N E W Y O R K S T O C K E X C H A N G E L L C

<u>NYSE HEARING BOARD DECISION 06-133</u> **July 10, 2006**

A.G. EDWARDS & SONS, INC.
MEMBER ORGANIZATION

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> **Violated NYSE Rule 401 by inappropriately maintaining customers in fee-based accounts; violated NYSE Rule 476(a)(6) by charging customer accounts excessive fees in light of trading activity in accounts and effecting trades that were unsuitable in view of customers' investment objectives, prior investment experience, and financial resources; violated NYSE Rule 351(d), by failing to report, failing to timely report, and/or failing to properly code and report to NYSE required statistical information regarding customer complaints; violated NYSE Rule 342(a) and (b), by failing to establish reasonable procedures of supervision and control, including separate system of follow-up and review, over its non-managed fee-based brokerage business, and with respect to supervision of certain of its employees – Consent to censure, $900,000 fine, and undertaking.**

Appearances:

For the Division of Enforcement
Linda Riefberg, Esq.
Joy A. Weber, Esq.
James O'Donnell, Esq.
Richard Chin, Esq.
Josefina Martinez, Esq.
Sandra Landron, Esq.
Tracy Timbers, Esq.
Dorian M. Gross, Esq.

For Respondent
Stephen G. Sneeringer, Esq.

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A Hearing Officer on behalf of the New York Stock Exchange LLC ("NYSE") considered a Stipulation of Facts and Consent to Penalty entered into between NYSE Regulation, Inc.'s Division of Enforcement ("Enforcement") and A.G. Edwards & Sons, Inc. ("Respondent" or the "Firm"), an NYSE member organization. Without admitting or denying guilt, Respondent consented to a finding by the Hearing Officer that it:

I. Violated NYSE Rule 401, in that the Firm failed to adhere at all times to the principles of good business practice in the conduct of its business affairs in that it inappropriately maintained customers in fee-based accounts.

II. Violated NYSE Rule 476(a)(6) in that the Firm engaged in conduct inconsistent with just and equitable principles of trade in that it:

a. charged customer accounts excessive fees in light of the trading activity in the accounts.

b. effected trades in the accounts of customers through a registered representative of the Firm that were unsuitable in view of the customers' investment objectives, prior investment experience, and financial resources.

III. Violated NYSE Rule 351(d), in that the Firm failed to report, failed to timely report, and/or failed to properly code and report, to the NYSE required statistical information regarding customer complaints.

IV. Violated NYSE Rule 342(a) and (b), in that the Firm failed to establish reasonable procedures of supervision and control, including a separate system of follow-up and review, over its non-managed fee-based brokerage business, and with respect to the supervision of certain of its employees.

For the sole purpose of settling this disciplinary proceeding, Enforcement and Respondent stipulate to certain facts, the substance of which follows:[*]

Background and Jurisdiction

1. The Firm in its current form has been a member organization since 1967. The Firm is primarily engaged in retail securities brokerage and maintains its head office in St. Louis, Missouri.

2. Between 2002 and 2005, NYSE Regulation's Division of Member Firm Regulation Sales Practice Review Unit ("SPRU") conducted annual examinations of the sales practice and supervisory standards at the Firm and set forth various findings in reports to the Firm (the "2002, 2003, 2004, and 2005 SPRU Reports"). These reports were referred to Enforcement, and the findings thereof are resolved herein. In 2003, Enforcement commenced an investigation concerning the supervision at the Firm of customer accounts serviced by a producing branch office manager. In addition, in 2004, the Securities and Exchange Commission ("SEC") conducted an examination

[*] Hearing Officer Note: The facts, allegations, and conclusions contained in paragraphs 1 to 59 are taken from the executed Stipulation of Facts and Consent to Penalty between Enforcement and Respondent. No changes have been made to the stipulated paragraphs by the Hearing Officer, except that pseudonyms have been provided to protect the privacy of non-parties.

of the Firm that included the Firm's fee-based account programs. The SEC referred that examination to NYSE Regulation for further review.

3. By letters from Enforcement to the Firm of various dates, the Firm was advised that it was the subject of investigation by Enforcement with respect to the foregoing matters.

