SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3260 / August 5, 2011

INVESTMENT COMPANY ACT OF 1940
Rel. No. 29746 / August 5, 2011

Admin. Proc. File No. 3-12978

In the Matter of

ROBERT L. BURNS

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING

INVESTMENT COMPANY PROCEEDING

Grounds for Remedial Action

Accepting prohibited compensation from brokerage firms

Equity trader, who was affiliated person of investment adviser, willfully accepted compensation from brokerage firms that sought and obtained orders to buy or sell securities on behalf of trader's advisory clients, in violation of Section 17(e)(1) of the Investment Company Act of 1940. *Held*, it is in the public interest to censure respondent, impose a cease-and-desist order, order disgorgement of $141,822.50, and assess a $40,000 civil penalty.

APPEARANCES:

Robert L. Burns, *pro se*.

Frank C. Huntington, for the Division of Enforcement.

Appeal filed: February 9, 2011
Last brief received: April 29, 2011

I.

Robert L. Burns, a former equity trader at FMR Co., Inc., a registered investment adviser, appeals an administrative law judge's decision. The law judge found, on summary disposition, that Burns willfully violated Section 17(e)(1) of the Investment Company Act of 1940 by accepting compensation from brokerage firms to which he transmitted orders to buy and sell securities on behalf of certain mutual funds that were advisory clients of FMR Co. The law judge censured Burns, imposed a cease-and-desist order, and ordered Burns to disgorge $135,281.45 plus prejudgment interest and to pay a $40,000 civil penalty. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

The salient facts of this case are not in dispute. From 1986 until he was dismissed in December 2004, Burns was an equity trader at FMR Co., Inc., a wholly-owned subsidiary of Fidelity Management and Research Company that provides portfolio management services to, among other clients, the Fidelity Investments group of mutual funds. As an equity trader, Burns received orders from mutual fund portfolio managers and had discretion to choose the brokers, from a list of brokers approved by Fidelity, to whom he would send orders to buy or sell securities.

From 2002 through 2004, Burns sent orders to more than fifty brokerage firms, including ten firms from which he accepted gifts such as wine, travel, and tickets to various concerts, sporting events, and theater productions.[1] The record demonstrates, through a combination of Burns' written admissions, investigative testimony, e-mails between Burns and brokers, and

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[1] The Commission instituted administrative proceedings against eight other equity traders and two supervisors of the equity trading desk at FMR Co. for engaging in similar conduct during the same time period. All have settled those proceedings. *See Thomas H. Bruderman*, Investment Advisers Act Rel. No. 3184 (Apr. 4, 2011), __ SEC Docket __; *Kirk C. Smith*, Advisers Act Rel. No. 2819 (Dec. 11, 2008), 94 SEC Docket 12347, 12349; *Steven P. Pasucci*, Advisers Act Rel. No. 2818 (Dec. 11, 2008), 94 SEC Docket 12343, 12345; *Christopher J. Horan*, Advisers Act Rel. No. 2817 (Dec. 11, 2008), 94 SEC Docket 12339, 12341; *Edward S. Driscoll*, Advisers Act Rel. No. 2816 (Dec. 11, 2008), 94 SEC Docket 12334, 12336; *Scott E. DeSano*, Advisers Act Rel. No. 2815 (Dec. 11, 2008), 94 SEC Docket 12321, 12324; *Timothy J. Burnieika*, Advisers Act Rel. No. 2814 (Dec. 11, 2008), 94 SEC Docket 12317, 12318-19; *Jeffrey D. Harris*, Advisers Act Rel. No. 2813 (Dec. 11, 2008), 94 SEC Docket 12313, 12314-15; *David K. Donovan*, Advisers Act Rel. No. 2812 (Dec. 11, 2008), 94 SEC Docket 12309, 12311; *Bart A. Grenier*, Advisers Act Rel. No. 2714 (Mar. 5, 2008), 92 SEC Docket 3060, 3061-62. FMR Co. and its parent, Fidelity Management & Research Company, also settled administrative proceedings arising out of these events. *See Fid. Mgmt. & Research Co.*, Advisers Act Rel. No. 2713 (Mar. 5, 2008).

brokerage firms' expense reports and receipts, that Burns received at least thirty-nine gifts from these brokers. Examples of the gifts include tickets to the finals weekend at Wimbledon in 2002 (eight tickets), 2003 (eight tickets) and 2004 (twelve tickets); fourteen tickets to the U.S. Open tennis tournament in September 2002; a case of 1993 Château Pétrus Pomerol wine in December 2003; tickets to see Prince, the Rolling Stones, Bruce Springsteen, Madonna, and several other performers in concert; tickets to see the Celtics, Red Sox, and Patriots play (sometimes in playoff games); and tickets to numerous theater productions, including "The Lion King," "The Producers," "Avenue Q," and "Hairspray."

The record also demonstrates that Burns often expressed gratitude for the gifts he received, and that brokers often alerted him to the difficulty of obtaining the gifts. For example, when Burns received eight tickets to a Broadway production of the musical "Hairspray" in December 2002 from a broker named Kevin Quinn, Quinn e-mailed Burns to tell him that "[T]hese tixs are not easy by the way," to which Burns replied, "I know. That's why I asked Kevin 'The Man' Quinn for a big favor."[2] In February 2003, Burns sent an e-mail thanking a broker at Soundview Technology Corp. ("Soundview") for giving him tickets to a sporting event; in response, the broker wrote, "The demand for those tix was the highest I have had – sans playoffs – in years. I was holding them out for a quality friend and confidente [sic]. I am not surprised that you ended up w/ them." When Burns requested tickets from Quinn to a Red Sox playoff game in October 2003, Quinn e-mailed him to say, "I have miraculously been able to make 4 great seats appear. I have no doubt that you will reward me for being a true friend. A friend in need is a friend indeed."

