SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Rel. No. 8721 / July 13, 2006

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54143 / July 13, 2006

Admin. Proc. File No. 3-11465

In the Matter of

DOLPHIN AND BRADBURY, INCORPORATED

and

ROBERT J. BRADBURY

OPINION OF THE COMMISSION

BROKER-DEALER PROCEEDING

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Antifraud violations

Broker-dealer acting as underwriter for public offering of municipal bonds, and firm's chief executive officer, offered and sold bonds based on offering documents that recklessly omitted to disclose material fact that made information provided misleading, in violation of Section 17(a) of the Securities Act of 1933, Sections 10(b) and 15B(c)(1) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Municipal Securities Rulemaking Board Rule G-17. Held, it is in the public interest to order broker-dealer and officer to cease and desist from committing or causing any violation or future violation of the provisions they were found to have violated; to order both to pay civil money penalty; and to order broker-dealer to disgorge ill-gotten profits plus prejudgment interest.

APPEARANCES:

Philip G. Kircher, William J. Winning, Scott Magargee, and Patricia Sons Biswanger, of Cozen O'Connor, for Dolphin and Bradbury, Incorporated and Robert J. Bradbury.

Amy J. Greer, Denise D. Colliers, and Mark R. Zehner, for the Division of Enforcement.

Appeal filed: March 17, 2005
Last brief received: June 1, 2005
Oral argument: October 31, 2005

I.

Dolphin and Bradbury, Incorporated ("D & B"), a broker-dealer registered with the Commission since 1986, Robert J. Bradbury, who owns 38% of D & B and serves as its chairman, chief executive officer, and chief operating officer (together, "Respondents"), and the Division of Enforcement appeal from the decision of an administrative law judge. 1/ The law judge found that, as alleged in the Order Instituting Proceedings ("OIP"), offering documents used by Respondents to market to investors long-term, non-taxable municipal bonds were misleading. D & B served as underwriter of the bond issue. The law judge found that, through their conduct in connection with the bond issue, Respondents willfully violated Section 17(a) of the Securities Act of 1933, 2/ Section 10(b) of the Securities Exchange Act of 1934 3/ and Rule 10b-5 thereunder, 4/ and Municipal Securities Rulemaking Board Rule G-17 ("MSRB Rule G-17"), and that D & B willfully violated, and Bradbury willfully aided and abetted and caused D & B's violation of, Exchange Act Section 15B(c)(1). 5/ The law judge ordered D & B and Bradbury to cease and desist from committing or causing violations of the provisions they were found to have violated; jointly and severally to disgorge $482,562.50, plus prejudgment interest; and to pay civil penalties of $400,000 and $82,000 respectively. The law judge rejected the Division's request that he create a fund for the benefit of investors into which the disgorgement

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1/ We take official notice of the fact that, on March 8, 2006, D & B filed with the Commission a request to withdraw its registration as a broker-dealer on Form BDW (Uniform Request - Withdrawal from Broker-Dealer Registration), which request remains pending. D & B therefore continues to be registered with the Commission as a broker-dealer.

2/ 15 U.S.C. § 77q(a).

3/ 15 U.S.C. § 78j(b).

4/ 17 C.F.R. § 240.10b-5.

5/ 15 U.S.C. § 78o-4(c)(1).

and civil penalties would be paid. 6/ We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

Acquisition by the Dauphin County General Authority of Forum Place

In July 1998, the Dauphin County General Authority ("DCGA" or "Authority"), a municipal authority, issued bonds to finance its acquisition of Forum Place, a multi-story building in Harrisburg, Pennsylvania, with approximately 376,000 square feet of net leasable office space and a parking garage for approximately 1,090 vehicles. DCGA acquired Forum Place, which is located in downtown Harrisburg adjacent to the Capitol Complex, for the public purpose of leasing space to departments and agencies of the Commonwealth or other governmental units. 7/ Before the purchase, John Vartan of Vartan Enterprises, Inc., acting on behalf of the private owner of Forum Place, the Musalair Trust, had negotiated leases for much of the office space; at closing, the seller assigned these leases to DCGA.

DCGA financed the purchase through the public offer and sale of unrated, non-taxable revenue bonds, with the source of funds for repayment limited to the stream of revenue generated by the building. 8/ The Forum Place offering comprised $72.25 million of Office and Parking Revenue Bonds, Series A of 1998; $3.1 million Subordinated Office and Parking Revenue Bonds, Series B of 1998; and $10.9 million of Subordinated Office and Parking

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6/ See Sarbanes-Oxley Act § 308, Pub. L. No. 107-204, 116 Stat. 745 (2002); 17 C.F.R. §§ 201.1100-06.

7/ Harrisburg is the seat of Dauphin County as well as the capital of Pennsylvania. The Commonwealth of Pennsylvania ("Commonwealth") is the largest employer in Dauphin County.

In a separate proceeding, also based on the Forum Place bond offering, DCGA, without admitting or denying the Commission's allegations, consented to the entry of findings that it violated Sections 17(a)(2) and 17(a)(3) of the Securities Act and to the imposition of a cease-and-desist order. See Dauphin County Gen. Auth., Securities Act Rel. No. 8415 (Apr. 26, 2004), 82 SEC Docket 2884.

8/ General obligation bonds, in contrast, are backed by the full faith and credit of the issuer. See John Downes & Jordan Elliot Goodman, Barron's Dictionary of Finance and Investment Terms 235 (5th ed. 1998).

Revenue Bonds, Series C of 1998. 9/ The Series A bonds had maturity dates ranging from 2003 to 2025, 10/ and the two types of Series B bonds matured in either 2003 or 2009. 11/

The Forum Place bonds initially qualified as non-taxable under Section 103 of the Internal Revenue Code ("Code"), 12/ and DCGA pledged to preserve that status throughout the life of the bonds. Section 103(a) of the Code generally excludes from a taxpayer's gross income interest received on state or local bonds. The general rule in Section 103(a) is, however, subject to several exceptions set forth in Section 103(b). Among these is an exception for private activity bonds. 13/ In order to avoid coming within that exception, at least 90% of the lease revenues at Forum Place had to come from state and local government tenants. 14/ If payments for use by the federal government, individuals, and private entities collectively exceeded 10%, the bonds' non-taxable status could be lost. 15/

Leasing at Forum Place at the Time of the DCGA Acquisition

Before DCGA purchased Forum Place, Vartan had already negotiated several leases for office space at Forum Place with the Commonwealth and other entities. By mid-1998, approximately 375,000 square feet of the 376,000 square feet of total net leasable space in the office building were occupied. Terms of the office leases ran from two to ten years, with various renewal options; terms of the parking leases ran from three to eight years. The principal tenant at Forum Place was the Commonwealth's Department of Transportation ("PennDOT").

9/ The Series C Bonds were not sold publicly and are not the subject of this proceeding.

10/ More specifically, $4.8 million matured in 2003; $7.8 million were to mature in 2008, $3.9 million in 2010, and the majority – $55.6 million – in 2025.

11/ Two million dollars' worth of Series B bonds matured in 2003, and $1.1 million were to mature in 2009.

12/ 26 U.S.C. § 103(a).

13/ Id. § 103(b).

14/ 26 U.S.C. § 141.

15/ One month prior to the purchase of Forum Place, DCGA had publicly issued approximately $45 million in revenue bonds to finance the acquisition of Riverfront Office Center ("Riverfront"), another privately-owned office building in Harrisburg, for the purpose of leasing space to the Commonwealth and other government tenants. The Riverfront transaction, in which Respondents were also involved, was in this sense very similar to the Forum Place transaction, and the official statement ("OS") – the principal disclosure document – for Riverfront was used as a model in drafting the Forum Place OS.

Until 1994, most of PennDOT's Harrisburg employees had offices in the Transportation & Safety Building ("T & S Building"), which was owned by the Commonwealth. A 1994 fire, plus ongoing environmental problems, caused government officials to seek temporary facilities for the occupants of the T & S Building. In October 1995, PennDOT, acting through the Commonwealth's Department of General Services ("DGS"), and Vartan Enterprises, Inc., acting for the Musalair Trust, signed a lease for 284,142 net usable square feet of office space at Forum Place (the "PennDOT lease"), which was then under construction, for use by some of PennDOT's administrative employees. 16/ The PennDOT lease was for a term of sixty-one and one-half months, with an option to renew for an additional year. When the PennDOT lease was signed, the Commonwealth had not yet decided whether to reconstruct the fire-damaged T & S Building or replace it with new construction, but it always intended to move the PennDOT employees out of Forum Place once renovation or replacement of the T & S Building was completed.