Prior Discipline

4. The Firm has been the subject of prior formal disciplinary action, as reported in A.G. Edwards & Sons, Inc. Hearing Panel Decision 02-196. In that matter, the Firm consented to the imposition of a censure, $400,000 fine, and an undertaking. From August 1996 through December 2000, the Firm failed to provide for reasonable supervision of certain business activities and engaged in other violative conduct. The Firm's failure of supervision related to, among other things: the marketing and sale of callable certificates of deposit; the recommendation and sale of securities to customers which were unsuitable; permitting producing branch office managers to review and approve their own customer related correspondence; failing to maintain accurate customer account information; employee trading of securities that were on the Firm's research department's restricted securities list; failing to monitor pricing on account statements of bond and mutual fund positions; and failing to prevent statutorily disqualified individuals from being associated with the Firm.

Overview

5. In or about March 2000, the Firm implemented a non-managed fee-in-lieu of commission program known as Client Choice. During relevant times, the Firm was aware of concerns that arose from its Client Choice program with respect to the payment of higher fees by certain customers for little, or no, trading activity. Between approximately March 2000 and October 2001, the Firm did not have any systematic procedures in place to monitor for such issues in connection with the Client Choice program. Thereafter, exception-type reports were created and a supervisory review of Client Choice accounts was conducted by the Firm. However, while the Firm created a tool to review Client Choice accounts in October 2001, the Firm had no policy in place requiring its branch managers and financial consultants to address accounts that were identified on the exception reports, including no requirement to contact customers. In the absence of a Firm policy requiring such follow-up action be taken, the Firm could not determine, nor reasonably supervise, whether a customer whose account was identified on an exception report wished to remain in the Client Choice program, despite the lack of trading activity in the customer's account. This led to certain customers paying substantially higher fees than if they had been in a traditional commission-based account.

6. In addition, during the period of January 2001 through March 2004, the Firm provided inaccurate, incomplete, and/or incorrect statistical information to the NYSE regarding customer complaints in 95 instances. The Firm did not timely report certain customer complaints, failed to report certain customer complaints, reported

certain customer complaints with inaccurate problem codes and/or product codes, and reported certain customer complaints against an incorrect Social Security number.

7. Finally, from in or about 1996 through December 2001, the Firm, through its producing branch office manager, William Floyd Gibbs, Sr. ("Gibbs"), engaged in conduct inconsistent with just and equitable principles of trade by recommending and effecting trades in customer accounts that were unsuitable in view of the customers' investment objectives, prior investment experience, and financial experience. The Firm also failed to reasonably supervise the recommendation and sale of such securities by Gibbs to these customers.

Background of Firm's Client Choice
Non-Managed Fee-In-Lieu Of Commission Program

8. In or about March 2000, the Firm implemented the "Client Choice" program, which was then and continues to be, the Firm's only non-managed fee-in-lieu of commission program. In this type of brokerage account, a customer pays account fees based upon the level of eligible account assets, as opposed to paying commissions on a transactional basis, as in a traditional commission-based brokerage account.

9. Client Choice accounts are billed quarterly in advance pursuant to a fee-rate schedule. During relevant times, Client Choice accounts with eligible account assets under $500,000 were assessed a fee (under the fee-rate schedule) that began at a rate of 1.5% of the eligible account asset amount. A minimum quarterly fee is assessed if application of the fee-rate schedule on the eligible account assets does not result in a fee greater than the minimum quarterly fee amount, which is $312.50 ($1,250 annually).

10. Multiple customer accounts may be linked together within the Client Choice program, which is known as "householding" of accounts. The accounts thus linked all participate in the fee-in-lieu of commission arrangement. The fee assessed for accounts within a household group is billed to the accounts at a pro rata rate.

Insufficient Supervision
of the Client Choice Program Between 2000 and Early 2004

11. The Firm was aware since the inception of Client Choice of certain concerns associated with this type of fee-based program. Beginning in or about March 2000, the Firm sent internal communications about such issues to its financial consultants ("FCs") and to its branch managers. Such communications conveyed that Client Choice might not be appropriate for clients who have few transactions and who would pay substantially more in Client Choice fees than they would under a standard commission structure. While Firm internal communications also suggested that FCs should review the customer's past transaction activity prior to opening a Client Choice account, there was no policy or procedure that required such reviews to be

performed, and customers were not clearly made aware in writing when they enrolled in Client Choice, that the program was not appropriate for buy-and-hold investors.

