INITIAL DECISION RELEASE NO. 353
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12829

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

In the Matter of	:	
	:	
GUY P. RIORDAN	:	INITIAL DECISION
	:	July 28, 2008
	:	

APPEARANCES: Nancy Gegenheimer, Elizabeth Espinosa Krupa, and Allison Lee for the Division of Enforcement of the Securities and Exchange Commission

Robert J. Gorence, Timothy Padilla, and Ignacio V. Gallegos for Guy P. Riordan

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

On September 25, 2007, the Securities and Exchange Commission (Commission) instituted these public administrative and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 (Securities Act), and Sections 15(b) and 21C of the Securities Exchange Act of 1934 (Exchange Act). I held a public hearing December 10 through 13, 2007, in Albuquerque, New Mexico. The Division of Enforcement (Division) presented testimony from seven witnesses, including one expert, and introduced fifty-five exhibits. (Tr. 441.) Guy P. Riordan (Riordan) testified and presented four witnesses, including two experts, and introduced twenty-seven exhibits. The final brief was filed on April 24, 2008.[1]

[1] I will cite to the transcript of the hearing as "(Tr. __.)." I will cite to the Division's and Respondent's exhibits as "(Div. Ex. __.)" and "(Riordan Ex. __.)," respectively. I will cite to the Division's and Respondent's Post-Hearing Briefs, and the Division's Reply Brief, as "(Div. Post-Hearing Br. __.)," "(Riordan Post-Hearing Br. __.)," and "(Div. Reply Br. __.)," respectively.

ISSUE

Whether from 1996 through 2002, Riordan willfully violated Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by paying secret cash kickbacks in exchange for obtaining business from the State of New Mexico's Treasurer's Office (Treasurer's Office).

FINDINGS OF FACT

Riordan

Riordan, a college graduate with one year of law school, served three years in the United States Marine Corps. (Tr. 784.) He began working in the securities industry in 1982 and has been associated with several securities firms. On February 19, 1997, Riordan moved from Southwest Securities to Everen Securities, which first became First Union Securities (First Union), and then ultimately became Wachovia Securities, LLC (Wachovia). (Tr. 843-44.) From 1996 or 1997 until he retired in 2007, Riordan was a retail securities salesman associated with Wachovia in its Albuquerque, New Mexico, office, with, according to his branch manager, a few institutional accounts.[2] (Tr. 719, 747.) The Division's expert, however, found that, in 2001 and 2002, Riordan's earnings came from one institutional account, the Treasurer's Office. (Tr. 472.) Riordan is a public figure in New Mexico.[3] (Tr. 761.) Riordan denies that he paid kickbacks for any transaction in agency paper by the Treasurer's Office. (Tr. 857.)

[2] Wachovia considers an institutional investor someone with more than $10 million to invest. (Tr. 687.) James Stebner (Stebner), Wachovia's Senior Vice President, did not consider Riordan an institutional salesperson. (Tr. 685, 709.) Charles Ovis, Branch Manager of Wachovia's Albuquerque office, testified that Riordan was definitely an institutional salesperson who worked for the retail division. (Tr. 747.) Riordan's activities do not fit the description of an institutional salesperson because they usually service only institutional accounts and constantly use computer terminals to track market conditions. (Tr. 644, 648-49, 472-74.)

[3] Riordan is active in the Democratic party, and he has served on the Board of the New Mexico Mortgage Finance Authority, the Golf Advisory Board in the City of Albuquerque, the Albuquerque Museum Foundation Board, the University of Albuquerque Foundation Board, the Hispano Chamber of Commerce Board, the State Game and Fish Board, Judicial Nominating Committees, and the Albuquerque-Chihuahua Bilateral Commission. (Tr. 761, 789-91, 794.)

Riordan owns a farm and game preserve. (Tr. 938.) He represents that he has bought and sold extensive real estate for several years. (Tr. 939-40.) In 2002, Riordan sold real estate he and others had purchased for $225,000 to the Sandia Pueblo people for $1.3 million and a $1.8 million charitable contribution. (Tr. 938-39, 942, 944.) During the investigation, when the Division asked Riordan about his real estate transactions, Riordan did not mention what he refers to as the $2.8 million sale of land to the Sandia Pueblo people in 2002 because he did not think it was pertinent to the question. (Tr. 942.)

Michael Montoya (Montoya)

Montoya was Treasurer of the State of New Mexico from January 1, 1995, through December 31, 2002. (Tr. 20, 155-56, 183, 794-95; Riordan Ex. C-1 through C-19.) In 2003, the United States Secret Service (Secret Service) raided the Treasurer's Office as part of a counterfeiting investigation involving Leo Sandoval (Sandoval), Montoya's boyhood friend whom he employed in the Treasurer's Office in 1994 and who remained employed there after Montoya left office.[4] (Tr. 364, 384, 386.) Sandoval's disclosures caused the Secret Service to transfer the investigation to the FBI. (Tr. 57-58, 374.) The FBI arrested Montoya and Robert Vigil (Vigil) on September 16, 2005.[5] (Tr. 38, 191.) The FBI found that the State of New Mexico has a reputation for public corruption in the area of public finance, and that Montoya received individual kickbacks in "tens of thousands of dollars" totaling over a million dollars from assorted investment advisers in connection with flex repos.[6] (Tr. 41-42, 76-77, 82-83, 90.)

Montoya cooperated with the FBI and pled guilty to one count of violating 18 U.S.C. § 1951, Hobbs Act, Extortion Under Color of Official Right. Montoya's Plea Agreement estimated that the value of the payments Montoya, and those with whom he acted, received was between $2,500,000 and $5,000,000.[7] United States v. Montoya, Criminal No. 05-2050 JP (D.

[4] Sandoval introduced Montoya to Angelo Garcia (Garcia). (Tr. 27.) Sandoval and Garcia cooperated with the government and became Federal Bureau of Investigation (FBI) informers. (Tr. 89-90.) On December 17 and 19, 2003, Sandoval gave the Secret Service and the FBI a statement detailing bribes paid to Montoya in connection with purchases by the Treasurer's Office of flexible repurchase agreements (flex repos). (Tr. 20-24, 36, 41; Div. Ex. 6.)

[5] Montoya had served as Vigil's Deputy at the State Auditor's office in 1993. (Tr. 235.) In 1999, after Vigil was unsuccessful in his efforts to become Governor, Montoya hired him as Deputy State Treasurer. (Div. Ex. 3 at 4.) Vigil succeeded Montoya as Treasurer. (Tr. 191, 335.) Vigil's first trial in U.S. District Court in April 2006 ended in a hung jury. The second trial in September 2006 resulted in a guilty verdict on one count of violating 18 U.S.C. § 1951, Hobbs Act, Attempted Extortion, and Vigil was sentenced to a prison term of thirty-seven months, supervised release for three years and ordered to pay a fine of $97,248.42. (Tr. 47, 921; United States v. Vigil, 1:05CR02051001 JB, Judgment, (D. N.M. Feb. 22, 2007), aff'd, (10th Cir. Apr. 29, 2008).) Vigil was in prison in December 2007. (Tr. 990.)

[6] A repurchase agreement is an "agreement between a seller and a buyer, usually of U.S. Government securities, whereby the seller agrees to repurchase the securities at an agreed upon price and, usually, at a stated time." BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS, 476 (4th ed. 1995). Combating corruption among public officials is a priority issue for the FBI. The FBI was interested in any payments made in a variety of forms: cash, checks, purchases, campaign contributions, or fundraising, to Montoya or Vigil from people doing business with the state. (Tr. 71.)

[7] Montoya's testimony is that he received about $700,000 to $800,000 of the amount. (Tr. 216.) His salary, $65,000, went directly to the bank to pay off a $100,000 campaign debt. (Tr. 209, 218.) He also owed his sister $100,000. (Tr. 213, 217-18.)

N.M. Nov. 8, 2005). (Tr. 39, 42, 47, 216; Div. Ex. 24.) Montoya was sentenced to a prison term of forty months, supervised release for three years, and ordered to pay a fine of $25,000.[8] (United States v. Michael Montoya, 1:05CR02050-001JP, Judgment, (D. N.M. Sept. 27, 2007). (Tr. 156; Div. Ex. 25 at 22-23.) This administrative proceeding concerns allegations about the Treasurer's Office's sales and purchases of agency paper, not flex repos that were the subject of the criminal cases against Montoya and Vigil.

Kickback Scheme

Montoya met Riordan in 1990 when Montoya made his unsuccessful campaign for State Treasurer. (Tr. 793.) Riordan supported Montoya in his campaigns for State Treasurer in 1994 and 1998. (Tr. 795, 834.). For five years, beginning in 1995, Riordan and others organized an annual golf tournament that each raised between $14,000 and $18,000 for Montoya. (Tr. 169, 796-800.) In late 1995 or early 1996, Riordan began giving Montoya kickbacks at Montoya's request. (Tr. 193-95, 268, 325; Div. Ex. 2.) Montoya asked Riordan to "help him out," and they developed a pattern where, after Riordan participated in a transaction for the Treasurer's Office, he would meet with Montoya and give him money. (Tr. 166.) In the beginning, Montoya accepted checks from Riordan so that the payments appeared as campaign contributions, but later Montoya became concerned at the appearance and they switched to cash to disguise the payments. (Tr. 169-70.)

Riordan taped his conversations with Montoya and others in the Treasurer's Office for three months in 1997 because he became concerned when Montoya said he did not want a bottle of Dom Perignon champagne that Riordan gave to his large customers on the holidays, but a "green tree," which Riordan took to mean cash. (Tr. 807-08, 824; Riordan Exs. A-1, A-2.) Riordan claims he told Montoya that he was "not going to play his game," but this statement is not on the tape. (Tr. 980-82.) Riordan continued to do business with the Treasurer's Office, which he had been doing since before Montoya became Treasurer, even though he suspected Montoya was "crooked." (Tr. 804, 831, 987.)

