

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES ACT OF 1933**  
**Release No. 8624 / October 12, 2005**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 52591 / October 12, 2005**

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 2440 / October 12, 2005**

**INVESTMENT COMPANY ACT OF 1940**  
**Release No. 27113 / October 12, 2005**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-11261**

**In the Matter of**  
  
**THEODORE CHARLES SIHPOL III,**  
  
**Respondent.**

**ORDER MAKING FINDINGS AND  
IMPOSING REMEDIAL SANCTIONS AND A  
CEASE-AND-DESIST ORDER PURSUANT  
TO SECTION 8A OF THE SECURITIES ACT  
OF 1933, SECTIONS 15(b) AND 21C OF THE  
SECURITIES EXCHANGE ACT OF 1934,  
SECTION 203(f) OF THE INVESTMENT  
ADVISERS ACT OF 1940, AND SECTIONS  
9(b) AND 9(f) OF THE INVESTMENT  
COMPANY ACT OF 1940**

**I.**

On September 16, 2003, the Securities and Exchange Commission ("Commission") instituted public administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Investment Company Act") against Theodore Charles Sihpol III ("Sihpol" or "Respondent").

## II.

Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order Pursuant to Section 8A of the Securities Act of 1933, Sections 15(b) and 21C of the Securities Exchange Act of 1934, Section 203(f) of the Investment Advisers Act of 1940, and Sections 9(b) and 9(f) of the Investment Company Act of 1940 ("Order"), as set forth below.

## III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

### Summary

1. This is a proceeding against Sihpol, formerly a registered representative with Banc of America Securities LLC ("BAS"), for his key role in enabling certain hedge fund customers of BAS to engage in "late trading" in shares of mutual funds sold by BAS and others. Late trading refers to the practice of placing orders to buy or redeem mutual fund shares after the close of trading as of 4:00 p.m. Eastern Time ("ET"), but receiving the price based on the prior net asset value ("NAV") already determined as of 4:00 p.m. Late trading violates the federal securities laws concerning the price at which mutual fund shares must be bought or redeemed and defrauds innocent investors in those mutual funds by giving to the late trader an advantage not available to other investors. By virtue of his conduct, Respondent violated and/or aided and abetted and caused violations of the antifraud, mutual fund pricing and broker-dealer record-keeping provisions of the federal securities laws.

### Respondent

2. **Sihpol**, age 38, resides in New Canaan, Connecticut. Sihpol holds Series 7, 63, and 66 licenses. During the conduct at issue, Sihpol was a registered representative in BAS's high-net worth group located in New York.

### Related Entities

3. BAS, a registered broker-dealer, is a full-service U.S. investment bank and brokerage firm with principal offices in San Francisco, California, New York, New York, and

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Charlotte, North Carolina. BAS is also registered as an investment adviser pursuant to the Advisers Act. BAS is a subsidiary of Bank of America Corporation ("BAC"), a bank and financial holding company incorporated in Delaware with its principal place of business in Charlotte. Other BAC subsidiaries, Banc of America Advisors, LLC and Banc of America Capital Management, LLC, both located in Charlotte, managed and advised the Nations Funds family of funds. Nations Fund, Inc., incorporated in Maryland, is a registered investment company organized as a series company and is the issuer of the shares of the Nations Funds.

4. At all relevant times, Canary Capital Partners, LLC, was a domestic hedge fund, and Canary Capital Partners, Ltd., was an offshore hedge fund domiciled in Bermuda, managed by an investment adviser Canary Investment Management, LLC (collectively, "Canary"), and its principal, Edward J. Stern ("Stern"). Canary has offices in Secaucus, New Jersey.

### **Background - Late Trading**

5. Rule 22c-1(a) under the Investment Company Act requires any registered investment company issuing redeemable securities, its principal underwriter, any dealers in its shares, and any person designated in the fund's prospectus as authorized to consummate transactions in securities issued by the fund to sell and redeem fund shares at a price based on the current net asset value ("NAV") next computed after receipt of an order to buy or redeem. Mutual funds generally determine the NAV of mutual fund shares as of 4:00 p.m. Eastern Time ("ET"). In these circumstances, orders received by the entities identified in Rule 22c-1 before 4:00 p.m. must be executed at the price determined as of 4:00 p.m. that day. Orders received by these entities after 4:00 p.m. must be executed at the price determined as of 4:00 p.m. the next trading day.

