SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Rel. No. 8641 / December 2, 2005

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 52875 / December 2, 2005

Admin. Proc. File No. 3-11462

In the Matter of

IRA WEISS

OPINION OF THE COMMISSION

CEASE-AND-DESIST PROCEEDINGS

Grounds for Remedial Action

Antifraud Violations

Attorney who acted as bond counsel for school district violated antifraud provisions by negligently rendering unqualified opinion that interest on notes issued by school district would be exempt from federal income taxation, and representing that the proceeds would be used for school renovation and construction projects. Held, it is in the public interest to order the attorney to cease and desist from violating Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 and to pay disgorgement of $9,509.63, plus prejudgment interest.

APPEARANCES:

David J. Hickton, of Burns, White & Hickton, LLC, for Ira Weiss.

Arthur S. Gabinet, Christina Rainville, and Mark R. Zehner, for the Division of Enforcement.

Appeal filed: March 18, 2005
Last brief filed: June 10, 2005

I.

The Division of Enforcement appeals from an administrative law judge's decision dismissing this proceeding against Ira Weiss. Weiss served as bond counsel for the Neshannock Township School District ("School District"), of Lawrence County, Pennsylvania, in connection with the School District's issuance of $9.6 million in three-year general obligation notes (the "Notes") to fund capital improvement projects. The Notes were offered and sold to investors in June 2000 based on Weiss's unqualified opinion that the interest on the Notes would be exempt from federal income taxation, and on a representation that the proceeds would be used to finance projects. The Division alleged that Weiss violated Section 17(a) of the Securities Act of 1933, 1/ Section 10(b) of the Securities Exchange Act of 1934, 2/ and Exchange Act Rule 10b-5, 3/ by making material misrepresentations and omissions about the proposed use of the Note proceeds and the risk that the interest on the Notes would be taxable. The Division also alleged that Weiss caused the School District to violate those antifraud provisions. 4/ We base our findings on an independent review of the record, except with respect to findings not challenged on appeal.

II.

The School District is located in New Castle, Pennsylvania, approximately eighty miles north of Pittsburgh. The School District is governed by a Board of School Directors ("Board"), composed of nine unpaid members elected by the citizens of Neshannock Township for four-year terms. The Board hires several officials, including a superintendent, business manager, and solicitor, to administer the school system. The superintendent, as the School District's chief executive officer, is responsible for all aspects of school operations. The School District operates one elementary school for grades kindergarten through six and one junior/senior high school for

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1/ 15 U.S.C. § 77q(a).

2/ 15 U.S.C. § 78j(b).

3/ 17 C.F.R. § 240.10b-5.

4/ The School District consented, without admitting or denying the findings, to the entry of a cease-and-desist order in which the Commission found that the School District recklessly violated the antifraud provisions in connection with the Notes' issuance. Neshannock Township School District, Securities Act Rel. No. 8411 (Apr. 22, 2004), 82 SEC Docket 2718. The School District also agreed to pay disgorgement, plus prejudgment interest, in the amount of $28,904.

grades seven through twelve. The elementary and junior/senior high schools are housed in the same building.

A. School District's Construction Projects

Since at least early 1999, the School District recognized that the portion of the building housing the elementary school had multiple physical and mechanical deficiencies and needed substantial repairs and renovations. 5/ The School District was also considering the idea, referred to as the "middle school concept," of separating students in grades six through eight and constructing a new middle school facility to serve them. In July 1999, Eckles Architecture, a New Castle firm, submitted a report detailing the costs associated solely with the elementary school repairs and renovations. The report estimated nearly $5 million in costs.

In the summer of 1999, the School District hired a new superintendent, Dr. Ronald Mento. Mento had been superintendent of the Duquesne City School District in Duquesne, Pennsylvania. When Mento was hired, the Board told him that the School District would be involved in school construction projects, and that part of his duties would be to ensure that the elementary school and other areas of the building were improved. By then, School Board President Harry Flannery ("President Flannery") testified, the Board believed that the elementary school repairs and renovations, coupled with the construction of a new middle school, would cost in the "ball park" of $9 or $10 million.

With Mento installed as superintendent, the planning continued on the various projects. The minutes of a December 1999 Board meeting stated that the School District was "in the process of putting together ideas and looking at renovations and updating the Elementary School, fixing the roof at both schools and the bus garage. A middle school concept [was] also being explored." A "wish list" of projects that included the elementary school repairs and renovations as well as other options was compiled in February 2000. However, as of that time, there was no consensus among the Board members on whether to proceed with any projects.

In Pennsylvania, a school district's major construction projects, i.e., a new school building or building renovation, are eligible for state reimbursement. Reimbursement requires state approval, a feasibility study, including enrollment projects, and public hearings. The School District had only a preliminary demographic report before the Note closing. In April

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5/ In August 1998, the School District received a report evaluating the elementary school's electrical and mechanical systems, roofs, and other structures. That report estimated over $1 million in needed repairs.

2000, the Board announced that public hearings would be held before any final decisions on the projects were made. 6/ No public hearings were held before the Notes were issued in June 2000.

B. Shupe Presents Financing Proposal to School District

In or about May 2000, the School District began to consider issuing tax-exempt securities to finance its construction projects. 7/ Around this time, L. Andrew Shupe II, who was president of Quaestor Municipal Group, Inc., a registered broker-dealer, read in the local newspapers that the School District was contemplating projects. 8/ Shupe contacted Mento and proposed that the School District issue a three-year note in order to fund its projects and make additional money by investing the Note proceeds that were not immediately being used for projects. 9/

Shupe also contacted his friend, Weiss, a Pittsburgh attorney listed in the "Bond Buyer's Municipal Marketplace" (the "Red Book") of experienced counsel. Shupe had worked with Weiss on more than twenty municipal bond transactions, and had referred bond counsel matters

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6/ Board member Gina Hennon stated that the Board was responding to concerns from citizens who "heard that we [the Board] were going to build a middle school, and they were very upset about it." According to Hennon, the Board sought to "reassure" citizens that "this was a process, and that part of that process would be a public hearing with an opportunity for [their] input."

7/ Tax-exempt municipal securities typically have lower interest rates than taxable securities. Investors accept those lower interest rates because they will not be taxed at the federal level on the income received. See 26 U.S.C. § 103(a) (providing that gross income generally does not include interest on state or local bonds).

8/ Shupe was named as a respondent in this proceeding, but entered into a settlement with the Commission. Shupe consented, without admitting or denying the findings, to the entry of a cease-and-desist order in which the Commission found that Shupe willfully violated Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5, and willfully aided, abetted, and caused the School District's violations of those provisions. The Commission also barred Shupe from association with any broker or dealer, and ordered him to disgorge $15,043, plus prejudgment interest. L. Andrew Shupe II, Securities Act Rel. No. 8459 (Aug. 24, 2004), 83 SEC Docket 2113. However, it waived Shupe's payment of disgorgement and prejudgment interest, and did not impose a penalty against him, based on his sworn representations in his Statement of Financial Condition, as updated, and other documents submitted to the Commission. Id.

9/ Mento and Shupe had previously worked together on a Duquesne City School District bond offering. When Mento was superintendent of that district, Weiss had been its solicitor. Mento was not called as a witness at the hearing.

to Weiss in the past. Shupe testified that he "offered the deal" to Weiss if Weiss "felt comfortable" writing the bond opinion. Shupe told Weiss that, if he did not write the bond opinion, Shupe "could get it done elsewhere." Weiss replied that he would get back to Shupe.