For many of the items Burns received, the Division introduced documentary evidence consisting of brokers' expense reports and related receipts that demonstrate the cost paid by the broker to purchase the gift for Burns. These items, and the cost of each as shown by record evidence, are given in Table A below:

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[2] Quinn, a former account executive and senior vice president of equity and sales at Jefferies & Co. ("Jefferies"), settled Commission administrative proceedings charging him with giving gifts to several traders (including Burns) and, among other things, thereby aiding and abetting and causing the traders' violations of Section 17(e)(1). *Kevin W. Quinn*, Investment Co. Act Rel. No. 27588 (Dec. 1, 2006), 89 SEC Docket 1381, 1383. Jefferies also settled Commission administrative proceedings against it arising from these activities. *Jefferies & Co., Inc.*, Exchange Act Rel. No. 54861 (Dec. 1, 2006), 89 SEC Docket 1362, 1364-65.

Table A: Gifts to Burns of Known Cost Paid by the Giving Brokers		
Date	*Gift*	*Price paid*
July 2002	Eight tickets to the finals weekend of the Wimbledon tennis tournament from Jefferies & Co. ("Jefferies") at $1,675 per ticket for Saturday's matches and $3,100 per ticket for Sunday's matches	$19,100
Sept. 2002	Two tickets to the U.S. Open tennis tournament from Robert W. Baird & Co. ("Baird")	$3,700
Oct. 2002	Four tickets to a Bruce Springsteen concert from Jefferies	$800
Nov. - Dec. 2002	Five bottles of wine from Jefferies at $149.95 each and three bottles at $1,675 each; one bottle from Morgan Stanley & Co. ("Morgan Stanley") at $118.47	$5,893.22
Dec. 2002	Eight tickets to the "Hairspray" theater production from Jefferies	$3,610
Apr. 2003	Four tickets to an Alvin Ailey Dance Company show from Jefferies	$700
May 2003	Four tickets to a Red Sox game from Soundview	$1,100
June 2003	Four tickets to a Broadway performance from Lehman Brothers, Inc. ("Lehman")	$800
July 2003	Eight tickets to the finals weekend of the Wimbledon tennis tournament from Jefferies at $2,091 each for Saturday's matches and $3,095 each for Sunday's matches	$31,216
Aug. 2003	Four tickets to a Justin Timberlake and Christina Aguilera concert from Jefferies	$600
Sept. 2003	Four tickets to the finals weekend of the U.S. Open tennis tournament from Jefferies	$7,200
Oct. 2003	Four tickets to a Red Sox playoff game from Soundview	$1,950
Dec. 2003	A case (twelve bottles) of 1993 Château Pétrus	$7,627.77

	Pomerol wine from Jefferies at $625 per bottle; one bottle of champagne from Morgan Stanley at $127.77	
Jan. 2004	One ticket to a Patriots playoff game from Fidelity Capital Markets ("FCM")	$503.75
Mar. 2004	Tickets to an Erykah Badu concert from Jefferies	$1,080
Apr. 2004	A Masters golf tournament shirt from Jefferies	$125
June 2004	Four tickets to a Red Sox game from Needham & Co. ("Needham")	$900
July 2004	Twelve tickets to the finals weekend of the Wimbledon tennis tournament from Jefferies costing £20,200 plus a 3.4% service charge, or $38,207.59, and four nights' lodging at the Lanesborough Hotel in London costing £6,575.28 or $12,470.21	$51,016.76
	Total:	$137,922.50

For certain other gifts, the Division did not submit evidence of the actual cost of the gift but provided an estimate that was countered by an estimate Burns himself provided in documents he submitted to FMR Co. in the course of its investigation. On appeal, the Division does not object to the use of Burns' estimates in place of its own. Under Commission Rule of Practice 250(a),[3] we may take as evidence Burns' estimates as admissions on summary disposition, and we do so here. We identify the gifts for which Burns provided an estimate of the value in Table B below:

Table B: Gifts to Burns for Which Burns Provides an Estimate of Value		
Date	*Gift*	*Burns' estimate*
Apr. 2003	Federal Cup tennis tournament tickets (twelve from Jefferies)	$30 - $40 each
May 2003	"Lion King" tickets (four from an unidentified broker)	$85 - $100 each
Aug. 2003	Use of vacation home in Wellfleet, MA for	$500 - $1,000

[3] 17 C.F.R. § 201.250(a).

	one week (from Knight Securities, L.P. ("Knight")). Burns stated he reimbursed the broker $700 - $800 for this trip	
Jan. 2004	Use of vacation condominium in New Hampshire for a weekend (from Knight)	$300
Feb. 2004	"Moving Out" and "Avenue Q" tickets (four tickets each from Jefferies)	$65 - $85 each
Mar. 2004	Use of vacation condominium in New Hampshire for a weekend (from Knight)	$300
June 2004	Madonna concert tickets (four from Jefferies)	$100 each
Aug. 2004	"Avenue Q" and "Caroline, or Change" tickets (four each from Baird)	$65 - $85 each
Aug. 2004	Prince concert tickets (from Baird)	Burns conceded that six cost $75 each and estimates other four cost $65 each.
Sept. 2004	Red Sox tickets (six from Knight and Needham)	$75 each
		Total: $4,400 - $5,770

Burns also received several gifts for which neither the Division nor Burns provided evidence of value. In addition, there were a number of gifts that Burns requested and received not for himself but for Peter Lynch, who served as vice chairman and director of FMR Co. and Fidelity Management & Research Company and was the former portfolio manager of Fidelity's Magellan Fund.[4] We group both of these types of gifts together in Table C, below, because these gifts serve as evidence of Burns' violation[5] but, as we will discuss later with respect to the appropriate sanction in this case, they do not contribute to the figure Burns should disgorge.