In January 1996, DGS publicly announced that the T & S Building would be demolished and replaced with a new structure, the Keystone Building. In October 1996, PennDOT's employees moved into Forum Place; the Commonwealth's lease on space for PennDOT would expire in November 2001.

In July 1998, when DCGA acquired Forum Place, the PennDOT lease accounted for approximately 79% of the office space in Forum Place, and it generated approximately 60% of Forum Place's total lease revenues. Although DGS had announced its intent to construct the Keystone Building, the demolition of the T & S Building and construction of the Keystone Building were delayed by environmental and legal problems. Thus, as of July 1998, when DCGA acquired Forum Place, the T & S Building was still standing, and site preparation for the Keystone Building had not begun.

Although the T & S Building was to be demolished, other buildings used by the Commonwealth as office space for various agencies were undergoing renovation in the mid-1990's. Before the PennDOT lease was signed in October 1995, Vartan met with Gary Crowell, the Secretary of DGS, who informed Vartan that the Commonwealth would use all of the space covered by that lease either for PennDOT administrative employees or as "swing space" for other agencies during the renovation period. 17/ DGS made no commitment, however, to use this "swing space" for a particular period of time. Several years later, a few months before DCGA's acquisition of Forum Place, a local newspaper reported that Crowell said that, after the

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16/ DGS acted as the Commonwealth's leasing agent. Vartan Enterprises, Inc. acted as agent for the Musalair Trust.

17/ DGS serves, among other things, as the leasing agent for most of the Commonwealth's agencies. "Swing space," as the term is used here, means flexible, vacant office space that could be used by Commonwealth agencies or departments that needed temporary quarters.

PennDOT employees moved out of Forum Place, the Commonwealth would "likely use that building as 'swing space' to house a variety of agencies" that would be temporarily dislocated as the Commonwealth continued to renovate Capitol Complex buildings. 18/

Preparation of the Offering Documents

Robert D. Fowler, president of Public Finance Consultants, Inc. ("PFC"), a financial advisory business, served as the financial advisor to DCGA on the Forum Place transaction. 19/ On Fowler's recommendation, DCGA retained D & B as underwriter of the Forum Place bond issue and Pepper Hamilton LLP ("Pepper Hamilton") as bond counsel. David W. Sweet served as lead attorney for Pepper Hamilton on the Forum Place transaction. On June 22, 1998, Sweet and Bradbury placed a telephone call to Thomas O'Neill of the firm Lamb, Windle & McErlane, P.C. ("LWM"), proposing that LWM serve as underwriter's counsel on the Forum Place transaction. O'Neill agreed to act as the principal LWM lawyer with respect to the Forum Place transaction; O'Neill's partner, James McErlane, subsequently acted for the firm while O'Neill was on vacation.

Bradbury, Fowler, Sweet, and O'Neill all had extensive experience with municipal bonds, and all had worked together previously. Bradbury first did business with Fowler's company, PFC, in 1989; he also had a long-standing business relationship with Pepper Hamilton. D & B had worked on more than fifty bond offerings for DCGA since 1986. 20/ Sweet had known Fowler since approximately 1990 and had worked on several transactions with PFC. Sweet and O'Neill had been law partners at one time and were still social friends. O'Neill had known Fowler for thirty years. O'Neill had worked on more than 100 transactions with D & B, one dozen transactions with PFC, and three or four transactions with DCGA.

During the June 22 call, Bradbury and Sweet told O'Neill that Forum Place was a relatively novel transaction involving the acquisition by a municipal authority of a building that would be leased almost entirely to governmental agencies, so that the interest from bonds issued to finance the transaction would be exempt from federal taxes because the building was publicly owned and publicly used. O'Neill was also told that there was a "tight time frame" for the Forum Place project and that he should use the preliminary official statement ("POS") from an earlier, similar transaction as a model in drafting the Forum Place POS because doing so "would save a

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18/ Jack Sherzer, "State Lease Study Spurs City Fears," The Patriot-News, Feb. 15, 1998, at B-1.

19/ The OIP charged PFC and Fowler with having caused DCGA's violations of Securities Act Sections 17(a)(2) and 17(a)(3). The law judge found that these charges were not established. Neither Fowler nor PFC is a party to this appeal.

20/ Bradbury testified that D & B assisted DCGA on the "remarketing of notes" approximately fifty times, as well as five or ten new bond issues.

lot of time." 21/ Because Pepper Hamilton had served as underwriter's counsel to D & B on the earlier project, Sweet had access to computerized versions of key documents used in that transaction. Sweet therefore sent O'Neill a computer disc containing offering documents from DCGA's preceding bond issue, which O'Neill used as models in preparing the Forum Place documents. O'Neill had not been advised, by Bradbury or anyone else, of any distinctions between the two transactions, and he assumed there were none. Thus, the disclosures he included in the Forum Place POS are almost identical to comparable provisions used in the earlier transaction. O'Neill circulated a first draft of the POS for comments on or about June 26, 1998. 22/

On June 30, 1998, Fowler, Sweet, and Crowell met, primarily to discuss the Commonwealth's plans for leasing space at Forum Place after PennDOT moved to the Keystone Building. 23/ Participants in the meeting had conflicting recollections as to the specifics of Crowell's remarks, but all agreed that Crowell gave no commitments or guarantees that the Commonwealth would continue to lease space at Forum Place after PennDOT's departure. 24/ Bradbury did not attend this meeting, relying instead on the description of the meeting given him by Fowler and Sweet. Neither Bradbury, nor anyone else, informed O'Neill or his partner McErlane about either the meeting or PennDOT's plans to move out of Forum Place when the Keystone Building was ready for occupancy.

On July 7, O'Neill sent the first half of the revised POS and a draft purchase contract to Sweet for distribution at a DCGA meeting on the following day. The agenda for the July 8 meeting included approval of DCGA's purchase of Forum Place, approval of the bond purchase contract with D & B, approval of the POS, and related matters. During the meeting, the issue of PennDOT's anticipated move from Forum Place into the Keystone Building arose. Fowler

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21/ As explained supra note 15, DCGA had acquired the Riverfront Office Complex in June 1998.

22/ The record contains three versions of the POS and the official statement ("OS"), the latter dated July 17, 1998. There are no relevant differences among these four documents with respect to the omissions at issue.

23/ Fowler testified that he had recognized as early as April 1998 that the fate of Forum Place after PennDOT's move was likely to be a concern for prospective bondholders.

24/ According to Fowler, Crowell said that he expected the Commonwealth to use Forum Place as swing space for the next fifteen to twenty years. According to Sweet, Crowell said that Forum Place would be ideal for Commonwealth use as swing space for a five- to ten-year period during which various government buildings were undergoing renovation. Crowell testified, however, that he said that the Commonwealth's need for swing space could not be projected with any certainty, but that Forum Place could possibly be used as swing space for the remainder of the original term of the PennDOT lease and the additional one-year option period.

reported on the June 30 meeting with Crowell, stating that Crowell had said the Commonwealth might use Forum Place as swing space for fifteen or twenty years. 25/ There was no discussion at the meeting as to whether PennDOT's anticipated move should be disclosed in the POS. Bradbury did not attend this meeting.

At the July 8 meeting, Fowler also presented financial projections of anticipated tenant revenues at Forum Place through 2008. The projections were provided so that DCGA could determine whether future cash flow at Forum Place would be sufficient to service the debt and eventually retire the bonds. Fowler based his cash flow analysis on the assumption that the existing tenants would extend their leases without interruption, or would be replaced immediately by other qualified tenants at similar rates. Bradbury, who had received Fowler's projections before they were presented to the DCGA at the July 8 meeting, discussed the assumptions with Fowler, concluded that they were reasonable, and added footnotes to the projections. The first of these footnotes stated, "Revenues based on actual Commonwealth of Pennsylvania, U.S. Government[,] and other leases now in effect at the time of Closing and assume[] all leases will continue to option date or renew on similar terms (see Lease Terms and Options on page 5)." The projections listed the individual leases, providing information such as agency, start date, term, and space occupied, identified PennDOT's lease as "Lease #91988 (PENDOT)" and "Lease #91988 Pennsylvania Dept. of Transportation," and in columns to the right listed projected revenues from each lease for each year from 1998 through 2008. Neither the projections nor the footnotes contained any mention of PennDOT's anticipated departure from Forum Place.

