-6 and 17Ad-7 amount to violations of Section 17(a)(3) since Executive did not make, keep, or furnish to the Commission all records required. Therefore, I conclude that Executive also willfully violated Section 17(a)(3).

Exchange Act Rule 17Ad-10

Section 17(a)(3) authorizes the Commission to promulgate rules requiring the creation and maintenance of transfer agent records that the Commission deems necessary for the furtherance of facilitating a national system for clearance and settlement of securities transactions. 15 U.S.C. § 78q(a)(3). Under this Section, Rule 17Ad-10 requires transfer agents to maintain certain books and files. See 28 SEC Docket at 95.

As relates to Executive, Rule 17Ad-10 requires the keeping of a master securityholder file, which is updated within five days of any transaction, and a control book, which is maintained such that it is current and accurate. See 17 C.F.R. § 240.17Ad-10(a), (e). In connection with these two recordkeeping requirements, an agent must also exercise diligent and continuous attention to resolve any differences between the master securityholder file and the control book. See 17 C.F.R. §§ 240.17Ad-9(g)(1), 240.17Ad-10(b).

Relatedly, Section 17(b)(1) holds that records authorized by Section 17(a)(3) and described in Commission rules, such as Rule 17Ad-10, are subject to examinations by the

Commission. See 15 U.S.C. § 78q(b)(1). During an examination, the staff found three issuers with out-of-balance conditions, where Executive's master securityholder file did not match the information in its control book. (Ex. 2 at 7-8; Ex. 11b at 3; Ex. 14 at 3.)

Donnelly blames this condition on the actions of the previous owners of Executive (Ex. 13 at 2), and argues that since he was subsequently able to balance the records, then there was no violation (Resp't Br. at 2). However, the fact remains that it was during an examination of Executive while it was under Donnelly's control that these out-of-balance conditions were found. (Ex. 11b at 3.) That he corrected the out-of-balance conditions after they were brought to his attention is irrelevant; Rule 17Ad-10 requires the master securityholder file and control book to be current, accurate, and updated quickly and requires differences to be resolved through diligent attention. See 17 C.F.R. § 240.17Ad-10(a), (b), (e).

By taking control of out-of-balance books and not fixing the out-of-balance conditions until after the staff found an issue (Ex. 14 at 3), Donnelly did not exercise diligent or continuous attention as required by Rule 17Ad-10(b). As a result, I conclude that Executive willfully violated Rule 17Ad-10.

Exchange Act Rule 17Ad-13

Rule 17Ad-13 requires that "[e]very registered transfer agent . . . shall file annually with the Commission . . . a[n accountant's report] prepared by an independent accountant concerning the transfer agent's system of internal accounting control and related procedures for the transfer of record ownership and the safeguarding of related securities and funds." 17 C.F.R. § 240.17Ad-13(a). Whether this rule is being followed is easy to detect; either the Commission has accountant reports on file for the registered transfer agent, or it does not. In the case of Executive under the control of Donnelly, it does not. (Ex. 2 at 5; Ex. 5 at 2; Ex. 7 at 4; Ex. 8 at 2.)

Following Commission examinations conducted on Executive from May 15-18, 2006, and again from November 13-15, 2006 (Ex. 2 at 2), Executive was notified in deficiency letters that the staff found no record of accountant's reports on file for Executive as required by Rule 17Ad-13 (Ex. 5 at 2; Ex. 8 at 2). At that time, Donnelly had only failed to file reports for 2004 and 2005. (Id.) However, since receiving these two notices regarding his delinquent filings, two more annual periods have passed, yet still no accountant's report from Executive has been filed. (Ex. 2 at 5; Ex. 7 at 4.)

Donnelly contends that this deficiency is due to confusion with his accountants. (Answer at 4; Resp't Letter at 5; Ex. 6 at 1; Ex. 9 at 1.) However, this is not a defense. Executive, not its accountants, has an obligation as a registered transfer agent to submit each year an accountant's report. This report is an important component of the Commission oversight of transfer agents, as it certifies that an agent has proper internal controls and follows accepted accounting standards. See 28 SEC Docket at 91-92. As Donnelly admitted, he should have hired a new accountant. (Answer at 4.) He did not.

In the meantime, Executive has missed four annual accountant's reports in violation of the Commission's rules. Thus, I conclude that Executive willfully violated Rule 17Ad-13.