12. Although the Client Choice program commenced in March 2000, the Firm conducted virtually no systematic reviews specific to the Client Choice accounts between approximately March 2000 and October 2001. Thereafter the Firm began doing automated reviews.

13. Between approximately October 2001 and December 2003, the Firm conducted automated Client Choice reviews. The principal review conducted was the Client Choice Quarterly Review, that used a Quarterly Review Report. The Quarterly Review Report compared actual Client Choice fees paid by an account (during the prior four quarters) against estimated commissions or mark-ups ("estimated commission(s)") on eligible Client Choice transactions (if any) effected in the identified account during that same time period. Firm personnel would review the report and identify accounts that met the exception report criteria. Firm personnel would then send a copy of the report to the appropriate branch with a standardized cover memorandum recommending that the branch manager review whether a referred account was appropriate for Client Choice. Among other things, the Firm recommended that the branch manager review with the FC all identified accounts where the percentage difference between Client Choice fees and estimated commissions was 50% or greater. For accounts with such a difference, the standardized memorandum stated that the branch manager should document the reason for the customer's participation in Client Choice. The Firm also recommended that the branch manager take appropriate action with respect to accounts that consisted primarily of mutual funds.

14. Although the Firm recommended to branch managers that they review whether identified accounts were appropriate for Client Choice, there was no Firm policy in place that required that the recommended reviews be conducted by the branch manager or by the FC servicing the account. Thus, the Firm had no adequate means of determining that any action was taken with respect to accounts identified in its oversight of Client Choice accounts, including contacting customers and/or disclosing the discrepancy between the fee and estimated commissions.

15. In or about July 2002, the Firm began to follow-up on Client Choice accounts referred to branch managers for review on a limited sampling basis only. In instances where, in connection with the sampling, a continued concern was thereafter referred by the Firm to a regional manager, it was not the practice of the Firm to follow-up with the regional manager to ascertain what, if any, action had ultimately been taken with respect to the referred account.

Excessive Fees Charged To Client Choice
<u>Customers In Light Of Zero or Limited Trade Activity in The Customer's Account</u>

16. A review of accounts enrolled in Client Choice between the years 2001 and 2004, disclosed numerous customer accounts (or household groups) that had zero trades in either two consecutive years, three consecutive years, or in some instances, four consecutive years. Such customers paid substantially more in fees than they would have had they not been in the Client Choice program. Two examples of account groups with zero transaction activity over consecutive years are as follows:

    a. Household group consisting of the account of A and the account of B. Each of these linked accounts effected zero trades during each of the four years between 2001 and 2004. During this four-year period, the two accounts paid Client Choice fees of respectively, approximately $4,008, $3,425, $3,403, and $1,344 (for a total of approximately $12,180).

    b. Household group consisting of three linked accounts (two accounts of C, and one account titled D Beneficiary). Each of the linked accounts effected zero trades during each of the four years between 2001 and 2004. During this four-year period, the three accounts paid total fees of respectively, approximately $1,744, $1,250, $1,250, and $375 (for a total of approximately $4,619).

17. In addition to accounts that effected zero trades for two or more consecutive years, during a rolling two-year period that occurred between 2002 and 2004, numerous Client Choice accounts paid Client Choice fees that were excessive in light of the limited trading activity in those accounts during that two-year period. Two examples of such instances are as follows:

    a. The single account of E paid total fees of $2,500 between April 2002 and March 2004 (eight billing quarters). During that two-year period, E effected two trades, for which the estimated commission was approximately $118. E paid the minimum fee each quarter ($312.50). As of March 2004, the total asset value of the account was approximately $71,908. Actual fees paid were approximately 21 times greater than the estimated commissions.

    b. The single account of F paid fees of $5,008 between April 2002 and March 2004 (eight billing quarters). During that two-year period, F effected only one trade, for which the estimated commission was approximately $213. However, F paid fees on average in excess of $600 each quarter. As of March 2004, the total asset value of the account was approximately $181,521. Actual fees paid were approximately 23 times greater than the estimated commissions.

18. Notwithstanding the absence of any trading activity over two or more consecutive years in certain Client Choice accounts, or the limited trading activity during a two-year period in certain other Client Choice accounts, such accounts remained in Client Choice and continued to pay fees, without the Firm taking adequate steps to

determine whether the customers, if after being informed of relevant facts, still desired to remain in the Client Choice program.

