

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

**INVESTMENT ADVISERS ACT OF 1940**

**Release No. 1879 / June 15, 2000**

**ADMINISTRATIVE PROCEEDING**

**File No. 3-10232**

**In the Matter of Founders Asset Management LLC and Bjorn K. Borgen**

**ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTIONS 203(e), 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

**I.**

The United States Securities and Exchange Commission (the "Commission") deems it appropriate in the public interest and for the protection of investors that administrative and cease-and-desist proceedings be instituted pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940 (the "Advisers Act") against Founders Asset Management LLC ("New Founders"), as successor to Founders Asset Management, Inc. ("Old Founders"), and pursuant to Sections 203(f) and 203(k) of the Advisers Act against Bjorn K. Borgen ("Borgen") (collectively "Respondents").

**II.**

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement ("Offers") that the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission or in which the Commission is a party, and without admitting or denying the findings, except those findings pertaining to the jurisdiction of the Commission over them and the subject matter of these proceedings, Respondents consent to the entry of the findings and the imposition of the remedial sanctions and cease-and-desist order as set forth herein.

Accordingly, IT IS ORDERED that proceedings pursuant to Sections 203(e), 203(f) and 203(k) of the Advisers Act be, and hereby are, instituted.

**III.**

On the basis of this Order Instituting Proceedings, and the Offers submitted by Respondents, the Commission finds that:

**RESPONDENTS**

A. On April 1, 1998, Mellon Bank, N.A. ("Mellon") acquired Old Founders, which merged into New Founders, a subsidiary of Mellon. Old Founders had been registered with the Commission as an investment adviser pursuant to Section 203(c) of the Advisers Act since December 6, 1971, and New Founders, as its successor, registered with the Commission as an investment adviser on March 13, 1998. Old Founders was a Delaware corporation with headquarters in Denver, Colorado. Old Founders served as an investment adviser to certain mutual funds (the "Funds") and managed private accounts for clients, including pension and profit-sharing plans, trusts, corporations and individuals.

B. Borgen, a resident of Colorado, was at all relevant times the president and sole owner of Old Founders. During the relevant period, Borgen was also president and a director of the Funds. 1 Borgen directed the business and affairs of Old Founders, including its brokerage policy and the

selection of broker-dealers which would execute transactions for the Funds and Old Founders' privately managed accounts.

## **FACTS**

C. From at least 1992 through July 1995, Old Founders effected securities transactions of certain privately managed accounts with broker-dealers with which William O. Foster ("Foster"), a registered representative, was associated (the "Foster broker-dealers"). Old Founders did so at Borgen's direction in order to provide Foster with a pre-arranged amount of brokerage commissions in exchange for Foster referring clients to Old Founders. By July 1995, Foster had referred more than 40 of his brokerage customers to Old Founders. Collectively, those referrals invested more than \$39 million in privately managed accounts with Old Founders and more than \$84 million in the Funds. During the period from January 1991 through July 1995, Old Founders received more than \$1.4 million in advisory fees from these clients.

D. Prior to January 1992, Old Founders had "bunched" same-day, same-security purchases (or sales) for the Funds and privately managed accounts. Under this policy, orders for privately managed accounts usually were executed at the same time and price as orders for the Funds. Moreover, these trades were generally executed at a commission rate of six to eight cents per share. With the understanding that small privately managed accounts with \$2 million or less in assets likely would be disadvantaged, Old Founders, through Borgen, proposed to the Board of Directors of the Funds in May 1991 that it approve a change in policy, allowing the unbunching of orders placed by the small privately managed accounts from orders placed by the Funds and large privately managed accounts. Further, pursuant to the policy, the orders for the smaller accounts were to be executed after the orders for the Funds and larger accounts.

E. From January 1992 through July 1995, Borgen directed Old Founders to segregate transactions in small privately managed accounts from same-day, same-security transactions for the Funds and other large accounts and, in most cases, execute the transactions for the smaller accounts after transactions for the Funds and larger accounts. This resulted in those clients paying higher (or receiving lower) prices compared to the larger privately managed accounts and the Funds in same-day transactions for the same securities.

F. From January 1993 through July 1995, Old Founders, through Borgen, directed securities transactions for certain small privately managed accounts to the Foster

broker-dealers at a commission rate of 20 cents per share in order to meet Old Founders' obligation to pay Foster the pre-arranged amount of commissions Borgen had established for the client referrals. Old Founders effected transactions with the Foster broker-dealers for those accounts at a commission rate of 20 cents per share on the same days that Old Founders effected transactions with the Foster broker-dealers and other broker-dealers in the same securities for the Funds and other large accounts at commission rates of six to eight cents per share. In July 1995, Old Founders terminated this practice and then conducted a comprehensive review of its brokerage policies. After completing the review, Old Founders voluntarily paid \$85,000 to certain of the small privately managed accounts whose trades were directed to the Foster broker-dealers for execution at a 20 cent per share commission rate while lower commission rates were available, pursuant to an offer made by Old Founders.

## **VIOLATIONS OF SECTIONS 206(1) AND 206(2) OF THE ADVISERS ACT**

G. Sections 206(1) and 206(2) of the Advisers Act prohibit an investment adviser from employing any device, scheme, or artifice to defraud any client or prospective client and from engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

H. Old Founders willfully violated and Borgen willfully aided and abetted and caused Old Founders' violations of Sections 206(1) and 206(2) of the Advisers Act by: (1) failing to disclose in its Form ADV or otherwise to its clients (a) Old Founders' arrangement with Foster pursuant to which Old Founders and Borgen used brokerage commissions generated from certain small privately managed accounts to compensate Foster for client referrals, and (b) the effect on those small accounts of the change in Old Founders' trade allocation policy and the delayed execution of certain small privately managed accounts' trades; and (2) by falsely stating in Old Founders' Form ADV that it was Old Founders' policy to seek best execution.