Exchange Act Rule 17Ad-15

Rule 17Ad-15(c) requires written procedures for the acceptance of signature guarantees. 17 C.F.R. § 240.17Ad-15(c). During an examination of Executive's books and records, the staff was not provided Executive's written procedures for such acceptance. (Ex. 2 at 8; Ex. 11b at 4.) Regardless of whether Donnelly's other registered transfer agent, United, had such written procedures, the staff noted that clearly-marked, separate procedures were needed for Executive. (Ex. 14 at 3.) Donnelly's conflicting claims that he does not recall being asked to produce such written procedures (Ex. 13 at 2) or that such written procedures were only misplaced (Answer at 4) tacitly admit the deficiency noted by the staff.

It is the transfer agent's responsibility to be able to provide written procedures to the staff. See 15 U.S.C. § 78q(a)(3). Executive could not produce such written procedures when asked. (Ex. 11b at 4.) Since no such procedures were produced, I conclude that Executive willfully violated Rule 17Ad-15.

Exchange Act Rule 17Ad-16

Under Rule 17Ad-16(a), a transfer agent must send written notice of termination to the "qualified registered securities depository" ten days prior to the effective date of the termination or on the day the agent is notified of the effective date when its services are terminated by an issuer. 17 C.F.R. § 240.17Ad-16(a). The staff advised Donnelly in a June 12, 2007, letter that Executive had failed to comply with this rule. (Ex. 7 at 4.) In the referenced incident, Donnelly waited until almost a month after the issuer notified Executive of its termination to send the required notice to the DTC. (Id.) Despite Donnelly's desire to withhold notification until he receives supposedly overdue payment (Resp't Letter at 6-7), the rule does not permit the withholding of required information until payment is made.

The terms of Rule 17Ad-16(a) required notification by December 19, 2006, and Executive was twenty-four days late. This is a violation of Rule 17Ad-16 and Executive willfully violated it.

Exchange Act Rule 17Ad-17

Rule 17Ad-17(c) requires written procedures of an agent's methodology for conducting lost securityholder searches. 17 C.F.R. § 240.17Ad-17(c). In March 2004, the staff cited Executive for failure to produce written procedures for lost securityholder searches at the time of its examination earlier that year. (Ex. 11b at 4.) As was the case with Executive's violation of Rule 17Ad-15(c), it was irrelevant whether United had written procedures; since as a separately registered agency, Executive needed separately written procedures. (Ex. 2 at 9-10, Ex. 14 at 3.)

Donnelly's response as to Executive's violation of this rule changed from a claim that there was no violation (Ex. 13 at 2), to a claim that the procedure was being written at the time of

the exam (Answer at 5), to a claim that it was the Commission's fault for not providing guidance (Resp't Br. at 1). Regardless of these claims, Executive was required to have written procedures pursuant to Rule 17Ad-17(c) and to produce such procedures at Commission request pursuant to Section 17(a)(3).

When asked to provide its written procedures for complying with Rule 17Ad-17(c), Executive did not produce such procedures. Thus, I conclude that Executive willfully violated Rule 17Ad-17.

Exchange Act Rule 17Ad-19

Rule 17Ad-19(b) requires written procedures for the handling and disposition of securities certificates, and Rule 17Ad-19(c)(5) notes that, among the minimum provisions that must be included, these written procedures must describe the method of transportation of cancelled certificates and maintenance of a record of those certificates in transit. See 17 C.F.R. § 240.17Ad-19(b), (c)(5). On June 27, 2006, following a May 2006 examination of Executive, the staff noted that Executive's procedures did not include this minimum provision. (Ex. 8 at 2.) In other words, the written procedures provided to the staff were deficient in that they did not contain a required provision, and, thus, Executive was in violation of Rule 17Ad-19(b).

Donnelly's reply to the deficiency letter, sent almost five months later, did not deny that Executive's written procedures were lacking (Ex. 9 at 2); however, his Answer did (Answer at 5). In both instances, he sought to excuse Executive's delinquency by superficially describing a procedure he claimed Executive used. (Answer at 5; Ex. 9 at 2.) It appears that Donnelly missed the issue at hand. The purpose of Commission examinations of registered transfer agents is to ensure, among other things, the agent's compliance with Commission statutes and rules in order to protect investors. See 15 U.S.C. 78q(b)(1). Rule 17Ad-19(b) requires written procedures, and the Commission has noted that this requirement allows "the Commission's examiners to verify compliance as a routine part of their examination schedules." See 81 SEC Docket at 3266.

