

**UNITED STATES OF AMERICA  
BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES ACT OF 1933**

Release No. 8872 / December 18, 2007

**SECURITIES EXCHANGE ACT OF 1934**

Release No. 56979 / December 18, 2007

**INVESTMENT COMPANY ACT OF 1940**

Release No. 28077 / December 18, 2007

**INVESTMENT ADVISERS ACT OF 1940**

Release No. 2683 / December 18, 2007

**ADMINISTRATIVE PROCEEDING**

File No. 3-12906

**In the Matter of**

**MARC H. PLOTKIN,**

**Respondent.**

**ORDER INSTITUTING  
ADMINISTRATIVE AND CEASE-AND-  
DESIST PROCEEDINGS, MAKING  
FINDINGS, AND IMPOSING REMEDIAL  
SANCTIONS AND A CEASE-AND-DESIST  
ORDER PURSUANT TO SECTION 8A OF  
THE SECURITIES ACT OF 1933,  
SECTIONS 15(b) AND 21C OF THE  
SECURITIES EXCHANGE ACT OF 1934,  
SECTION 9(b) OF THE INVESTMENT  
COMPANY ACT OF 1940, AND SECTION  
203(f) 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 Section 8A of the Securities Act of 1933 (“Securities Act”), Sections 15(b) and 21C of the Securities Exchange Act of 1934 (“Exchange Act”), Section 9(b) of the Investment Company Act of 1940 (“Investment Company Act”), and Section 203(f) of the Investment Advisers Act of 1940 (“Advisers Act”) against Marc H. Plotkin (“Plotkin” or “Respondent”).

## II.

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

## III.

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

### Summary

1. Plotkin was a registered representative from March 2000 until November 2003 at Morgan Stanley DW Inc. (“MSDW”), a broker-dealer and investment adviser registered with the Commission during the relevant time period. From approximately January 2002 through March 2003, Plotkin knowingly and substantially assisted another MSDW financial advisor (“FA 1”) engage in deceptive trading practices designed to circumvent mutual funds’ restrictions on market timing.<sup>2</sup> By virtue of his conduct, Plotkin willfully aided and abetted and caused violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5.

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

<sup>2</sup> Market timing includes (a) frequent buying and selling of shares of the same mutual fund or (b) buying or selling mutual fund shares in order to exploit inefficiencies in mutual fund pricing. Market timing, while not illegal *per se*, can harm other mutual fund shareholders because it can dilute the value of their shares if the market timer is exploiting pricing inefficiencies, disrupt the management of the mutual fund’s investment portfolio, and cause the targeted mutual fund to incur costs borne by shareholders to accommodate frequent buying and selling of shares by the market timer.

### **Respondent**

2. Plotkin, 71, was a financial advisor from March 2000 until November 2003 in MSDW's Third Avenue, New York, New York office. At all relevant times, Plotkin held a General Securities Representative license (Series 7) with NASD. From November 2003 until he retired on May 31, 2007, Plotkin was a registered representative at another firm.

### **Other Relevant Entity**

3. MSDW, during the relevant time period, was a Delaware corporation with its principal place of business in New York, New York. Also during the relevant time period, MSDW was a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act, a registered investment adviser pursuant to Section 203(c) of the Advisers Act, and a member of self-regulatory organizations, including the National Association of Securities Dealers ("NASD") and the New York Stock Exchange. MSDW was a wholly owned subsidiary of Morgan Stanley, a Delaware corporation whose common stock trades on the New York Stock Exchange, until April 1, 2007, when MSDW merged into Morgan Stanley & Co. Incorporated, also a wholly owned subsidiary of Morgan Stanley and a broker-dealer registered with the Commission pursuant to Section 15(b) of the Exchange Act, to form a single broker-dealer.

### **Background**

4. From approximately January 2002 through March 2003, Plotkin substantially assisted another MSDW financial advisor, FA 1, in engaging in deceptive trading practices designed to circumvent mutual funds' restrictions on market timing. Plotkin assisted FA 1 in deceiving multiple mutual funds and their shareholders in at least 19 fund companies by engaging in deceptive practices to circumvent restrictions the mutual fund companies imposed on market timing.

### **Respondent's Assistance in Deceptive Trading Activity**

5. Plotkin and FA 1 worked in MSDW's Third Avenue, New York, New York office. FA 1 engaged in, and Plotkin substantially assisted FA 1 in engaging in, deceptive market-timing practices on behalf of two different New York-based hedge fund customers. FA 1 placed market-timing trades in mutual funds for one New York-based hedge fund from at least January 2002 until July 2003. Plotkin placed market-timing trades for this customer from at least January 2002 through March 2003. FA 1 and Plotkin placed market-timing trades for the other New York-based hedge fund from at least January 2002 through March 2003. Plotkin knew that both hedge funds' trading strategy was to market-time mutual funds. Together, FA 1 and Plotkin placed over 2,500 market-timing trades for these customers in 2002 and 2003. This trading made Plotkin a top ten revenue generator in the Third Avenue office in 2002.

