

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 2872 / May 7, 2009

ADMINISTRATIVE PROCEEDING
File No. 3-13463

In the Matter of

**INTECH Investment
Management LLC and
David E. Hurley**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTIONS 203(e), 203(f) AND 203(k) OF
THE INVESTMENT ADVISERS ACT OF
1940, MAKING FINDINGS, AND
IMPOSING REMEDIAL SANCTIONS AND
A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against INTECH Investment Management LLC, formerly known as Enhanced Investment Technologies, LLC (“INTECH”) and David E. Hurley (“Hurley”) (collectively, the “Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the “Offers”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

Summary

1. This case involves a registered investment adviser, INTECH, which, from at least 2003 through 2006 (the "relevant time period"), exercised voting authority over client securities without having written policies and procedures that were reasonably designed to ensure it voted its clients' securities in the best interests of its clients because those policies and procedures did not include how the adviser would address material potential conflicts of interests that may arise between its interests and those of its clients. INTECH also did not sufficiently describe its proxy voting policies and procedures to clients. In determining how to vote securities (or proxies) for those clients who had delegated such voting authority to INTECH, it selected a third-party proxy voting service's guidelines that followed AFL-CIO proxy voting recommendations.¹ Those guidelines, offered by Institutional Shareholder Services ("ISS"), were referred to as the ISS Proxy Voter Services ("ISS-PVS"). INTECH chose to follow ISS-PVS at a time when it was participating in the annual AFL-CIO Key Votes Survey that ranked investment advisers based on their adherence to the AFL-CIO recommendations on certain votes. INTECH believed that following the ISS-PVS Guidelines would improve its ranking in the AFL-CIO Key Votes Survey and that the improved score would likely be helpful in maintaining existing and attracting new union-affiliated clients.

2. In connection with the then-newly effective Investment Advisers Act Rule 206(4)-6 (the "Proxy Voting Rule"), INTECH adopted and implemented written proxy voting policies and procedures and provided them to its clients.² Contrary to the Proxy Voting Rule, INTECH's written policies and procedures did not address material potential conflicts that may have arisen between INTECH's interests and those of its clients who were not pro-AFL-CIO. Moreover, INTECH did not sufficiently describe to clients its proxy voting policies and procedures. Using ISS-PVS created a material potential conflict of interest for INTECH because INTECH chose an AFL-CIO-based voting platform for all clients without addressing and describing its potential effect on INTECH's ability to retain and obtain business from existing and prospective union-affiliated clients.

Respondents

3. **INTECH**, a Delaware limited liability company located in West Palm Beach, Florida, has been registered with the Commission as an investment adviser since February 28, 2002. As of September 30, 2008, INTECH had approximately 400 clients with over \$55 billion in assets under management. Since 2002, INTECH has exercised voting authority with respect to those clients' proxies for which it had been delegated such authority.

¹ The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a voluntary federation of national and international labor unions.

² Final Rule: Proxy Voting By Investment Managers, Investment Advisers Act Rel. No. 2106 (Jan. 31, 2003).

4. **David E. Hurley**, 65 years old, is a resident of Palm Beach Gardens, Florida. During the relevant time period, he was INTECH's Chief Operating Officer and an Executive Vice President.

INTECH Exercised Voting Authority on Behalf of its Clients

5. During the relevant time period, INTECH managed institutional portfolios for pension plans, foundations, unions (including those referred to as "Taft-Hartley" clients), public funds, and public corporations (hereinafter collectively referred to as "clients"). Most of the assets invested by the public funds and corporations were related to employee pension plans. As part of its investment advisory services, INTECH exercised voting authority with respect to many of its clients' securities. In deciding how to vote client securities, INTECH chose to rely upon the recommendations of a third-party proxy voting service called Institutional Shareholder Services. ISS offered various sets or platforms of recommendations.

6. During 2002, INTECH chose one of ISS' platforms known as the ISS-General Guidelines ("ISS-General"). These guidelines typically recommended voting in accordance with corporations' management's recommendations.