On the tape, Riordan complains about Montoya to Ron Bessera, Deputy Treasurer, and says he will not cross the line. (Riordan Ex. A-2 at 72.) Riordan's position is that "[w]e made sure that Mr. Montoya stood the line. He did not step over the line. He never stepped over that line with me again . . . until October 2002." (Tr. 988.) Montoya used the term "help me out" to mean give me money. (Tr. 165-66, 889, 893.) In the recorded conversation, Montoya says, "We need some help," and Riordan replied, "I always help." (Tr. 999; Riordan Ex. A-2 at 35.) The meaning of Riordan's comment is ambiguous. It occurred in the middle of a conversation where he urged Montoya to act quickly to purchase agency paper. (Tr. 999-1002.) Riordan claims that Montoya did not attempt to extort money from him between 1997, when he specified wanting a "green tree," and October 2002, when he called and demanded money because Riordan had done several transactions with the Treasurer's Office. (Tr. 858-59.) In October 2002, Montoya

[8] Montoya agreed to forfeit a parcel of real estate and United States Senior District Judge James A. Parker (Judge Parker) recommended that Montoya participate in the Bureau of Prisons' 500-hour drug and alcohol treatment program. (Div. Ex. 25 at 22-25.)

was a lame duck in that he had served the maximum number of terms and could not run again. (Tr. 236.)

The evidence shows that Riordan paid $107.91 for a hotel room for one night for Montoya in Las Vegas, Nevada, on February 23, 1999. (Div. Ex. 87.) Riordan denied to Wachovia's Albuquerque Branch Manager that he paid for a trip to Las Vegas for Montoya and that he paid Montoya kickbacks.[9] (Tr. 739-40, 745, 757.) Riordan testified that February 23, 1999, was Super Bowl weekend, a very busy time in Las Vegas, and that Montoya requested help in obtaining a hotel room. The 1999 Super Bowl, however, occurred on January 31, 1999. (Tr. 906.) Riordan, through his contacts, obtained a hotel room for Montoya, but, according to Riordan, Montoya did not use it. (Tr. 881-82.)

In 2006, Wachovia put Riordan on about a year's leave of absence following allegations Montoya made about Riordan when he testified in the Vigil trial. (Tr. 730, 741-42, 921.) Following an "exhaustive" internal examination of all of Riordan's trades and bank accounts for a ten-year period, Wachovia reinstated Riordan to his position with the firm. (Tr. 732, 758-59.) When questioned, Riordan did not disclose to Wachovia that he obtained a hotel room for Montoya and paid for it. (Tr. 739-40.) Riordan's file on the Central Registration Depository shows no disciplinary actions for the twenty-six years he has been in the securities industry. (Tr. 802-03.)

Treasurer's Office and Agency Paper

The market for federal agency paper is in the billions, is very competitive and liquid, and is run by most firms in a similar fashion. (Tr. 662, 688, 711.) Agency paper is issued by federal agencies, including the Federal National Mortgage Association (FNMA), the Federal Home Loan Mortgage Corporation (FHLMC), and the Federal Home Loan Bank (FHLB). (Tr. 487-88, 689, 722.) New issues are available at par so that competition exists in the secondary market which is why the State policy was for the Treasurer's Office to purchase bonds in the secondary market through competitive bids.[10] (Tr. 660-63.) Bids for agency paper are based on the market for U.S. Treasuries. (Tr. 481-84.) Most of the transactions at issue are referred to as custom-made underwritings by the FHLB.[11] (Tr. 487-88.)

[9] Montoya testified that Riordan took him to Las Vegas and paid all his expenses. (Tr. 356.) The only documentary evidence of a payment by Riordan is the $107.91 hotel bill. There is evidence, however, that Riordan withdrew $10,000 for a Las Vegas trip. (Tr. 742-43.)

[10] Stebner explained that on a purchase of $10 million worth of agency paper at par, the issuer pays the fees (selling concession to salesperson and an underwriting fee that goes to the dealer) and receives $9,970,000. (Tr. 693-94.)

[11] Custom deals are in smaller amounts where, typically, one buyer intends to hold the securities to maturity. Big buyers who intend to market the securities want transactions in the amount of one to three hundred million dollars because they are more liquid. (Tr. 504.)

On April 30, 2001, the State Treasurer's investment portfolio totaled almost $4.2 billion with $1.6 billion invested in flex repos and almost $330 million in agency investments. (Tr. 240, 356; Riordan Ex. C-5.) In 2001 and 2002, the Treasurer's Office, staffed by fifty people, bought and sold agency paper and corporate bonds with a value of close to $1.5 billion. (Tr. 87; Div. Ex. 10.) Agency paper was a small portion of the State's total investments, and the State Auditor's Office did not know much about it. (Tr. 161.)

Transactions by the Treasurer's Office were covered by a written policy that had safety, maintenance of liquidity, and return as investment objectives. (Div. Ex. 22 at NMSTO 132, 23 NMSTO at 145-46.) Montoya did not consider safety and liquidity as issues because all the bids were on the same government paper and agency paper was a very small portion of the State's total investments of $3.5 billion. (Tr. 263.) It was State policy "to transact all securities purchases/sales only through a formal and competitive process requiring the consideration and evaluation of at least three offers/bids." (Tr. 663; Div. Ex. 22 at NMSTO 140.) It also required that "[a]t least one offer/bid shall be considered from a broker physically located in the state of New Mexico," and "[s]ecurities broker/dealers with offices in New Mexico will be given priority when possible over out-of-state dealers." (Tr. 256-58; Div. Exs. 22 at NMSTO 141, 23 at NMSTO 154-56.) Further, it required that an offer or bid shall be considered from the successful firm in the immediately preceding transaction, and that at least three offers or bids be received from primary brokers-dealers.[12] (Div. Exs. 22 at NMSTO 141, 23 at NMSTO 154-55.) Considering a local firm does not mean that it had to be selected. (Tr. 673.) The State was still obligated to get the best bid, buy low and sell high. (Tr. 624.)

Montoya hired David Abbey (Abbey) who served as Chief Investment Officer from approximately June 1995 to June 1997.[13] (Tr. 611, 628.) In this position, Abbey dealt directly with people who specialize in bond transactions for institutions and talked with them several times a day. (Tr. 645-48.) Sales people depend on their firm's trading desk for prices and quotations, however, some sales people are far more knowledgeable than others. (Tr. 708-10.) An institutional salesperson specialized in fixed instruments watches the market full time and is knowledgeable about market conditions so he or she knows the best pricing available. (Tr. 642, 710.) Abbey, who worked on drafting the State investment policies, interprets the requirement that bids be obtained from a primary or institutional dealer to mean a specialized institutional salesperson, not a retail salesperson like Riordan. (Tr. 642-45, 647-48.) Abbey notes that some

[12] A primary dealer and being able to issue primary paper are two different concepts in the securities market. (Tr. 695.) A primary dealer is "one of the three dozen or so banks and investment dealers authorized to buy and sell government securities in direct dealings with the Federal Reserve Bank of New York in its execution of Fed Open Market Operations." (Tr. 474; BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 437 (4th ed. 1995).) A primary issuer, on the other had, is a firm designated by an issuer of agency paper as a firm that "can write paper from the agency." Wachovia, previously First Union, is a primary issuer. (Tr. 474-76.)

[13] Abbey earned a Bachelor of Arts in Economics from Brown University. (Tr. 680.)

Treasurer's Office purchases were at par, which indicates to him that they were not competitive purchases. (Tr. 660-61.)

In 2000-2002, Sandoval was in charge of the Local Government Investment pool, and he got competitive bids on agency paper from the brokers from whom Montoya told him to solicit bids.[14] (Tr. 365-66, 390, 396.) The Treasurer's Office was not subject to thorough oversight, and, during this period, it did not keep good records of its investment activities. (Tr. 171, 174, 266.) Prior to 2001, bids were received via the telephone. In 2001, the oral bids were confirmed by facsimiles, and Sandoval, at Montoya's instructions, began keeping a record of the bids. (Tr. 371, 392, 407-08; Div. Ex. 1.) The FBI could not find organized records in the Treasurer's Office for the pre-2001 period. (Tr. 88, 103.) The Treasurer's Office's records for transactions in agency paper or flex repos in 2001 through 2002 are in two binders organized after the fact by Sandoval, and they are full of inaccuracies. (Tr. 85-87, 453.)

Riordan was on an "approved list" of twelve broker-dealers from whom the Treasurer's Office solicited bids on U.S. Government securities. (Tr. 164, 181, 259; Div. Ex. 1 at LS 260.) Riordan and Trent Tucker (Tucker), a financial consultant with Southwest Securities, were the only in-state brokers on the list in 2001-2002. (Tr. 396-97, 429, 887.) Tucker paid Montoya kickbacks in return for receiving business from the Treasurer's Office in the period 1999 through 2002.[15] (Tr. 888, 896.)

Montoya wanted to obtain money from brokers, who won supposedly competitive bids, for business from the Treasurer's Office. (Tr. 173.) The Chief Investment Officer was to solicit

[14] Sandoval is a graduate of the University of New Mexico with a degree in University Studies. (Tr. 363.) When Montoya hired him in October 1994, Sandoval was working for a child development food program as a quality monitor. (Tr. 364-65.) Sandoval secretly recorded one conversation with Montoya for the FBI. (Tr. 411.) Sandoval entered into an immunity agreement with the United States Attorney's Office in which it agreed not to prosecute him provided he cooperated and gave truthful testimony. (Tr. 375-76.) The State of New Mexico indicted Sandoval based on his testimony at the first trial of Vigil, but it gave him use immunity on the testimony he gave at this administrative hearing. (Tr. 376.) Sandoval has no agreements with the Commission. (Tr. 377.)