According to the staff, written procedures that complied with Rules 17Ad-19(b) and (c)(5) were not provided by Executive during its examination. (Ex. 2 at 11; Ex. 8 at 2.) Donnelly's summary description of a procedure purportedly used does not meet the requirements of the rule. Therefore, I find that Executive willfully violated Rule 17Ad-19.

Furthermore, each violation of Rules 17Ac2-1, 17Ac2-2, 17Ad-2, 17Ad-6, 17Ad-7, 17Ad-10, 17Ad-13, 17Ad-15, 17Ad-16, 17Ad-17, and 17Ad-19, described above constituted a violation of Section 17A(d)(1) forbidding action in contravention of Commission statutes and rules. Thus, I conclude that Executive willfully violated Section 17A(d)(1).

**2. Section 17(f)(2) of the Exchange Act and Rule 17f-2 thereunder**

Section 17(f)(2) requires that transfer agents fingerprint each of their employees and provide those fingerprints to the appropriate regulatory body for processing, unless the employee falls under an exemption as provided by the Commission's rules. 15 U.S.C. § 78q(f)(2). The purpose of this requirement is to reduce the incidence of securities theft. See 28 SEC Docket at

91 n.50. As such, the exemptions to the fingerprinting requirement are for those employees whose job duties do not include the handling of securities, monies, or the agent's books and records. See 17 C.F.R. § 240.17f-2(a). Further, if such an exemption is applicable, the transfer agent is required to keep a notice of that exemption and provide the notice to the staff for inspection. See 17 C.F.R. § 240.17f-2(e)(2).

The staff noted in its February 2007 deficiency letter that Executive had failed to fingerprint three employees as required by Section 17(f)(2) and Rule 17f-2(a). (Ex. 2 at 11-12; Ex. 5 at 3; Ex. 7 at 3.) Respondents admitted the deficiency in their reply to the staff's letter (Ex. 6 at 5) and effectively admitted it in replies in this proceeding (Answer at 5; Resp't Letter at 6). Respondents did not claim to have a valid exemption under Rule 17f-2(a), nor is there evidence that they maintained the "Notice Pursuant to Rule 17f-2" required under Subsection (e) to claim an exemption. Furthermore, Donnelly's argument regarding the time of employment is not a valid ground for exemption.

While Donnelly did not "feel it was necessary to process fingerprint cards for [these] employees" (Answer at 5), the fact is that Executive was required to process fingerprint cards for all employees no matter how long a time they were employed by the agent. Therefore, I conclude that Executive willfully violated Section 17(f)(2) and Rule 17f-2.

**B. Liability of Related Party**

The OIP alleges that United willfully violated Exchange Act Sections 17(a)(3) and 17A(d)(1) and Rules 17Ac2-1, 17Ad-6, 17Ad-7, 17Ad-16, and 17Ad-17. (OIP at 4.)

As United is no longer incorporated or registered with the Commission and is not a Respondent in this proceeding, the violations that occurred at United are those violations for which Donnelly, as United's control person, is secondarily liable. The statutory and regulatory requirements related to each of United's alleged violations are described in the prior section discussing Executive's primary liability.

The facts listed in Parts II.D.2., II.D.4., II.D.5., and II.E. of this decision clearly demonstrate that United, as alleged, failed to file timely updates to its Form TA-1, failed to notify the DTC promptly of its termination, failed to maintain and produce written procedures for conducting lost securityholder searches which met the Commission's minimum criteria, and failed to produce and retain correspondence with issuers. Therefore, I conclude that United did willfully violate Exchange Act Sections 17(a)(3) and 17A(d)(1) and Rules 17Ac2-1, 17Ad-6, 17Ad-7, 17Ad-16, and 17Ad-17.

**C. Secondary Liability**

The OIP alleges that Donnelly willfully aided and abetted Executive's violations of Exchange Act Sections 17(a)(3), 17(f)(2), and 17A(d)(1) and Rules 17Ac2-1, 17Ac2-2, 17Ad-2, 17Ad-6, 17Ad-7, 17Ad-10, 17Ad-13, 17Ad-15, 17Ad-16, 17Ad-17, 17Ad-19, and 17f-2. (OIP at 5.) Further, the OIP alleges that Donnelly willfully aided and abetted United's violations of

Sections 17(a)(3) and 17A(d)(1) and Rules 17Ac2-1, 17Ad-6, 17Ad-7, 17Ad-16, and 17Ad-17. (Id.)