7. In response to this choice, INTECH received inquiries and complaints from some of its union-affiliated clients about proxy votes that INTECH had cast on behalf of its clients as the result of following ISS-General.

INTECH Moved From a Management-Based Platform to the AFL-CIO-Based Voting Platform for All Clients

8. During the relevant time period, INTECH participated in the annual AFL-CIO Key Votes Survey ("AFL-CIO Survey"). The AFL-CIO collects the information regarding proxy voting from investment advisers and the AFL-CIO Survey summarizes and ranks investment advisers based on their proxy voting records on issues the AFL-CIO identifies as "Key Votes." The AFL-CIO Survey places investment advisers into one of three tiers based upon the percentage of votes the adviser cast that were consistent with the AFL-CIO voting recommendations on Key Votes. The AFL-CIO ranks advisers that vote all or the majority of its clients' proxies, including clients that are not pro-AFL-CIO, in accordance with AFL-CIO recommendations, higher than advisers who vote only their union-affiliated clients in accordance with the AFL-CIO recommendations. INTECH recognized this incentive in the AFL-CIO Survey.

9. On January 1, 2003, INTECH switched from ISS-General Guidelines to ISS-PVS Guidelines for all of its clients. INTECH believed that this change could improve its score on the AFL-CIO Survey. INTECH also believed that some union-affiliated clients felt that it was important for INTECH to score well on the AFL-CIO Survey. Moreover, INTECH believed that prospective union-affiliated clients might use the AFL-CIO Survey as a factor in selecting an investment adviser. Further, INTECH made this switch to please its union-affiliated clients, which had communicated displeasure with some of INTECH's 2002 votes made while INTECH followed

the ISS-General Guidelines. INTECH also believed ISS-PVS applied a reasonable standard for enhancing shareholder value as it related to corporate governance matters.³

10. INTECH improved its AFL-CIO Survey score by changing to the ISS-PVS recommendations. In 2002, when INTECH followed ISS-General, INTECH scored 68.9% and was ranked in the middle tier. In 2003, when INTECH followed ISS-PVS, INTECH scored 100% and was ranked in the top tier.

11. After switching from the ISS-General Guidelines to the AFL-CIO-based ISS-PVS Guidelines, INTECH received inquiries from some clients as to why there seemed to be a higher number of votes against management on shareholder proposals.

The Proxy Voting Rule Requires Advisers to Adopt Proxy Voting Policies and Procedures

12. The Proxy Voting Rule became effective on March 10, 2003 and its compliance date was August 6, 2003.⁴ The Proxy Voting Rule requires advisers to adopt and implement policies and procedures that are reasonably designed to ensure that advisers vote clients' proxies in the clients' best interests. Such procedures must include how the adviser addresses material conflicts that may arise between the adviser's interests and those of its clients, disclose to clients how they can obtain information about how the adviser voted the proxies, and describe to clients the adviser's proxy voting policies and procedures.⁵

13. In the Adopting Release for the Proxy Voting Rule, the Commission recognized that under the Advisers Act, "an adviser is a fiduciary that owes each of its clients duties of care and loyalty with respect to all services undertaken on the client's behalf, including proxy voting."⁶ This duty of care requires an adviser who has voting authority to monitor corporate events and vote the proxies. To satisfy its duty of loyalty, an adviser must cast the proxy votes in a manner consistent with the best interests of its client and must not subrogate a client's interest to its own.⁷ The Commission explained that the Proxy Voting Rules "were designed to prevent material conflicts of interest from affecting the manner in which advisers vote" clients' proxies.⁸

³ The PVS Proxy Voting guidelines in effect at the time stated that they were "based upon the AFL-CIO Proxy Voting Guidelines, which comply with all the fiduciary standards delineated by the U.S. Department of Labor" and intended to "promot[e] long-term shareholder value, emphasizing the 'economic best interests' of plan participants and beneficiaries." They further stated that "PVS will . . . promote a position that is consistent with the long-term economic best interests of plan members embodied in the principle of a 'worker-owner view of value.'"