[15] Tucker would get a telephone call requesting a bid for agency paper transactions. He had a time frame in which he had to respond. Later, he would get a call that he had won, and he would submit a facsimile. (Tr. 894-95.) Tucker paid Montoya cash for getting Treasurer's Office business. (Tr. 888.) Tucker would meet Montoya in restaurants and Montoya would ask for help or for a charitable donation and Tucker would give him $300 or $500 in cash. (Tr. 889, 892-93.) Tucker entered a settlement where he was ordered to cease and desist from committing or causing any violations and any future violations of the antifraud provisions of the Securities Act and Exchange Act, and barred from association with any broker or dealer. No civil penalties were assessed against Tucker and disgorgement of $290,000, plus prejudgment interest, was waived given Tucker's inability to pay. (Tr. 891-92.) Trent L. Tucker, 91 SEC Docket 1975 (Sept. 25, 2007).

bids from brokers and conduct the competitive bidding process. (Tr. 171-75.) In 1997, Montoya asked Abbey to consider a $10 million primary purchase of an agency offering by Riordan. (Tr. 613-14.) Abbey considered that the Treasurer's Office only had surplus cash for long-term investment of $5 million, which is the amount of the primary purchase he made through Riordan.[16] (Tr. 614.) Riordan was not generally successful on transactions for which there was competitive bidding from June 1995 to June 1997. (Tr. 612-13, 673.) Montoya did not fill the Chief Investment Officer position with an independent person when Abbey left, but he gave the title to Sandoval so that he could direct investments to Riordan, Tucker, and Robert Sanchez, brokers who paid him kickbacks for State business. (Tr. 171-74, 176.)

Montoya decided on the winning bid, and he found it easy to rig the bids to give business to the brokers who paid him cash. He basically awarded State business to whomever he wanted. (Tr. 178-79, 265-66, 382, 389-90, 393, 395-96, 398.) Many of the transactions involving Riordan used a technique called forward delivery or settling forward where the dealer offered a new issue security that settled in the future, rather than next-day settlement, the standard settlement date in U.S. Treasury and agency paper transactions. Riordan's bids had the highest average number of days between the trade date and the settlement date. (Tr. 512-13.)

Use of the forward delivery technique "on the surface made an offer higher yielding and *appear* to be better," when, in fact, it results in comparing bids of apples and oranges. (Tr. 491-93, 498, 501; Div. Ex. 31, Appendix A.) For example, the purchase of $30 million of FHLB paper with a trade date of April 22, 2002, and a settlement date of June 3, 2002, awarded to First Union, whose bid was the highest by seventeen basis points, does not indicate that the Treasurer's Office took the best bid. (Tr. 491-93, 498.)

In a true competitive situation, when the Treasurer's Office asked for bids, salespersons working with the firm's traders would go to the agency who would construct a coupon that would state the maximum amount that they could make on those securities. The salespersons would submit bids to the Treasurer's Office working off of what the agency would sell it for. (Tr. 488-89, 495-96, 712-13.) In these transactions, the brokers had no risk because they bought it from the agency after they got an order from the Treasurer's Office. (Tr. 503-04.) In 2001, Riordan dealt with Montoya and Vigil. (Tr. 850.) Riordan described the process used by the Treasurer's Office to buy and sell agency paper as: "[T]hey'd call you up and say we're looking for something. You'd get on the phone, you'd call. And either you'd win the trade or you wouldn't." (Tr. 805, 845-49.) He also described a situation where the Treasurer's Office would call and ask, "What's out there? Do you have anything good out there? What's a three-year paying today?" (Tr. 851-52.) Riordan denies that he was ever told the specific bids of others. (Tr. 854, 967-68.)

Montoya had tried to invest the State's funds in mutual funds in September 2001, but the Governor and the State Board of Finance caused him to undo the transaction. (Tr. 329-33;

[16] The Treasurer's Office does not use competitive bidding on primary agency paper. (Tr. 613.) Abbey's responsibilities as Chief Investment Officer were to make cash flow projections and manage the bond proceeds pool. (Tr. 631.)

Riordan Ex. Q-1.) Montoya had the Treasurer's Office invest $900 million in mutual funds on December 13, 2002. Montoya hoped that the broker would pay him a kickback related to the transaction after he left Office. (Tr. 239, 335, 341, 343.) Riordan claims that Montoya has given false testimony about him because Riordan caused Vigil to cancel the mutual fund investment when he became Treasurer. (Tr. 335-40.)

Montoya never examined the bids; he directed Sandoval as to who should win the bidding process, both purchases and sales. (Tr. 175-76, 310-11, 349-57.) Unlike the investment advisers who agreed to kickback a specific percentage of the commissions they received, Montoya did not have a set formula for the amount of kickbacks that Riordan should pay. (Tr. 319.) At first, Riordan gave Montoya $300 per transaction; later, the amount increased to $2,500 or $3,000 at most. (Tr. 170, 180, 320.) To create the appearance of legitimacy, Montoya had the files show that Riordan submitted the best bid, but it was a ruse because the other bids had different terms. (Tr. 278.) Sandoval never saw Riordan give Montoya a kickback. (Tr. 402.)

According to Montoya, he and Riordan agreed on a payment plan; however, if for some reason Riordan made more on the transaction, then Montoya wanted a higher payment. (Tr. 179-80.) There were a couple of times when Montoya did not think he received enough and so he would use Riordan less often. (Tr. 180-81) Montoya probably would not have directed business to Riordan if Riordan did not pay him. (Tr. 181.) There might have been a few instances where Riordan claimed that he did not make any money, so he did not pay Montoya, but that was rare. (Tr. 181-82.) Riordan always paid Montoya personally. (Tr. 179.) The FBI could not find that Montoya kept any records of money he received. (Tr. 91.)

Riordan received a commission on purchases and sales by the Treasurer's Office. (Tr. 963.) In 2001 and 2002, Riordan was a very successful bidder on transactions in agency paper by the Treasurer's Office. In terms of number, he won eighteen of twenty-nine bids submitted for a sixty-two percent success rate, and he won thirty-four percent of the total transactions. (Div. Ex. 10.) In terms of value, Riordan's winning bids amounted to forty-three percent of the total value of successful bids ($1,452,500,000). (Tr. 118, 963; Div. Exs. 10, 33; Riordan Ex. F-2.) Riordan won five bids out of thirty submissions in 2001 or sixteen percent, and thirteen bids out of twenty-three submissions for over fifty percent in 2002.[17] (Tr. 145-46.) The Division agrees that Riordan did not win any bids in 2000, but it does not know if he submitted any bids in that period. (Tr. 138-39.)

In 2001 and 2002, Southwest Securities, represented by Tucker, had a success rate of forty-five percent on the bids submitted, it was successful on thirty-two percent of the total transactions, and its bids amounted to thirty-nine percent of the total value of all bids. (Div. Ex. 10.) Riordan and Tucker won eighty-two percent of the value of all transactions in agency paper by the Treasurer's Office in 2001-2002. (Div. Ex. 10.) According to Montoya, Riordan and Tucker won so many bids because:

[17] Riordan makes much of the fact that, in 2001, the Treasurer's Office only awarded him one bid to purchase agency securities. (Tr. 510.) However, Riordan won five of the eight times he bid on transactions. (Div. Ex. 33, Riordan Ex. F-2.)

> They were both close friends of mine and I had worked out – or we had worked out a deal that for any transaction that they obtained through the State Treasurer's Office that I would get a certain portion of their proceeds of the broker fee.

(Tr. 165.)

Riordan's total commissions from 1996 through 2002, including bonuses for 2001 and 2002, on agency and corporate bond transactions with the Treasurer's Office totaled $1,017,278.78. (Tr. 115-17; Div. Ex. 12.) In 2001 and 2002, Riordan received net commissions of $615,738.28. (Div. Ex. 12.) The expert found Riordan's earnings from one account, the Treasurer's Office, over two years "pretty extraordinary." (Tr. 472; Div. Ex. 12.) Riordan's earnings from agency and corporate bond transactions by the Treasurer's Office amounted to over seventy-one percent of his total earnings in 2001 and 2002. (Div. Ex. 12a.)

The Treasurer's Office reports to the State Board of Finance, a seven person board that meets monthly, and committees of the State Legislature have oversight responsibility for the Treasurer's Office. (Tr. 345, 611.) On January 14, 2002, Abbey, now Director of the State of New Mexico Legislative Finance Committee, informed the Secretary of Finance Administration, who is also the Executive Officer of the State Board of Finance, of multiple concerns about practices in the Treasurer's Office in 2001, including the fact that Riordan was the broker on bond transactions by the Treasurer's Office that appeared to involve churning and the possible mispricing of securities. (Tr. 620-21; Div. Ex. 29 at NMAG 021.)

Expert Testimony

James McKinney (McKinney)

McKinney, an expert in fixed-income securities, called by the Division, found the Treasurer's Office's bidding process not to be competitive but "rigged." (Tr. 453.)

> Well, [the Treasurer's Office's files] weren't done contemporaneously. They were done after the fact, and I think in some cases weeks later, someone stuff [sic] together, you know, information to try to feather a file to make it look like there was a real competitive situation.
>
> They were so – whoever did it, it wasn't a very careful guy and he left certain – all kind [sic] of fingerprints on it to make it look like – because there's information there that gave you all the evidence you needed to know that this was not a competitive situation going on.

(Tr. 454.)

> [W]hen I looked at almost all these files, people were bidding helter skelter on different pieces of paper.

> So they took a lot of anecdotal information from the market, put them together in the files, to make this guy win. . . . I doubt that everybody was bidding on the same paper. If it was that kind of competition, their bids would have been within a half of basis points [sic] of each other.

(Tr. 508.)

> Because plenty of the records – when you could see the records, they were bidding on different kinds of paper or different maturities. So, in absence of those, I just assume the same pattern. It's kind of, we want somebody to win today, you guys chase this, go out in this field, and I'm going to throw the pass down here.
>
> And that just seems to be what happened in an awful lot of times.

(Tr. 510.)

In a normal competitive bid situation, an institution will call for bids by a certain time, and everyone submits bids seconds before the specified time. (Tr. 480.) That was not the case here. The customary process in which all bidders are expected to submit bids by a "sharp" or exact time, did not happen here.[18] (Tr. 483-84.) According to the Treasurer's Office's files, the bidding process remained open for an extraordinarily long time with no firm bids. (Tr. 486.) McKinney considers the last look allowed to Riordan to be inappropriate because trading in agency paper is a quick business. (Tr. 481-82, 553.) Bids are good for about a maximum of thirty seconds because the market moves so quickly. (Tr. 482.) No one leaves a trade out for three or four hours. (Tr. 482.) The fact that Riordan was allowed to put in a winning bid, after the market had moved, was a "no-brainer" that indicated this was not a competitive process. (Tr. 482-83.)