Failure To Supervise the Client Choice Program

19. During all relevant times, NYSE Rule 342 (a) and (b) required the Firm to establish reasonable procedures of supervision and control over its various business activities (including over its Client Choice program) and to establish a separate system of follow-up and review.

20. Although the Firm issued account opening guidelines to its FCs instructing them to consider how active the account has been, how active it is likely to be, and how much the client has paid in commissions during the past 12 months, the Firm had no way of ensuring such guidelines were followed.

21. The Firm had an insufficient system for oversight of the Client Choice program until late 2001. Although the Firm began conducting systematic reviews specific to the Client Choice accounts in late 2001, the Firm had no policy in place that required its branch managers or FCs to address accounts that were identified on Firm exception reports, or that required adherence to standards applicable to such accounts. There were no clearly defined guidelines established under which a customer would be contacted by Firm personnel to determine whether the customer wished to remain in the Client Choice program despite the lack of trading activity in the customer's account. Disclosure of the discrepancy between the fee and estimated commissions was not made to the customer.

22. In addition, the Firm had no systematic basis for following-up with branch managers or with regional managers about accounts identified by the Firm through its oversight of Client Choice accounts.

23. In February 2003, a Firm Client Choice Policy Review Committee Working Group advised, in connection with an internal review of the Client Choice program, that in the absence of "business monitoring efforts or published policies that require some action be taken as consequence of not following those policies," the Firm had "no reasonable basis for believing that reverse churning [where there are high fees associated with little or no account activity] will not occur in these accounts." The Working Group further advised in February 2003 that "[t]oday, [the Firm] reviews accounts on a very limited basis and makes recommendations, but without [F]irm policy to point to, we are almost powerless to stop reverse churning, even if it can be identified."

24. Due to the lack of a Firm policy, some Firm branch managers failed to address concerns about the Client Choice accounts that had been identified in the Firm's exception reports.

25. For the foregoing reasons, prior to April 2004, the Firm failed to reasonably discharge its duties and obligations in connection with supervision and control of, and establishing a separate system of follow-up and review over, its Client Choice program. The Firm lacked any policy under which a customer was required to be contacted by Firm personnel so that the Firm could disclose to the customer the account inactivity, including the discrepancy between the fee and estimated commissions, enabling the customer (and the Firm) to determine whether the customer wished to remain in the Client Choice program.

Failure to Submit to NYSE Accurate Reports Concerning Customer Complaints

26. NYSE Rule 351(d) requires each member organization to report to the NYSE certain statistical information concerning customer complaints on a quarterly basis. NYSE Rule 351(d) provides, in relevant part:

> At such intervals and in such detail as the Exchange shall specify, each member not associated with a member organization and each member organization shall report to the Exchange statistical information regarding customer complaints relating to such matters as may be specified by the Exchange.

27. During the period from January 2001 through March 2004, the Firm provided inaccurate, incomplete, and/or incorrect statistical information to the NYSE regarding customer complaints in 95 instances.

28. A review of the 2002 SPRU Report and the investigative record has revealed that, out of the 320 sales practice complaints reviewed by MFR, the Firm had a total of 43 reporting deficiencies in 2002, including: two incorrect Social Security numbers; one incorrect product code; eight incorrect problem codes; twenty-two failures to report a complaint; and ten failures to timely report a complaint.

29. A review of the 2003 SPRU Report and the investigative record has revealed that, out of the 293 customer complaints reviewed by MFR, the Firm had a total of 35 reporting deficiencies in 2003, including: fifteen incorrect Social Security numbers; eight incorrect problem codes; five incorrect product codes; three failures to report a complaint; and four failures to timely report a complaint.

30. A review of the 2004 SPRU Report and the investigative record has revealed that, out of the 226 customer complaints reviewed by MFR, the Firm had a total of 17 reporting deficiencies in 2004, including: six incorrect Social Security numbers; two incorrect problem codes; four failures to report a complaint; and five failures to timely report a complaint.

The Firm's Recommendation and Sale of Unsuitable Securities and Related Supervisory Failures

31. From 1993 through 2001, Gibbs was the producing branch office manager ("BOM") for the Firm's Augusta, Georgia branch office (the "Branch").