6. Mutual fund prospectuses typically identify the time as of which the NAV is determined for purposes of pricing fund shares for purchases and redemptions. For example, the August 1, 2001 prospectus for Nations Funds Primary A Shares indicates that orders received "before the end of a business day (usually 4:00 p.m. Eastern time, unless the NYSE closes early) will receive that day's net asset value per share. Orders received after the end of a business day will receive the next business day's net asset value per share."

7. "Late trading" refers to the practice of placing orders to buy or redeem mutual fund shares after the time as of which a mutual fund has calculated its NAV (usually as of the close of trading at 4:00 p.m. ET), but receiving the price based on the prior NAV already determined as of 4:00 p.m. Late trading enables the trader to profit from market events that occur after 4:00 p.m. but that are not reflected in that day's price. In particular, the late trader obtains an advantage – at the expense of the other shareholders of the mutual fund – when he learns of market moving information and is able to purchase (or redeem) mutual fund shares at prices set *before* the market moving information was released.

8. Late trading violates Rule 22c-1(a) under the Investment Company Act, defrauds innocent shareholders in those mutual funds by giving to the late trader an advantage not available to other shareholders, and harms shareholders when late trading dilutes the value of their shares.

### **Sihpol Enabled Canary to Engage in Late Trading**

9. From 2001 until 2003, Sihpol enabled Canary to engage in late trading in shares of Nations Funds and other mutual funds. Specifically, Sihpol enabled Canary to place orders to buy or redeem mutual fund shares that were received by and cleared through BAS until 6:30 p.m., but that received the price previously determined as of 4:00 p.m. that day (rather than the price determined as of 4:00 p.m. the next day). Canary did, in fact, place orders after 4:00 p.m. to buy and redeem mutual fund shares that received the price previously determined as of 4:00 p.m. on the day of the order. In the process, Sihpol falsified, altered, destroyed, or evaded the creation of, books and records that BAS was required accurately to create, maintain and preserve.

#### **Origins of the Relationship Between Canary and BAS**

10. In or around April 2001, Stern met with Sihpol concerning Canary potentially trading mutual funds through BAS, a dealer in fund shares and also a clearing broker. Stern outlined Canary's approach to timing mutual funds. "Timing" includes the practice of short term buying and redeeming mutual fund shares in order to exploit inefficiencies in mutual fund pricing. Stern asked if Canary would be allowed to time the Nations Funds family. Sihpol agreed to check and get back to Canary.

11. Sihpol and other BAS representatives met with Stern and Canary traders again in or around April 2001 to discuss Stern's proposal. The parties discussed Canary's mutual fund trading strategy, timing certain Nations Funds and other funds and BAS financing Canary's trading.

12. In that meeting, BAS representatives offered to install an electronic trading system in Canary's offices that would enable Canary to bypass BAS brokers and enter trades directly to BAS's clearing function. They also explained that, by using the electronic system, Canary would be able to enter its trades until 6:30 p.m. ET. They also stated that, through the electronic system, Canary would be able to trade numerous other mutual funds that BAS distributed.

13. Canary confirmed an agreement in a May 1, 2001 letter from Stern to Sihpol. First, Stern identified the Nations Funds he wanted to time and the dollar amounts of timing for each fund. Next, Stern confirmed that initially Canary would execute late trades by calling or faxing the trades to Sihpol or his team, and later Canary would use the electronic system:

We plan on transacting our trades manually at first (via Fax), at a time of day that is a little bit earlier than [one of the clearing representatives] specified in our first meeting. As soon as we can work out our lending arrangement with the bank and begin transacting electronically via ADP [i.e., the BAS electronic system], we will draw down leverage against the capital we have deployed in the Nations funds, effectively increasing our trading capital with your firm to \$32 million. If all goes well, this capital should grow larger as we get a sense of what trades can and cannot be done via the Banc of America Securities Platform. We really would like to get going with ADP and begin trading electronically as soon as possible.

#### **"Manual" Late Trading at BAS**

14. In or around May 2001, Canary began to late trade the Nations Funds. At first, Canary conducted its late trading "manually." In the manual stage, Canary was able to engage in

late trading primarily because Sihpol and his team falsified BAS's books and records. Prior to 4:00 p.m. ET, a Canary trader would send Sihpol or a member of his team a series of "proposed" mutual fund trades by e-mail or facsimile. Upon receipt, Sihpol, or a member of his team acting upon his instructions, would fill out an order ticket, time stamp it, and set it to one side until that evening.