McKinney found it very odd, considering the highly competitive firms on the list of approved brokers-dealers, that First Union and Wachovia could be so consistently successful if the bidding process was truly fair and transparent.[19] (Div. Ex. 31 at 4.)

McKinney observed that Riordan's trades from January 1998 through February 2006 occurred largely in small blocks of common stock, not government securities; however, by a

[18] Some bidders were told that their bids had to be in by an exact time. (Tr. 485.)

[19] McKinney is a principal of William Blair & Company, L.L.C. (Blair & Co.), a Chicago-based, independent investment firm offering investment banking, management, equity research, institutional and private brokerage, and private capital to individual, institutional, and issuing clients. McKinney, a graduate of Spring Hill College with an MBA degree from Loyola University, has thirty-three years of experience in developing and marketing fixed-income securities. (Div. Ex. 31.)

wide margin, Riordan earned most of his commissions from trades of government securities.[20] McKinney considers Riordan's commissions over two years, from one client on a few dozen trades, "pretty extraordinary." (Tr. 472; Div. Ex. 12.) It is particularly unusual that, in one year, Riordan made almost no commissions on the rest of his business. (Tr. 472.) McKinney thinks it is reasonable to ask why, if Riordan was such a successful institutional salesperson, he was not assigned to several institutional accounts and why his only institutional client was the Treasurer's Office. (Tr. 472.)

In McKinney's expert opinion, a buyer the size of the Treasurer's Office would usually demand a specialized institutional salesperson. Riordan's mix of clients engaged in "small, really tiny trades," and one institutional client does not fit the profile of a fixed-income securities salesperson. Usually, institutional salespersons are required to spend a great deal of time engaged with their clients who want to be kept informed about the actions of other large institutional accounts. (Tr. 473-74; Div. Ex. 31 at 3.) This position is supported by Abbey who noted that, with tens of billions of dollars of assets in its permanent and pension funds, the State of New Mexico could buy agency paper directly in a competitive secondary market that was cheaper; it did not need to go to a retail broker. (Tr. 665-67.)

McKinney found the Treasurer's Office's file confusing because it used the date around when they were getting bids, which was not always the same day, as the transaction date, and information was lacking on many trades. (Tr. 451-52, 512-13.) For his analysis, he used the date the trade happened.[21] (Tr. 451, 458-59.) McKinney found substantial irregularities in fifty-three agency paper and corporate bond trades all awarded to First Union by the Treasurer's Office in 2001 and 2002.[22] He considered what he found "pretty extraordinary" and sufficient information to prove his point. (Tr. 511.)

1. On November 29, 2001, the sale of $20 million in FHLMC bonds was awarded to First Union, but the information in the file makes no sense. (Div. Ex. 31 at 5.)

[20] Riordan testified that he did not submit any bids to the Treasurer's Office from June 9, 1999, to January 11, 2001, because he believed that the Federal Reserve was going to raise interest rates. (Tr. 836-37.)

[21] McKinney finds the date discrepancies between his analysis and the OIP understandable because the Treasurer's Office's records are confusing and finding an empirical bright line to use as the date for when the transactions occurred was difficult. McKinney found transactions for which Riordan's bid occurred on a different day than the other bids. The transaction at 11.n of the OIP is the transaction McKinney discusses in Exhibit 31 at 8 under the title "October 01, 2002." (Tr. 454-58.)

[22] The transactions that McKinney mentions are not necessarily the eighteen transactions specified in the OIP at Paragraph 11 as transactions for which Riordan paid kickbacks to Montoya. (Tr. 460.)

2. On December 11, 2001, First Union was the winning bidder on the sale of $25 million FHLB securities on a bid that came in several hours after the bids of other brokers-dealers, and after an announcement by the Federal Reserve Bank (Federal Reserve) that caused bond prices to spike upward. (Div. Ex. 31 at 5.) McKinney's expert opinion is that the Treasurer's Office did not consider three competitive bids because "[i]t is inconceivable that any quote, [given] hours earlier, would still be relevant." First Union was advantaged by bidding near the close of the market and by knowing of the Federal Reserve's announcement. (Div. Ex. 31 at 5.)

3. On December 18, 2001, First Union had no competition for a $30 million sale of FHLB bonds. (Div. Ex. 31 at 6.)

4. Nothing makes sense about the sale by the Treasurer's Office on December 18, 2001, of $25 million of FNMA securities. It appears to McKinney that Riordan was allowed to correct his "overbid," to gain a better cost basis (potential profit margin), and to just barely beat a competitive bid. "Riordan received a commission of $20,750, generous for a bidding situation that was that close." (Div. Ex. 31 at 6-7.)

5. There is no evidence that the Treasurer's Office received competitive bids on the $50 million FHLB transaction awarded to First Union on March 1, 2002. (Div. Ex. 31 at 7.)

6. A summary sheet is the only evidence of a competitive bid for a $50 million transaction of FHLB securities awarded to Southwest Securities on March 4, 2004. (Div. Ex. 31 at 7.)

7. There is no evidence that the Treasurer's Office received competitive bids on the $25 million FHLB transaction awarded to First Union on March 7, 2002. (Div. Ex. 31 at 7.)

8. There is no evidence that the Treasurer's Office received competitive bids on the $25 million FHLB transaction awarded to First Union on March 8, 2002. (Div. Ex. 31 at 7.)

9. There is no evidence that the Treasurer's Office received competitive bids on the $50 million FHLB transaction awarded to First Union on May 29, 2002.[23] McKinney finds it extraordinary that the Treasurer's Office would allow First Union a "whopping 50 day forward delivery in a market with an upward yield curve," and a generous $72,500 sales commission. (Div. Ex. 31 at 7.)

10. A comparison of a $55 million purchase on August 6, 2002, with a $75 million purchase on August 15, 2002, both awarded to First Union, contains fraudulent documents for the second transaction and shows that First Union was given a distinct advantage because its bid was to settle thirty-eight days forward, in a time period with an upward-sloping yield curve. (Div. Ex. 31 at 7-8.)

[23] Riordan claims that McKinney was wrong that First Union had no competitors on the purchase of $50 million agency paper on May 29, 2002. He contends that the competitors on the $30 million purchase that occurred on the same day, which First Union also won, also competed for the $50 million transaction. (Tr. 1012-13; Riordan Ex. F-2 number 42.)

11. On August 15, 2002, First Union won a bid for a $75 million purchase where its bid was on three-year and four-month paper and the other bidders bid on straight three-year paper.[24] Also, the three-year four-month paper had another advantage in that it was issued at a time when the yield curve was sloping upward. (Div. Ex. 31 at 8-9.)

12. First Union had an advantage on bids for purchasing $50 million paper on October 1, 2002, with a settlement date of October 30, 2002, because the other brokers were bidding on paper that had a three-year maturity with a three-month call, but First Union bid on paper that had a maturity of three years and three months with a three-month call date from a date that was twenty-nine days forward. Because First Union's bid came due in the following year, First Union had a significant yield advantage. (Tr. 451; Div. Ex. 31 at 9.)

13. Also, on October 1, 2002, the Treasurer's Office awarded First Union four different sale transactions, totaling $100 million, even though its bid was the highest and, therefore, the worst bid for the seller in each situation. (Div. Ex. 31 at 9.)

Gaetano Perrone (Perrone)

Perrone, an expert in bond and institutional trading, called by Riordan, found that the Treasurer's Office preferred the local traders in awarding business, which he believes is allowed by policy.[25] (Tr. 539.) Perrone believes that bond markets in general are a little unethical at times because it is not an electronic market and it is only lightly regulated. The market in agency securities is no different. (Tr. 535-36.)

Overall, Perrone thinks McKinney's analysis of the trades was reasonable and correct. (Tr. 540; Riordan Ex. I-1.) Perrone found evidence in the files that some traders received second looks or were allowed to submit a second bid, and he considers that inappropriate. (Tr. 538.) Perrone did not know that Riordan was able to look at the bids others had submitted. (Tr. 527.) Perrone compliments traders at being creative by offering three-year and three-month paper rather than three-year paper or by offering a forward settlement date. Perrone credits Wachovia's trading desk as being very creative at winning the business by "boutiquing" or creating special settlements. (Tr. 543-45.) He disagrees with McKinney that these creative techniques resulted in a comparison of apples and oranges when looking at the bids. (Tr. 541-43.) Perrone has not done any trades with the Treasurer's Office because he does not have the any political ins or relationships. (Tr. 545-46.)

[24] According to one witness, three-year, four-month paper would mean it could not be called for four months. (Tr. 697.)

[25] Perrone, Vice President, 1st National Financial Services, Albuquerque, New Mexico, graduated from Northeastern University and has been trading bonds for over thirty-two years. (Tr. 519; Riordan's Ex. I-1.)

Janet McHard (McHard)

McHard, an expert in forensic accounting, called by Riordan, determined that in calendar 2001, Riordan had available $42,663.26 in currency or cash (currency), and, in calendar 2002, Riordan had available $23,204.48 in currency.[26] (Tr., 561, 781-82; Div. Ex. 89, Riordan Ex. G-1, Exhibit B.) Riordan failed to inform McHard or the Division of a $100,000 line of credit that his wife had at First Union National Bank of Delaware, so McHard's initial analysis did not consider it. (Tr. 581-82, 913-15, 917). In the six-month period, from March 2001 to September 18, 2001, the line of credit was drawn down by $96,000. (Tr. 776-78.) McHard traced $81,104.75 of the drawn-down amount. (Tr. 776; Div. Ex. 88.) Riordan reported adjustable gross income in 2001 and 2002 of $197,211 and $920,684, respectively. (Tr. 584.)