#### **VIOLATIONS OF SECTION 207 OF THE ADVISERS ACT**

I. Section 207 of the Advisers Act makes it unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under Sections 203 or 204 of the Advisers Act, or willfully to omit to state in any such application or report any material fact which is required to be stated therein. 2

J. Old Founders and Borgen willfully violated Section 207 of the Advisers Act by filing Forms ADV and amendments thereto which: (1) from February 1992 through March 1995, omitted material facts by not disclosing the new trade execution policy for certain small privately managed accounts and the fact that this change in policy caused those clients to generally receive less favorable prices than the Funds and other institutional accounts managed by Old Founders; (2) from March 1993 through March 1995, falsely stated that it was Old Founders' policy "to seek the best execution of orders at the most favorable prices" and that "[s]ubject to the policy of seeking best execution of orders at the most favorable prices, Registrant may place transactions with brokerage firms which refer investment advisory clients to Registrant," when in fact trades for certain small privately managed accounts were being directed to the Foster broker-dealers for execution at a 20 cent commission rate while lower commission rates were available; and (3) omitted material facts by not disclosing the brokerage arrangement with Foster.

#### **IV.**

In view of the foregoing, the Commission deems it appropriate in the public interest and for the protection of investors to accept the Offers submitted by Respondents and to impose the sanctions specified therein.

Accordingly, IT IS ORDERED:

A. Pursuant to Section 203(e) of the Advisers Act that New Founders, as the successor to Old Founders, be censured;

B. Pursuant to Section 203(k) of the Advisers Act, that New Founders, as the successor to Old Founders, cease and desist from committing or causing any violation and any future violation of Sections 206(1), 206(2) and 207 of the Advisers Act;

C. That New Founders, as successor to Old Founders, shall, within thirty (30) days of the entry of this Order, pay a civil money penalty in the amount of \$50,000 to the United States Treasury. Such payment shall be: (1) made by United States postal money order, certified check, bank cashier's check or bank money order; (2) made payable to the Securities and Exchange Commission; (3) hand-delivered or mailed to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (4) submitted under cover letter that identifies Founders as a respondent in these proceedings, and the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Daniel F. Shea, Regional Director, Securities and Exchange Commission, Central Regional Office, 1801 California Street, Suite 4800, Denver, Colorado 80202;

IT IS FURTHER ORDERED:

D. Pursuant to Section 203(f) of the Advisers Act, that Borgen be, and hereby is, suspended from association with any investment adviser for a period of one hundred and eighty (180) days, effective on the second Monday following the entry of this Order. Borgen shall provide to the Commission, within thirty (30) days after the end of the 180 day suspension period described above, an affidavit that he has complied fully with the sanctions described in paragraph D.;

E. Pursuant to Section 203(k) of the Advisers Act, that Borgen cease and desist from committing or causing any violation and any future violation of Section 207 of the Advisers Act and from causing any violation and any future violation of Sections 206(1) and 206(2) of the Advisers Act;

F. That Borgen, as the former president and sole owner of Old Founders, shall, within thirty (30) days of the entry of this Order, pay disgorgement and prejudgment interest in the total amount of \$590,000. Old Founders has already paid \$85,000 to clients. The remaining disgorgement payment of \$505,000 shall be: (1) made by United States postal money order, certified check, bank cashier's check or bank

money order; (2) made payable to the Securities and Exchange Commission; (3) hand-delivered or mailed to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (4) submitted under cover letter that identifies Borgen as a respondent in these proceedings, and the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Daniel F. Shea, Regional Director, Securities and Exchange Commission, Central Regional Office, 1801 California Street, Suite 4800, Denver, Colorado 80202;

G. The disgorgement and prejudgment interest paid shall be held by the Comptroller, to be utilized for payment to persons eligible to receive such funds pursuant to a plan of distribution, which shall be submitted by the Division of Enforcement within sixty (60) days from the date of the payment. In the event that all or any portion of these funds remain after adjudication of any claims and disbursements of any funds, the remainder shall be disbursed to the United States Treasury. In no event shall any portion of these funds be returned to Borgen or his agents, successors, or assigns;

H. That Borgen, as the former president and sole owner of Old Founders, shall, within thirty (30) days of the entry of this Order, pay a civil money penalty in the amount of \$150,000 to the United States Treasury. Such payment shall be: (1) made by United States postal money order, certified check, bank cashier's check or bank money order; (2) made payable to the Securities and Exchange Commission; (3) hand-delivered or mailed to the Comptroller, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (4) submitted under cover letter that identifies Borgen as a respondent in these proceedings, and the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Daniel F. Shea, Regional Director, Securities and Exchange Commission, Central Regional Office, 1801 California Street, Suite 4800, Denver, Colorado 80202.

By the Commission.

Jonathan G. Katz Secretary

**FOOTNOTES**

1 Borgen has no affiliation with New Founders, Mellon or the Funds.

2 Section 204 of the Advisers Act and Rule 204-1 thereunder require periodic filing and amendment of Forms ADV by investment advisers. Pursuant to Rule 204-1(d), a Form ADV or an amendment thereto is a "report" within the meaning of Section 207.