C. Requirements for Three-Year Tax-Exempt Municipal Securities

Applicable Treasury regulations provide that a local government entity such as a school district may issue up to $10 million in tax-exempt securities, including notes, and invest the proceeds in higher yielding investments for up to a three-year period, without the notes being considered arbitrage notes, 10/ if, and only if, the issuer reasonably expects to satisfy three tests, known as the expenditure, time, and due diligence tests. "The expenditure test is met if at least 85 percent of the net sale proceeds of the issue are allocated to expenditures on the capital projects by the end of the 3-year temporary period." 11/ "The time test is met if the issuer incurs within 6 months of the issue date a substantial binding obligation to a third party to expend at least 5 percent of the net sale proceeds of the issue on the capital projects." 12/ "The due diligence test is met if completion of the capital projects and the allocation of the net sale proceeds of the issue to expenditures proceeds with due diligence." 13/

The determination of whether an issuer satisfies the expenditure, time, and due diligence tests is based on its reasonable expectations as of the issue date of the notes. 14/ The issuer's expectations are considered reasonable only if a prudent person in the same circumstances would have the same expectations based on all the objective facts and circumstances. 15/ If any one of the tests is not met, and the issuer earns arbitrage profits, the notes lose their tax exemption, and note purchasers may be required to pay tax on the interest earned on those notes.

10/ See 26 U.S.C. § 148(a) (defining "arbitrage bond" as any bond issued as part of any issue any portion of the proceeds of which is to be used, directly or indirectly, to acquire higher yielding investments or to replace funds which were so used).

11/ 26 C.F.R. § 1.148-2(e)(2)(i)(A).

12/ 26 C.F.R. § 1.148-2(e)(2)(i)(B).

13/ 26 C.F.R. § 1.148-2(e)(2)(i)(C). The Internal Revenue Service ("IRS") has ruled that the due diligence test is not met when bonds are deliberately issued earlier than necessary to prolong the period during which arbitrage profits are earned. See IRS Rev. Rul. 80-204, 1980-2 C.B. 51.

14/ 26 C.F.R. § 1.148-2(b)(1).

15/ See 26 C.F.R. § 1.148-1.

D. Weiss's Preliminary Conversation with Mento

Weiss testified that he had a preliminary conversation with Mento before responding to Shupe. During that conversation, Mento described the construction projects contemplated by the School District. Weiss understood that the projects included repairs to, and renovations of, the elementary school, and that certain repair work would begin at the end of the 2000 school year. Mento informed Weiss that there was "some back and forth, some uncertainty" about the elementary school renovations, but Weiss believed that the elementary school project was "moving forward." Mento admitted to Weiss that the Board did not have a consensus on the middle school project.

Mento further informed Weiss that an architect was "on board." Weiss testified that he interpreted this expression to mean that "Eckles was project architect for these capital repair projects and any other project" the School District was going to undertake.

E. Weiss's Role as Bond Counsel

After his conversation with Mento, Weiss called Shupe and agreed to write the bond opinion. The School District retained Weiss as bond counsel. Weiss testified that bond counsel is retained in a municipal securities transaction "to assure that the bonds are validly issued and to provide an opinion to that effect, as well as to the effect that they are issued on a tax-exempt basis." 16/ Weiss testified that an unqualified opinion is required so that investors can be assured that interest on the bonds is "exempt from federal taxes." 17/

16/ Both parties point to the industry standard of care for bond counsel set forth by the National Association of Bond Lawyers ("NABL"). Under NABL standards in effect during the relevant period,

> [b]ond counsel should not render an "unqualified opinion" as to the validity and tax exemption of bonds unless it has concluded that it would be unreasonable for a court to hold to the contrary. Bond counsel may reach such a conclusion as to federal income tax issues addressed in the opinion by determining that there is no reasonable possibility that the Internal Revenue Service would not concur or acquiesce in the opinion, if it considered all material legal issues and relevant facts.

1997 NABL Model Bond Opinion Report at p.7. In addition, bond counsel's opinion should be based on a reasonably sufficient examination of material legal and factual sources and reasonable certainty as to the subjects addressed. 1993 NABL Statement Concerning Standard Applied in Rendering the Federal Income Tax Portion of Bond Opinions at p.9.

We have stated that, "[w]hile compliance with industry standards is a consideration, it is only one factor to be weighed" in determining liability under the federal securities laws. See Piper Capital Mgmt., Inc., Exchange Act Rel. No. 48409 (Aug. 26, 2003), 80 SEC Docket 3594, 3607 & n.28, petition for review denied, No. 03-1349 (D.C. Cir. 2004) (unpublished order). See also, e.g., SEC v. Dain Rauscher, Inc., 254 F.3d 852, 857 (9th Cir. 2001) ("The industry standard is a relevant factor, but the controlling standard remains one of reasonable prudence."); Monetta Fin. Serv., Inc. v. SEC, 390 F.3d 952, 956 (7th Cir. 2004) (same) (quoting Dain Rauscher). The United States Court of Appeals for the Ninth Circuit has held that the standard of care by which to measure conduct "is not defined solely by industry practice, but must be judged by a more expansive standard of reasonable prudence, for which the industry standard is but one factor to consider." Dain Rauscher, 254 F.3d at 856; see also Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 274 (3d Cir.) ("Even a universal industry practice may still be fraudulent."), cert. denied, 525 U.S. 811 (1998).

17/ An unqualified opinion "describes an opinion that is subject only to customary assumptions, limitations, and qualifications, and that is not otherwise 'explained.'" 1997 NABL Model Bond Opinion Report at p.7. An unqualified opinion assures investors that the risk of the IRS declaring the Notes taxable is so "small" that the investor "need not factor it into the calculation of the price he is willing to pay." Id.

F. Solicitor Flannery's Concerns

Mento relayed Shupe's proposal to Richard Flannery ("Solicitor Flannery"), the School District's solicitor and brother of School Board President Harry Flannery. 18/ Solicitor Flannery, who served as solicitor during the School District's prior bond issues, indicated to Mento that he was "not comfortable with the concept being presented." Solicitor Flannery told Mento that the proposal was "not consistent with" the School District's past experience. Solicitor Flannery explained that, "typically," the School District would begin a project "quickly after a bond issue was approved, and this sounded different"; "[h]istorically, the [School] [D]istrict was about ready to proceed more close at a point in time with projects" than the situation here. Solicitor Flannery also asked why the School District was not "bidding" out the underwriting work, as had been done before.

According to Solicitor Flannery, Mento responded that Shupe "had a new concept or way of doing a bond issue." He testified that Mento claimed that the School District "did not have to be at the ready to dig ground when the bonds were issued. That's why [Shupe] was the person the district needed." Mento also informed Solicitor Flannery that Weiss would be the School District's bond counsel.

G. Weiss's May 2, 2000 Letter

Weiss learned from Mento that Solicitor Flannery had concerns that the School District had not decided which projects it was going to undertake. Weiss also understood that Solicitor Flannery had a question about "how far along" the School District had to be on its list of projects before it could do a financing.