32. To date, approximately 144 customer complaints have been reported to the NYSE concerning Gibbs alleging, among other things, unsuitable and unauthorized trading. The complaints relate to activity occurring from in or about 1996 through December 2001 (the "Gibbs Relevant Period"). The Firm has settled the majority of the complaints for a total of over $30 million.

Unsuitable Trading Strategy

33. During the Gibbs Relevant Period, Gibbs held seminars directed specifically to retired persons and those who were close to retirement age. Many of the seminar attendees were long-term factory workers of a consumer-product company (the "Company" and the "Company employees," respectively) in their late forties, fifties and sixties who had participated in the Company's profit sharing plan and owned hundreds of thousands of dollars in Company stock.[1]

34. During the seminars, Gibbs encouraged Company employees to retire, sell the Company stock held in the Company profit sharing plan and invest the monies with Gibbs using a trading method called the Dow Strategy (the "Dow Strategy"[2]). Gibbs also recommended modifying the Dow Strategy by purchasing a technology stock, which he called a "kicker" and by trading the stocks more than once per year. Collectively, Gibbs referred to these modifications as "active management."

35. Many of the Company retirees were similar in their financial circumstances, investment experience, level of education and employment background. Many were long-term employees of the Company, who held operational jobs, had little investing experience, and were dependent upon their investment in the Company profit sharing plan for a substantial portion of their monthly income. Many had a "growth-conservative" investment objective.

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[1] Gibbs entered into a Stipulation of Facts and Consent to Penalty with Enforcement in connection to this matter. Under the terms of that Stipulation of Facts and Consent to Penalty, Gibbs consented to findings that he engaged in conduct inconsistent with just and equitable principles of trade by effecting unsuitable and unauthorized trades in the accounts of his customers and violated NYSE Rule 408(a) by exercising discretion in the accounts of his customers without their prior written authorization. Gibbs agreed to the imposition of a sanction consisting of a censure and a permanent bar. See William Floyd Gibbs, Decision No. 06-42 (NYSE Hearing Panel Mar. 27, 2006).

[2] The Dow Strategy involved buying either the 10 highest yielding stocks of the Dow Jones 30 Industrials or the five lowest priced of the 10 highest yielding Dow stocks and holding them for one year. Thereafter, stocks would be re-evaluated and those that no longer met the criteria would be sold. New undervalued stocks would be purchased using the proceeds of the sale and accrued dividends.

36. In many instances, Gibbs employed the above-described variations of the Dow Strategy in Company customer accounts without consideration as to whether the trade was suitable to each customer's investment objective and, in some instances, without the customer's prior written authorization.

37. In or about March 2000, Gibbs contacted some of his Company retiree customers and solicited their investment of at least $100,000 in what he called a "short-term trading program."[3] No explanation of the risks accompanying such trading was provided to the customers.

38. Pursuant to the short-term trading program, on March 3, 2000, Gibbs invested approximately $8 million dollars of Company retiree customer funds, first in the stock of XYZ that was sold for a 14% profit on March 6, 2000, then Gibbs invested the proceeds in the stock of ABC. XYZ and ABC were rated "aggressive" and "buy/aggressive" respectively by the Firm. Gibbs earned substantial commissions with respect to each set of transactions.

39. Although the sale of XYZ yielded a gain, the share price of ABC fell significantly and rapidly. ABC eventually declared bankruptcy. The result was substantial losses to the Company retiree customers.

40. In early 2001, Gibbs began an options trading program by writing covered calls in the accounts of the Company retiree customers to generate income. This strategy subjected customers to the risk that their stock could be called away, removing assets from their accounts, which had already lost much of their value.

41. The purchase of aggressive technology stocks, including XYZ and ABC in the Company retiree customer accounts were unsuitable investments for the Company retirees, inexperienced investors who had invested their life's savings and sought conservative investments to generate consistent income.

42. Pursuant to the "short-term trading program," Gibbs executed unauthorized trades and exercised discretionary trading authority in Company retiree customer accounts without the customers' prior written authorization.

43. During the Gibbs Relevant Period, the Firm, through Gibbs, engaged in conduct inconsistent with just and equitable principles of trade by recommending and effecting trades in customer accounts that were unsuitable in view of the customers' investment objectives, prior investment experience, and financial experience.