DCGA voted to approve the purchase of Forum Place and proceed with the bond offering. It reaffirmed the appointment of PFC as financial advisor and Pepper Hamilton as bond counsel, and approved the appointment of other professionals involved with the project. DCGA also approved the content of the POS and authorized its distribution. 26/ Because O'Neill was on vacation at the time, his partner McErlane finalized the Forum Place POS after the July 8 meeting, adding a more detailed summary of tenant leases that included their expiration dates. The final version of the official statement ("OS") is dated July 17, 1998.

The OS stated that the Forum Place bonds were "limited obligations of the Authority," that they were secured solely by the receipts and revenues received by DCGA from payment on leases for office and parking space, and that neither the general credit of DCGA nor the credit or taxing power of Dauphin County, the Commonwealth, or any political subdivision thereof was

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25/ Sweet was present at the July 8 DCGA meeting. Although Sweet's testimony as to what Crowell said at the June 30 meeting about the Commonwealth's likely use of Forum Place as swing space differed from that of Fowler (whose testimony was consistent with the summary Fowler presented at the July 8 meeting), the record does not show that Sweet took issue with Fowler's summary.

26/ The record does not show that DCGA authorized the distribution of the financial projections to investors.

pledged for the payment of the principal and interest on the bonds. The OS further warned that the Pennsylvania General Assembly was not required to appropriate the funds necessary to make the payments due under the leases.

The OS explained that the current terms of leases at Forum Place ran from two to ten years, with various renewal options. 27/ The OS warned, in capital letters and bold type, that "THE OFFICE LEASES ARE SCHEDULED TO EXPIRE PRIOR TO THE MATURITY OF THE 1998 BONDS. THERE IS NO COMMITMENT, REQUIREMENT OR GUARANTEE THAT THE COMMONWEALTH WILL RENEW OR EXTEND ANY OF THE LEASES." The OS did not, however, contain any disclosure regarding PennDOT's anticipated departure from Forum Place once the Keystone Building was completed. Although Bradbury, Fowler, and Sweet all knew that PennDOT intended to leave Forum Place when the Keystone Building was completed, none of them conducted any investigation into the construction schedule for the Keystone Building. Moreover, none of them initiated any discussion as to whether PennDOT's intended move from Forum Place should be disclosed in the offering documents, and none of them raised the issue in any way with others working on the transaction.

Sales of the Forum Place Bonds

In late June 1998, D & B sales agents began contacting institutional investors to find out whether they would be interested in acquiring the Forum Place bonds. D & B put together an information package containing, among other things, the POS, the existing Forum Place leases, and the financial projections prepared by Fowler with Bradbury's added footnotes. 28/ D & B sent the package to those investors who expressed an interest. 29/ D & B also arranged for interested prospective investors to tour Forum Place; on July 7, 1998, two such tours were conducted by Vartan and attended by a member of D & B's sales staff. 30/ Bradbury did not attend these tours himself, but spoke over the telephone to several potential investors about the investment.

27/ An appendix to the OS provided more information about the individual leases, including agency, start date, term, and space occupied.

28/ The information package also contained a March 1997 building appraisal that showed, among other things, that occupancy rates for "Class A" office space in Harrisburg's Central Business District were 97% to 99%. Although the OIP charged that the vacancy rate information in the appraisal, taken together with other information sent to investors, was misleading, the law judge found that the appraisal was not misleading, either taken alone or when considered with other information. The Division has not appealed this finding, and it is not now before us.

29/ Steven Syfert, a senior vice president at D & B who worked in the area of institutional sales, testified that several of the customers he approached had no interest in participating in the offering because it involved long-term bonds supported by short-term leases.

30/ Bradbury did not inform his sales staff about PennDOT's intended departure from Forum Place.

Bradbury testified that it was his "general understanding" that in the Harrisburg market for office space, tenants, and particularly state agencies, tended to stay in the buildings they occupied. Nevertheless, in his discussions with investors, Bradbury failed to disclose that, contrary to the usual trend, PennDOT planned to vacate Forum Place as soon as construction of the Keystone Building was completed. 31/

Bradbury also discussed with some investors his understanding that Forum Place would be used as swing space by the Commonwealth. In testimony, Bradbury recalled that he "was advised that . . . the State would be using [Forum Place as] swing space," but conceded that the Commonwealth had neither committed to doing so nor clearly specified any period of time it planned to use the PennDOT space following expiration of the existing PennDOT lease. Indeed, the record reveals significant disagreement among the members of the finance team with respect to their understanding of the Commonwealth's intentions regarding Forum Place. 32/

Despite these uncertainties, Bradbury assured prospective investors about the future of Forum Place by referring to the Commonwealth's swing space needs. Putnam's McCormack testified that Bradbury answered several questions she had about the future occupancy of Forum Place; notes that McCormack had made contemporaneously with Putnam's purchase state that after PennDOT vacated Forum Place, the head of DGS "fully expects this building to always be needed – many of the [Capitol] Complex buildings are older and have asbestos problems." Barnett Sherman, an analyst at Morgan Stanley, testified that he "had a conversation with Mr. Bradbury . . . and, broadly speaking, my recollection was that there was an insurance that regardless of who came and went in the building, because of the building's proximity to the state capitol, that there would be generally a lot of demand for other government services or other government agencies to come in and use that building. So whoever left would be quickly replaced." Similarly, Keith Lowe, an analyst for Evergreen Funds, testified that he discussed with Bradbury "the State Capitol Complex and the fact that the buildings were very old and in need of repairs, if something more specific to the lines of asbestos or mediation, that this complex that we were looking to purchase this building would provide very viable swing space

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31/ Bradbury did, however, disclose this information in response to direct questioning by Susan McCormack, a credit analyst for Putnam Investments, Inc. ("Putnam"), in what McCormack called "an iterative process." McCormack's contemporaneous notes state that PennDOT's old building, the T&S Building, "will be imploded this summer due to asbestos, and a new one built" and that PennDOT "will probably move out of" Forum Place in 2001 or 2002. When asked why he did not feel that PennDOT's departure needed to be disclosed to all investors, Bradbury testified that this information "would have been speculative" and that he "believed that what we disclosed was sufficient within the official statement explaining the short-term nature of the leases and the long-term bonds."

32/ See supra note 24.

so that those entities could move in and out, if need be, as part of the reconfiguration or the upgrading of those facilities." 33/

D & B sold a total of $72.3 million of Series A bonds to four institutional investors, with conditional trade dates between July 10 and July 14; these trades would settle at closing on July 31, 1998. 34/ Putnam, which discovered that PennDOT planned to vacate Forum Place when the Keystone Building was complete, nevertheless was the single largest purchaser of the Series A bonds, buying almost $27 million of the bonds. Other purchasers in the primary market, none of whom then knew about PennDOT's intended move, were Merrill Lynch, PaineWebber, and Evergreen Funds. 35/ D & B sold about two-thirds of the subordinated Series B bonds to Wilmington Trust Bank; it sold some of the Series B bonds to members of Bradbury's family and to persons Bradbury characterized as "good friends" of his, and retained the remainder for D & B's own account. 36/

33/ The law judge considered McCormack and Sherman to be "very credible," and Lowe "generally credible." Credibility determinations of the fact-finder are "entitled to considerable weight and deference." Leslie A. Arouh, Securities Exchange Act Rel. No. 50889 (Dec. 20, 2004), 84 SEC Docket 1880, 1893 n.40; see also Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951). Moreover, we note that Respondents do not question the credibility of any witness who testified at the hearing.

34/ Because the Forum Place bonds were new issues, D & B's initial sales were conditional, or "when issued," transactions; that is, the trades were made conditionally because the bonds, though authorized, had not yet been issued. See Barron's Dictionary of Financial and Investment Terms 699 (5th ed. 1998).

35/ Evergreen Funds was a subsidiary of First Union Bank, D & B's primary bank and clearing agent. Morgan Stanley eventually purchased $4 million in Forum Place bonds in the secondary market from PaineWebber. In August 1998, Merrill Lynch learned that PennDOT would be moving out of Forum Place and sold all of the bonds it had purchased in July.