To show that one respondent willfully aided and abetted the violation of another, the Commission requires the Division to establish three elements: (1) another respondent has committed a securities law violation; (2) the accused aider and abetter has a general awareness that his or her role was part of an overall activity that was improper or illegal; and (3) the accused aider and abetter knowingly and substantially assisted the primary violation. See SEC v. Nacchio, 438 F. Supp. 2d 1266, 1285 (D. Colo. 2006) (citing Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000)); Orlando Joseph Jett, 82 SEC Docket 1211, 1256 & n.46 (Mar. 5, 2004).

The Commission has held that a showing of recklessness will satisfy the "substantial assistance" prong of the aiding and abetting test. See Sharon M. Graham, 53 S.E.C. 1072, 1084-85 & n.33 (1998), aff'd, 222 F.3d 994 (D.C. Cir. 2000); Russo Sec., Inc., 53 S.E.C. 271, 278-79 & n.16 (1997). Additionally, the Commission has made clear that the accused aider and abetter must have acted with scienter. See Zion Capital Mgmt. LLC, 81 SEC Docket 3063, 3076-77 & n.35 (Dec. 11, 2003); Kingsley, Jennison, McNulty & Morse, Inc., 51 S.E.C. 904, 911 & n.28 (1993). However, a person cannot escape aiding and abetting liability by claiming ignorance of the securities laws. See Graham, 53 S.E.C. at 1084 n.33. Furthermore, when the alleged aider and abettor is a fiduciary or active participant, his recklessness can satisfy the scienter requirement. See Ross v. Bolton, 904 F.2d 819, 824 (2d Cir. 1990); Woodward v. Metro Bank of Dallas, 522 F.2d 84, 97 (5th Cir. 1975).

Executive's and United's violations as transfer agents are clear and numerous. It is plain that Donnelly substantially assisted both Executive's and United's transfer agent violations, and that he did so with an awareness of the agencies' wrongdoing. As president and control person of both agencies, Donnelly was responsible for the activities each performed as transfer agents. Donnelly's agencies received numerous deficiency letters outlining the many violations that each agency had committed. Frequently, Donnelly delayed in replying to these letters, and when he did reply, his answers contained false assurances against future violations or unsupported accusations aimed at others to obfuscate his own obligations and wrongdoing.

Under Donnelly's leadership, United was subject to two cease-and-desist orders and he was subject to one himself. Nevertheless, examination after examination of United and then Executive turned up more violations, most of which Donnelly failed to cure. Each of these violations was a violation of the 2001 cease-and-desist order imposed on Donnelly. In several responses to the Commission examination staff and in this proceeding, Donnelly demonstrates that he is unaware of the provisions and obligations of the 2001 order. This lack of effort to understand the ramifications of a legal order imposed upon him demonstrates Donnelly's indifference to following the rules and regulations imposed on transfer agents by the Commission and his apathy toward the importance of abiding by such rules and regulations.

Donnelly has been unable to articulate a colorable legal basis for his agencies' failures to keep and retain required records, to fingerprint personnel, to timely amend Forms TA-1, to timely file Forms TA-2 and annual accountant's reports, to turnaround non-routine items, to maintain a balanced control book and securityholder files, to create compliant written

procedures, and to notify the DTC of terminations. As the control person for these agencies, Donnelly was responsible for assuring Executive's and United's legal compliance with the Commission's registered transfer agent requirements; yet, despite prior Commission sanctions and several deficiency letters, both agencies continued to violate the Commission's statutes and rules. Donnelly was aware of Executive's and United's violations, he acted recklessly as a fiduciary, and substantially assisted in these violations.

Thus, I conclude that Donnelly willfully aided and abetted Executive's violations of Exchange Act Sections 17(a)(3), 17(f)(2), and 17A(d)(1) and Rules 17Ac2-1, 17Ac2-2, 17Ad-2, 17Ad-6, 17Ad-7, 17Ad-10, 17Ad-13, 17Ad-15, 17Ad-16, 17Ad-17, 17Ad-19, and 17f-2; and United's violations of Exchange Act Sections 17(a)(3) and 17A(d)(1) and Rules 17Ac2-1, 17Ad-6, 17Ad-7, 17Ad-16, and 17Ad-17.