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[3] Pursuant to this program, Gibbs solicited a minimum of $100,000 from several Company retiree customers, advised each customer that they would not be contacted prior to purchases or sales and placed block trades in aggressive technology stocks which were held for a short period of time. Gibbs did not obtain written authorization to handle these customer accounts on a discretionary basis.

Firm Failure to Supervise Gibbs

44. During the Gibbs Relevant Period, the Firm violated NYSE Rules 342(a) and (b) by failing to adequately supervise the Branch and its producing BOM with respect to the implementation of the "Dow Strategy" to Company retiree customers and by failing to establish a separate system of follow-up and review to determine that the delegated supervisory authority and responsibility with respect to the activities of its producing branch office managers was being properly exercised with respect to the suitability of activity in customer accounts.

45. During the Gibbs Relevant Period the Firm designated a Regional Manager (the "RM")[4] as the officer responsible for the supervision of the Branch and Gibbs, including the supervision of activity in Gibbs' customer accounts.

46. The RM never attended any of the dozens of seminars Gibbs presented during a four-year period and failed to review the written information disseminated at the seminars or ascertain what Gibbs was communicating to customers during the seminars.

47. The RM spent only one-half to one hour per week reviewing daily trade reports, active account reports, exception reports and other materials relating to trading activity in Gibbs' customer accounts and failed to detect the violative conduct.

48. Although the RM spoke with Gibbs once or twice a month, he failed to discuss with Gibbs his customer accounts and the version of the Dow Strategy Gibbs was implementing. Further, the RM never conducted any review of Gibbs' customer accounts when he periodically visited the Branch during the Gibbs Relevant Period.

49. On or about February 12, 1998, the Firm identified a problem with the trading activity in some of Gibbs' discretionary accounts. Specifically, the Firm's Compliance Department sent a memorandum (the "1998 Compliance Memorandum") to the RM discussing such activity and noting that although documents relating to these accounts contained a "consistent mention of a Dow Strategy," the "activity in these accounts differs from the Dow 10 and Dow 5 strategies as implemented by unit trusts."

50. The 1998 Compliance Memorandum advised that Gibbs' discretionary accounts participating in the Dow Strategy had "conservative-growth" investment objectives

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[4] The designated Regional Manager was Earl Duncan Laing ("Laing"). Laing entered into a Stipulation of Facts and Consent to Penalty with Enforcement by which he consented to findings that he violated NYSE Rule 342(a) by failing to reasonably discharge his duties and obligations as a regional manager of a member firm in connection with the supervision and control of certain of the member firm's business activities, including the supervision of a producing branch office manager, and NYSE Rule 405(2) by failing to supervise diligently the activity in numerous customer accounts handled by a producing branch office manager of his member firm employer. Laing agreed to the imposition of a sanction consisting of a censure, a two-year supervisory bar and a requirement that he retake supervisory examinations prior to resuming employment in any supervisory capacity. See Earl Duncan Laing, Decision 06-47 (NYSE Hearing Panel Apr. 20, 2006).

and that “the Dow 10 and Dow 5 strategies are not by nature conservative strategies.” The 1998 Compliance Memorandum requested that the RM review this information with Gibbs, document his supervisory actions and contact the Compliance Department to verify such review.

51. The RM failed to contact Gibbs to address the issues raised in the 1998 Compliance Memorandum or to conduct any further supervisory review, which should have alerted the Firm to unsuitable trading activity in the Company retiree customer accounts.

52. On November 20, 1998, the Firm’s branch administrator for the Southeast Region identified that the trading activity in Gibbs’ Company retiree customer accounts was inconsistent with the Dow Strategy and alerted the RM accordingly. Neither the RM nor any other representative of the Firm conducted any supervisory review of Gibbs’ customer accounts in light of this advisory.

53. On November 28, 1998, a Firm branch manager relayed to the RM the report of a registered representative who had attended one of Gibbs’ seminars. During a telephone conversation, the RM was informed of Gibbs’ statement to attendees that they should “concentrate their investment in five stocks” and that asset allocation was a “waste of time” and “ineffective.” The RM failed to take action in response to this information.