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[4] Lynch settled Commission administrative proceedings against him based on his alleged request and receipt of tickets to sporting and entertainment events from Burns and another FMR Co. trader, which allegedly caused certain of the traders' violations of Advisers Act Section 17(e)(1). *See Peter S. Lynch*, Investment Co. Act Rel. No. 28189 (Mar. 5, 2008), 92 SEC Docket 3101, 3102-03.

[5] *See infra* note 12 and accompanying text.

Table C: Gifts to Burns for Which the Record Contains No Evidence of Value, or Which Burns Gave to Lynch	
Date	*Gift*
Mar. 2002	Celtics tickets (two from Robertson Stephens, Inc. ("Robertson Stephens"))
Sept. 2002	Rolling Stones tickets (two from Jefferies)
Sept. 2002	U.S. Open tennis tournament tickets (ten total from Jefferies, Lehman, and Morgan Stanley)
Oct. 2002	"Lion King" tickets for Lynch (three from Jefferies)
Dec. 2002	Wine (from Needham)
Feb. 2003	Unidentified sporting event (unknown number of tickets from Soundview). We note that, although the law judge does not appear to have counted this item as a benefit Burns received, we conclude that e-mail correspondence between Burns and the Soundview broker sufficiently establishes that the broker gave Burns tickets to a sporting event in February 2003, and that Burns considered them to be of some value.
Apr. 2003	Celtics playoff game (four from Soundview)
July 2003	Red Sox game (two from Soundview)
Sept. 2003	"The Producers" tickets for Lynch (two from Jefferies)
Dec. 2003	Case of wine (from Instinet, LLC ("Instinet"))
Feb. 2004	"The Producers" tickets (four from Baird)
Summer 2004	Red Sox tickets (four from Schwab Soundview Capital Markets ("Schwab"), fka Soundview)
Sept. 2004	Ryder Cup gold tournament tickets for Lynch (twelve from Baird)
Sept. 2004	Red Sox playoff game tickets for Lynch (two from Knight or Needham)
2003 or 2004	Neil Diamond concert tickets for Lynch (two from Jefferies)

Burns does not dispute that he received any of the items at issue.[6] Nor does Burns contest the Division's representation that, according to data supplied by Fidelity, Burns sent securities transactions involving more than 2 billion shares to the ten brokerage firms from which he received gifts during 2002 - 2004.[7]

III.

Section 17(e)(1) of the Investment Company Act prohibits, with certain exceptions not relevant here, the receipt by an affiliated person of an investment company, acting as agent, of compensation from any other source for the purchase or sale of the company's property.[8] First, the record demonstrates, and Burns concedes, that Burns was an "affiliated person" under Section 17(e)(1) because he was an employee of an investment adviser (FMR Co.) to an

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[6] Although Burns does not contest that he received any of the gifts at issue in this proceeding, we exclude from consideration three items that the law judge appears to have found that Burns received but which we find are not established with sufficient clarity to support a finding of liability. These items were alleged to be three tickets to an unidentified theater event in October 2002, two tickets to an unidentified event in November 2002, and an unknown number of seats to an unidentified sporting event in January 2003. In excluding these items we are mindful of the fact that, in reviewing appeals of decisions made on motions for summary disposition, the "facts of the pleading of the party against whom the motion is made shall be taken as true. . . ." *Conrad P. Seghers*, Advisers Act Rel. No. 2656 (Sept. 26, 2007), 91 SEC Docket 2293, 2301 & n.30 (quoting Rule of Practice 250(b), 17 C.F.R. § 201.250(b)).

[7] Specifically, according to the Division, from 2002 - 2004 Burns directed transactions involving 541,555,078 shares to FCM, 442,264,543 to Lehman, 331,783,942 to Morgan Stanley, 279,835,684 to Baird, 202,485,456 to Jefferies, 132,818,191 to Knight, 82,147,580 to Instinet, 29,076,719 to Needham, 33,309,252 to Soundview and Schwab Soundview, and 1,114,100 to Robertson Stephens.

[8] Section 17(e)(1) of the Investment Company Act provides that

> it shall be unlawful for any affiliated person of a registered investment company, or any affiliated person of such a person, acting as agent, to accept from any source any compensation (other than regular salary or wages from such registered company) for the purchase or sale of any property to or for such registered company or any controlled company thereof, except in the course of such person's business as an underwriter or broker[.]

investment company (the Fidelity Funds).[9] Second, Burns concedes, and the record demonstrates, that Burns, who directed securities trades to brokers for execution on behalf of mutual funds, was "acting as agent" within the meaning of the statute.[10] Third, the record demonstrates that the various gifts Burns received constitute "compensation" within the meaning of Section 17(e)(1), which is broadly defined to include "any economic benefit paid directly or indirectly to an adviser."[11] The gifts listed above, for which Burns often expressed appreciation and gratitude in correspondence with the givers, were of at least some value to Burns.[12] The record therefore supports finding that the first three prongs of Section 17(e)(1) are satisfied.