15. Sometime after 4:00 p.m. ET, a Canary trader would telephone Sihpol or a member of his team, and would either confirm or cancel the "proposed" trades. If confirmed, Sihpol's team would fax the order (with its pre-4:00 p.m. time stamp and no post-4:00 p.m. time stamp) to BAS's clearing department for processing. As a result, Canary would receive that day's NAV. If Canary cancelled the "order," Sihpol or a member of his team would discard the ticket.

#### Late Trading Through BAS's Electronic System

16. In the summer of 2001, BAS technicians installed the direct access system in Canary's offices. Through this system, Canary was able to enter its trades directly into BAS's clearing function until 6:30 p.m. ET.

17. After a Canary trader entered the trades directly into the system, the trader would print out a document confirming the trades and the time (after 4 p.m.) that the trades had been entered. The trader then faxed the document to Sihpol or a member of his team. The following day, Sihpol or a member of his team would use this document to reconcile Canary's trades. Once the trades were reconciled, Sihpol or a member of his team discarded the document.

18. From the summer of 2001 until the summer of 2003, Canary used the electronic system to late trade. Canary also late traded "manually" whenever there were technical problems with the electronic system. BAS technicians also installed a second direct access system in the residence of a Canary trader, which also was used to late trade.

19. The electronic system enabled Canary to late trade the Nations Funds and in the many other mutual funds for which BAS was a dealer. By using the electronic system, Canary was able to send orders directly to BAS's clearing function, circumventing the normal trading process in which each brokerage order must be properly documented, including the time the order was received.

20. Canary paid BAS a so-called "wrap fee" of one percent of the Canary assets in Nations Funds and one-half of one percent of the assets in other funds traded through the electronic link. Sihpol received a portion of this wrap fee. In addition, Canary agreed to leave millions of dollars invested in Nations Funds on a long-term basis. Canary also paid interest and other charges to BAS and its affiliates. Canary also paid fees for the installation and maintenance of the electronic system.

#### Violations

21. As a result of the conduct described above, Sihpol willfully violated Section 17(a) of the Securities Act in that he, by the use of the means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly, in the offer or sale of securities, employed devices, schemes or artifices to defraud; obtained money or

property by means of untrue statements of material fact or omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or engaged in transactions, practices or courses of business which operated or would operate as a fraud or deceit upon purchasers or prospective purchasers of such securities, as described above.

22. As a result of the conduct described above, Sihpol willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in that he, in connection with the purchase or sale of securities, directly or indirectly, by the use of the means or instrumentalities of interstate commerce, or of the mails, employed devices, schemes or artifices to defraud; made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon the purchasers of the securities, as described above.

23. As a result of the conduct described above, Sihpol willfully aided and abetted and caused BAS's violations of Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder, which require registered brokers and dealers to make and keep current, and preserve, books and records relating to their brokerage business.

24. As a result of the conduct described above, Sihpol willfully aided and abetted and caused BAS's violations of Rule 22c-1 promulgated under Section 22(c) of the Investment Company Act, which provides that "[n]o registered investment company issuing any redeemable security, no person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and no principal underwriter of, or dealer in any such security shall sell, redeem, or repurchase any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security."

#### IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Sihpol's Offer.<sup>2</sup>

Accordingly, pursuant to Section 8A of the Securities Act, Sections 15(b) and 21C of the Exchange Act, Section 203(f) of the Advisers Act, and Sections 9(b) and 9(f) of the Investment Company Act, it is hereby ORDERED that:

A. Respondent Sihpol shall cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder;

B. Respondent Sihpol shall cease and desist from causing any violations and any future violations of Section 17(a) of the Exchange Act, and Rules 17a-3 and 17a-4 thereunder, and Rule 22c-1 promulgated under Section 22(c) of the Investment Company Act;

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<sup>2</sup> In addition to the sanctions imposed herein, Sihpol has agreed to the entry of a final judgment imposing a civil penalty of \$200,000 in a civil action in the United States District Court for the Southern District of New York.

C. Respondent Sihpol shall be, and hereby is, barred from association with any broker, dealer, or investment adviser, and is prohibited from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, with the right to reapply for association after five (5) years to the appropriate self-regulatory organization, or if there is none, to the Commission;

D. Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Jonathan G. Katz  
Secretary