In response to those concerns, Weiss wrote a letter to Solicitor Flannery dated May 2, 2000. Weiss began the letter by stating that he had prior experience with "similar notes." Solicitor Flannery testified that he believed this statement meant that Weiss was an expert on whom he could rely for questions he had on the note issue. At the hearing, however, Weiss

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18/ Solicitor Flannery testified that, as solicitor, he was a part-time employee of the School District, and devoted, at most, 15% of his practice to School District matters. Solicitor Flannery represented the School District in "all general matters that might come before the district, including assessment appeals, grievances involving teachers, suspension issues involving students, [and] policies of the district that required legal participation." Solicitor Flannery stated that, "[w]henever we [the School District] got into areas requiring specific expertise, we would bring in outside counsel." Solicitor Flannery did not act as bond counsel for the School District on any bond or note issue.

admitted that he had never before given an opinion on a note issue structured similarly to the Notes. 19/

Weiss also stated that "the School District will be able to invest the proceeds of the Notes in available Treasury obligations during the period of the Notes," without mentioning the requirement that, absent objectively reasonable plans to use the proceeds, interest on the Notes would be taxable. Weiss concluded by stating that, "because there [were] capital projects being contemplated for which proceeds [would] be used should the projects be undertaken," he believed that issuance of the Notes was "totally proper and authorized under the [Internal Revenue] Code." (Emphasis supplied.) At the hearing, Weiss was asked by the Division if this statement was contrary to the Treasury regulations because it suggested that the School District was not required to actually undertake any projects. Weiss agreed that his statement in the letter "[did not] read as the Treasury regulations read." Weiss wrote the May 2 letter without having met with the Board and without having reviewed any documents. Weiss admitted that he based his assertions in the May 2 letter exclusively on his preliminary conversation with Mento.

Solicitor Flannery, after receiving the May 2 letter, spoke with Weiss over the telephone. Solicitor Flannery testified that "probably the most important part" of their conversation involved the "timing of expenditures." While Solicitor Flannery believed that the School District intended to proceed with projects, he wondered when the School District would be able to go forward with projects. He recalled that "the only thing that came out of that conversation was what I would refer to [as] an 85 percent rule, where the bond money would have to be spent during the three years of the bond issue." Solicitor Flannery testified that he understood from Weiss that the money could be spent "any time during the three years, as long as it was spent on the projects." He understood further that, in the course of this three-year period, the School District could invest the money it was not using and "legitimately earn interest" that could be used for projects.

During the conversation, Weiss did not tell Solicitor Flannery that the School District had to incur an obligation to spend 5% of the net proceeds within six months. Nor did Weiss tell Solicitor Flannery that the School District had to proceed with due diligence. Weiss testified that he did not consider these requirements to be an "issue" because he understood the School District was "moving forward" with certain elementary school repairs after the 2000 school year ended. In Weiss's judgment, the cost of those repairs "easily could have exceeded" the 5% requirement. Weiss also did not discuss with Solicitor Flannery any potential downside to the transaction, i.e., the risk to the Notes' tax-exempt status if the School District did not comply with Treasury regulations.

19/ Weiss had been consulted regarding other three-year notes, but those notes had not been issued. Weiss's expert, Henry Klaiman, found Weiss's misrepresentation of his expertise to be "puffery," and testified that he, Klaiman, "would not do it."

H. May 8, 2000 Board Meeting

Weiss and Shupe met with the Board on May 8, 2000, shortly after Weiss's telephone conversation with Solicitor Flannery. Before the meeting, Weiss and Shupe met in Mento's office, where Mento reiterated the nature of the elementary school repairs and renovations. Weiss saw "some documents" from the Eckles firm on a table in the office, but he did not examine them.

At the May 8 meeting, Shupe presented the Note transaction as a means for the school district to make money by investing, and not spending, the Note proceeds. Shupe stated that there was a "loophole" in the federal tax laws that would allow school districts to borrow tax-free money just to invest the proceeds for profit. He indicated that the School District could earn $225,000 by investing 100% of the net Note proceeds in higher yielding investments for the full three-year period of the Notes. 20/

Shupe's written proposal, which was circulated at the May 8 meeting, tracked his oral presentation. The proposal stated that "current tax regulations allow school districts to prefund construction projects for up to three years, to borrow up to $10 million in any calendar year, and to keep any positive investment earnings gained on the money." The proposal also stated that school districts "have and are borrowing in advance of projects just to invest the proceeds for three years and legally keep the positive investment earnings." The proposal gave the example that a school district could borrow $9.6 million for three years on a tax-exempt basis and pay an annual interest rate of 5.10%. The school district could invest the net Note proceeds in United States Treasury securities over the same three-year period at a yield of 6.56%, to generate "excess earnings," less issuance costs, of $225,000. Under this example, $225,000 in profits would be available to the school district from the investment of the net proceeds.

Weiss admitted that he understood that Shupe's proposal assumed that the School District would invest 100% of the net Note proceeds for the full three years. Weiss testified that he knew school districts could not borrow money just to invest the proceeds, and that Shupe's assertion to that effect did not accurately describe the Treasury regulations. Weiss's expert, Henry Klaiman, conceded that Shupe's proposal was a red flag to reasonable bond counsel because it indicated

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20/ Weiss disputes Shupe's calculation of the School District's potential arbitrage profits. He contends that the correct figure was $430,000, and not $225,000. For the purpose of our analysis, the difference in the calculation of potential arbitrage profits is immaterial. The Treasury regulations do not specify the amount of arbitrage profits that can be earned by an issuer. Rather, they proscribe the issuer's investment of note proceeds without meeting certain minimum requirements.

that "maybe the money [was] not going to be spent." 21/ Weiss's other expert, Wayne Gerhold, stated that the standard industry practice for bond counsel, after being shown a proposal like Shupe's, would be to "get up right away" and "indicate that this [was] not legal." Gerhold also testified that, in such circumstances, bond counsel should "go into a little more detail" about the Treasury regulation requirements.

Weiss did not advise the Board that Shupe's proposal was "not legal." Instead, Weiss advised the Board that the proposal "wasn't exactly the case." Weiss testified that he told the Board members that "they had to have projects, that they had to spend the money in three years[,] and they had to proceed with [the projects]." Weiss further told them that, "[i]f they didn't want to do the project[s], [he] shouldn't be there." 22/ Weiss believed the Board members understood him because "[t]hey all nodded their heads." In addition, the Board members nodded their heads when Weiss mentioned that there was an architect "in place." Weiss testified that he interpreted the nods as a sign that the Board had approved Eckles' participation in the projects. As a result, Weiss did not ask to contact Eckles or see a copy of any contract with the firm. Weiss made no further inquiries about Eckles.

The five Board members who testified stated that Shupe's proposal to invest the Note proceeds for three years was the "focus" of the May 8 meeting. According to their testimony, the Board understood that the plan was to invest the Note proceeds at a higher rate of interest than the rate the School District was to pay the noteholders and retain the difference. The Board believed that the School District could make money on the interest rate difference, and thereby have more money to fund school projects. At the May 8 meeting, Board members questioned

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21/ We note that, during the proceeding below, the law judge stated that she had accepted the opinions of Weiss's experts, but rejected those of the Division's experts "as inconsistent with the credible testimony and exhibits." In resolving the issues in this case, we have appraised and given such weight to the expert testimony as we consider is indicated by the relevant facts in the record. See, e.g., West Penn Elec. Co., 29 S.E.C. 685, 693 n.7 (1949) ("[w]hile an expert's testimony may properly be given substantial weight by the Commission, it has the duty to make its independent analyses and findings") (citing SEC v. Central-Illinois Sec. Corp., 338 U.S. 96 (1949)). Moreover, we reiterate that, although expert testimony as to industry practice, in this case, NABL standards, is relevant to show the standard of care necessary to evaluate Weiss's liability, that standard ultimately is one of reasonable prudence. See Dain Rauscher, 254 F.3d at 856 ("[I]t is well-settled that proof of adherence to an industry practice or custom is not dispositive of the issue of negligence, because what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.") (citations and internal quotations omitted).

22/ Weiss also testified that, after the May 8 meeting, he took Shupe aside and told him that his proposal was wrong. Shupe, however, did not remember having such a discussion. Rather, Shupe recalled that Weiss said he thought it had been a good meeting.