The fourth requirement for liability under Section 17(e)(1) is that the compensation be received "for the purchase or sale of any property to or for" a registered investment company. Congress intended the scope of Section 17(e)(1) to be broad. In *United States v. Deutsch*, the U.S. Court of Appeals for the Second Circuit examined the legislative history of the Investment Company Act and noted that Section 17 was "aimed specifically at insuring the independence of

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[9] As noted, Section 17(e)(1) applies to "any affiliated person of a registered investment company, or any affiliated person of such person." The Investment Company Act defines an "affiliated person of another person" as "any officer, director, copartner, or employee of such other person; [and,] if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof." 15 U.S.C. § 80a-2(a)(3)(D)-(E).

[10] "[A]n affiliated person is acting as agent within the meaning of § 17(e)(1) in all cases when he is not acting as broker for the investment company." *United States v. Deutsch*, 451 F.2d 98, 111 (2d Cir. 1972), *cert. denied*, 404 U.S. 1019 (1972).

[11] *See also William Lewis Morgan*, 51 S.E.C. 622, 627 n.21 (1993) (characterizing "compensation" under Section 17(e)(1) as a "synonym for economic benefit") (citing *Investors Research Corp.*, 46 S.E.C. 1209, 1216 n. 28 (1978)), *remanded on other grounds*, 628 F.2d 168 (D.C. Cir.), *cert. denied*, 449 U.S. 919 (1980); *Steadman Security Corp.*, 46 S.E.C. 896, 910 n. 38 (1977), *aff'd and remanded on other grounds*, 603 F.2d 1126 (5th Cir.1979), *aff'd* (as to standard of proof), 450 U.S. 91 (1981); *United States v. Milken*, 759 F. Supp. 109, 120 (S.D.N.Y. 1990) ("Section 17(e)(1) requires only that the affiliated person believe that the gratuity he has received constitutes 'something of value' at the time he received it. The precise value of the gratuity in the marketplace is of little importance.") (citing *United States v. Deutsch*, 451 F.2d 98, 108 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972)).

[12] In his petition for review, Burns "disagree[s]" with the law judge's determination that gifts he accepted for Lynch meet the compensation requirement of Section 17(e)(1). However, Burns himself identifies the value of these items: he states that the "only benefit or value that I received from such actions was to keep my boss happy and favorably disposed to me – to keep my job." As demonstrated by the case law cited above, this kind of benefit qualifies as "something of value" within the broad scope of the statute. We find that the gifts Burns accepted for Lynch support a finding that Burns received prohibited compensation under Section 17(e)(1).

management" of investment companies and "was designed in part quite clearly to establish broad standards which would more easily enable the government to convict affiliated persons for self-dealing in the management of investment companies – an industry the very nature of which made it difficult to gather proof."[13] The Court concluded that Section 17(e)(1) is "cast in the familiar 'for' terminology of the [federal] gratuity statutes where the only intent required is that the payment be given and accepted in appreciation of past, or in anticipation of future, conduct."[14] Indeed, the Court found, "[t]he paying of compensation is evil in itself, even though the payor does not corruptly intend to influence the affiliated person's acts, for it tends to bring about preferential treatment in favor of the payor which can easily injure the beneficiaries of investment companies."[15]

In *Decker v. SEC*, the U.S. Court of Appeals for the Tenth Circuit further explained the meaning of the phrase "for the purchase or sale of any property."[16] In that case, the Court agreed with *Deutsch*'s conclusion that this provision did not require the Division to prove any "intent to influence."[17] It explained that, instead, the Division must simply establish that respondent was "in a position where his own interests and the interests of [his employing investment advisor] were in conflict with the interests of the [mutual funds]." Once the Division establishes that a conflict existed, the Court reasoned, "'the burden shifts to the party in conflict to prove that he has been faithful to his trust.'"[18] That is, it becomes Burns' burden to produce evidence that none of the gifts he received were in exchange for the brokerage business he distributed.[19]

The record shows, and Burns does not contest, that Burns accepted numerous gifts from multiple brokers to whom Burns had directed (and continued to direct) securities transactions on behalf of mutual funds to which he, affiliated with the funds' adviser, owed a fiduciary duty. We therefore conclude that the Division made a prima facie showing that, in accepting these gifts, Burns' interest conflicted with that of the investment companies he was advising. As *Decker* provides, the burden of proof then shifted to Burns to prove that none of the gifts he received was in exchange for the brokerage business he gave to the giftors.

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[13] 451 F. 2d 98, 108 (2d Cir. 1971).

[14] *Id*. at 112 (citing 18 U.S.C. §§ 201 (f-i) (1964).

[15] *Id*. at 112.

[16] 631 F.2d 1380, 1383 n.4 (10th Cir. 1980).

[17] *Id*. at 1384.

[18] *Id*. at 1385 (quoting *Investors Research Corp. v. SEC*, 628 F.2d 168, 175 (D.C. Cir. 1980)).

[19] *Id*.

Burns has offered no such evidence. In lieu of such proof, he points out that the Division has not provided a "particularized, gift-by-gift inquiry" showing how each and every gift he received caused him to direct his securities orders differently. He argues that, although he took gifts from brokers, the Division "failed to find ANY circumstance where [Burns] purchased securities for other than the lowest possible price." However, under *Decker*, it is not the Division's task to prove the quid pro quo that Burns provided in exchange for each gift; instead, once the Division shows Burns placed himself in a position where his interests conflicted with the trust placed in him by the investment companies and, by extension, their shareholders, it became Burns' task to prove that none of the gift-giving violated that trust.[20] He has not done so.