## IV. SANCTIONS

The proven violations involve serious misconduct. Executive's violations of the transfer agent rules and its failure to cure repeated deficiencies outlined by Commission examinations are ongoing. The sanctions imposed for Executive's transfer agent violations are accordingly severe.

Correspondingly, as the control person of Executive and United during the time of their many violations, Donnelly is responsible for Executive's and United's repeated and numerous failures. Additionally, Donnelly has previously been sanctioned by the Commission and was under an order to cease and desist from many of these violations. Despite that cease-and-desist order and in violation of it, Donnelly willfully aided and abetted Executive's and United's violations, and therefore, the sanctions imposed on Donnelly are also severe.

### A. Cease-and-Desist Order against Executive

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 the rules and regulations thereunder.

In addressing the standard for issuing cease-and-desist relief, the Commission has explained that the Division must show some risk of future violations. See KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1183-92 (2001), recon. denied, 74 SEC Docket 1351 (Mar. 8, 2001), pet. denied, 289 F.3d 109 (D.C. Cir. 2002). The Commission explained that such a showing should be "significantly less than that required for an injunction," id. at 1191, and that, absent evidence to the contrary, a single past violation ordinarily suffices to raise a sufficient risk of future violations, id. at 1185.

Along with the risk of future violations, the Commission considers the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the respondent's opportunity to commit future violations. Id. at 1192 (referencing Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd

on other grounds, 450 U.S. 91 (1981)). In addition, the Commission considers whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceeding. Id. The Commission weighs these factors in light of the entire record, and no one factor is dispositive.

The Division seeks a cease-and-desist order against Executive. (Div. Br. at 16-17.)

Executive's violations of Sections 17(a)(3), 17(f)(2), and 17A(d)(1) as well as a multitude of transfer agent rules were egregious and involved important regulatory provisions. The violations can hardly be described as isolated infractions, given the number of violations and the duration of time over which they occurred. It is clear that Donnelly deliberately disregarded his responsibilities as the officer responsible for Executive's activities as a transfer agent. Executive and Donnelly do not recognize the wrongful nature of their conduct. In fact, Respondents have made a clear effort to deflect any and all blame to others, including DTC, various broker-dealers, naked short sellers, and members of the Commission's staff. The violations are recent, as some of them continue to this day. The Division does not lay out a quantifiable harm to investors; however, Executive's violations of the turnaround rules deprived investors of the timely acquisition of the shares they owned. I infer that future violations are quite likely to occur, since, despite repeated deficiency letters, Executive continues to violate the same provisions or finds new transfer agent rules to break. I will, therefore, impose a cease-and-desist order as to Executive.

**B. Revoking Executive's Registration as a Transfer Agent; Barring Donnelly from Associating with a Transfer Agent**

The Division next seeks to revoke Executive's registration as a transfer agent and to bar Donnelly from associating with any transfer agent. (Div. Br. at 18-19.)

Section 17A(c)(3)(A), in conjunction with Section 15(b)(4)(D), allows 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 a transfer agent. The Commission must determine that such action is in the public interest. As here relevant, it must also determine that the transfer agent is subject to an order or finding that it has willfully violated the Exchange Act or the rules and regulations thereunder.

Similarly, Section 17A(c)(4)(C), in conjunction with Section 15(b)(4)(E), authorizes the Commission to censure, place limitations on the activities or functions of, suspend for a period not exceeding twelve months, or bar any person from being associated with a transfer agent. The Commission must determine that such action is in the public interest. It must also determine that the person is subject to an order or finding that he or she has willfully aided and abetted a violation of the Exchange Act or the rules and regulations thereunder.