Weiss about the propriety of Shupe's proposal. Board member Hennon stated that "[t]here was some incredulity, skepticism about this. There were questions along the nature of is this too good to be true." When asked about Weiss's response to those questions, Hennon stated that Weiss "endorsed it [the proposal]. He said absolutely, it was legal, it was being done, it was an opportunity not to be missed, and that, no, it was not too good to be true." Hennon also stated that she asked Weiss whether "the bond issue committed [the School District] to a building project," and that Weiss answered, "No. As long as you [the Board members] have intent or reasonable expectations to do the project[s], you don't actually have to do them at the time the notes were issued. If the intent was there, that was adequate." Other Board members' hearing testimony supported Hennon's recollection of the discussion at the May 8 meeting.

Weiss acknowledged that, during the May 8 meeting, he did not advise Board members about the time test -- the requirement that the School District enter into binding commitments to spend 5% of the net Note proceeds within six months of the issue date of the Notes. Weiss "saw no reason to get into 5% rules" because he understood that there were several repair projects set to begin at the end of the 2000 school year which would have satisfied the 5% requirement. 23/ At the hearing, Weiss did not explain the basis for his conclusion that the cost of those repairs would amount to 5% of the net Note proceeds.

Weiss also acknowledged that he did not advise Board members about the due diligence test -- the requirement that the School District complete the projects with due diligence. Weiss testified that he believed the School District was "moving forward" with the elementary school repairs, so that the due diligence test "wasn't an issue." While Weiss mentioned in passing the expenditure test -- the requirement that the School District expend 85% of the net proceeds in three years, he did not tell the Board that it needed to have "objectively reasonable expectations" that those proceeds could be spent, nor did he explain to the Board what that phrase meant. As President Flannery testified, Weiss and Shupe told the Board that the School District "needed to have the intent to do the projects and . . . the interest would be available to [it], even if [the School District] didn't follow through with the projects."

Weiss's expert, Gerhold, acknowledged that a reasonable bond lawyer would have advised the School District of the time test because the School District had not decided on the

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23/ Weiss also argues that he had no reason to explain the time test because Pennsylvania architects who participate in school construction projects typically receive 6% to 7% of the total cost of the projects as their fees. Consequently, if an architect is "on board," as Weiss believed Eckles was, the 5% requirement "takes care of itself." As indicated above, Weiss made no inquiries about Eckles' relationship with the School District. In addition, Weiss admitted he was unsure of the scope of the School District's engagement with Eckles. In the absence of information about Eckles' engagement with the School District, we fail to see how Weiss reasonably could have believed that the architect's fee would "take care of" the 5% requirement.

scope of its major projects and whether they would include a new middle school. Solicitor Flannery testified that the time test "would have raised a lot of red flags" because it "would have meant that the [B]oard probably would have started asking questions about when do we have to have our consensus" on moving forward with the various projects. Two Board members testified that knowledge of the time test would have affected their vote to authorize the Notes' issuance.

Weiss's failure to inform the Board of the due diligence test gave Board members the impression that there was no "urgency" in proceeding with projects. President Flannery stated that, based on Weiss's legal advice to the Board, "there was no need to proceed -- there was no hammer over our [the Board's] head. The project[s] didn't even have to occur, and we wouldn't have any problems." President Flannery added that it was "understood that[,] if we did not do the projects, there would be no downside."

I. Board Approves Financing Proposal

Board members left the May 8 meeting agreeing in principle to Shupe's proposal pending Solicitor Flannery's approval. Solicitor Flannery subsequently spoke to Weiss and Mento and reviewed a list of proposed projects prepared by Mento. Thereafter, he informed the Board that he was "not opposed to" the transaction. Meanwhile, Shupe was preparing the final proposal to be presented to the Board at its May 31, 2000 meeting. Shupe showed Weiss a provision that "tied up" Note proceeds for the full three-year period of the Notes. When Weiss objected to Shupe that this was "contrary to the concept of spending the money," Shupe took the provision out of the proposal.

Between May 8 and May 31, 2000, Weiss had no discussions with any school officials regarding the status of the construction projects to be financed by the Notes. Weiss attended the May 31 meeting. In spite of Shupe's earlier proposal that the Board invest the entire proceeds for three years, Weiss did not tell Board members that tying up the Note proceeds for the full three-year period could result in the Notes being considered taxable. Weiss asserted that he believed that tying up the money was a "dead" issue because the provision had been eliminated from the proposal. The Board approved the final proposal, which structured the Notes on a three-year basis, with a one-year call.

J. Weiss Prepares Non-Arbitrage Certificate

On June 1, 2000, Weiss wrote to Mento and requested the list of projects to be financed by the Notes and their associated costs, so that the Board could approve the projects at a Board meeting scheduled for June 15, 2000. Weiss knew that the Board had not awarded bids or even authorized advertising for the bids. He sought its approval because he wanted assurance that the School District would proceed with the projects. In his own words, Weiss "wanted evidence that the Board had seen the list and voted on it, [and] said, this is what [the Board was] . . . going to do."

However, Weiss did not ask Mento for evidence that the School District had committed to undertake any of the projects for which estimates were to be provided. Nor did he ask Mento for evidence that the School District was in a position to spend the money within three years. Instead, Weiss enclosed a response letter for Mento to complete and sign. The draft letter stated, "In conjunction with the issuance of the School District's General Obligation Notes, Series of 2000, the Board of School Directors has authorized the issuance of this letter which sets forth capital projects which the District is contemplating undertaking in the next three years to utilize the proceeds of the Note issue." (Emphasis supplied.) The draft letter provided space for a list of the projects and their estimated costs.

In the response letter, dated June 15, 2000, Mento repeated Weiss's language that the Board had "authorized the issuance of this letter which sets forth capital projects which the School District is contemplating undertaking." The June 15 letter listed thirty-three projects, but omitted any cost estimates or prioritization among the projects. This letter was the only School District document that Weiss examined. Weiss admitted that he was "upset" when he received the letter because it did not contain cost estimates. Weiss called Mento and again asked for costs, but he did not get them.

Weiss acknowledged that he should have obtained a list of costs. Weiss's expert, Klaiman, testified that reasonable bond counsel would want to know "how much money [was] involved" with the school projects, and whether there were "enough projects to absorb the proceeds of the bond issue." Weiss did not know "how much money was involved" because he did not have cost estimates for any of the projects. 24/ Weiss also did not know if there were "enough projects to absorb" the $9.6 million in Note proceeds because he never obtained evidence that the Board had voted on or approved any of the thirty-three projects on the list. There is no dispute that neither the Board nor any of its members saw Mento's June 15 letter. Had Weiss examined minutes of Board meetings, he would have discovered that the Board had yet to vote on or approve a single project to be financed by the Notes. Weiss, however, never looked at or asked for Board minutes or any other documents to confirm the Board's purported action.

Applicable Treasury regulations require an issuer to certify a statement of its reasonable expectations to use note proceeds on projects. This certification is accomplished in a Non-

24/ At the hearing, a School District witness testified that "there was no study done to exactly know how much money" all the projects on the list were going to cost because "we [the Board] hadn't decided on what [projects] we were going to do."