Burns claims that, if he must demonstrate that he has been "faithful to his trust," then "trial discovery is the appropriate time to gather all such evidence on this critical point." However, to defeat summary disposition, the opposing party must present facts demonstrating a genuine issue of fact that is material to the charged violation.[21] Burns suggests that at a hearing he would present evidence that he never "traded to the detriment of the Fidelity Funds" and which "might go a long way in proving lack of improper intent." However, Rule 250 provides that the law judge "shall deny or defer the motion" if "it appears that a party, for good cause shown, cannot present by affidavit prior to hearing facts essential to justify opposition to the motion."[22] In connection with the Rule 250 motion before the law judge, Burns neither presented the evidence to which he refers nor made a showing why he could not do so, nor does he do so now.

Moreover, even if Burns were to establish that he never traded to the detriment of the mutual funds, this would not preclude liability under Section 17(e)(1). The facts in evidence– none of which Burns contests– demonstrate that the brokers who gave Burns tens of thousands of dollars in tickets to baseball games, basketball games, concerts, Broadway shows, and tennis matches, among other things, gave them to Burns in recompense for sending them trades and in hopes that Burns would send them more. Burns has never argued that these gifts had no connection to his status as a trader for Fidelity mutual funds or to the discretion he wielded in directing billions of shares of securities transactions to brokers for execution. To be plain, brokers sent Burns gifts because of his position. Even if Burns could prove his assertion that he "never bought securities at more than the lowest price for the volume requested [or] . . . [sold] securities at other than the highest price attainable," this does not cure the obvious "abuse of trust in the investment company industry" inherent in this gift-giving – the kind of abuse that Section

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[20] *See id.*

[21] Rule of Practice 250(b), 17 C.F.R. §201.250(b); *Gary M. Kornman*, Exchange Act Rel. No. 59403 (February 13, 2009), 95 SEC Docket 14246, 14263 *aff'd. Kornman v. SEC*, 592 F. 3d 173 (D.C. Cir. 2010).

[22] Rule of Practice 250(b). *See also Kornman v. SEC, 592* F. 3d at 182 (quoting language of Rule 250(b) with approval).

17(e)(1) was designed to eliminate.[23] And it is not exempt from the "flat ban" imposed by Section 17(e)(1) on "conduct tending to compromise the fiduciary judgment of affiliated persons," even in the absence of any "larcenous intent."[24]

We conclude that there is no genuine issue with regard to any material fact, and that the Division has demonstrated as a matter of law that Burns willfully violated Investment Company Act Section 17(e)(1).[25]

V.

Burns takes issue with the sanctions imposed by the law judge, arguing that neither a censure nor a cease-and-desist order is warranted, that the law judge erred in calculating disgorgement, and that he is unable to pay disgorgement or a civil penalty. He makes several representations that are not disputed by the Division and which we accept as true for purposes of review on summary disposition.[26]

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[23] *Deutsch*, 451 F.2d at 108 (citing Hearings on S. 3580 before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. (1940) at 131 and 971).

[24] *Investors Research Corp. v. SEC*, 628 F.2d 168, 177 & n.53 (D.C. Cir. 1980) (finding no scienter requirement in Section 17(e)(1) and noting that the statute "sets forth a flat ban on certain conduct tending to compromise the fiduciary judgment of affiliated persons. There is no language suggesting a scienter requirement. Indeed, the legislative history of section 17 demonstrates specifically that Congress did not intend to saddle the Commission with the difficult problem of proving fraudulent or 'larcenous intent.'") (citing Hearings on S. 3580 before a Subcomm. of the Senate Comm. on Banking and Currency, 76th Cong., 3d Sess. (1940)).

[25] *Cf. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (holding that, where "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'") (quoting analogous Federal Rule of Procedure 56(e) and citing *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

A willful violation of the securities laws means the intentional commission of an act that constitutes the violation; there is no requirement that the actor be aware that he is violating any statutes or regulations. *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (internal quotation marks and citation omitted).

[26] Rule of Practice 250(a).

Burns notes that, unlike other traders at FMR Co. who were sanctioned by the Commission for accepting gifts from brokers, Burns did not accept gifts that were "embarrassing" to FMR Co. "[W]hile wrong," Burns states, "my actions in accepting gifts . . . did not result in any loss for my employer or my employer's clients." He asserts that he has fully cooperated with the Commission's investigation of the matter and has no prior disciplinary history. He has been unemployed since FMR Co. terminated him in 2004 and asserts that the "extreme losses" he has suffered as a result of this proceeding have taught him a "lesson [that] will surely never be forgotten." Burns asserts that he will not accept gifts again and simply wants to "bring this awful situation to a close" so that he can "turn [his] energies to finding employment."

A. Censure

Investment Advisers Act Section 203(f) authorizes the Commission to censure, place limitations on, suspend, or bar a person associated with an investment adviser if we determine that the person has, among other things, willfully violated the federal securities laws and that it is in the public interest to do so.[27] In determining whether these sanctions are in the public interest, we consider the factors articulated in *Steadman v. SEC*.[28] Those factors include the egregiousness of a respondent's actions, the degree of scienter involved, the isolated or recurrent nature of the infraction, the recognition of the wrongful nature of the conduct, the sincerity of any assurances against future violations, and the likelihood that the respondent's occupation will present opportunities for future violations.[29] This inquiry is flexible, and no single factor is dispositive.[30]

The misconduct at issue was serious. Burns accepted over $150,000 in gifts of sporting and theater tickets, travel, and wine from at least ten brokerage firms over the course of nearly three years. Although there is no allegation that Burns acted with scienter, Burns must have known that the gifts he was accepting were difficult to acquire and of substantial value.[31] Burns has, nevertheless, made assurances that he understands his conduct was wrong and that he will not engage in future violations of this sort. The Division has not contested Burns' representations. In light of these facts, we conclude that a censure will appropriately serve the

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[27] 15 U.S.C. § 80b-3(f).