36/ A few months after the closing of the Forum Place bond transaction, D & B sold its Series B bonds to First Financial Bank, of which Bradbury was a member of the Board of Directors.

Closing of the Transaction and Subsequent Events

The Forum Place transaction closed on July 31, 1998. D & B purchased the Series A and Series B bonds from DCGA at a 1% discount from par value. 37/

In connection with the closing, D & B received various opinion letters from counsel associated with the transaction. LWM, as underwriter's counsel, provided an opinion letter stating, among other things, that "nothing has come to our attention that would lead us to believe that the [OS] as of its date . . . contains an untrue statement of a material fact or omits to state a material fact necessary to make the statements therein . . . not misleading." 38/ Pepper Hamilton, as bond counsel, provided a supplemental opinion letter to D & B, stating that certain sections of the OS fairly described the matters they discussed and that the tax matters discussed in the OS accurately reflected the firm's opinion. 39/

On August 1, 1998, the day after the Forum Place bond closing, the T & S Building was imploded. Through the remainder of 1998 and 1999, Forum Place remained filled with Commonwealth agency tenants. In late 2000, PennDOT vacated most of its space in Forum Place and moved into the newly completed Keystone Building. 40/ The Commonwealth continued to pay rent on the vacant PennDOT space at Forum Place until the lease expired on November 15, 2001. By December 2001, Forum Place was 55% empty. At the time of the hearing, the Series A bonds were in technical default, with principal and interest payments being made from the debt service reserve fund rather than from revenues, and the Series B bonds were in default, with no payments being made to bondholders. 41/

37/ The record does not suggest that D & B or Bradbury received any compensation for underwriting the Forum Place bonds beyond this 1% profit margin on sales of the bonds.

38/ As previously noted, no one told O'Neill about PennDOT's intended move.

39/ The bond purchase agreement also references an opinion letter from Goldberg, Katzman & Shipman, P.C., the solicitor for DCGA, apparently affirming DCGA's authority to issue the bonds and consummate the transaction and opining as to representations in the OS. This letter, which is not part of the record or referenced in the parties' briefs, was apparently limited on its face to "statements made with respect to the Authority."

40/ PennDOT vacated 257,410 net usable square feet of space. Some PennDOT computer operations remained at Forum Place.

41/ An analyst from Evergreen Funds, which still held Forum Place bonds at the time of the hearing, testified that DCGA tapped the debt service reserve fund to pay the principal and interest due on the Series A bonds, which, he stated, was a violation of a trust indenture covenant made by DCGA. A chronology prepared by Fowler indicates that the Series B bonds entered default on July 15, 2002; because the trust indenture summary indicates

(continued...)

In 2003, the bondholders forced Forum Place into receivership. 42/ At the time of the hearing before the law judge, in August 2004, the occupancy rate for Forum Place was approximately 55%, and the Series A bonds traded at approximately half of their par value.

III.

A. Section 17(a), Section 10(b), and Rule 10b-5

Securities Act Section 17(a), Exchange Act Section 10(b), and Exchange Act Rule 10b-5 all prohibit fraudulent and deceptive acts and practices in connection with the offer, purchase, or sale of a security. Violations of Section 17(a)(1), Section 10(b), and Rule 10b-5 may be established by a showing that persons acting with scienter omitted material facts in connection with securities transactions, such that the omission rendered disclosures that were made materially false or misleading. 43/ Scienter need not be shown to establish a violation of Sections 17(a)(2) and (3); such violations may be premised on a showing of negligence. 44/ An omission is material if there is a substantial likelihood that a reasonable investor would have considered the omitted fact important in making an investment decision, and disclosure of the omitted fact would have significantly altered the total mix of information available. 45/

The Forum Place POS and OS contained disclosures about the use of rent for space at Forum Place to pay the principal and redemption price of and interest on the bonds. They also contained disclosures about the tax-exempt status of the bonds and the importance to that status of the continued use of Forum Place as office space for the Commonwealth. An appendix provided details about the existing leases, including the PennDOT lease. The financial projections that Respondents distributed with the POS contained revenue projections that assumed the continuation of the PennDOT lease, or the immediate replacement of PennDOT by

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41/ (...continued)
that replenishment of the debt service reserve fund must occur before Series B bonds can be paid, it is likely that the Series A and B bonds entered default at about the same time; i.e., July 2002.

42/ See Mfrs. & Traders Trust Co. v. Dauphin County Gen. Auth., Dauphin County Court of Common Pleas, Equity Action No. 2003-EQ-0040.

43/ Basic Inc. v. Levinson, 485 U.S. 224, 239 n.17 (1988); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

44/ Aaron v. SEC, 446 U.S. 680, 701-02 (1980).

45/ Basic, 485 U.S. at 231-32; TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); see also SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) (stating that a fundamental purpose of the federal securities laws is "to substitute a philosophy of full disclosure for the philosophy of caveat emptor").

another qualified tenant at a similar rate, through 2008. Moreover, in discussing the Forum Place bonds with potential investors, Bradbury assured them of the continued viability of the project by indicating that, regardless of the short-term nature of the existing leases, the Commonwealth planned to use Forum Place as swing space for an indefinite, but substantial, amount of time.

Whether the Forum Place leases would generate enough revenue to service the bonds and whether the bonds would maintain their tax-exempt status would have been crucially important considerations to investors. 46/ PennDOT was the principal tenant of Forum Place by a wide margin, occupying more than three-quarters of the space and generating 60% of the total lease revenues; moreover, it was a state government entity, so its lease was critically important in light of the tax rule that allowed the bonds to maintain their non-taxable status as long as 90% of the lease revenues at Forum Place were from qualified tenants. We find that a reasonable investor would have considered the intended departure of a tenant of this importance significant in deciding whether to purchase Forum Place bonds. 47/ Thus, Respondents' failure to disclose the anticipated departure of PennDOT from Forum Place upon the completion of the Keystone Building was a material omission. 48/ This omission rendered the disclosures made in the POS, OS, and financial projections about the financial underpinnings of the bonds materially false and misleading: PennDOT's intended departure would make it much more difficult for DCGA to achieve the necessary level of revenues to service the bonds and to preserve their tax-exempt status.

46/ The investors who testified at the hearing all agreed that the information would have been important to them, characterizing it variously as "very critical," "a critical factor," "very material," and "important." Even Respondents' expert testified that the information "would have been important."

47/ The fact that Putnam bought almost $27 million of the bonds despite its knowledge of PennDOT's intended move does not alter our conclusion. See Raymond L. Dirks, 47 S.E.C. 434, 443 (1981) (stating that actual investment decisions are a factor that the Commission may consider, but they are not dispositive of the issue of materiality), aff'd, 681 F.2d 824 (D.C. Cir. 1982), rev'd on other grounds, 463 U.S. 646 (1983). Because Bradbury orally disclosed information about PennDOT's intended move to Putnam, however, there was no material omission of the information with respect to Putnam, and we therefore impose no liability based on those sales.

48/ The OIP recited that the financial projections, like the OS, "omitted information about PennDOT's relocation to the Keystone building." We find that the projections, although distributed to investors with the OS, were not physically part of the OS, but rather a separate document, and that the failure to disclose PennDOT's intended move in the projections was also a material omission that provides the basis for additional findings of violation.

Respondents invoke the "bespeaks caution" doctrine to argue that cautionary language in the OS negates the materiality of the alleged omissions. They argue that the OS contained warnings to the effect that (1) the bonds would be secured solely by revenues generated from the office building, (2) DCGA was obligated to service the bond debt "solely from rents and other available revenues," (3) the leases held by tenants in the building would expire prior to the maturity of most of the bonds being sold, 49/ and (4) PennDOT occupied almost 80% of Forum Place, and the lease on that space would expire in 2001. Moreover, they argue, the OS contained a bold-faced statement in upper-case letters that there was no commitment or guarantee that the Commonwealth would renew or extend any of the office leases. These portions of the OS, Respondents contend, generally disclosed the risk that leases would not be renewed, creating problems with debt service and security of the bonds, such that the omission of the specific disclosure of PennDOT's anticipated move was not material.