Arbitrage Certificate. The Non-Arbitrage Certificate "must state the facts and estimates that form the basis for the issuer's expectations" as of the issuance date. 25/

Weiss prepared the Non-Arbitrage Certificate certifying the School District's reasonable expectations to spend Note proceeds. The Non-Arbitrage Certificate provided that the proceeds were to be used to fund "capital projects." The term "capital projects," however, was not defined. Weiss acknowledged that "greater specificity" "might not have been wrong," but believed it was understood that a "capital project" referred to a "new money" project as opposed to a refunding. On page six of the thirteen page Non-Arbitrage Certificate, it stated:

> The Issuer reasonably expects that prior to the expiration of six months following the date hereof (the "Closing Date"), there will be binding obligations to expend in the aggregate at least five (5%) percent of the proceeds of the Notes (net any reserve funds established with proceeds of the Notes) for costs of the acquisition, construction, equipping or improvement of the Project. The Issuer reasonably expects that the Project will proceed with due diligence to completion. The Issuer reasonably expects that at least eighty-five (85%) percent of the proceeds of the Notes (net of any reserve funds established with proceeds of the Notes) will have been expended prior to the date that is three years from the Closing Date.

Weiss admitted that the Non-Arbitrage Certificate did not contain "estimates," meaning figures indicating "how much [the construction projects were] going to cost." Weiss prepared the Non-Arbitrage Certificate based on the list of thirty-three projects from Mento and his conversations with Mento, Solicitor Flannery, and the Board. Weiss testified that he relied on the Non-Arbitrage Certificate in issuing his unqualified opinion.

K. Weiss Reviews and Approves Official Statement

In addition to preparing the Non-Arbitrage Certificate, Weiss reviewed and approved the Official Statement, the School District's disclosure document that Shupe drafted. The Official Statement indicated that the purpose of the Notes was to "provide funds for capital improvement projects." It also referred to the fact that Weiss, as bond counsel, had rendered an opinion that interest on the Notes was tax-exempt. It did not discuss or disclose the existence of any risk to the Notes' tax-exempt status. The Official Statement further provided that the Notes were "not arbitrage notes." It also stated that the Non-Arbitrage Certificate would be "accompanied by an

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25/ 26 C.F.R. § 1.148-2(b)(2). Under NABL standards, bond counsel may base an unqualified opinion on the assumption that the Non-Arbitrage Certificate is accurate unless it "has knowledge that any such assumption or condition is false, or has knowledge of facts that, under the circumstances, would make it unreasonable so to assume." 2003 NABL Model Bond Opinion Report at p.12.

opinion [of] [c]ounsel, based solely upon the facts, estimates and circumstances set forth in the Non-Arbitrage Certificate."

L. Weiss Issues Two Legal Opinions

Weiss stated that, before he issues an unqualified opinion, he ascertains that the Treasury regulation requirements are met. In making this determination, Weiss considers whether there is a "defined project"; whether there is a time schedule for spending the proceeds; whether the project is for a new building or an addition; and whether there is a "professional team" in place, for example, an architect or a project manager. Weiss agreed that, with a nine-member school board, such as the Board in this case, he would require some assurance that a clear majority of members wished to proceed with the project. Had Weiss inquired, he would have found that the School District had not determined to begin work on any major construction project at the time the Notes issued. The testifying Board members agreed that, as of June 2000, the Board had not reached a consensus on the major projects to be undertaken. The Board was still in "the very early stages" of decision-making, "looking at floor plans" and "preliminary schematics." 26/

Nonetheless, after approving the Official Statement, Weiss prepared a proposed unqualified opinion addressed to potential note purchasers and to be printed on the reverse side of each note. In the opinion, Weiss stated that the School District "determined to undertake" projects requiring "in excess" of $10 million, and that all the Note proceeds, less issuance costs, would be used to fund the projects. He also stated that interest on the Notes would not be subject to federal income taxation. He further stated that the Notes were not "arbitrage bonds." Weiss prepared a "supplemental opinion of note counsel" affirming that nothing had come to his attention that would lead him to believe that the Official Statement was materially inaccurate or incomplete. Both opinions were required by the Note Purchase Agreement.

M. June 28, 2000 Closing

At the closing, Weiss delivered his legal opinions. Weiss also reviewed generally all of the documents with President Flannery, who signed the Official Statement. President Flannery testified that he relied on Weiss's advice in signing the document because Weiss had the "expertise." Solicitor Flannery signed a standard form solicitor's opinion that Weiss prepared.

The school business manager, Sharon Robinson, signed the Non-Arbitrage Certificate. Weiss's expert, Klaiman, testified that reasonable bond counsel would have ensured that the

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26/ Weiss also never inquired whether the School District had a feasibility study, despite his awareness that such a study was an initial step to obtain state reimbursement. At no time did Weiss seek to ascertain the School District's status in the reimbursement process, even though he knew that the process required major projects to be approved by the state before construction could begin.

official signing the Non-Arbitrage Certificate understood the document before it was signed. Weiss admitted that he did not explain the Non-Arbitrage Certificate to Robinson, despite the fact that he believed she was "not a sophisticated person." Robinson testified that she signed the Non-Arbitrage Certificate "pretty much having no idea what the document meant."

The School District thereupon issued $9.6 million in three-year general obligation notes, dated May 15, 2000. 27/ The Notes had an interest rate of 5.25% and a stated maturity date of May 15, 2003. The Notes were structured in accordance with Shupe's proposal, with a one-year call. All the net Note proceeds were initially invested in money-market funds because "the yields were dropping" in the Treasury Market. Shupe testified that he eventually invested the entire net Note proceeds in Federal Home Loan Bank securities maturing in 2003, so the School District could earn the $225,000 in profits that it sought. Before the closing, Weiss did not inquire about the disposition of the Note proceeds. Nor did he tell Shupe that the funds should be kept available for use on projects. Weiss's engagement as bond counsel ended at the conclusion of the bond closing. Weiss received $9,509.63 for his work. Weiss's fee was paid out of Note proceeds.

N. IRS Declares Notes Taxable

On November 8, 2000, the IRS sent a letter to the School District indicating that it had commenced an examination of the Notes. The IRS began investigating three-year note issues in the Commonwealth after receiving information that some school districts were "bragging" about making money from tax-exempt bond issues. On November 16, 2000, Weiss received the IRS's November 8 letter from the School District. Weiss claimed that he did not know that the Board had placed the net Note proceeds in a three-year investment until he received a copy of the Board's bank statement requested by the IRS. Although the School District still had six weeks to enter into binding commitments to spend 5% of the net proceeds, Weiss assisted the School District in redeeming the Notes. The Notes were redeemed at the first available call date, one year after the Notes were issued, on May 15, 2001. The redemption price for the Notes was paid from the Note proceeds. The Notes were fully redeemed as of June 15, 2001. None of the Note proceeds were spent on construction projects. The School District was left with around $150,000 in arbitrage profits after calling the Notes.

On September 25, 2001, the IRS issued a preliminary determination that the interest on the Notes was taxable. In the IRS's view, the School District issued the Notes with no reasonable

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27/ The record is unclear as to why the Notes were dated May 15, 2000, but the Note closing was not held until June 28, 2000.

expectations to use the proceeds on capital projects. 28/ The School District and IRS eventually entered into a closing agreement under which the School District agreed to rebate its arbitrage profits to the IRS.

O. Post-Closing Events

No work was performed on any construction project for over a year after the Notes were issued. The Board did not authorize the elementary school repairs, which were supposed to start at the end of the 2000 school year, until June 2001. The total cost of those repairs was around $350,000, significantly less than $480,000, or 5% of the $9.6 million the Board was obligated to commit to spending in the first six months under the Treasury regulations.

In October 2001, the Board formally retained the Eckles firm. In 2002, the Board reached an agreement on the major construction projects and held public hearings. The Board decided in favor of renovating the existing elementary school, and against building a new middle school. The elementary school renovations began in May 2003 and were financed with other funds. When Board member Hennon was asked to identify "the single most important factor . . . as to why that work didn't start sooner," she replied, "[i]ndecision," meaning "an inability [by the Board] to come to a conclusion about the scope" of its major projects.