ARGUMENTS OF THE PARTIES

The Division argues that the evidence shows Riordan acted with scienter in violating the antifraud provisions of the securities statutes. (Div. Post-Hearing Br. 13-16.) The Division recommends that Riordan be:

(1) barred from association with a broker or dealer;

(2) ordered to cease and desist from violations of Section 17(a) of the Securities Act, Section 10(b)(5) of the Exchange Act, and Rule 10(b)(5) thereunder;

(3) required to disgorge all compensation received on transactions in agency securities with the Treasurer's Office from 1996 through 2002, with prejudgment interest; and

(4) ordered to pay a civil penalty in an amount equal to disgorgement. (Div. Post-Hearing Br. 28-35.)

Riordan maintains that: (1) the allegations are barred by the statute of limitations; (2) the Division did not meet its burden by proving the allegations by a preponderance of the evidence; and (3) no adverse inference should be drawn from Riordan's invocation of the Fifth Amendment. (Riordan Post-Hearing Br. 13-41.) Riordan claims that Montoya gave false testimony because Montoya is angry with Riordan for causing his successor, Vigil, to void a Treasurer's Office investment in mutual funds that would have paid Montoya a fee after he left office. (Tr. 338-40.)

Riordan invoked the Fifth Amendment during the investigation that led up to this administrative proceeding. (Tr. 863, 904-05, 947-48.) Riordan maintains that no adverse

[26] McHard, a graduate of the University of New Mexico with a Bachelor of Arts and Master of Business Administration, has been a Certified Public Accountant (CPA) licensed in New Mexico since 1998. (Tr. 558; Riordan Exhibit G-1.) She is certified as a fraud examiner and a forensic financial analyst, and is with the public accounting firm of Meyners & Company, LLC, specializing in forensic accounting. (Tr. 558-60; Riordan Exhibit G-1.)

inference should be drawn from his use of the Fifth Amendment because he believed, at the time, that people were targets of investigation because of their political party affiliations and this was demonstrated by the fact that the present administration forced the resignation of the U.S. Attorney for New Mexico, David Iglesias, for allegedly not indicting Democrats before the elections in November 2007, one of many "outrageous" political actions. (Tr. 1007-08, 1010.)

PENDING MOTIONS

At the start of the hearing, Riordan made a motion in limine to exclude evidence of alleged violations that occurred prior to September 25, 2002, relying on the language of 28 U.S.C. § 2462: "[a]n action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." (Tr. 10-12.) I allowed the Division to present evidence of alleged illegal conduct occurring outside the five-year statute of limitations period because five transactions where kickbacks are alleged are within the five-year period and disgorgement, one of the possible sanctions if violations are found, is an equitable remedy not subject to the statute. (Tr. 14-16.) See Johnson v. SEC, 87 F.3d 484, 491; SEC v. Rind, 991 F.2d 1486 (9th Cir. 1993).

Riordan's Post-Hearing Brief argues strenuously that actions prior to September 25, 2002, five years before the OIP was issued, are time-barred by 28 U.S.C. § 2462, citing Johnson and United States v. Core Labs, Inc., 759 F.2d 480 (5th Cir. 1985). (Riordan Post-Hearing Br. 13-33.) During the hearing, Riordan moved to strike from the OIP thirteen of eighteen agency securities transactions for which Riordan allegedly paid cash kickbacks, Paragraphs 11.a.-m., because they occurred prior to September 25, 2002. (Tr. 360-61.) In a second related action, Riordan moved to strike one transaction shown in the OIP, Paragraph 11.n., for which Riordan allegedly received a kickback, where the OIP gives a transaction date of October 2, 2002, and the evidence is that the settlement date was October 30, 2002.

The Division addressed Riordan's statute of limitations concerns at the hearing, in a written response filed on December 21, 2007, to the motion in limine, and in two post-hearing briefs.

It is significant in deciding the statue of limitations issue to note that the record contains evidence of some actionable conduct within the statute of limitations, and that Riordan's argument, that the transaction shown in the OIP at 11.n. did not happen, is unpersuasive.[27]

[27] At the hearing, and in a written motion, dated December 17, 2007, the Division moved, under Rule 200(d)(2) of the Commission's Rules of Practice, to amend Paragraph 11.n. of the OIP to conform to the evidence by changing the settlement date from October 2, 2002, to October 30, 2002. (Tr. 469.) (Motion to Amend OIP). Riordan filed a Response to the Motion to Amend OIP on January 8, 2008, and the Division filed a Reply on January 11, 2008. I DENY Respondent's motion to strike Paragraph 11.n. in the OIP, and I GRANT the Division's Motion to Amend the OIP. The unanimous evidence is that the Treasurer's Office's files are in disarray, which accounts for the error, and it was obvious at the hearing that the settlement date for this

(Riordan Post-Hearing Br. 16-18.) First, the record establishes that the transaction shown in the OIP as a purchase of $50 million agency securities with a settlement date of October 2, 2002, did occur. (OIP at 2-3.) The Division's expert stated unequivocally that this was the $50 million purchase transaction he recorded on October 1, 2002, and Riordan showed the same transaction as occurring on October 1, 2002, with a settlement date of October 30, 2002. (Tr. 457; Div. Ex. 31 at 19, Riordan Ex. F-2.)

Second, in addition to the one purchase, four sales transactions, for which cash kickbacks allegedly occurred, noted in the OIP, are unaffected by the statute of limitations. Riordan accurately states that Montoya testified that Riordan did not pay kickbacks on sales by the Treasurer's Office. (Tr. 309.) However, that testimony was accompanied by Montoya's "best guess" and "no more than likely" comments. (Tr. 188, 299, 309.) Based on hearing the testimony, observing Montoya, and reading the transcript, I find Montoya to be confused on this point. He seemed to think that most of Riordan's transactions with the Treasurer's Office were purchases. (Tr. 188, 443-44.) However, from January 2001 through October 2, 2002, six of Riordan's eighteen transactions with the Treasurer's Office were sales, Riordan earned commissions on sales, "[s]ometimes pretty good money." (Tr. 472, 487; Riordan Ex. F-2.) Montoya could not recall a single instance where he did not receive a kickback from Riordan after he won a bid. (Tr. 181-82.) Given these facts, the large amount of commissions Riordan earned, and Montoya's greed, I find the evidence to show that Riordan paid kickbacks to Montoya on sales as well as purchases. (Tr. 170, 179-81; Div. Ex. 33; Riordan Ex. F-2.)

Third, Montoya's unequivocal testimony is that he received the last cash kickback from Riordan in mid-December 2002. (Tr. 189-91.) Based on my observation of his demeanor, how he responded to questions, and comparing his testimony with the other evidence in the record, I find Montoya to be credible. He was confused or lacking in information on some details, but, in my judgment, he was consistent and candid in his responses.[28]

Finally, Riordan's reliance on Core Labs is misplaced because, in that situation, all the alleged violations occurred outside the statute of limitations.[29]

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transaction was October 30, 2002, and that Riordan was not taken by surprise by this fact. (Tr. 455-58, 469; Riordan's Ex. F-2.)

[28] I note that the Government at Montoya's sentencing recommended a reduced sentence based on Montoya's cooperation and assistance, and that Judge Parker, who had presided at the first Vigil trial, stated he was highly impressed with Montoya's candor and he observed that he was candid. (Div. Ex. 25 at 8-10.)

[29] The court noted that:

> The government may, however, be entitled to invoke the equitable powers of the Court to toll the § 2462 limitations period in this case. [case citations omitted] If it were shown, for example, that the government's failure to file its action within the limitations period was caused by improperly dilatory tactics of Core, tolling might be appropriate.

In view of the above, the question is whether related conduct that began earlier than five years before the OIP was issued can be considered as violations of the antifraud provisions and thus be a reason for imposition of what Johnson found to be penalties. Riordan contends that the sanctions requested by the Division, a cease-and-desist order, a broker-dealer bar, disgorgement, and civil penalties, are all time-barred. (Riordan Post-Hearing Br. 18-33.) The Division contends that the statute of limitations does not apply to remedial sanctions, such as disgorgement and injunctive relief, and that, if Riordan violated the statutes within the five-year statute of limitations, then his conduct beyond the five-year limit, "the full record," should be considered in determining whether sanctions such as civil penalties are in the public interest. (Div. Reply Br. 5-10.) The Division also invokes the continuing violation and the fraudulent concealment doctrines in support of its position that alleged violations prior to September 25, 2002, and sanctions for those violations, are not time-barred. (Div. Post-Hearing Br. 34; Div. Reply Br. 6-8.)

The Division cites SEC v. Ogle, No. 99 C 609, 2000 WL 45260, at *4 (N.D. Ill. Jan. 11, 2000) and In re Donald A. Roche, 53 S.E.C. 16 (1997), for the proposition that all of Riordan's actions, dating back to 1995, are part of a continuing violation. I agree with Riordan that the facts of this case are distinguishable. See Ogle, 2000 WL 45260, at *5 ("The claims in this suit represent the consummation of years of alleged violations; the alleged market manipulation itself was fluid and ongoing and not a discrete goal."); Roche, 53 S.E.C. at 24-25 ("'Churning is a unified offense [and] a finding of churning, by the very nature of the offense, can only be based on a hindsight analysis of the entire history of a broker's management of an account and of his pattern of trading that portfolio. Thus, the offense was not complete . . . .'"). Contrary to the Division's position, each kickback constituted a separate and distinct violation which would have been actionable alone had none of the others occurred. Therefore, I find that the continuing violation doctrine is inapplicable.

The Division cites SEC v. Koenig, 532 F. Supp. 2d 987 (N.D. Ill. 2007), and SEC v. Jones, No. 05 Civ. 7044(RCC), 2006 WL 1084276 (S.D.N.Y. Apr. 25, 2006) (Jones I), to argue that Riordan's secret kickback scheme was self-concealing, thereby tolling the statute of limitations until it was made public in September 2005. (Div. Post-Hearing Br. 34.) In order to toll the statute of limitations for fraudulent concealment, the Division must prove: "(1) that the [Respondent] concealed the existence of the cause of action, (2) that it did not discover it until some point within five years of commencing this action, and (3) that its continuing ignorance was not attributable to lack of diligence on its part." Jones I, 2006 WL 1084276, at *3.