[28] 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[29] *Id.*; *see also KPMG Peat Marwick, LLP*, 54 S.E.C. 1135, 1183-84 (2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002).

[30] *See Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004).

[31] Indeed, certain emails in the record suggest that, for at least some of the gifts, Burns was well aware of the scarcity and value of the gifts. *See* n. 2 and accompanying text.

remedial purpose of "alert[ing] the public . . . of the unacceptability of [Burns'] conduct" and will have the additional salutary effect of encouraging other traders to observe scrupulously the fiduciary duties they owe their investment advisory clients.[32]

B. Cease-and-Desist Order

Investment Company Act Section 9(f) and Investment Advisers Act Section 203(k) authorize the Commission to impose a cease-and-desist order if we find that any person has violated the federal securities laws or rules thereunder.[33] In our public interest analysis for cease-and-desist orders, we look to whether there is some risk of future violations.[34] The risk of future violations required to support a cease-and-desist order is significantly less than that required for an injunction; indeed, a single violation can be sufficient to indicate some risk of future violations.[35] We also consider whether other factors demonstrate a risk of future violations, including the factors discussed above in regard to Burns' censure as well as 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.[36] This inquiry is flexible, and no single factor is dispositive.[37]

As noted above, Burns engaged in serious misconduct over almost three years, accepting numerous gifts of substantial value from brokers to whom he directed business. However, we note that the conduct at issue last occurred seven years ago and that there has been no evidence presented showing that it caused demonstrable harm to investors. We also note Burns' lack of scienter and his assurances that he has learned that his acceptance of gifts from brokers was wrong. Nevertheless, Burns states that he intends to re-enter the industry as soon as these proceedings are concluded and, given his age (49), he has the potential for a long career working with investment companies and advisers. In light of the seriousness of Burns' misconduct and the fact that, given our determination not to impose a bar or suspension, he will be able to re-enter the industry at any time, we conclude that a cease-and-desist order is necessary to protect the investing public against possible future violations by Burns should he again become a

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[32] *Philip L. Spartis*, Exchange Act Rel. No. 64489 (May 13, 2011), __ SEC Docket __, __ & n.61.

[33] 15 U.S.C. §§ 80a-9(f), 80b-3(k).

[34] *KPMG Peat Marwick LLP,* 54 S.E.C. 1135, 1185 (2001), *petition denied,* 289 F.3d 109 (D.C. Cir. 2002).

[35] *Id*. at 1191; *Geiger v. SEC,* 363 F.3d 481, 489 (D.C. Cir. 2004).

[36] *KPMG,* 54 S.E.C. at 1192.

[37] *Id*.

securities professional.[38] We find that a cease-and-desist order would have remedial value by encouraging Burns and other similarly situated securities professionals to take their fiduciary responsibilities more seriously.[39]

C. Disgorgement

Investment Company Act Section 9(g) and Investment Advisers Act Section 203(j) authorize disgorgement, including reasonable prejudgment interest, in a cease-and-desist proceeding and a proceeding in which a civil money penalty may be imposed.[40] Disgorgement is an equitable remedy designed to deprive wrongdoers of their unjust enrichment and to deter others from similar misconduct.[41] "[T]he amount of disgorgement should include all gains flowing from the illegal activities."[42]

Disgorgement "need only be a reasonable approximation of profits causally connected to the violation."[43] Once the Division shows that its disgorgement figure is a reasonable approximation of the amount of unjust enrichment, the burden shifts to the respondent to demonstrate that the Division's estimate is not a reasonable approximation.[44] The Division has shown, by offering documentary evidence consisting of brokers' expense reports and related receipts, that brokers paid a total of $137,922.50 for eighteen items given to Burns, as listed above in Table A.

For the gifts listed in Table B, for which Burns provided his own value estimate in the absence of evidence from the Division supporting a different valuation, we use Burns' estimate. Where Burns provided a range for the value of the item, we use the lowest value consistent with the requirement to construe the facts on summary disposition in the light most favorable to

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38 *See KPMG*, 54 S.E.C. at 1191.

39 *Cf. Vladlen Larry Vindman*, Securities Act Rel. No. 8679 (Apr. 14, 2006), 87 SEC Docket 2626, 2648 (stating that, "[a]lthough we have ordered a penny stock bar and the payment of a civil penalty, the issuance of a cease-and-desist order should serve the remedial purpose of encouraging Vindman to take his responsibilities more seriously in the future").

40 15 U.S.C. §§ 80a-9(g), 80b-3(j).

41 *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989).

42 *David Henry Disraeli*, Exchange Act Rel. No. 57027 (Dec. 21, 2007), 92 SEC Docket 852, 879, *aff'd*, 2009 WL 1791547 (D.C. Cir. 2009) (slip copy).

43 *First City Fin. Corp.*, 890 F.2d at 1231.

44 *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 2006); *First City Fin. Corp.*, 890 F.2d at 1232.

Burns. Doing so gives an amount of $4,400. However, this amount includes the $500 which Burns estimated was the low end of the range of the value of the rental cost of the Knight broker's summer home in Wellfleet in August 2003. Burns also estimatess, without challenge from the Division, that he reimbursed the broker between $700 to $800 for this gift. Accordingly, we are deducting the $500 value for the August 2003 rental cost. This results in a total of $3,900 in gifts Burns received for which he provides his own estimate.