III.

Securities Act Sections 17(a)(2) and 17(a)(3) make it unlawful for any person in the offer or sale of any securities to obtain money or property by means of any material misrepresentations or omissions, or to engage in any transaction, practice, or course of business which operates as a fraud or deceit on the purchaser. 29/ Proof of scienter is not required to establish violations of

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28/ At the hearing, an IRS official testified that the IRS considered the following: that "the bulk of the money . . . was locked up" in a security that matured "three years out"; that it was "rare" for notes to be issued "without intensive discussion of how much and when the money will be spent"; that there was "a virtual absence in any discussion of the [Board's] minutes about any significant project as much as a year or so after the notes were issued"; that no Board members were able to "recall discussing how likely these [projects on the June 15 list] were and how much they would cost"; and that "to find a list of projects with no discussion of costs is very unusual" because school districts "seem to obsess on how much things are going to cost because they want to keep the taxes down for the citizens."

29/ Neither party disputes that all of the statements and omissions at issue here were made in connection with the offer, purchase, or sale of securities, i.e., the Notes.

those provisions; negligence alone is sufficient. 30/ Negligence is the failure to exercise reasonable care. 31/

Weiss is primarily liable for his role in the Note issue. 32/ Weiss reviewed and approved the Official Statement, which misrepresented that Note proceeds would be used to fund school construction projects. Weiss also rendered an unqualified bond opinion, reinforced by a second, supplemental opinion, that misrepresented the risk that interest on the Notes would be taxable. The Official Statement referred to Weiss's unqualified opinion that interest on the Notes would be tax-exempt. Weiss knew the statements in the Official Statement and in his legal opinions were communicated to, and relied on, by prospective investors in deciding whether to purchase the Notes. 33/ As the Division's expert testified, the Notes were sold to investors, and priced,

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30/ Aaron v. SEC, 446 U.S. 680, 697 & 701-02 (1980).

31/ SEC v. Hughes Capital Corp., 124 F.3d 449, 453-54 (3d Cir. 1997).

32/ Courts have held that a person may be primarily liable under Exchange Act Section 10(b) and Rule 10b-5 for directly or indirectly making an untrue statement of fact if that person creates a false statement that reaches investors. See, e.g., In re Enron Corp. Sec. Litig., 235 F. Supp. 2d 549, 588 (S.D. Tex. 2002) (adopting the Commission's proposed test for liability under Exchange Act Rule 10b-5, and stating that a person is primarily liable when he creates or writes misrepresentations for inclusion in document to investors); In re ZZZZ Best Sec. Litig., 864 F. Supp. 960, 970 (C.D. Cal. 1994) (holding accountant liable if it was "intricately involved" in drafting company's fraudulent financial reports and press releases, including "incorporat[ing] data" it had prepared into them and "modif[ying] the financial data [they] contained"); In re Software Toolworks, Inc., 50 F.3d 615, 628 n.3 & 629 (9th Cir. 1994) (accounting firm could be primarily liable under Exchange Act Section 10(b) when it reviewed and played significant role in drafting and editing letters to Commission containing misstatements), cert. denied, 516 U.S. 907 (1995). United States v. Naftalin, 441 U.S. 768 (1979), holds that Exchange Act Section 10(b) and Securities Act Section 17(a) prohibit some of the same conduct. Id. at 778. Weiss does not assert that he should be at most an aider and abetter and not primarily liable.

33/ Courts have held that, when a lawyer provides an opinion letter or drafts disclosure documents that contain a material misstatement or omission of fact, the lawyer may be held liable for violations of the securities laws. See, e.g., SEC v. Fehn, 97 F.3d 1276, 1294 (9th Cir. 1996) (holding that attorney violated federal securities laws by editing and filing misleading Forms 10-Q that were prepared by attorney's law firm), cert. denied, 522 U.S. 813 (1997); Ackerman v. Schwartz, 947 F.2d 841, 848 (7th Cir. 1991) (stating, with respect to Exchange Act Section 10(b) and Exchange Act Rule 10b-5 allegations, that

(continued...)

based on Weiss's unqualified opinion that interest on the Notes would be tax-exempt. Weiss also knew that information about the Notes' tax-exempt character was material to investors because they would have wanted to know that their interest earnings might be taxable, at a minimum reducing the return from the Notes. 34/

A. Weiss's Conduct

Before rendering an unqualified opinion, Weiss was obligated to determine, based on all the objective facts and circumstances, whether the School District had reasonable expectations to satisfy the expenditure, time, and due diligence tests as of June 28, 2000, the issuance date of the Notes. Weiss acknowledged that he also was obligated to conduct a reasonable investigation of the facts to establish the objective reasonableness of the School District's expectations. The evidence adduced at the hearing indicates that Weiss knew or should have known that the Note transaction was intended to earn arbitrage profits, and that the School District lacked sufficiently concrete plans for the use of the proceeds to justify the Notes' tax-exempt status. The evidence also indicates that Weiss did not make adequate inquiry to determine the level of certainty of the School District's construction plans, objectively viewed, before reviewing and approving the Official Statement and issuing his legal opinions. Weiss's failure to look for even minimal objective indicia of the School District's reasonable expectations to spend Note proceeds on projects was at least negligent. From the outset of the transaction, Weiss understood that the

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33/ (...continued)
attorney "cannot evade responsibility to the extent he permitted the promoters to release his [opinion] letter"; noting that, if the attorney "authorized the inclusion of the [opinion] letter with the offering documents, then he appears as a principal . . . and not as an aider or abettor").

Cf. Restatement (Third) of the Law Governing Lawyers § 56, cmt. b (2000) ("Lawyers are subject to the general law. If the activities of a nonlawyer in the same circumstances would render the nonlawyer civilly liable or afford the nonlawyer a defense to liability, the same activities by a lawyer in the same circumstances generally render the lawyer liable or afford the lawyer a defense.").

34/ Information is material if there is a substantial likelihood that reasonable investors would consider it important in making their investment decision. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 & 240 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976). The Commission has stated that "[t]ax-exempt securities typically pay a lower interest rate than other debt securities, which interest rate differential investors accept because of the tax-exempt status. Thus, if the securities are not tax-exempt, the interest rate is not competitive and the securities are not as attractive to investors." County of Orange, California, Securities Act Rel. No. 7260 (Jan. 24, 1996) (settled case), 61 SEC Docket 395, 422-23.

Board had gone "back and forth" on the elementary school project, and that the Board had not committed to the middle school project. He also understood that Solicitor Flannery had concerns about the financing because the Board had not determined which projects it was going to undertake.

After being advised of Solicitor Flannery's concerns, Weiss wrote the June 2 letter in which he misstated the Treasury regulation requirements by indicating it was sufficient for the tax-exempt status of the Notes that the School District merely "contemplate" projects on which the Note proceeds would be spent "should the projects be undertaken." In a follow-up conversation with Solicitor Flannery, Weiss told Solicitor Flannery of the requirement that the School District spend 85% of the net proceeds in three years. However, as he acknowledged, Weiss did not mention the potential risk to the Notes' tax-exempt status if the School District did not spend that amount during the three-year period. Nor did Weiss describe the time and due diligence tests.

At the May 8 meeting, Shupe articulated to the Board the arbitrage opportunity presented by the Note transaction. Weiss understood that Shupe proposed that the School District issue the Notes solely to invest the net proceeds and to earn $225,000 in arbitrage profits. Weiss admitted that he knew at the time that Shupe's proposal was contrary to the Treasury regulations. Weiss also admitted that he knew Shupe's $225,000 figure was based on the School District investing all the net Note proceeds for the full three years, and not spending any of those proceeds, much less 5% in six months or 85% in three years.