Riordan asserts that the Division inadequately relies on the allegations in the OIP, that he made "secret" cash payments to Montoya, to prove that the conduct was self-concealing. (Riordan Post-Hearing Br. 21-22.)

> Standing alone, allegations of fraud are generally insufficient to demonstrate that a particular act is self-concealing. Indeed, for a fraud to be self-concealing, the [Respondent] must have engaged in "some misleading, deceptive or otherwise

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Core Labs., 759 F.2d at 484.

> contrived action or scheme, *in the course of committing the wrong*, that [was] designed to mask the cause of action."

SEC v. Jones, 476 F. Supp. 2d 374, 382 (S.D.N.Y. 2007) (Jones II) (citing Hobson v. Wilson, 737 F.2d 1, 34 (D.C. Cir. 1984)).

> A fraud "conceal(s) itself" when [the Division], even by the exercise of due diligence, could not uncover it. . . . [A] fraud conceals itself when the [Respondent] does only what is necessary to perpetrate the fraud, and that alone makes the fraud unknowable.

Jones II, 476 F. Supp. 2d at 382 (citing Long v. Abbott Mortgage Corp., 459 F. Supp. 108, 118, 120 (D. Conn. 1978) (Newman, J.)).[30]

Contrary to Riordan's position, I find that these facts satisfy the requirements of Jones I, and that Riordan's kickback scheme from 1992 through 2002 can be considered pursuant to the fraudulent concealment doctrine. The first element of the doctrine is satisfied because the kickbacks were in cash, the exchanges took place in men's restrooms at restaurants or in motor vehicles so as to be undetected, Riordan never spoke about them, and Montoya used code words and phrases such as "help" and "green tree" for when he wanted cash from Riordan. (Tr. 320, 321, 328.) All this conduct was in the course of committing the wrong to mask the wrongdoing. The second and third elements of fraudulent concealment are satisfied because there is no persuasive showing that the Commission was aware of the allegations earlier than five years before it issued the OIP or that its ignorance was due to a lack of due diligence in the conduct of its operations. But for the Secret Service's investigation of counterfeiting, the FBI would not have begun its investigation in December 2003 that led to public reports of Riordan's activities in 2005 or 2006. (Tr. 20, 731-32.)

Riordan further attempts to undermine the Division's reliance on the doctrine by suggesting that the case law on which the Division has relied is not valid and by citing cases which refused to apply the doctrine. (Riordan Post-Hearing Br. 22-23.) Specifically, Riordan argues that Jones II overruled Jones I; however, as the Division argues, Jones I was not overruled, the fraudulent concealment law is the same in both cases, and the difference in analysis is attributable to the difference in standards applied (i.e., the standard for dismissal in Jones I and the summary judgment standard in Jones II). (Div. Reply Br. 7.) Accordingly, Riordan's position that Koenig is not valid due to its reliance on Jones I is also flawed. The other cases referenced by Riordan do not preclude the applicability of the fraudulent concealment doctrine to securities cases, but are instances in which the court refused to apply the doctrine to a given set of facts.

[30] The circuits for the United States Court of Appeals are divided as to the standard for concealment to be applied. West Virginia v. Meadow Gold Dairies, Inc., 875 F. Supp. 340, 343-44 (W.D. Va. 1994) (articulating the different standards), see also Texas v. Allan Constr. Co., Inc., 851 F.2d 1526, 1534 (5th Cir. 1988).

I find the Division's application of the fraudulent concealment doctrine, as stated in the cited cases, permits tolling the statute of limitations to determine whether Riordan's conduct resulted in antifraud violations prior to September 25, 2002.

I DENY the Division's motion to strike Riordan's answer at pages 921-22 of the transcript as being non-responsive. (Tr. 932.) Riordan's answer that included an explanation of why he acted the way he did is not an unreasonable response.

I GRANT Riordan's Written Motion to Submit Additional Exhibit, filed April 23, 2008, and allow into evidence Riordan Ex. S-1, a letter from Steve A. Padilla, dated February 7, 2008, describing Riordan's humanitarian efforts to assist on-site the residents of New Orleans following Hurricane Katrina.

I GRANT the Division's motion to admit into evidence Div. Ex. 93, a one-page letter, dated December 14, 2007, from Diona Gibson with a facsimile cover sheet, and Div. Ex. 94, the transcript of Riordan's testimony before the Federal Grand Jury on October 12, 2005.

I ADMIT into evidence as Div. Ex. 95, Exhibit A, a five-page attachment to Div. Post-Hearing Br., Disgorgement Calculation for Riordan, Includes Prejudgment Interest Calculated as of February 4, 2008.

FINDINGS AND CONCLUSIONS

My findings are based on the record and my observation of the witnesses' demeanors. I applied preponderance of the evidence as the applicable standard of proof. See Steadman v. SEC, 450 U.S. 91, 102 (1981). I have considered and rejected all proposed findings, conclusions, and arguments raised by the parties that are inconsistent with this Initial Decision.

The antifraud provisions of the Securities Act and the Exchange Act prohibit fraudulent conduct in the offer, purchase, or sale of securities by use of the means of interstate commerce.[31]

[31] Section 17(a) of the Securities Act prohibits:

> any person in the offer or sale of any securities or any security-based swap agreement . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly --
>
> (1) To employ any device, scheme, or artifice to defraud, or
> (2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
> (3) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Congress's principal purpose in enacting the Exchange Act was "to insure honest securities markets and thereby promote investor confidence." See United States v. O'Hagan 521 U.S. 642, 658 (1997). The phrase "any manipulative or deceptive device or contrivance" in Section 10(b) includes a scheme. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 n.20 (1976). Also, Section 10(b) has been held to apply to complex securities frauds in which there are multiple violators. See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994).

To establish a violation of Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5, the Division must show: (1) misrepresentations or omissions of material facts, or other fraudulent devices; (2) made in connection with the offer, sale, or purchase of securities; and (3) that the respondent acted with scienter, a mental state embracing intent to deceive, manipulate, or defraud. See Aaron v. SEC, 446 U.S. 680, 685, 697, 701-02 (1980); Hochfelder, 425 U.S. at 193 n.12. Circumstantial evidence is more than sufficient to prove scienter. See Herman & MacLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983), (citing Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 330 (1960)); see also TSC Indus., Inc. v. Northway, Inc. 426 U.S. 438, 463 (1976).

The Supreme Court has "repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" Huddleston, 459 U.S. at 386-87 (citing SEC v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963); accord, Superintendent of Ins. v. Bankers Life and Cas. Co., 404 U.S. 6, 12 (1971); Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972)).

Giving kickbacks, defined in government contracts as a "payment made secretly by a seller to someone instrumental in awarding a contract or making a sale – an illegal payoff," in the purchase or sale of securities is by definition a fraudulent act. DICTIONARY OF FINANCE AND INVESTMENT TERMS 287 (4th 1995). See SEC v. Zwick, 2007 WL 831812 *17 (S.D.N.Y. 2007); SEC v. Savino, 2006 U.S. Dist. LEXIS 6357 *37-38 (S.D.N.Y. 2006), aff'd in part and remanded in part, 208 Fed. Appx. 18, 2006 U.S. App. LEXIS 30193 (2d Cir. 2006); SEC v. Santos, 355 F. Supp. 2d 917, 919 (N.D. Ill. 2003); Ted Harold Westerfield, 54 S.E.C. 25, 29 (1999); SEC v. Feminella, 947 F. Supp. 722, 731 (S.D.N.Y. 1996); United States v. Rudi, 902 F. Supp. 452, 456 (S.D.N.Y. 1995).

The following evidence shows that Riordan, acting with scienter, gave kickbacks to Montoya beginning in 1996 through December 2002.

1. Based on a detailed examination of the Treasurer's Office's files for transactions between January 2001 and October 2002, McKinney, an expert in trading agency securities, concluded that the Treasurer's Office did not conduct a competitive bidding process, that the

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Section 10(b) of the Exchange Act prohibits, under similar conditions as Section 17(a), in connection with the purchase or sale of any security, the use of any manipulative or deceptive device or contrivance. Rule 10b-5 prohibits, under similar conditions, the same conduct as in subsections (1), (2), and (3) of Section 17(a).

bidding process was rigged to make it appear that Riordan on behalf of First Union and Wachovia submitted the best bid, and that the Treasurer's Office's files were assembled after the fact to support a falsehood. (Div. Ex. 31.)

2. McKinney finds it highly unlikely that First Union would have been so consistently successful in a true competitive process considering the capable broker-dealers on the approved list. (Div. Ex. 31 at 4, 10.) McKinney's position is affirmed by Abbey who expects that there would be a broad dispersion of business going to brokers in a comparative scenario, especially when dealing with very competitive institutional salespeople who track the market continuously. (Tr. 636.)

3. Riordan's agency trading expert, Perrone, did not challenge McKinney's conclusions or findings.

4. Montoya testified that, during the period "probably late 1995 or 1996 to 2002," he gave Riordan preferential treatment on business with the Treasurer's Office. (Tr. 193; Div. Ex. 2.) Montoya stated that Riordan made payments to him in exchange for investment business from the State. (Tr. 89, 195, 268; Div. Ex. 2.) Montoya stated to the FBI that "[Riordan] paid in cash ($300-500) some of the time." (Tr. 193-95; Div. Ex. 2.) Montoya claims that, when he was arrested, he downplayed the extent of his illegal activities with Riordan. (Tr. 270.) At one time, Montoya estimated that he received payments from Riordan once or twice a month for a five-month period in the period 1995 through 2001. (Tr. 289.) One FBI agent in charge of the investigation recalls that Montoya admitted receiving a range of payments between $200 and $2,000 from Riordan on each one of the transactions. (Tr. 91.) According to Montoya's statement to the FBI:

> RIORDAN paid kickbacks to MONTOYA for business RIORDAN did with the [State Treasurer's Office.] RIORDAN's [sic] paid the kickbacks during his employment with both SOUTHWEST SECURITIES and WACHOVIA.
>
> RIORDAN received the "last look" at bids submitted by competitors to ensure RIORDAN could outbid them. SANDOVAL would call RIORDAN and give him the "last look". MONTOYA went along with whatever RIORDAN paid. The amount was never discussed.
>
> RIORDAN paid $500 to $1,000 to MONTOYA following the conclusion of each investment. RIORDAN paid MONTOYA in the men's restroom at restaurants or in Riordan's truck. RIORDAN would have an envelope with money either lying on the seat or in the door and would point to the envelope. RIORDAN never discussed the payments with MONTOYA.