⁴ Final Rule: Proxy Voting By Investment Managers, Investment Advisers Act Rel. No. 2106 (Jan. 31, 2003).

⁵ Rule 206(4)-6 of the Advisers Act, 17 C.F.R. § 275.206(4)-6.

⁶ Final Rule: Proxy Voting By Investment Managers, Investment Advisers Act Rel. No. 2106.

⁷ Id.

⁸ Id.

14. The Commission noted that advisers may use a “predetermined voting policy,” such as a third-party proxy voting service’s platform, to vote proxies provided that the predetermined policy is “designed to further the interests of clients rather than the adviser.”⁹

INTECH Did Not Satisfy the Proxy Voting Rule Requirements

15. In an effort to comply with the new rule, INTECH drafted written proxy voting policies and procedures. Hurley, as Chief Operating Officer, reviewed and edited counsel’s drafts of those policies and procedures. On July 22, 2003, INTECH sent those policies and procedures to clients along with a cover letter from Hurley. Those policies and procedures remained in effect as written until 2006. Under INTECH’s proxy voting policy, Hurley, as the Chief Operating Officer, had responsibility to evaluate whether certain proxy votes created conflicts between INTECH and its clients’ interests.

16. At the same time that Hurley participated in drafting the proxy voting policies and procedures, he knew that INTECH was voting all of its clients’ securities in accordance with the ISS-PVS Guidelines. Hurley recognized the potential benefits to INTECH of choosing ISS-PVS, including an improved AFL-CIO Survey score. Hurley also recognized the choice created a potential conflict of interest because he acknowledged that different types of clients may have made a different choice than INTECH made. Although he received some input from counsel during the drafting process, he did not discuss the potential conflict of interest with counsel during the drafting process. The policy, as finalized, did not address this potential conflict.

17. INTECH’s final written policies and procedures did not address the potential conflict caused by INTECH choosing the ISS-PVS Guidelines for all of its clients while having an interest in retaining and obtaining union-affiliated clients. Moreover, INTECH told its clients in the cover letter signed by Hurley and stated in its proxy voting policy that, because it relied on a third-party proxy voting service, it did not “expect[] that any conflicts w[ould] arise in the proxy voting process.”

18. In addition, INTECH did not sufficiently describe its proxy voting policies and procedures to its clients. INTECH disclosed that it intended to rely on ISS-PVS to vote clients’ securities. INTECH, however, did not disclose that ISS-PVS followed AFL-CIO proxy voting recommendations. In fact, INTECH, through Hurley, described its policies and procedures without including references to the fact that the ISS-PVS guidelines it had chosen followed AFL-CIO recommendations. Although INTECH did not sufficiently describe its proxy voting policies and procedures to its clients, it did, on a quarterly basis, send to all of its clients a report showing all proxy votes cast on behalf of clients. The report, however, did not reference the guidelines that were followed that resulted in those votes.

⁹ Id. at n.24.

19. In mid-2005, INTECH considered offering clients the additional option of the ISS-General Guidelines. In December 2005, after the Commission staff began inquiring about INTECH's proxy voting, INTECH offered clients a choice between the ISS-PVS and ISS-General Guidelines to begin in 2006. At that time, INTECH sent a summary of the ISS-PVS Guidelines to clients that explained that the voting recommendations were based upon the AFL-CIO proxy voting recommendations. If clients did not notify INTECH of a choice, the default choice on behalf of clients was to the ISS-PVS recommendations. Approximately 27% of INTECH's clients chose to switch voting recommendations from ISS-PVS to the ISS-General Guidelines.