Board members asked Weiss if Shupe's proposal was "too good to be true." They also asked whether the Note issue committed the School District to proceed with the projects, or whether it was sufficient that there were projects to be done. Weiss did not advise the Board that Shupe's proposal was illegal. Nor did Weiss explain what the Board had to do in order to comply with the Treasury regulations. While Weiss informed the Board that it had to have projects, he did not advise the Board about the time or due diligence tests. Those two requirements were critical. The Board did not comprehend that it had to commit 5% of the net proceeds on projects within six months of the issue date of the Notes, or that it had to proceed with due diligence to complete the projects. At best, the Board was left with the impression that it had three years in which to undertake projects. At worst, the Board believed that it merely had to identify some projects that could be funded by the Notes. 35/

35/ Weiss's expert, Gerhold, testified that the standard industry practice for bond counsel, when faced with an uncertain School Board and a financing proposal for unconfirmed projects, would be to "speak strongly," if not "yell at" the School Board. Gerhold stated that bond counsel should give a "finger pointing lecture . . . and get[] very firm with regard to this, that at the time that you go into this transaction, and the closing, you better be doing a project and it better be a project that has expenditures that are the same or in

(continued...)

Following the May 8 meeting, Shupe presented Weiss with a document showing Shupe's intention to tie up the Note proceeds for three years in an illiquid investment. Weiss told Shupe to take the provision out of the final Note proposal. Weiss did not mention to the Board when it approved the Note issue that tying up the proceeds for a full three-year period could result in the interest on the Notes being taxable.

Weiss also asked Mento for a list of projects that the Board "contemplated undertaking" with associated costs. In response, Weiss received an unapproved list of potential projects, without costs. At no time prior to the Notes' issuance did Weiss review a single cost estimate for any of the projects. Despite the requirement that the Non-Arbitrage Certificate set forth the facts and estimates underlying the issuer's expectations, Weiss prepared a Non-Arbitrage Certificate that did not contain any estimates and was short on facts. Weiss himself recognized that he should have obtained a list of costs.

Thereafter, Weiss failed to ascertain whether there was a time schedule for spending Note proceeds, failed to confirm the nature and scope of any engagement with the architect, and failed to determine whether a majority of Board members wished to proceed with the projects, despite acknowledging that he viewed all of these considerations as important in issuing an unqualified opinion. Indeed, the Treasury Regulations required, among other things, that the School Board "incur[] within 6 months of the issue date a substantial binding obligation to a third party to expend at least 5 percent of the net sale proceeds of the issue on the capital projects." 36/ Had Weiss exercised even minimal care, he would have learned that there was no time schedule for spending Note proceeds, no written contract with Eckles, 37/ and no agreement on proceeding with any of the projects. At the time, Weiss was aware that the School District had not yet advertised for bids. Nonetheless, Weiss reviewed and approved the offering documents, and signed and reiterated an unqualified opinion that the Notes were tax-exempt, when he knew or should have known that the School District's primary purpose in issuing the Notes was to earn arbitrage profits, and that it did not have any objectively reasonable expectation of satisfying the

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35/ (...continued)
excess of what you are talking about, and if you don't, you better have a good reason why you were not able to expend those funds."

36/ 26 C.F.R. § 1.148-2(e)(2)(i)(B).

37/ The record indicates that, at all relevant times, the School District and Eckles had an informal agreement by which Eckles would provide services to the School District at no initial cost.

Treasury regulations. 38/ His conduct departed from the standard of reasonable prudence and was at least negligent. 39/ Weiss violated Securities Act Sections 17(a)(2) and 17(a)(3). 40/

B. Weiss's Contentions

1. Weiss notes that the Order Instituting Proceedings ("OIP") alleged that he "violated Section 17(a) of the Securities Act" without specifying a particular subsection. 41/ Weiss argues that the Division "made no allegations in the OIP supporting a violation of Section 17(a)(2) or 17(a)(3)," and did not assert before its final brief to the law judge that he was negligent. Weiss concedes that the law judge considered whether he acted intentionally, recklessly, or negligently.

We believe that the OIP fairly placed Weiss on notice that all subsections of Securities Act Section 17(a) would be at issue. While the Division's primary focus was violation of Section

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38/ Weiss's reliance on SEC v. Haswell, 1979-1980 Fed. Sec. L. Rep. (CCH) ¶ 97.156 (W.D. Okla. 1977), aff'd, 654 F.2d 698 (10th Cir. 1981), is misplaced. In holding that bond counsel was not liable under the antifraud provisions, the district court there found that counsel had no duty to insist on reviewing an offering circular in final form or withdraw his tax opinions from the circular, when facts known to him were insufficient to place him on notice of a fraud perpetrated by the underwriters. The district court also cited the fact that the IRS had not disagreed with bond counsel's tax opinions. By contrast, in this case, Weiss was responsible for misrepresentations and omissions in the Official Statement and in his legal opinions regarding the School District's use of the Note proceeds and the Notes' non-taxable nature. Weiss's liability stems from his making those misrepresentations and omissions without conducting adequate inquiries, and not on any failure to discover the fraud.

39/ See Jean Costanza, Securities Act Rel. No. 7621 (Jan. 6, 1999) (attorney serving as municipal issuer's bond counsel in connection with eight note offerings consented, without admitting or denying findings, to the entry of a cease and desist order in which the Commission found that she violated Securities Act Sections 17(a)(2) and 17(a)(3) by negligently participating in drafting offering documents and negligently issuing a legal opinion that notes were tax-exempt), 68 SEC Docket 2730.

40/ Because we find that Weiss committed primary violations of Securities Act Sections 17(a)(2) and 17(a)(3), we do not decide whether he was also liable for causing the School District's antifraud violations.

41/ Weiss notes that some conduct in the OIP was alleged to be committed "willfully." Courts have held that willfulness under the securities laws "means intentionally committing the act which constitutes the violation," not an intent to violate the laws or rules. Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000).

17(a)(1), the OIP alleged misconduct that sounded in negligence. For example, the OIP charged that Weiss drafted an "inaccurate" certificate and "made untrue statements of material fact and omitted to state material facts" in connection with the note offering. Weiss's answer to the OIP reflected his awareness that the allegations therein could provide a basis for negligence liability. Weiss asserted in his answer that he acted with "due care" and performed his professional duties in compliance with NABL standards, which he indicated were the applicable industry standards. At the hearing, Weiss introduced expert testimony on the issue of whether his conduct conformed to NABL standards, and was given full opportunity to defend himself. The OIP gave Weiss sufficient notice of the charges against him. 42/

2. Weiss contends that, for the purposes of his unqualified opinion, he was entitled to rely on the representations from School District officials and Board members that the School District had projects it intended to undertake and plans to proceed with them. As bond counsel, Weiss was obligated to determine whether all the objective facts and circumstances, established, for example, by Board minutes and resolutions, contracts, and estimates, justified an unqualified opinion that the Board's intention to undertake projects satisfied the objective standard under the Treasury regulations. Weiss's reliance on vague, subjective expressions of intent to undertake projects, without independent inquiry, was unreasonable and an abdication of his responsibilities as bond counsel. 43/ Moreover, even assuming that the School District had projects it was planning to do in the future, the Notes were issued prematurely. Treasury regulations provide that issuers may not issue bonds any sooner than necessary. 44/

42/ See, e.g., Aloha Airlines, Inc. v. Civil Aeronautics Board, 598 F.2d 250, 262 (D.C. Cir. 1979) (notice is "sufficient if the respondent 'understood the issue' and 'was afforded full opportunity' to justify its conduct during the course of the litigation").