We find that the inclusion of the language on which Respondents rely was not sufficient to render the omission of PennDOT's intended move immaterial. Language warning of risks forms part of the "total mix" of information against which we assess materiality, and in appropriate circumstances, adequate warnings may render certain omissions immaterial. But "[c]autionary words about future risk cannot insulate from liability the failure to disclose that the risk has transpired." 50/ Here, the cautionary language cited by Respondents warns of future risks of non-renewal, but it does not disclose the actual knowledge that PennDOT at the time intended to move out of Forum Place when the Keystone Building was completed. Thus, the inclusion of these warnings does not alter our conclusion as to the materiality of the omission.

Respondents contend that PennDOT's anticipated move to the Keystone Building was publicly available information and that they cannot be held liable for failing to disclose material information that is readily accessible in the public domain. Respondents argue that the information about the plans for PennDOT was readily accessible from several different sources: it was reported in Harrisburg's Patriot-News, discussed at the public meetings of DCGA (and reported in the official minutes of those meetings), discussed by DGS representatives in response to questions posed, and available for discussion at the investor tours arranged by D & B. Sophisticated institutional investors, Respondents argue, must be presumed to know what is in the newspapers, and it must be assumed that they understand that newspapers in the local markets where bonds are issued are a valuable source of information.

49/ Approximately $5 million of the Series A bonds matured on January 15, 2003, and one lease was not scheduled to end until 2007.

50/ Rombach v. Chang, 355 F.3d 164, 173 (2d Cir. 2004) (stating that the "bespeaks caution" doctrine does not protect "someone who warns his hiking companion to walk slowly because there might be a ditch ahead when he knows with near certainty that the Grand Canyon lies one foot away") (quoting In re Prudential Sec. Inc. P'ships Litig., 930 F. Supp. 68, 72 (S.D.N.Y. 1996)).

The extent to which information is publicly available can be a factor in assessing materiality because, in determining whether an omission is material, we consider whether disclosure of the omitted fact would be viewed by a reasonable investor as having significantly altered the "total mix" of information available. 51/ The "total mix" of information may include "information already in the public domain and facts known or reasonably available to shareholders." 52/ The information, however, must be "reasonably" available. 53/ Publication of a few articles in local newspapers with limited circulation and discussion at DCGA meetings that were open to the public do not meet this standard. 54/ Moreover, although Respondents argue that the entities that purchased the bonds were "large Wall Street institutions that employed sophisticated analysts responsible for researching potential bond purchases," this was a public offering, and our inquiry is based on the total mix of information that was reasonably available to investors generally, not the entire universe of information that might have been

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51/ Basic, Inc. v. Levinson, 485 U.S. at 231-32.

52/ United Paperworkers Int'l v. Int'l Paper Co., 985 F.2d 1190, 1199 (2d Cir. 1993) (quoting Rodman v. Grant Found., 608 F.2d 64, 70 (2d Cir. 1979)).

53/ See Koppel v. 4987 Corp., 167 F.3d 125, 131-32 (2d Cir. 1999) (quoting United Paperworkers, 985 F.2d at 1198).

54/ See, e.g., United Paperworkers, 985 F.2d at 1199 (finding that eight newspaper articles were too "few in number, narrow in focus, and remote in time" to affect materiality analysis; "the mere presence in the media of sporadic news reports . . . should not be considered to be part of the total mix of information" for purpose of assessing materiality of disclosures in proxy statements); RichMark Capital Corp., Exchange Act Rel. No. 48758 (Nov. 7, 2003), 81 SEC Docket 2205, 2214-15 & n.24 (stating that press release plus brief mentions in April media reports were not part of "total mix" of information reasonably available to investors in July-September time period) (citing United Paperworkers), aff'd, 86 Fed. Appx. 744 (5th Cir. 2004); cf. Koppel, 167 F.3d at 131 (holding that offering shareholders opportunity to review report that was available at one location during limited hours did not make report part of "total mix" of information available).

Although Respondents argue that the Patriot-News "frequently reported on" PennDOT's proposed move and related issues, the record contains only one such article, dated five months before the Forum Place bond closing. Evidence as to other press coverage is inconclusive.

found by sophisticated investors. 55/ Moreover, the protection of the antifraud provisions of the securities laws extends to sophisticated investors as well as those less sophisticated. 56/

As noted above, liability under Securities Act Section 17(a)(1) and Exchange Act Section 10(b) and Rule 10b-5 thereunder requires a showing of scienter. Scienter may be established by a showing of recklessness. 57/ Reckless conduct involves "an 'extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it.'" 58/

The standard of care to which municipal underwriters are expected to adhere is informed by releases we issued in 1988 and 1994, in which we explained that underwriters have a "duty to the investing public to have a reasonable basis for recommending any municipal securities, and [a] responsibility, in fulfilling that obligation, to review in a professional manner the accuracy of statements made in connection with the offering." 59/ Moreover, we have observed that, when municipal securities professionals underwrite a bond offering, they impliedly represent to the investing public that they have a "reasonable basis for belief in the truthfulness and completeness of the key representations made in any disclosure documents used in the offerings," documents that should "accurately reflect all material facts which a prudent investor should know in order to evaluate the offering before reaching an investment decision." 60/

55/ Respondents argue that Merrill Lynch, which purchased $5.6 million of the bonds, reviewed Harrisburg and Pittsburgh newspapers routinely and that Putnam, which purchased almost $27 million of the bonds, commonly reviewed out-of-town newspapers as part of its research on investments. The fact that these investors reviewed local newspapers does not relieve D & B and Bradbury of the obligation to disclose material information in connection with their offer and sale of the bonds.

56/ Brian A. Schmidt, Exchange Act Rel. No. 45330 (Jan. 24, 2002), 76 SEC Docket 2255, 2271 & n.40 (citing additional authority).

57/ See, e.g., Robert M. Fuller, Securities Act Rel. No. 8273 (Aug. 25, 2003), 80 SEC Docket 3539, 3546 n.20, petition denied, 95 Fed. Appx. 361 (D.C. Cir. 2004).

58/ SEC v. Steadman, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (quoting Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033, 1044-45 (7th Cir. 1977)).

59/ Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others, 59 Fed. Reg. 12748, 12758 (Mar. 17, 1994) (interpretation; solicitation of comments).

60/ Municipal Securities Disclosure, 53 Fed. Reg. 37,778, 37,787 & 37,788 n.76 (Sept. 28, 1988) (proposed rulemaking).

(continued...)

We conclude that, based on a consideration of all the circumstances, Respondents' conduct in connection with the Forum Place offering constituted an extreme departure from the standards of ordinary care. As we have discussed, the majority of the Forum Place bonds had a twenty-seven-year term. The leases ran from two to ten years with various renewal options. The lease revenues were the only source of funding for the bonds. PennDOT was the principal tenant at Forum Place and was a type of tenant on which the non-taxable status of the Forum Place bonds depended. It is undisputed that Bradbury knew that PennDOT planned to vacate Forum Place when construction of the Keystone Building was complete. Neither the OS nor the financial projections disclosed this information. Bradbury could not specifically recall reviewing the Forum Place POS or discussing the need to disclose PennDOT's intended departure with any member of the finance team. Indeed, Bradbury never informed his own counsel, who prepared the OS, of PennDOT's plans. Nor did Bradbury make any effort to determine when the Keystone Building would be completed and how the completion of that building and the resulting departure of PennDOT from Forum Place would affect DCGA's ability to service the bonds. Under the circumstances, Bradbury had far from a reasonable basis for belief in the completeness of the OS or accompanying financial projections, which served as his primary sales material.

Respondents must have appreciated that the omission of PennDOT's planned departure from Forum Place would result in a significant understatement of the risks associated with an investment in the bonds, especially as PennDOT's departure ran counter to the presumption in the Harrisburg market for office space that state agencies tended to relocate only rarely. Modeled on an offering that did not involve the impending departure of a major tenant, the OS contained general cautionary language that advised investors that the Forum Place leases were scheduled to expire before the maturity date of the bonds and that there was no guarantee that the Commonwealth would renew its leases. However, as one investor put it, "[T]here's a big difference between facing the potential loss of your biggest tenant and actually knowing that you'll have to replace your major tenant within three years." Similarly, Respondents must have appreciated that the financial projections would mislead investors as to the associated risks. The projections presented a healthy financial outlook for the project based on the assumption that PennDOT's space in Forum Place would remain leased under similar contract terms for at least ten years. That assumption was far more risky than it appeared to an investor reading the projections because of the undisclosed fact that PennDOT planned to move to a new building.