We do not include, for purposes of disgorgement, a value for any of the items listed in Table C. As noted, these items include gifts of two kinds: (1) gifts for which the Division did not submit documentary evidence to support its estimated value of the gifts and for which Burns himself also offers no estimate, and (2) gifts that Burns requested and accepted on behalf of a senior manager at Fidelity, Lynch. We do not include the first type of gift in our disgorgement calculation because we do not find that the evidence supports with sufficient clarity a reasonable approximation of the value of these gifts, in light of the standard of review on summary disposition. We do not include the second type of gift in our calculation because, as noted, Lynch has already disgorged the value of the gifts he received in a separate proceeding.[45]

Totaling the value of the items Burns received as proven with documentary evidence or as estimated by Burns himself (i.e., as reflected in Tables A and B), we conclude that $141,822.50 reflects the total amount that Burns should disgorge.

Burns argues that disgorgement should not be calculated using the actual cost of an item paid by the broker (as reflected in Table A) but using the face value of gifts received, which Burns believes is a "matter of public record" and which Burns suggests would be substantially lower than the actual "inflated" cost paid by the brokers who purchased the items. Burns has cited several cases and laws in support of his argument, but none of these precedents control here. For example, Burns cites Massachusetts state law prohibiting ticket brokers from charging more than $2 over face value and some federal and state ethics rules requiring gift recipients to report the face value of gifts received; he also states that federal tax law limits ticket grantors to deducting only the face value of those tickets.[46] These statutes relate to public policy matters involving regulation of particular issues – ticket scalping, ethics disclosures of public officials, and collection of federal tax revenues – that are unrelated to the present question of how to

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[45] *See supra* note 4.

[46] Burns cites Mass. Gen. L. c.140 § 185A; IRS Pub. 463 (2005) at 10.

calculate disgorgement, which is intended to serve a remedial function in the context of securities law enforcement by depriving the wrongdoer of his unjust enrichment.[47]

Burns further argues that *United States v. Ostrander*[48] and *United States v. Milken*[49] establish that "the appropriate measure of value, for purposes of Section 17(e)(1), is based on the recipient's belief concerning the value of the compensation at issue." However, Burns misconstrues these cases. Both *Ostrander* and *Milken* hold that a person who received a gift and believed it to be of at least some benefit when he received it has thereby received "compensation" for purposes of Section 17(e)(1); these cases do not extend the relevance of the recipient's subjective belief to the question of how to value the gift when calculating disgorgement, and they do not compel the result that the face value of an item, even if known, is a more accurate measure of value than the actual cost paid to procure it.

The face value of an item may be a useful starting point from which to estimate the value of a gift of unknown cost, if necessary; but here, the record demonstrates the price paid to a disinterested third-party seller of the gifts.[50] To ignore the actual cost of an item, when known, would defeat the "effective enforcement of the federal securities laws, [which] requires that the SEC be able to make violations unprofitable."[51] This is especially true where, as here, the face value of the items in question did not reflect the fact that they were in high demand and short supply, making them all but impossible to procure at face value.

We find that the Division proved the value of the items listed above either by providing uncontroverted documentary evidence to demonstrate the actual price paid by the broker or by deferring to Burns' own admission of value. In that circumstance, there is no additional fact-

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47 *See Brendan E. Murray*, Advisers Act Rel. No. 2809 (Nov. 21, 2008), 94 SEC Docket 11961, 11979 & n.47 (describing disgorgement as an "equitable remedy designed to deprive wrongdoers of unjust enrichment by returning them to where they would have been absent the violation and to deter others from violating the securities laws").

48 999 F. 2d 27, 31 (2d Cir. 1993).

49 759 F. Supp. 109, 120 (S.D.N.Y. 1990).

50 *See First City Fin. Corp.*, 890 F.2d at 1232 (finding Commission's showing of respondents' actual profits on insider trading reasonably approximated disgorgement figure and noting that while "the line between restitution and penalty is unfortunately blurred, . . . the risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty").

51 *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1474 (2d Cir. 1996).

finding that would refine the amount of disgorgement Burns properly owes. We therefore order Burns to disgorge $141,822.50, plus prejudgment interest.[52]

D. Civil Penalty

Investment Company Act Section 9(d) and Advisers Act Section 203(i) authorize the Commission to impose a civil money penalty where a respondent has willfully violated any provision of the federal securities laws and a penalty is in the public interest.[53] These acts establish a three-tiered system of civil penalties, each with a larger maximum penalty amount applicable to increasingly serious misconduct.[54] In determining whether a penalty is in the public interest, we may consider whether there was fraudulent misconduct, harm to others or unjust enrichment, whether the respondent had prior violations, and the need for deterrence, as well as such other matters as justice may require.[55]

As noted, Burns was unjustly enriched by accepting, and often requesting, numerous gifts of substantial value over the course of nearly three years. Burns' conduct is not alleged or shown to have been fraudulent, there was no demonstrated harm to others, and Burns' disciplinary history was unblemished before this proceeding. In light of the other sanctions already imposed, we find that a first-tier penalty of $4,000 for each of the ten brokerages from whom he accepted

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[52] Commission Rule of Practice 600(a), 17 C.F.R. § 201.600(a) (noting that "[p]rejudgment interest shall be due on any sum required to be paid pursuant to an order of disgorgement" and describing method of calculation of prejudgment interest due on sums ordered to be disgorged).

Burns argues that "the Staff's astronomical disgorgement demands are particularly unreasonable in view of certain other precedents," citing several disciplinary cases decided by NASD. We note that self-regulatory organizations' disciplinary decisions are not directly analogous to Commission administrative proceedings and that, in any event, it is well established that the appropriateness of a sanction "depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with the action taken in other proceedings." *Paz Sec., Inc.*, Exchange Act Rel. No. 57656 (April 11, 2008), 93 SEC Docket 5122, 5134, *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009) (citing *Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 187 (1973)).