6. Most of the mutual funds in which FA 1 and Plotkin placed market-timing trades either prohibited market timing or limited the number and frequency of trades in an effort to prevent market timing. The mutual funds reserved the right to cancel or reject trades that violated their market-timing policies and attempted to enforce these policies primarily by monitoring the trading associated with a particular account number. Some of the mutual funds monitored trading associated with the financial advisor's identification number. When the funds detected a market-timing trade that violated their policy, they would generally block the trade. In many cases, the funds also blocked all future trades by that account or blocked all future trades in that fund family by the financial advisor associated with the trade.

7. Fund companies informed MSDW by letters or emails, generally referred to as block letters, of the violative trading detected and the action taken. From December 14, 2001 until February 10, 2003, MSDW received over 125 block letters from mutual funds attempting to stop FA 1's and Plotkin's market-timing trading for the two New York-based hedge fund customers. The block letters were typically sent to employees in MSDW's Mutual Fund Operations department, which oversaw mutual fund trading and dealt directly with fund companies. Mutual Fund Operations employees then forwarded the block letters to FA 1, Plotkin, their branch manager, and MSDW compliance personnel.

8. In order to prevent detection as a market-timer and to continue placing market-timing trades once detected, Plotkin knowingly and substantially assisted FA 1 in engaging in a series of deceptive acts and practices to conceal their customers' market-timing activity from fund companies.

9. For example, FA 1 and Plotkin placed market-timing trades through multiple accounts they opened for the customers, including accounts opened in response to the block letters. Multiple accounts made it harder for fund companies to monitor trading and allowed the hedge fund customers to re-enter funds that had blocked their other accounts. FA 1 and Plotkin opened approximately 59 accounts for one of the New York-based hedge funds and 13 accounts for the other New York-based hedge fund in order to circumvent mutual funds' restrictions on market timing. The accounts were opened in the names of multiple entities associated with the hedge funds. Plotkin also assisted FA 1 in effecting transfers between the related accounts in furtherance of the deceptive scheme.

10. In addition, FA 1 and Plotkin placed trades for the hedge fund customers under multiple financial advisor identification numbers to circumvent mutual fund restrictions on market timing, including restrictions imposed by block letters. FA 1 and Plotkin placed market-timing trades using the identification number of a retiring financial advisor to circumvent mutual fund restrictions on market timing. FA 1 and Plotkin also placed market-timing trades using financial advisor identification numbers they obtained by entering into a joint production agreement with a financial advisor in their own office and multiple joint production agreements with a financial advisor in another MSDW office. Identification numbers from the joint production agreements with the financial advisor at the other office facilitated the market-timing activity because trades using those identification numbers contained a branch code prefix not associated with the Third

Avenue office. FA 1 and Plotkin used at least eight different financial advisor identification numbers to place trades for the two hedge fund customers.

11. Plotkin also substantially assisted FA 1 in disguising market-timing trades by assisting the hedge fund customers in acquiring, and placing trades in, variable annuity contracts from issuers that held mutual funds in their underlying sub-accounts. Because the variable annuity issuers aggregate and transmit trades in their contracted fund companies on a net basis, the fund companies had difficulty identifying trading by particular customers or financial advisors. FA 1 and Plotkin opened approximately 32 variable annuity contracts for one of the New York-based hedge funds, and 14 for the other New York-based hedge fund, in order to enable these customers to market-time the underlying mutual funds.

12. Plotkin knew of the deceptive nature of the trading in which he substantially assisted FA 1. Plotkin willfully engaged in the practices described above to effect the trading and further the scheme.

### **Violations**

13. As a result of the conduct described above, Plotkin willfully aided and abetted and caused violations of Section 17(a) of the Securities Act, which prohibits fraudulent conduct in the offer or sale of securities, and Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5, which prohibits fraudulent conduct in connection with the purchase or sale of securities.<sup>3</sup>

### **Undertakings**

14. In determining whether to accept the Offer, the Commission has further considered the following undertakings by Respondent:

**Ongoing Cooperation:** Respondent shall cooperate fully with the Commission in any and all investigations, litigations or other proceedings relating to or arising from the matters described in the Order. In connection with such cooperation, Respondent has undertaken:

1. To produce, without service of a notice or subpoena, any and all non-privileged documents and other information requested by the Commission's staff;
2. To be interviewed by the Commission's staff at such times as the staff reasonably may request and to appear and testify without service of a notice or subpoena in such investigations, litigations, hearings or trials as may be requested by the Commission's staff; and
3. That in connection with any testimony of Respondent to be conducted at deposition, hearing or trial pursuant to a notice or subpoena, Respondent:
  - i. Agrees that any such notice or subpoena for Respondent's appearance and testimony may be served by regular mail on: Michael L. Spafford,

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<sup>3</sup> "Willfully" as used in this Order means intentionally committing the act that constitutes the violation. *See Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000); *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965).

Esq., McKee Nelson LLP, 1919 M Street N.W., Suite 200, Washington, D.C. 20036;

- ii. Agrees that any such notice or subpoena for Respondent's appearance and testimony in any action pending in a United States District Court may be served, and may require testimony, beyond the territorial limits imposed by the Federal Rules of Civil Procedure.

#### IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

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

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

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

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

D. It is further ordered that Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$90,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Such 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 Marc H. Plotkin as a Respondent in these proceedings and the file

number of these proceedings, a copy of which cover letter and money order or check shall be sent to Christopher R. Conte, Esq., Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549.

By the Commission.

Nancy M. Morris  
Secretary