20. In May 2006, INTECH, in its Form ADV, described its proxy voting policies and procedures. It described that it offered clients a choice between ISS-PVS and ISS-General. It stated that ISS-PVS recommendations are based upon the AFL-CIO proxy voting guidelines and that INTECH's policy may result in INTECH obtaining and retaining Taft-Hartley or other union-affiliated clients. If clients did not notify INTECH of a choice, the default choice on behalf of clients was to the ISS-PVS recommendations.

INTECH Changed its Policies and Procedures to Comply With the Proxy Voting Rule

21. In August 2006, INTECH communicated by letter with clients regarding its proxy voting policies and procedures and addressed the potential conflict of interest that choosing the ISS-PVS voting recommendations caused. INTECH disclosed the potential conflict by stating that INTECH's choice of ISS-PVS may result in INTECH retaining and obtaining Taft-Hartley or other union-affiliated clients. INTECH also disclosed to clients that its standard voting policy was to vote proxies pursuant to ISS-Taft Hartley (formerly known as ISS-PVS) and disclosed that this was developed by ISS in conjunction with the AFL-CIO. At that time, INTECH offered clients the choice of voting proxies pursuant to ISS guidelines known as ISS-US, formerly known as ISS-General, which continued to be more management-friendly.

22. In addition, although not required by the Proxy Voting Rule, starting in November 2006, INTECH allowed clients to choose from several voting recommendations. The default choice was no longer ISS-PVS. Instead, INTECH set the default to recommendations that best represent the client type.

LEGAL ANALYSIS

23. Section 206(4) of the Advisers Act makes it unlawful for investment advisers "to engage in any act, practice, or course of business which is fraudulent, deceptive or manipulative."

24. Rule 206(4)-6 under the Advisers Act provides that "it is a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of Section 206(4) of the Act for [a registered investment adviser] to exercise voting authority with respect to client securities unless [it]: (a) adopt[s] and implement[s] written policies and procedures that are reasonably designed to ensure that [it] vote[s] client securities in the best interests of clients, which procedures must include how [it] address[es] material conflicts of interest that may arise between [its] interests and those of [its] clients . . . and (c) describe[s] to [its] clients [its] proxy voting policies and

procedures, and, upon request, furnish[es] a copy of the policies and procedures to the requesting client.”

25. If registered investment advisers do not satisfy the foregoing conditions, they engage in acts, practices or courses of business that are unlawful.

26. As a result of the conduct described above, INTECH willfully¹⁰ violated Section 206(4) of the Advisers Act and Rules 206(4)-6(a) and 206(4)-6(c) thereunder.

27. As a result of the conduct described above, Hurley willfully aided and abetted and caused INTECH’s violations of Section 206(4) of the Advisers Act and Rules 206(4)-6(a) and 206(4)-6(c) thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents’ Offers.

Accordingly, pursuant to Sections 203(e), 203(f) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondents INTECH and Hurley shall cease and desist from committing or causing any violations and any future violations of Section 206(4) of the Advisers Act and Rules 206(4)-6(a) and 206(4)-6(c) promulgated thereunder.

B. Respondents INTECH and Hurley are censured.

C. INTECH shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of \$300,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. 3717. Payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies INTECH as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Esq., Associate Regional Director, Philadelphia Regional Office, Securities and Exchange Commission, Mellon Independence Center, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

D. Hurley shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of \$50,000 to the United States Treasury. If timely payment is not made, additional

¹⁰ With respect to direct violations, a willful violation of the securities laws means merely “that the person charged with the duty knows what he is doing.” Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor “also be aware that he is violating one of the Rules or Acts.” Id. (quoting Gearhart & Otis, Inc. v. SEC, 348 F.2d 798, 803 (D.C. Cir. 1965)).

interest shall accrue pursuant to 31 U.S.C. 3717. Payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Hurley as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Elaine C. Greenberg, Esq., Associate Regional Director, Philadelphia Regional Office, Securities and Exchange Commission, Mellon Independence Center, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

By the Commission.

Elizabeth M. Murphy
Secretary