54. On or about March 9, 2000, two days after the purchase of ABC as described in paragraphs 37 and 38 above, the Firm’s branch administrator responsible for the Branch, notified the RM that this large block trade had occurred. Neither the RM nor any other representative of the Firm conducted a supervisory review of Gibbs’ customer accounts upon notification of this transaction.

55. Likewise, neither the RM nor other Firm representative contacted any of the Company retiree customers, many having a “conservative-growth” investment objective, regarding the unsuitable concentrations of technology stocks in their accounts despite notice that Gibbs was entering large block orders and concentrating nearly all of the Company retiree customers in the same stocks.

56. Further, on May 30, 2001, the Firm’s branch administrator for the South and Southeast Region sent a memo to the RM noting that Gibbs had effected over 400 trades the previous day. The RM again failed to conduct any supervisory review in response to this advisory and to contact Gibbs or his customers regarding the circumstances of these trades.

57. The Firm was on notice of but ignored warning signs relating to Gibbs’ handling of the Company retiree customer accounts, which should have disclosed the violative trading activities in these accounts. Thus, the Firm failed to reasonably supervise the activities of its employees, including a producing branch office manager and regional

manager and did not have in place adequate procedures and systems to ensure compliance with securities laws.

Other Factors

58. The Firm represented that in or about April 2004, the Firm began implementation of new supervisory procedures and account requirements concerning Client Choice. The Firm began issuing a welcome letter to new Client Choice customers that stated that a buy-and-hold strategy was not suitable for Client Choice; implemented a minimum eligible asset amount to enter to Client Choice; and set conditions that required a customer to be contacted when a customer account (or household group) became inactive, underactive, overactive, or fell below certain eligible asset levels.

59. Beginning in 2002, the Firm took a series of corrective steps with respect to its reporting of complaints under NYSE Rule 351(d) including creating a new position with a primary responsibility of reporting complaints to the NYSE and implementing a random weekly review of newly opened complaint files to eliminate clerical, coding and other errors. The Firm's error rate with respect to NYSE Rule 351(d) filings has consistently declined since 2002, and, subsequent to the 2004 SPRU Report, no adverse findings against the Firm concerning its NYSE Rule 351(d) reporting have been referred to Enforcement.

DECISION

The Hearing Officer, in accepting the Stipulation of Facts and Consent to Penalty, found Respondent guilty as set forth above.

PENALTY

In view of the above findings, the Hearing Officer imposed the penalty consented to by Respondent of a censure, a $900,000 fine (the payment previously made by Respondent in connection with a consent order entered into with the State of Georgia concerning the Gibbs matter shall be deemed to satisfy $400,000 of this penalty[5]), and requirement to make restitution to customers relating to overpayment of fees pursuant to the following undertaking:

A. Within 30 days from the date the decision in this matter becomes Final (the "Final Date"), the Firm will retain an independent consultant (the "Consultant") not unacceptable to Enforcement, to (i) perform a review of Client Choice

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[5] On or about April 7, 2004, the Commissioner of Securities of the State of Georgia and the Firm entered into a consent order by which the Firm consented to findings that the Firm and its agents, including Gibbs, engaged in unsuitable and unauthorized trading and the Firm failed to exercise diligent supervision over the securities activities of Gibbs and other Firm employees. The Firm also consented to pay $950,000 consisting of a civil penalty, the costs of investigating the matter, costs of retention of an independent consultant to conduct a review of the Firm's sales and supervisory practices in Georgia, and certification that the Firm has paid in excess of $25 million in settlements to customers of its Augusta, Georgia branch office.

accounts (pursuant to a process that will be subject to Enforcement review and approval) (the "Review") to determine which accounts enrolled in Client Choice between 2001 and 2004 require restitution (the "Restitution Accounts"), and to (ii) prepare a report of the Review (the "Report") which shall identify the Restitution Accounts and restitution amounts.

B. Within 90 days from the Final Date (i) the Review shall be completed, and (ii) the Report shall be delivered to Enforcement and to the Firm.

C. After completion of the Review, but no later than 120 days after the Final Date, the Firm shall make restitution to the Restitution Accounts in the amounts determined by the Consultant, and concurrently send written notification to the Restitution Accounts, advising the account holders that restitution has been made by the Firm, with an explanation why.

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For the Hearing Board

Peggy Kuo - Chief Hearing Officer