We cannot accept that someone with Bradbury's experience in municipal financing and with Bradbury's knowledge of PennDOT's intended move would fail to recognize that the intended move would be significant to investors and that the failure to disclose that move would

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60/ (...continued)
We note that Respondents' own expert stated that a municipal underwriter had an obligation "to form a basis, reasonable basis for a belief in key representations in the official statement, to disclose material information of which the underwriter is aware; and I would go beyond that and say to disclose material information of which the underwriter should be aware as a result of [an] investigation to form a reasonable basis for belief in key representations."

render the information provided misleading. The fact that Bradbury told investors about the Commonwealth's potential use of Forum Place as swing space shows that he believed that investors would consider the continued occupancy of Forum Place office space by qualified tenants significant. 61/ Nor can we accept that Bradbury could justify his failure to disclose PennDOT's planned departure – to both his own sales team and to potential investors – because it was "speculative," when, at the same time, he reassured investors by telling them of the Commonwealth's intentions to use the building as swing space despite the fact that he learned about the swing space program secondhand, admittedly did not know how long the Commonwealth intended to use swing space, and made no effort to clarify or confirm the information. We find, therefore, that Respondents acted recklessly, and thus with the requisite scienter to support findings of violation under the anti-fraud provisions charged. 62/

In challenging the law judge's finding of scienter, Respondents assert that they did not attempt to restrict the flow of information, but rather helped investors get information by referring them to others involved with the Forum Place transaction and arranging Forum Place

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61/ We note that the OIP charges Respondents with the fraudulent offer and sale of the Forum Place bonds based on the "misleading Official Statement and financial projections" without making reference to Bradbury's oral representations to investors about the use of Forum Place as swing space. However, this issue of Bradbury's oral representations was litigated extensively during the proceeding and was the subject of testimony from several witnesses and from Bradbury himself. We therefore deem it appropriate to consider the evidence regarding this issue in assessing Respondents' scienter.

62/ In arguing that they did not act with scienter, Respondents rely, among other things, on Howard v. SEC, 376 F.3d 1136 (D.C. Cir. 2004). In Howard, the court held that the type of recklessness required to support liability for aiding and abetting a securities law violation may be established by showing that the alleged aider and abettor encountered "'red flags,' or 'suspicious events creating reasons for doubt' that should have alerted him to the improper conduct of the primary violator" or a danger of misleading investors so obvious that the alleged aider and abettor must have been aware of it. Id. at 1142-43 (citing Steadman, 967 F.2d at 641-42; Sundstrand Corp., 553 F.2d at 1045). On the facts of that case, the court found that Howard did not encounter "red flags," id. at 1147, and its discussion of the uncertainty of the state of the law with respect to the primary violation at issue suggests that the court did not regard the danger in question as obvious. Id. at 1145-46. Because the present case does not charge aiding and abetting of the antifraud provisions under Securities Act Section 17(a)(1) and Exchange Act Section 10(b) and Rule 10b-5 thereunder, this aspect of Howard is not directly applicable to the primary violations of those provisions at issue here. Under the Howard test, in any event, we find that Respondents acted recklessly: we find that the danger that failing to mention PennDOT's intended departure would mislead investors about the financial underpinnings of the bond issue was "obvious" and thus, under Howard, Respondents acted recklessly.

tours. Additionally, they assert that Bradbury disclosed PennDOT's intended move to one investor and would have disclosed it to others if they had asked about it. They further state that Bradbury "did not consciously reject any suggestion from any other member of the finance team to disclose material information" in the OS and that he involved in the transaction family members, friends, and institutions with which Respondents had significant connections.

We do not believe these facts contradict a finding of scienter. The fact that Respondents did not restrict, and even enabled or facilitated, access by specific investors to certain information about the Forum Place transaction does not contradict our finding that they acted recklessly in offering and selling the bonds based on offering documents that failed to disclose a particular, and critical, piece of information. 63/ The OIP does not charge Respondents with having withheld information from investors who requested it; it charges them with having failed to present the information to investors who would have considered it significant in light of the other information provided. The absence of evidence showing that Bradbury consciously rejected suggestions that PennDOT's intended move should have been disclosed in the OS does not negate his scienter; the need to disclose that information was so obvious that Bradbury must have realized the danger of omitting it, even without having it brought to his attention by

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63/ As noted above, however, we impose no liability with respect to the sales to Putnam, to whom Bradbury disclosed information about PennDOT's intended move.

others. 64/ Finally, it is well established that investing one's own funds, or the funds of friends or family members, does not negate scienter. 65/

Respondents argue that it is inconsistent to find that they acted with scienter while various others involved with Forum Place were not charged with any violations, or, in the case of DCGA, consented only to negligence-based violations. A refusal to prosecute is a "classic illustration of a decision committed to agency discretion," and agency decisions about the best use of staff time are a matter of prosecutorial judgment. 66/ Further, it is well established that respondents who offer to settle may properly receive lesser sanctions than they otherwise might have based on "pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary proceedings." 67/ The Commission's decision not to charge certain others

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64/ Respondents argue that a finding of recklessness is inconsistent with Bradbury's actual knowledge that others involved in the transaction never suggested that PennDOT's intended move should be disclosed. However, whether or not others were culpable in failing to ensure that the information about PennDOT's intended move was disclosed does not exonerate Respondents.

We also reject Respondents' argument that the "comfort" they received from the supplemental letter, in which Pepper Hamilton opined, among other things, that the section of the OS captioned "Security and Sources of Payment for the 1998 Bonds" "fairly described" the information provided therein, is inconsistent with a finding that they acted recklessly with respect to the failure to disclose PennDOT's intended move. While Pepper Hamilton opined that the security and sources of payment were fairly described, the letter explicitly stated that the firm "[was] not passing upon" and "[did] not assume any responsibility for" the completeness of the statements contained in the OS. Similarly, the fact that Respondents received an opinion letter from LWM stating that nothing "had come to [the firm's] attention" that would lead it to believe that the OS contained material misstatements or omissions does not undercut the conclusion that they acted recklessly in failing to disclose the intended move, because Bradbury did not inform O'Neill about the move and did not inquire as to whether O'Neill was aware of it (which he was not).

65/ See, e.g., Gilbert F. Tuffli, Jr., 46 S.E.C. 401, 405 (1976) (stating that respondent's "willingness to gamble with [his] own funds [gives him] no license to deceive others") (citing cases); see also Alfred Miller, 43 S.E.C. 233, 238 (1966) ("Merely informing a customer, whether he is a friend or former customer, that the stock is speculative, is not sufficient disclosure of an issuer's adverse financial condition, and in any event cannot excuse making false or misleading representations to him.").

66/ Chicago Bd. of Trade v. SEC, 883 F.2d 525, 530-31 (7th Cir. 1989) (citations omitted).

67/ David A. Gringas, 50 S.E.C. 1286, 1293-94 (1992) (citing Nassar & Co., 47 S.E.C. 20, (continued...)

involved in the Forum Place bond offering, or to accept an offer of settlement that includes consent to a lesser violation, does not imply approval or exoneration of the conduct involved. We thus conclude that Respondents willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Rule G-17 and Section 15B(c)(1)

MSRB Rule G-17 imposes on brokers, dealers, and municipal securities dealers an obligation to deal fairly and not to engage in any deceptive, dishonest, or unfair practice. 68/ Bradbury, as an associated person of D & B, was also bound by this rule. 69/ We have held that Rule G-17 can be violated, at a minimum, through negligent conduct. 70/ Under these circumstances, in light of our finding that Respondents acted with scienter in connection with the offer and sale of Forum Place bonds, we find that Respondents also violated Rule G-17.

Exchange Act Section 15B(c)(1) prohibits any broker, dealer, or municipal securities dealer from using the mails or interstate commerce "to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in contravention of any rule of the [MSRB]." 71/ Based on our findings above that D & B violated MSRB Rule G-17, we find that D & B also willfully violated Section 15B(c)(1). 72/

To show that Bradbury aided and abetted D & B's violation of Section 15B(c)(1), the Division was required to establish that (1) D & B committed the primary violation; (2) Bradbury

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67/ (...continued)
26 (1978), aff'd, 600 F.2d 180 (D.C. Cir. 1979)).

68/ The MSRB recently noted that Rule G-17 encompasses two basic principles: an antifraud prohibition and a general duty to deal fairly even in the absence of fraud. The MSRB stated that Rule G-17 "was implemented to establish a minimum standard of fair conduct." Interpretative Notice Regarding Rule G-17, on Disclosure of Material Facts (Mar. 20, 2002).

