

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

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 60935 / November 4, 2009**

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 2944 / November 4, 2009**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-13674**

**In the Matter of**

**JAMES E. OTTO,**

**Respondent.**

**ORDER INSTITUTING ADMINISTRATIVE AND  
CEASE-AND-DESIST PROCEEDINGS PURSUANT  
TO SECTIONS 15(b) AND 21C OF THE  
SECURITIES EXCHANGE ACT OF 1934 AND  
SECTIONS 203(f) AND 203(k) OF THE  
INVESTMENT ADVISERS ACT OF 1940**

**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 15(b) and 21C of the Securities Exchange Act of 1934 (“Exchange Act”) and Sections 203(f) and (k) of the Investment Advisers Act of 1940 (“Advisers Act”) against James E. Otto (“Otto” or “Respondent”).

**II.**

After an investigation, the Division of Enforcement alleges that:

**Summary**

1. From 2004 through the present, Otto has acted as a broker-dealer without being registered as required. In 2006, with respect to certain accounts maintained at the broker-dealer TD Ameritrade, Otto violated the antifraud provisions of the Exchange Act by effecting securities transactions under the guise of the holders of the accounts. Otto also acted as an investment adviser to an individual (the “Advisory Client”), and defrauded the Advisory Client by, on multiple occasions, contacting TD Ameritrade, where the Advisory Client maintained an account, pretending to be the Advisory Client.

## **Respondent**

2. Otto, age 51, is a resident of Overland Park, Kansas. From approximately 1986 through 2002, Otto was employed as a registered representative of several registered broker-dealers. Otto was barred from the industry for two months in 2002 by the New York Stock Exchange and he did not associate with another registered broker-dealer thereafter. At all times relevant to these proceedings Otto was licensed to sell insurance products in the states of Missouri and Kansas.

## **Otto's Conduct**

3. Otto acted as a broker-dealer by directing sales of securities held in approximately 159 accounts maintained at TD Ameritrade and another registered broker-dealer by individuals who were his insurance clients and the insurance clients of other insurance salespeople. Otto directed the sales of the securities to generate cash for the clients' purchase of insurance products from him and the other insurance salespeople. The clients gave Otto information, such as PIN numbers, for the accounts at TD Ameritrade and the other broker-dealer. Otto was thereby able to access the accounts via the Internet and direct the sales of the securities. Otto profited from this conduct because he was paid commissions on his sales of insurance products to these clients. In addition, the other insurance salespeople shared with Otto their commissions on their relevant sales of insurance products.
4. Through this conduct, Otto willfully violated Section 15(a) of the Exchange Act.
5. On April 11, 2006, TD Ameritrade sent Otto a letter terminating its business relationship with him. On June 12, 2006, TD Ameritrade sent Otto a letter confirming that its termination of its relationship with him barred him from having authorization or power of attorney on any TD Ameritrade accounts, from facilitating or authorizing others to conduct activities through TD Ameritrade, and from accessing any TD Ameritrade account or allowing others to access those accounts on his behalf.
6. Notwithstanding these communications from TD Ameritrade, between September 1, 2006, and March 25, 2007, Otto accessed TD Ameritrade accounts approximately 400 times under the guise of the holders of the accounts (i.e., by using PIN numbers and other information intended to allow the holders access to the accounts). Otto effected securities transactions on some of the occasions that he accessed the accounts.
7. Through this conduct, Otto willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.
8. In 2002, Otto entered into an arrangement with the Advisory Client in which he facilitated a transfer of the Advisory Client's securities to an account at TD Ameritrade and acquired trading authority on that account. From 2002 through

2007, Otto traded the securities in the Advisory Client's TD Ameritrade account. The Advisory Client paid Otto a management fee of 1% of the assets in the TD Ameritrade account, with a payment of 1.5% of assets if Otto doubled the S&P 500.

9. On March 19, 2007, Otto called TD Ameritrade and claimed to be the Advisory Client. Otto provided TD Ameritrade with the last four digits of the Advisory Client's social security number as identification. Posing as the Advisory Client, Otto attempted to facilitate the payment of his advisory fee through issuance of a check from the Advisory Client's account to Otto in the amount of \$1,300. The Advisory Client had authorized the issuance of the check to Otto, but did not authorize Otto to call TD Ameritrade and identify himself as the Advisory Client.
10. On March 28, 2007, Otto called TD Ameritrade and again claimed to be the Advisory Client. Otto provided TD Ameritrade with the last four digits of the Advisory Client's social security number, the Advisory Client's date of birth and identified one of the stocks held in the Advisory Client's account in order to confirm to TD Ameritrade that he was the Advisory Client. In this call, Otto requested assistance in accessing the Advisory Client's TD Ameritrade account via the Internet. The Advisory Client did not authorize Otto to call TD Ameritrade and identify himself as the Advisory Client.
11. Otto called TD Ameritrade on at least two other occasions and claimed to be the Advisory Client without the Advisory Client's authorization.
12. Through this conduct, Otto willfully violated Sections 206(1) and (2) of the Advisers Act.

### III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

- A. Whether the allegations set forth in Section II are true and, in connection therewith, to afford Respondent an opportunity to establish any defenses to such allegations;
- B. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 15(b)(6) of the Exchange Act including, but not limited to, disgorgement and civil penalties pursuant to Sections 21B(a) and (e) of the Exchange Act;
- C. What, if any, remedial action is appropriate in the public interest against Respondent pursuant to Section 203(f) of the Advisers Act including, but not limited to,

disgorgement and civil penalties pursuant to Sections 203(i) and (j) of the Advisers Act; and

D. Whether, pursuant to Sections 21C of the Exchange Act and 203(k) of the Advisers Act, Respondent should be ordered to cease and desist from committing or causing violations of, and any future violations of, Sections 10(b) and 15(a) of the Exchange Act and Rule 10b-5 thereunder and Sections 206(1) and (2) of the Advisers Act.

#### IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondent fails to file the directed answer, or fails to appear at a hearing after being duly notified, the Respondent may be deemed in default and the proceedings may be determined against him upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondent personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not “rule making” within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy  
Secretary