[53] 15 U.S.C. §§ 80a-9(d), 80b-3(i).

[54] Violations committed by a natural person after February 2, 2001, but before February 14, 2005, have a maximum penalty per occurrence of $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); 28 U.S.C. § 2461 (effective Mar. 9, 2006); 17 C.F.R. §§ 201.1001, 201.1002.

[55] 15 U.S.C. §§ 80a-9(d)(3), 80b-3(i)(3).

gifts, for a total of $40,000, is an amount sufficient to deter Burns from future misconduct, and will also have a remedial effect of deterring others from engaging in the same misconduct.

E. Inability to Pay

Under Rule of Practice 630(a), we may, in our discretion, consider evidence of ability to pay in determining whether a respondent should be required to pay disgorgement, interest, or civil penalties.[56] Ability to pay, however, is only one factor that informs our determination and is not dispositive.[57] In particular, "[e]ven when a respondent demonstrates an inability to pay, we have discretion not to waive the penalty, [disgorgement, or interest,] particularly when the misconduct is sufficiently egregious."[58]

Burns represents that he has been unemployed as a result of this misconduct since FMR Co. terminated him in 2004. Burns also states that, in anticipation of having to pay financial sanctions as part of his good-faith efforts to settle these proceedings, he withdrew substantial sums from his retirement account and then sold his condominium in order to pay the taxes and penalties owed on those early-withdrawn funds. The bulk of his assets comprises the cash that he withdrew from his retirement account as well as funds still in that account. He represents that his net worth is approximately $277,823.

Burns has not adduced into the record documentation to support the representations he makes regarding his financial condition. Nonetheless, even accepting his statements as true, we find that Burns has not demonstrated that he is unable to pay the monetary sanctions that we order today. His purported net worth—more than $275,000—is, on its face, sufficient to pay the disgorgement, penalties, and interest at issue.[59] Moreover, Burns has stated that he intends to re-enter the industry when these proceedings are concluded, indicating that Burns may soon have an

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[56] 17 C.F.R. § 201.630(a).

[57] *See, e.g.*, *Brian A. Schmidt*, 55 S.E.C. 576, 597-98 (2002) (noting that, under Exchange Act Section 21B, ability to pay a penalty is but one factor to consider in determining whether a penalty is in the public interest); *see also, e.g.*, *SEC v. Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008) (per curiam) (stating that "[a]t most" a defendant's ability to pay is one factor to be considered in imposing a civil money penalty or disgorgement for violations of the federal securities laws).

[58] *Philip A. Lehman*, Exchange Act Rel. No. 54660 (Oct. 27, 2006), 89 SEC Docket 536, 543.

[59] *Cf. Thomas C. Bridge*, Exchange Act Rel. No. 60736 (Sept. 29, 2009), 96 SEC Docket 20805, 20848 (noting that a claimed net worth of $107,944 "arguably demonstrates that [respondent] has the means to pay a civil penalty" in the amount of $120,000 and finding that egregiousness of conduct outweighed arguments that respondents could not pay sanctions levied), *aff'd sub nom. Robles v. SEC*, 411 Fed. Appx. 337 (D.C. Cir. 2010).

income stream that would further improve his financial condition. In light of these considerations, and in light of the important public interest served by the sanctions imposed, we reject Burns' claim that he is unable to pay the sanctions ordered.[60]

An appropriate order will issue.[61]

By the Commission (Commissioners CASEY and WALTER; Chairman SCHAPIRO and Commissioners AGUILAR and PAREDES not participating).

Elizabeth M. Murphy
Secretary

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[60] Burns notes that "[f]air notice of the standards against which one is to be judged is a fundamental norm of administrative law," and argues that he "could not possibly have had fair warning that Section 17(e)(1) would be applied against [him] as advocated by the SEC Staff and adjudged in the Initial Decision." However, courts have found similar attacks on Section 17(e)(1) to be "without merit." *See, e.g.*, *Deutsch*, 451 F.2d at 114 ("Section 17(e)(1) clearly places men of reasonable intelligence on notice that affiliated persons cannot accept compensation in connection with the purchase or sale of property to or for their affiliated investment companies."). Moreover, we have repeatedly held that ignorance of the securities laws is not a defense to liability thereunder. *See Marc N. Geman*, 54 S.E.C. 1226, 1260 (2001), aff'd, 334 F.3d 1183 (10th Cir. 2003).

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3260 / August 5, 2011

INVESTMENT COMPANY ACT OF 1940
Rel. No. 29746 / August 5, 2011

Admin. Proc. File No. 3-12978

In the Matter of

ROBERT L. BURNS

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Burns be, and hereby is, censured; and it is further

ORDERED that Burns cease and desist from committing or causing any violations or future violations of Section 17(e)(1) of the Investment Company Act of 1940; and it is further

ORDERED that Burns disgorge $141,822.50, plus prejudgment interest of $67,205.51, such prejudgment interested calculated beginning from October 1, 2004, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that Burns pay a civil money penalty in the amount of $40,000.

Payment of the amount to be disgorged and the civil money penalty shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, 100 F Street NE, Mail Stop 6042, Washington, DC 20549; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding. A copy of the cover letter and check shall be

sent to Frank C. Huntington, Division of Enforcement, Securities and Exchange Commission, Boston Regional Office, 33 Arch Street, 23rd Floor, Boston, MA 02110-1424.

By the Commission.

Elizabeth M. Murphy
Secretary