69/ See Wheat, First Sec., Inc., Exchange Act Rel. No. 48378 (Aug. 20, 2003) 80 SEC Docket 3406, 3421 n.29; Pryor, McClendon, Counts & Co., Exchange Act Rel. No. 48094 (June 26, 2003), 80 SEC Docket 1728, 1735.

70/ Wheat, First Sec., 80 SEC Docket at 3425 (holding that MSRB Rule G-17 requires a showing of at least negligence to establish an unfair practice violation); SEC v. Dain Rauscher, Inc., 254 F.3d 852, 856 (9th Cir. 2001) (holding that negligence satisfies the standard for liability under MSRB Rule G-17).

71/ 15 U.S.C. § 78o-4(c)(1).

72/ See Wheat, First Sec., 80 SEC Docket at 3421.

had a general awareness that his role was part of an overall activity that was improper; and (3) Bradbury substantially assisted the primary violation. 73/ We have already found that D & B violated Section 15B(c)(1), and our finding that Bradbury acted recklessly – that the omission of the information about PennDOT's intended move posed a danger so obvious that he must have been aware of it – is sufficient to establish his general awareness that his conduct was part of an activity that was improper. 74/ Finally, Bradbury's use of the OS to market the bonds to investors, while knowing of the omission of the information at issue, establishes that he substantially assisted the primary violation. Thus, we find that Bradbury willfully aided and abetted D & B's violation of Section 15B(c)(1). 75/

IV.

A. Disgorgement, Civil Penalties, and Ability to Pay

Disgorgement is a remedy designed to deprive respondents of ill-gotten gains by forcing them to give up the amount by which they were unjustly enriched by their misconduct. 76/ The law judge ordered that Respondents disgorge a sum representing the difference between the price at which they purchased the Forum Place bonds sold in the transactions at issue and the resale price of those bonds. 77/ We conclude that this calculation of disgorgement is appropriate but

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73/ See Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000); Investors Research Corp. v. SEC, 628 F.2d 168, 178 (D.C. Cir. 1980).

74/ See Howard, 376 F.3d at 1142-44 (holding that, in assessing liability for aiding and abetting a securities law violation, awareness of wrongdoing may be established by showing a danger so obvious that alleged aider and abettor must have been aware of it, and considering obviousness of danger in analyzing scienter).

75/ Our finding that Bradbury aided and abetted D & B's violation necessarily makes him a "cause" of that violation. See, e.g., Zion Capital Mgmt., LLC, Securities Act Rel. No. 8345 (Dec. 11, 2003), 81 SEC Docket 3063, 3077 (citing Sharon M. Graham, 53 S.E.C. 1072, 1085 n.35 (1998), aff'd, 222 F.3d 994 (D.C. Cir. 2000)). Moreover, we may find that Bradbury acted willfully – as we do here – by finding that he knowingly engaged in the conduct at issue, whether or not he knew that conduct violated the law. See, e.g., Fu-Sung Peter Wu, Exchange Act Rel. No. 45694 (Apr. 4, 2002), 77 SEC Docket 922, 934 n.31 (citing Wonsover v. SEC, 205 F.3d 408, 415 (D.C. Cir. 2000)).

76/ SEC v. Blavin, 760 F.2d 706, 713 (6th Cir. 1985) (citing SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 102 (2d Cir. 1978)).

77/ The law judge ordered disgorgement in the amount of $482,560.50: $31,000 for the Series B bonds and $451,562.50 for the Series A bonds. Because we do not impose liability for the sale of bonds to Putnam, to whom Bradbury disclosed PennDOT's anticipated departure, we have accordingly reduced the latter figure by $168,567.19, the difference between the purchase and resale prices of the almost $27 million of Series A

(continued...)

reduce the amount to $313,995.31, plus prejudgment interest, because we do not impose liability for Respondents' sales to Putnam. 78/ Where, as here, two respondents "collaborate or have a close relationship in engaging in the violations of the securities laws," joint and several liability for the disgorgement of illegally obtained proceeds is often appropriate. 79/ Bradbury, the chairman, chief executive officer, chief operating officer, and 38% owner of D & B, is intimately related to his co-respondent company, and his actions serve as the basis for D & B's liability. Nevertheless, the record is unclear as to whether Bradbury personally received commissions or other direct benefit from the sale of the Forum Place bonds. 80/ Therefore, under the circumstances, we have determined, in our discretion, to impose liability for the disgorgement amount only on D & B. 81/

Section 21B of the Exchange Act allows the imposition of civil money penalties in administrative proceedings where respondents have willfully violated or willfully aided and abetted any violations of the Securities Act, the Exchange Act, or the rules and regulations thereunder, and where such penalties are in the public interest. 82/ For each act or omission involving fraud that "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons," third-tier civil penalties may be warranted. We find

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77/ (...continued)
bonds sold to Putnam.

78/ Although Respondents argue that the prejudgment interest ordered by the law judge is excessive given the period of time tolled by the agreement between the parties, Respondents explicitly agreed, in the tolling agreement they executed, not to seek to "avoid or reduce any sanctions or relief to be imposed" in these proceedings. Nonetheless, our conclusion that liability should not be imposed for the sale of bonds to Putnam results in a reduction in the amount of prejudgment interest imposed.

79/ SEC v. First Pac. Bancorp, 142 F.3d 1186, 1191-92 (9th Cir. 1998) (holding that the "close relationship" warranting joint and several liability existed because the individual defendant was chairman of the board, chief executive officer, and majority shareholder of the corporate co-defendant); see also SEC v. Great Lakes Equities Co., 775 F. Supp. 211, 214 (E.D. Mich. 1991) (finding that, where the actions of an individual respondent are "inextricably interwoven" with the actions of a corporate respondent, joint and several liability for payment of the disgorgement is appropriate).

80/ We are mindful of the fact that disgorgement is intended to be remedial, not punitive, in nature. See SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978).

81/ We note that, to the extent Bradbury, as a part-owner of D & B, benefitted indirectly from the sale of the Forum Place bonds, he will likely be impacted indirectly by the disgorgement assessed against the firm. We consider this an appropriate result.

82/ 15 U.S.C. § 78u-2.

that a civil penalty against Respondents is in the public interest and that third-tier penalties are appropriate because Respondents' activities created a significant risk of substantial losses.

The Division sought civil penalties of $550,000 against D & B and $110,000 against Bradbury, amounts that equal the statutory maximum for each violation in the third tier. 83/ Although the facts of this case could have supported penalties of at least the amount requested by the Division, we find that penalties in the amounts of $400,000 against D & B and $82,000 against Bradbury are appropriate, taking into consideration Respondents' prior lack of disciplinary history and the need to deter misconduct by others. 84/

D&B argues that its financial condition has materially changed since the Forum Place bond offering, and that it is no longer in a position to satisfy the disgorgement, interest, and penalty amounts ordered by the law judge. It argues that "since the Forum Place transaction occurred," its financial health has declined due to "the proceedings themselves, the Division's lengthy delay in issuing the OIP[,] and the negative publicity caused by the Division's allegations against [Respondents]." Bradbury has not claimed that he is unable to pay any monetary sanctions levied against him at this time, but "reserves the right to make such an argument once the issue [of joint and several liability] is ultimately determined."

We have held that, "since the respondent carries the burden of demonstrating an inability to pay, financial information supporting that argument must be presented before the law judge, who may then require the filing of sworn financial statements." 85/ We also have held that an argument regarding a respondent's inability to pay may be waived if not raised before the law judge. 86/ Under the circumstances, we conclude that Bradbury, who did not raise this issue below, does not raise it now, and has not provided any evidence in support of such a claim, has waived any argument regarding his ability to pay monetary sanctions. 87/

83/ See Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, title III, §31001; 17 C.F.R. § 201.1001.

84/ These penalty amounts, which are the same as those imposed by the law judge, have not been appealed by either party and are well within the statutory maximum for third-tier penalties.

85/ Brian A. Schmidt, Exchange Act Rel. No. 45330 (Jan. 24, 2002), 76 SEC Docket 2255, 2273.

86/ Id.