Donnelly's actions in dealing with the Commission show a pattern of delay and unsubstantiated denial. He has on several occasions, in replies in this proceeding and in replies following Commission examinations, made it clear that he feels he has done nothing wrong and

has sought to obvert what he considers, at best, his own minor failings by citing or alleging the wrongdoing of others. Donnelly has been involved in two prior Commission proceedings related to violations by transfer agents under Donnelly's control. As a result of one of these proceedings, Donnelly was ordered to cease and desist from further violations of almost all of the statutes and rules at issue in this proceeding. His agencies have been continually cited for deficiencies and violations, and, yet, Donnelly remains impervious. It is clear from Donnelly's inability to follow the Commission's rules and regulations that it is in the public interest to bar him from association with any transfer agent as it is clear that neither civil penalties nor a cease-and-desist order have been successful in stopping his continued flouting of Commission rules.

As noted in the analysis offered above in connection with the need for a cease-and-desist order against Executive, virtually every criterion that the Commission uses to assess whether sanctions are in the public interest favors heavy sanctions for Executive. As was the case with Donnelly, Executive's pattern of repeated and continuing violations makes it clear to me that it is in the public interest to remove Executive from the transfer agent business.

Thus, the public interest requires the revocation of Executive's registration as a transfer agent. Further, the public interest requires that Donnelly be barred from associating with any transfer agent.

**C. Civil Monetary Penalties**

In any proceeding instituted pursuant to Section 17A, the Commission may assess a civil monetary penalty against any person who has willfully violated or willfully aided and abetted any violations of the Exchange Act or the rules and regulations thereunder, so long as the Commission also finds that such a penalty is in the public interest. See 15 U.S.C. § 78u-2(a). Six factors are relevant to the public interest determination: (1) presence of fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) harm to others; (3) unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other factors as justice may require. See 15 U.S.C. § 78u-2(c). Not all factors may be relevant in a given case, and the factors need not all carry equal weight.

As here relevant, the Commission instituted this proceeding against Executive and Donnelly pursuant to Section 17A. (OIP at 1.) The OIP alleged, and the Division proved, that Executive and United willfully violated several provisions of the Exchange Act and rules thereunder and that Donnelly willfully aided and abetted both Executive's and United's violations. (OIP at 4-5.) With regard to the public interest, the violations described show deliberate disregard for the Commission's regulations, actions that delayed receipt to investors of rightfully owned securities, and attempts to collect inapplicable fees, all which violated a prior cease-and-desist order. As a result, the Division has satisfied both of the predicates for imposing a civil penalty against Executive and Donnelly under Sections 21B(a)(1) and (2), respectively.

The Division seeks civil penalties of $10,000 against Executive and $25,000 against Donnelly. (Div. Br. at 17-18.)

Addressing the factors that guide the public interest, I have concluded that civil penalties are not necessary. Donnelly and his company were assessed similar penalties in his 2001 settlement with the Commission. Furthermore, there may be an issue with Respondents' ability to pay; Donnelly is representing himself and Executive pro se, suggesting an inability to pay penalties were they to be assessed. Additionally, Donnelly has stated during prehearing conferences held in this proceeding that he and Executive have financial difficulties. (Prehearing Tr. 4, 5-6, April 3, 2008; Prehearing Tr. 3, April 24, 2008.)

I conclude that the public interest is best served by removing Executive and Donnelly from the business of acting as transfer agents. The preceding sanctions accomplish that end, and, therefore, I conclude that civil penalties are unnecessary to furthering the public interest.

## V. ORDER

Based on the findings and conclusions set forth above:

IT IS ORDERED THAT, pursuant to Section 21C of the Securities Exchange Act of 1934, Executive Registrar & Transfer, Inc., cease and desist from committing or causing any violations or future violations of Sections 17(a)(3), 17(f)(2), and 17A(d)(1) of the Securities Exchange Act of 1934 and Exchange Act Rules 17Ac2-1, 17Ac2-2, 17Ad-2, 17Ad-6, 17Ad-7, 17Ad-10, 17Ad-13, 17Ad-15, 17Ad-16, 17Ad-17, 17Ad-19, and 17f-2; and

IT IS FURTHER ORDERED THAT, pursuant to Section 17A of the Securities Exchange Act of 1934, the registration of Executive Registrar & Transfer, Inc., as a transfer agent is revoked; and

IT IS FURTHER ORDERED THAT, pursuant to Section 17A of the Securities Exchange Act of 1934, John J. Donnelly is barred from associating with any registered transfer agent.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice. Pursuant to this 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. 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 unless the Commission determines on its own initiative to review this Initial Decision as to any party. If any of these events occur, the Initial Decision shall not become final as to that party.

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Robert G. Mahony
Administrative Law Judge