(Div. Ex. 3 at 5-6.)

The reference to SOUTHWEST SECURITIES in the first sentences is an error because Riordan was not associated with the firm.

5. Sandoval told the FBI on April 19, 2005, that Montoya told him "that he received money from GUY RIORDAN. RIORDAN always bid last on deals after learning the other bids. MONTOYA instructed ROBERT VIGIL to tell [Sandoval] what the bids were who then told Riordan." (Div. Ex. 7 at 2.) Sandoval told the FBI that he gave Riordan his competitors' bids to provide him an opportunity to win the competition, and Riordan's payments to Montoya were connected to the last look or preferential treatment. (Tr. 36, 65, 367-69, 393, 430-31.) Sandoval told the FBI that Riordan gave a better bid after Sandoval told him what the other brokers had bid. (Tr. 393.)

A transcribed statement by Sandoval to the FBI on December 19, 2003, states:

> Source said GUY RIORDEN [sic] (ph) of First Union, and TRENT TUCKER of Southwest Securities usually won all the [State Treasurer's Office] "flex repo" bids. As [the State Treasurer's Office] needed three bids on contractors for the state. MONTOYA would often direct source to call RIORDEN [sic] or TUCKER for the last bid. Source was directed by MONTOYA to inform them of the bid prices so they could then come in with the most competitive price. Both RIORDEN [sic] and TUCKER expected the information from source and MONTOYA in order to win the bids. At no point did either RIORDEN [sic] nor TUCKER ask why they were being told the prices, and each time they were informed of the price, they consistently provided a better bid. . . . In paperwork source provided, most contracts were consistently won by either company.

(Div. Ex. 6 at 2.)

The reference to "flex repo" in the first sentence is erroneous because, during Montoya's term, Riordan's and Tucker's business with the Treasurer's Office was in agency paper. (Tr. 88-89.)

6. According to Garcia's statement to the FBI on March 12, 2004:

> MONTOYA utilized broker GUY RIORDEN [sic] in Albuquerque, New Mexico. RIORDEN [sic] would "do agency paper" and bonds. MONTOYA would average two to four transactions with RIORDEN [sic] a month, approximately $25 million to $50 million each transaction. In the process of obtaining three bids, if another bidder was higher than RIORDEN [sic], MONTOYA would contact RIORDEN [sic] and tell him to make a better bid.

(Div. Ex. 8 at 4.)

7. Sandoval testified that, when he made copies of Riordan's bids for the Treasurer's Office's files, he deliberately omitted the facsimile line so that it was not obvious that Riordan's bids were usually received last. (Tr. 372; Div. Ex. 1 passim.)

8. The fact that the expected broad dispersion of business among brokers and dealers in a competitive environment did not occur caught the attention of the Legislative Finance Committee staff. (Tr. 636.) The Legislative Finance Committee's annual budget analysis of the

Treasurer's Office in 2002 noted that the policy was to have competitive bids on purchases by the Treasurer's Office and to rotate among authorized brokers-dealers, but that:

> The treasurer [sic] makes excessive use of costly, noncompetitive bond purchases from primary dealers and fails to rotate brokers.
>
> . . .
>
> Instead, approximately 91 percent of [the Treasurer's Office's] bond transactions have been through two brokers – First Union and Southwest. The Treasurer has paid approximately $600.0 [sic] more than was necessary to purchase the bonds than if he had followed the policy.[32]

(Tr. 626-27; Div. Ex. 30 at LFC 005.)

9. On October 9, 2002, the Albuquerque Journal reported that a member of the Board of Finance was concerned that, between February and September 2002, First Union (Riordan) and Southwest Securities (Tucker) received ninety percent of the commissions for buying bonds issued by federal government agencies for the Treasurer's Office.[33] (Tr. 347-48; Div Ex. 84.)

10. A report by an analyst on the New Mexico Legislative Finance Committee reported on November 22, 2002:

> The [Treasurer's Office] purchased $50 million in Federal Home Loan Bank (FHLB) bonds from Wachovia (First Union) in October. With this purchase over 91 percent of the current calendar year's bonds purchases have been through brokers – Wachovia or Southwest. Additionally, [the Treasurer's Office] sold $100 million in FHLB and Sallie MAE bonds all of which were non-callable. This eliminates all non-callable bonds from its US agency portfolio. . . . 100 percent of the $395 million US agency portfolio is callable by January 2003. The conclusion being apparent churning in [the Treasurer's Office's] portfolio.

(Div. Ex. 29 at NMAG 01.) The Treasurer's Office's policy was to limit callable bonds to twenty-five percent of the assets. (Tr. 619.)

[32] Percentage is for the period January 2002-September 2002. (Div. Ex. 30 at LFC 005.)

[33] Riordan testified that he never saw or heard about the concerns that two brokerage firms were getting too much of the business from the Treasurer's Office. (Tr. 919-20.) Riordan checked his calendar for October 9, 2002, and he believes he was pheasant hunting in South Dakota on that date. (Tr. 920.)

11. The only evidence that kickbacks did not occur is Riordan's denial, and Riordan is not credible.[34] I base this determination on the many discrepancies in the record. For example, Riordan gave two completely different explanations as to why he had not produced the tape-recorded conversations in response to a July 2007 Division subpoena: (1) he forgot he made them, and (2) he remembered taping Montoya, but he did not know where the tapes were located.[35] (Tr. 812-13, 819.) Riordan testified that he went through the boxes of material he had given to Padilla to respond to the Division subpoena in July 2007, but, at that time, he did not find the tapes or the transcription. (Tr. 817-18.) Riordan produced the tapes to the Division two weeks before trial when his other attorney, Robert Gorence, discovered them among materials Riordan delivered from Padilla. (Tr. 811, 820-21.) In addition, Riordan's explanation of obtaining a Las Vegas hotel room for Montoya because Las Vegas was crowded due to the Super Bowl was false because the Super Bowl occurred on a different date. (Tr. 906.) Also, he did not inform the expert reviewing his finances of his wife's $100,000 line of credit, and he failed to reveal a very profitable land transaction to the Division. (Tr. 581-82, 942.)

For all the reasons stated, I find that Riordan's secret cash payments to Montoya in connection with the purchase and sale of agency securities by the Treasurer's Office in what Riordan knew was not a competitive bidding process was a material scheme or artifice to defraud and a course of business that operated as a fraud on the citizens of the State of New Mexico, to obtain money.[36] I find further that Riordan willfully violated Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by giving secret cash

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[34] McHard's expert testimony is not persuasive that Riordan did not have cash available to pay kickbacks in 2001 and 2002. McHard's analysis reflects currency deposited into Riordan's bank account and currency withdrawals; it does not show the sources of the funds or if any amounts were held back from the amount being deposited. (Tr. 587, 590.)

[35] Riordan testified that he kept the tapes in his office until he moved offices in 1999 or 2000. He then put them in his garage. They were discovered in 2007 among six or seven boxes of documents Riordan gave to his attorney, Timothy Padilla (Padilla), in 2005. (Tr. 918.) Padilla had them transcribed in April 2006. (Tr. 811-16, 918.) Riordan testified that he was unaware of the transcription, which has the same title as this administrative proceeding, "In the Matter of Guy Riordan." (Tr. 918-19.)

The tapes were covered by a Division subpoena. On July 17, 2007, during his investigative testimony, Riordan denied withholding any documents or knowing of any documents responsive to the subpoena that were lost, destroyed, or otherwise disposed of. (Tr. 934.) On July 17, 2007, Riordan stated that he had looked through everything he had, and he denied that he had any voice mail recordings between himself and Montoya. (Tr. 935.) Riordan testified at the hearing that, at the time, he did not recollect taping the conversations. (Tr. 936.)

[36] Materiality is measured by whether or not there is a substantial likelihood that under all the circumstances, a reasonable person would consider the omitted or misstated information significant in making an investment decision. See Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988) (citing TSC Indus., 426 U.S. at 449.

kickbacks to Montoya in exchange for obtaining securities transactions from the Treasurer's Office and in participating in what he knew was a fraudulent bidding process. Willfulness is shown where a person intends to commit an act that constitutes a violation. There is no requirement that the actor must also be aware that he or she is violating any statutes or regulations. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000).

PUBLIC INTEREST

Bar from Association

This proceeding was instituted pursuant to Section 15(b)(6) of the Exchange Act which provides that, where a person was associated with a broker-dealer at the time he or she committed violations of the securities statutes, the Commission may censure, place limitations on the activities or functions of a person, or suspend for a period up to twelve months, or bar from association with a broker or dealer, where it is in the public interest to do so. The following considerations are relevant to making a public interest determination:

> [T]he egregiousness of the [respondent's] actions; the isolated or recurrent nature of the infraction; the degree of scienter involved; the sincerity of the [respondent's] assurances against future violations; the [respondent's] recognition of the wrongful nature of his conduct; and the likelihood that the [respondent's] occupation will present opportunities to commit future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979); Orlando Joseph Jett, 57 S.E.C. 350, 402 (2004); KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1183-84 (2001).

Because five of the violations occurred within the five-year period, Riordan's arguments that a bar from association is a punitive measure that is prohibited by 28 U.S.C. § 2462 are inapplicable. Thus a bar from association, whatever its nature, is allowable on these facts. Moreover, I have found that the fraudulent concealment doctrine tolls the statute of limitations and allows the government to review and react to all of Riordan's illegal conduct so all the violations are an independent basis for my finding.