87/ We have further recognized that there may be instances where a respondent can satisfy the standards presented in Rule of Practice 452, 17 C.F.R. § 201.452, regarding new evidence concerning its financial situation that the party had "reasonable grounds for fail[ing] to adduce" earlier in the proceeding. See Schmidt, 76 SEC Docket at 2273.

(continued...)

D & B also failed to raise its claim of inability to pay before the law judge and, like Bradbury, has not offered any grounds for that failure. D & B requests for the first time in this proceeding that we consider as evidence its audited reports filed annually with the Commission pursuant to Exchange Act Section 17 88/ and Rule 17a-5 thereunder. 89/ The requirements of Rule of Practice 410(c), 90/ however – which states that any "person who files a petition for review of an initial decision that asserts inability to pay either disgorgement, interest or a penalty shall file with its opening brief a sworn financial disclosure statement containing the information specified in [Rule of Practice] 630(b)" – are mandatory, not permissive, 91/ and the reports to which D & B directs our attention do not satisfy these requirements. In any event, the information in D & B's reports does not indicate that D & B is unable to pay the monetary sanctions imposed herein. 92/

B. Cease-and-Desist Order

Securities Act Section 8A(a) and Exchange Act Section 21C authorize the Commission to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate" any provision of either of these acts or any rule or regulation thereunder, or against any person who "is, was, or would be a cause of [a] violation" due to an act or omission the person

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87/ (...continued)
Under such circumstances – not present here – we may consider a claim of inability to pay that the respondent had not raised before the law judge.

88/ 15 U.S.C. § 78q.

89/ 17 C.F.R. § 240.17a-5.

90/ 17 C.F.R. § 201.410(c).

91/ See Terence Michael Coxon, Order Denying Motion to Delay Submission of Claim of Inability to Pay and Requesting Additional Briefs, Exchange Act Rel. No. 42485 (Mar. 2, 2000), 71 SEC Docket 2257.

92/ To the extent D & B may be attempting to argue that its financial condition has suffered a "substantial reverse" since the hearing, see Terry T. Steen, 53 S.E.C. 618, 628 n.26 (1998), we find that the annual reports D & B asked us to consider do not establish such a financial reversal. Further, although we have taken official notice of D & B's filing of a Form BDW subsequent to the completion of the briefing schedule and oral argument in this case, see supra note 1, neither party has addressed the extent to which that filing affects D & B's ability to pay disgorgement, interest, or a fine. As indicated, the burden was on D & B to do so. We therefore lack a basis for making findings regarding the impact of the Form BDW on D & B's financial situation and ability to pay.

"knew or should have known would contribute to such a violation." 93/ In determining whether a cease-and-desist order is an appropriate sanction, we look to whether there is some risk of future violations. 94/ The risk of future violations required to support a cease-and-desist order is significantly less than that required for an injunction. 95/ A single egregious violation can be sufficient to indicate some risk of future violation. 96/ We also consider whether other factors demonstrate a risk of future violations. Beyond the seriousness of the violation, these include the isolated or recurrent nature of the violation, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, the respondent's state of mind, the sincerity of assurances against future violations, recognition of the wrongful nature of the conduct, opportunity to commit future violations, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions sought in the proceeding. 97/ Not all of these factors need to be considered, and none of them, by itself, is dispositive.

Here, Respondents knew of the central importance of PennDOT's tenancy to the financial viability of the Forum Place bonds, but the POS, the OS, and the accompanying projections they distributed to investors omitted any mention of PennDOT's intent to vacate Forum Place once the Keystone Building was completed. The omission of this information deprived investors of a material fact as they considered the purchase of the bonds, and the omission rendered disclosures that were made misleading. The investors to whom PennDOT's intent to move was not disclosed were harmed by the omission and by the consequently misleading disclosures.

As found above, Respondents acted recklessly in offering and selling the Forum Place bonds based on offering documents that failed to include information about PennDOT's intended move. Respondents provide no assurances that they would avoid future violations by acting differently under similar circumstances. Bradbury has been employed by D & B since high school, and his continuing involvement in the securities industry presents an opportunity to commit future violations. Although we have ordered disgorgement and the payment of civil penalties, the issuance of a cease-and-desist order should serve the remedial purpose of encouraging Respondents to take their responsibilities more seriously in the future. 98/

93/ 15 U.S.C. §§ 77A(a), 78u-3.

94/ KPMG Peat Marwick LLP, 54 S.E.C. 1135, 1185 (2001), reconsideration denied, 74 SEC Docket 1351 (Mar. 8, 2001), petition denied, 289 F.3d 109 (D.C. Cir. 2002).

95/ KPMG, 54 S.E.C. at 1191.

96/ See Geiger v. SEC, 363 F.3d 481, 489 (D.C. Cir. 2004).

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

98/ See McCurdy v. SEC, 396 F.3d 1258, 1265 (D.C. Cir. 2005) (recognizing that order suspending auditor from practice before the Commission for one year had remedial

(continued...)

We find that the record as a whole, especially the evidence with regard to the seriousness of the violation, the lack of assurances against future violations, and the opportunity to commit future violations, establishes a sufficient risk that Respondents would commit future violations to warrant imposition of a cease-and-desist order. 99/ Based on all of these factors, we find a cease-and-desist order to be in the public interest. 100/

C. Creation of Fair Fund

Section 308(a) of the Sarbanes-Oxley Act of 2002 authorizes the Commission, in an administrative action brought under the federal securities laws, to create a fund into which civil penalties and disgorgement funds may be paid for the benefit of persons harmed by the violations. 101/ The Division asks us to create such a fund, and Respondents do not oppose its request. We therefore direct that the civil penalties and disgorgement funds ordered in this matter be paid into a fund to benefit investors harmed by the violations we have found above.

An appropriate order will issue. 102/

By the Commission (Chairman COX and Commissioners GLASSMAN, CAMPOS, and NAZARETH; Commissioner ATKINS not participating).

Nancy M. Morris
Secretary

98/ (...continued)
purpose of encouraging more rigorous compliance with generally accepted auditing standards in the future).

99/ We reach this conclusion despite our findings that the violation at issue was not recent and was not recurrent.

100/ D & B's filing of an application to terminate its broker-dealer registration, which remains pending, does not alter our conclusion that the potential for further violations exists even if D & B's registration is terminated.

101/ 15 U.S.C. § 7246(a). We have recently amended our Rules of Practice to make clear that law judges have the authority to create such funds in appropriate circumstances. See Adoption of Amendments to the Rules of Practice and Related Provisions and Delegations of Authority of the Commission, 70 Fed. Reg. 72,566 (Dec. 5, 2005) (final rule).

102/ 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

SECURITIES ACT OF 1933
Rel. No. 8721 / July 13, 2006

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54143 / July 13, 2006

Admin. Proc. File No. 3-11465

In the Matter of DOLPHIN AND BRADBURY, INCORPORATED and ROBERT J. BRADBURY	ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Dolphin and Bradbury, Incorporated ("D & B") and Robert J. Bradbury cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933, Sections 10(b) and 15B(c)(1) of the Securities Exchange Act of 1934 (including failing to deal fairly with all persons and engaging in any deceptive, dishonest, or unfair practice under Rule G-17 of the Municipal Securities Rulemaking Board) and Rule 10b-5 thereunder; and it is further

ORDERED that D & B disgorge the amount of $313,995.31, plus prejudgment interest as calculated in accordance with Commission Rule of Practice 600(b); and it is further

ORDERED that D & B pay a civil money penalty of $400,000 and that Bradbury pay a civil money penalty of $82,000; and it is further

ORDERED that the amounts of disgorgement and civil money penalties be used to create a "Fair Fund" for the benefit of investors pursuant to Commission Rules of Practice 1100-1106; and it is further

ORDERED that the Division of Enforcement submit to the Commission a proposed plan for the administration and distribution of funds in the Fair Fund established in this order no later

than 60 days after payment of the amounts due and any appeals of this Order have been waived or are no longer available.

Payment of the amount to be disgorged and the civil money penalties 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, Operations Center, 6432 General Green Way, Alexandria, VA 22312; and (iv) submitted under cover letter that identifies respondents and the file number of this proceeding.

A copy of the cover letter and check shall be sent to Amy J. Greer, counsel for the Division of Enforcement, Securities and Exchange Commission, Philadelphia District Office, The Mellon Independence Center, 701 Market Street, Philadelphia, PA 19106-1532.

By the Commission.

Nancy M. Morris
Secretary