43/ Compare Attorney's Conduct in Issuing an Opinion Letter, Exchange Act Rel. No. 17831 (June 1, 1981) (in a report issued under Exchange Act Section 21(a), the Commission opined that an attorney who served as counsel for an underwriter in connection with a bond offering failed to carry out his professional obligations when he issued a false opinion letter without making adequate factual inquiry; the Commission stated that "the preparation of an opinion letter is too essential and the reliance of the public too high to permit due diligence to be cast aside in the name of convenience"), 22 SEC Docket 1200, 1202.

44/ See 26 C.F.R. § 1.148-10(a)(4) (a transaction illegally overburdens the tax-exempt market "if it results in . . . issuing bonds earlier . . . than is otherwise reasonably necessary to accomplish the governmental purposes of the bonds"). The Non-Arbitrage Certificate prepared by Weiss recited this requirement. In addition, the IRS witness testified at the hearing that, if the School District planned to do the projects at a future date, it should have issued the Notes later.

3. Weiss contends that he was entitled to rely on the Non-Arbitrage Certificate. Weiss concedes, however, that he could not base an unqualified opinion on the Non-Arbitrage Certificate if he was aware of facts indicating that it was inaccurate. The Non-Arbitrage Certificate contained no cost estimates and was devoid of information supporting the School District's expectations to spend Note proceeds on projects. Weiss offered no explanation for his preparation of a Non-Arbitrage Certificate with insufficient facts and no estimates, which therefore failed to comply with Treasury regulations. Although Weiss twice asked for cost estimates from Mento, none were provided to him. Mento's failure or refusal to provide cost estimates for the projects should have prompted Weiss to question whether the School District was ready to proceed with its projects and comply with the Treasury regulations. In the absence of the requisite facts and estimates, the list of projects from Mento was merely a "wish" list and could not be used as a basis for rendering an unqualified opinion.

4. Weiss accuses the Division of taking a "fraud by hindsight" approach, and seeking to hold him liable for not being able to foresee that the IRS would declare interest on the Notes to be taxable. In order that interest on the Notes be tax-exempt, Weiss was required to evaluate the objective reasonableness of the School District's expectations to meet the expenditure, time, and due diligence tests as of the issue date. Weiss's liability under antifraud provisions arises from his negligence in his role of bond counsel, and not as a result of actions taken by the IRS after the Notes were issued. 45/

IV.

Under Securities Act Section 8A(a), 46/ the Commission may order any person who is violating, has violated, or is about to violate any Securities Act provisions to cease and desist from committing or causing any violation or future violation of those provisions. In determining the appropriateness of a cease-and-desist order, we look to the risk of future violations and other factors, including the seriousness of the violation, the isolated or recurrent nature of the violation, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, the respondent's state of mind, the sincerity of assurances against future violations, the respondent's recognition of the wrongful nature of the conduct, the respondent's opportunity to commit future violations, and the remedial function to be served by the cease-and-desist order

45/ We reject Weiss's argument that the School District was "distracted" by "unforeseeable events" which prevented it from moving forward on the projects. Most of those events occurred after the School District issued the Notes. Under applicable Treasury regulations, an issuer's reasonable expectations are determined as of the issue date of the bonds.

46/ 15 U.S.C. § 77h-1(a).

in the context of other sanctions sought in the proceeding. 47/ We impose a cease-and-desist order only when we have determined that there is some risk of future violation. 48/

Weiss was responsible for misrepresentations and omissions in the Official Statement and in his legal opinions which were made available to investors. Weiss's conduct caused harm to investors who purchased the Notes because they were without full information concerning the substantial risk that the IRS would find the Notes to be taxable. Weiss's conduct also caused harm to the marketplace by eroding confidence in bond counsels' unqualified opinions. The importance that investors place on such opinions cannot be overestimated. We have stated that "[t]he smooth functioning of the securities markets will be subject to serious disruption if the public cannot safely rely on the expertise proffered by lawyers rendering their opinions." 49/ As we have found, Weiss was at least negligent. He appears not to acknowledge any wrongdoing. Weiss, moreover, continues to practice in the area of municipal finance, and could give another unqualified opinion in the future. We believe there is a sufficiently high level of risk of future violations that would endanger the public. A cease-and-desist order is therefore warranted against Weiss to protect the public. 50/

Under Securities Act Section 8A(e), the Commission may enter an order requiring disgorgement, including reasonable interest. The remedy of disgorgement seeks to deprive the wrongdoer of his ill-gotten gains. 51/ It returns the violator to where he would have been absent the violative activity. An order to disgorge a certain amount need only be a reasonable approximation of the profits causally connected to the violations. 52/ Once the Division shows that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden shifts to the respondent to demonstrate that the Division's figure is not a reasonable

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47/ KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1192 (2001), reconsideration denied, Exchange Act Rel. No. 44050 (Mar. 8, 2001), 74 SEC Docket 1351, petition for review denied, 289 F.3d 109 (D. C. Cir. 2002).

48/ 54 S.E.C. at 1185. The risk of future violations required to support a cease-and-desist order is significantly less than that required for an injunction. Id. at 1191.

49/ Attorney's Conduct in Issuing an Opinion Letter, Exchange Act Rel. No. 17831 (June 1, 1981), 22 SEC Docket at 1202.

50/ We decline the Division's invitation to impose, for a five-year period, certain specified preconditions on Weiss's issuance of written opinions. We do not find such conditions to be necessary here in order to achieve compliance with the securities laws.

51/ See SEC v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989).

52/ Id. at 1231.

approximation. 53/ Any risk of uncertainty as to that amount falls on the wrongdoer whose illegal conduct created the uncertainty. 54/

The Division has established that Weiss received $9,509.63 for his work relating to the transaction. The Division also has established that this figure was causally connected to Weiss's wrongdoing because it represented his fee for his negligently rendered services as bond counsel. The Division's showing has presumptively satisfied its burden of proof. Weiss has not argued or shown that the $9,509.63 figure is an unreasonable approximation of his unjust enrichment. We will order Weiss to disgorge $9,509.63, plus prejudgment interest.

An appropriate order will issue. 55/

By the Commission (Chairman COX and Commissioners ATKINS, CAMPOS, and NAZARETH); Commissioner GLASSMAN dissenting.

Jonathan G. Katz
Secretary

53/ SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995).

54/ First City Fin. Corp., 890 F.2d at 1232.

55/ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 8641 / December 2, 2005

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 52875 / December 2, 2005

Admin. Proc. File No. 3-11462

In the Matter of

IRA WEISS

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Ira Weiss cease and desist from committing or causing any violations or future violations of Sections 17(a)(2) or 17(a)(3) of the Securities Act of 1933; and it is further

ORDERED that Ira Weiss disgorge the amount of $9,509.63, plus prejudgment interest, as calculated in accordance with Commission Rule of Practice 600(b).

Weiss's payment of disgorgement shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order made payable to the Securities and Exchange Commission; (ii) delivered by hand or courier to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312, within thirty days of the date of this order; and (iii) submitted under cover letter which identifies Weiss as the respondent in this proceeding and gives the file number of this proceeding. A copy of the cover letter and check shall be sent to Mark Zehner, Esq., Philadelphia District Office, Division of Enforcement, 701 Market Street, Suite 2000, Philadelphia, Pennsylvania 19106.

By the Commission.

Jonathan G. Katz
Secretary