Paying kickbacks to government officials that resulted in criminal convictions for the recipient was egregious conduct that involved a high degree of scienter by Riordan, a well-educated individual with many years of industry experience, who is prominent in civic and political affairs in New Mexico. The evidence is persuasive that, in the eight years Montoya served as Treasurer, Riordan paid kickbacks on most of the 103 occasions he engaged in agency transactions. (Tr. 189, 284-90.) Conduct that violates the antifraud provisions "is especially serious and subject to the severest sanctions." Marshall E. Melton, 56 S.E.C. 695, 713 (2003). The outrageous, extensive, serious, and protracted nature of Riordan's conduct is the primary reason for my determination. In addition, Riordan does not acknowledge the wrongful conduct that the record shows he committed. Given these facts, and the financial success that Riordan has enjoyed from his participation in the securities industry, I conclude that there is a high likelihood that Riordan will commit future violations if allowed to continue as an associated person.

Riordan's humanitarian actions toward the victims of Hurricane Katrina, his military service, and his clear record in the securities industry over many years, all positive factors, do not mitigate the harm that Riordan's continued participation in the securities industry presents to the public interest based on an analysis of the Steadman considerations. See Rooms v. SEC, 444 F.3d 1208, 1214-15 (10th Cir. 2006) (stating that lack of a disciplinary history is not a mitigating factor).

For all these reasons, and the need to deter Riordan and others from similar conduct in the future, I find it is in the public interest to bar Riordan from association with any broker or dealer.

Cease and Desist

This proceeding was also instituted pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act. These sections authorize the Commission to issue an order to cease and desist where it has found that a person has violated the statutes or rules thereunder. The criteria for ascertaining whether a cease-and-desist order is appropriate are very similar to the Steadman factors:

> the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the respondent's opportunity to commit future violations, . . . whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings.

KPMG, 54 S.E.C. at 1192.

I reject Riordan's claim that a cease-and-desist order is impermissible as a punitive measure that is time-barred for the same reasons I rejected his claim that the Commission could not bar him from association with any broker or dealer.

I have already considered most of the factors relative to Steadman, and I incorporate those conclusions here. The two considerations remaining are the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought.

The record established that public investors, the citizens of New Mexico, suffered financial harm from Riordan's illegal conduct in that the State did not receive the best price on the agency securities it purchased and sold. (Tr. 489; Div. Exs 29, 30, 31.) The testimony of Abbey, McKinney, Montoya, and Sandoval establish that the Treasurer's Office did not conduct a competitive bidding process for purchases and sales of agency paper and that Riordan, who did not submit the best price, was awarded the business. McKinney found that the Treasurer's Office allowed Riordan, on behalf of First Union, to "top" a bid of others by submitting a bid late, after the market had improved, and that, on occasion, the Treasurer's Office selected First Union, later Wachovia, when it submitted what was clearly the worst bid. (Div. Ex. 31 at 10.) An analysis by the Legislative Finance Committee in January 2002 "suggests [Treasurer's Office's] investment practices may have led to at least $50 million of forgone interest earnings." (Div. Ex. 29 at NMAG 021.)

I find that a cease-and-desist order is necessary to prevent future wrongdoing considering all the factors mentioned in KPMG, in particular the nature of the violations, Riordan's denial of facts established by extensive evidence, and the fact that securities markets generally, but especially markets in fixed-income securities because of the lack of transparency, are particularly vulnerable to wrongful conduct.

Disgorgement and Prejudgment Interest

Section 8A of the Securities Act and Section 21C of the Exchange Act also authorize the Commission to order disgorgement, including reasonable interest, in any cease-and-desist proceeding.

The Division recommends that Riordan be ordered to disgorge a total of $1,017,278.78, the amount of the total commissions and bonuses that he received on transactions with the Treasurer's Office in calendar 1996 through October 2002, and prejudgment interest of $699,804.18. (Div. Ex. 12; Div. Post-Hearing Br. 27, n.22; Div. Post-Hearing Br. Exhibit A, a summary from Div. Exs. 13, 15, 18, 19, 55.)

Riordan argues that disgorgement is time-barred, however, the statute of limitations does not apply to equitable remedies such as disgorgement. See Joseph J. Barbato, 53 S.E.C. 1259, 1279 n.27 (1999). Riordan does not contest the accuracy of the Division's summary and he has not alleged an inability to pay. See Terry T. Steen 53 S.E.C. 618, 626-27 (1998). (Riordan Post-Hearing Br. 27-33.)

"Disgorgement has been defined as an 'equitable remedy designed to deprive [respondents] of all gains flowing from their wrong, rather than to compensate the victims of the fraud. The purpose of disgorgement is to deter violations by making them unprofitable . . .'." SEC v. AMX, Int'l, Inc., 872 F. Supp. 1541, 1544 (N.D. Tex. 1994) (citation omitted). Disgorgement deprives a wrongdoer of his or her ill-gotten gains and deters others from violating the securities laws. See SEC v. First City Fin. Corp., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989). "The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits." SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1104 (2d Cir. 1972) ("'It would severely defeat the purposes of the Act if a violator of Rule10b-5 were allowed to retain the profits from his violation.'"); see also SEC v. First Pac. Bancorp., 142 F.3d 1186, 1191-93 (9th Cir. 1988), cert. denied, 525 U.S. 1121 (1999); SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989).

I will order disgorgement because the nature of disgorgement and the objective of deterrence both support the result that would deprive Riordan of the financial benefit of the kickback scheme in which he engaged with respect to agency transactions with the Treasurer's Office while Montoya was Treasurer.

Civil Penalties

Section 21B of the Exchange Act authorizes the Commission to impose a civil penalty, where it is in the public interest do so, if it finds that a person willfully violated provisions of the Securities Act or the Exchange Act and the rules thereunder. The statute specifies the following as public interest considerations: (1) whether the violations involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the harm caused to others; (3) the unjust enrichment; (4) prior violations; (5) deterrence; and (6) such other matters as justice may require. See 15 U.S.C. § 78u-2(c).

The statute sets out maximum amounts for each act or omission at three tiers of penalties. Tier-two penalties require a showing of fraud, deceit, manipulation, or deliberate or reckless disregard for a regulatory requirement. Tier-three penalties are applicable where the act or omission met the requirements of tier-two penalties and, in addition, "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission." 15 U.S.C. § 78u-2(b). The maximum amount set by statute for a natural person under the various tiers is adjusted for inflation.[37]

The Division recommends that Riordan be ordered to pay third-tier penalties for violations committed over the time period 1996 through 2002. The Division notes that applying a per-violation charge of $100,000 to each of Riordan's 103 transactions in agency paper with the Treasurer's Office from 1996 through 2002 would result in civil penalties of over ten million dollars. Alternatively, the Division suggests that Riordan be assessed a civil penalty in the same amount as his civil gain or $1,017, 278.78.

I reject Riordan's claim that the imposition of civil penalties is impermissible as a punitive measure that is time-barred for the same reasons I rejected his claim that the Commission could not bar him from association with any broker or dealer.

I find that civil penalties at the third-tier level are appropriate. Riordan's illegal conduct of giving kickbacks to a state official was outrageous, fraudulent, deceitful conduct that was in deliberate disregard of law, regulations, and standards of appropriate business conduct. Riordan received substantial financial benefit from his illegal activities and two knowledgeable people, McKinney and Abbey, agree that his actions caused substantial financial damage to the State of New Mexico and its taxpayers.

[37] From 1996 until February 1, 2001, violations committed by a natural person have a maximum penalty per occurrence of $5,500 in the first tier; $55,000 in the second tier; and $110,000 in the third tier. After February 2, 2001, but before February 14, 2005, the amounts were $6,500 in the first tier; $60,000 in the second tier; and $120,000 in the third tier. See Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, ch. 10, sec. 31001, § 3701(a)(1), 110 Stat. 1321-358; 28 U.S.C. § 2461 (effective Mar. 9, 2006); 17 C.F.R. §§ 201.1001, .1002.

In view of the considerable disgorgement and prejudgment interest that Riordan is being ordered to pay, I will set the amount of civil penalties at $500,000, which is $100,000 per kickback for the five kickbacks that occurred within the statute of limitations and is considerably less than the sum of the maximum per-occurrence amount and the number of occurrences from 1996 through 2002. Furthermore, I will order that the disgorgement and civil penalties be used to create a fund for the benefit of the State of New Mexico's Treasurer's Office that was harmed by the violations.

RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I certify that the record includes the items described in the record index issued by the Secretary of the Commission on July 10, 2008.

ORDER

I ORDER, pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, that Guy P. Riordan is barred from association with any broker or dealer;

I FURTHER ORDER, pursuant to Section 8A of the Securities Act of 1933, and Sections 15(b) and 21C of the Securities Exchange Act of 1934, that Guy P. Riordan cease and desist from committing or causing any violations, or any future violations, of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder;

I FURTHER ORDER, pursuant to Section 8A(e) of the Securities Act of 1933 and Section 21C(e) of the Securities Exchange Act of 1934, that Guy P. Riordan shall disgorge $1,017,278.78, and prejudgment interest in the amount of $699,804.18;[38]

I FURTHER ORDER, pursuant to Sections 15(b) and 21B of the Securities Exchange Act of 1934, that Guy P. Riordan pay a civil money penalty in the amount of $500,000; and

I FURTHER ORDER, pursuant to Rule 1100 of the Commission's Rules of Practice, 17 C.F.R. § 201.1100, the creation of a Fair Fund and that the amount of disgorgement and civil money penalties collected be placed in this Fair Fund and used for the benefit of the Treasurer's Office of the State of New Mexico that was harmed by the violations found in this decision.

Payment of the disgorgement, prejudgment interest, and civil penalties shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by certified check, United States Postal money order, bank cashier's check, or bank money order, payable to the U.S. Securities and Exchange Commission. The payment, and a cover letter identifying Respondent and the proceeding designation, shall be delivered to the Comptroller,

[38] I am assuming that the Division's computation of prejudgment interest is done in accordance with the method set forth in Rule 600 of the Commission's Rules of Practice. 17 C.F.R. § 201.600(b).

Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

_____

Brenda P. Murray
Chief Administrative Law Judge