SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 1918 / January 10, 2001

Admin. Pro. File No. 3-9725

In the Matter of SEABOARD INVESTMENT ADVISERS, INC. and EUGENE W. HANSEN
345 West Freemason Street
Norfolk, Virginia 23510

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING
Ground for Remedial Action
Injunction

Registered investment adviser and associated person of a registered investment adviser were permanently enjoined from violating antifraud provisions of the securities laws and from violating an earlier Commission cease-and-desist order. Held, it is in the public interest to revoke registration of investment adviser and to bar registered representative from association with any investment adviser.

APPEARANCES:
Eugene W. Hansen, pro se and on behalf of Seaboard Investment Advisers, Inc.
Brian Carroll and Kingdon Kase, for the Division of Enforcement.

Appeal filed: September 30, 1999
Last brief received: January 14, 2000
Oral argument held: November 29, 2000

I.

Respondents Seaboard Investment Advisers, Inc. ("Seaboard") and Eugene W. Hansen, as well as the Division of Enforcement, appeal from the decision of an administrative law judge. The law judge found that, on July 9, 1998, the United States District Court for the Eastern District of Virginia issued an order, with Respondents' consent without admitting or denying liability, permanently enjoining them from violating Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 and Advisers Act Rule 206(4)-1(a)(5) and from violating an earlier Commission Order Making Findings and Imposing Remedial Sanctions and Cease and Desist Order ("1994 Order"). On the basis of the injunction, the law judge revoked the registration of Seaboard and suspended Hansen from being associated with an investment adviser for a period of twelve months. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

Seaboard has been registered with the Commission as an investment adviser since 1985.1 Hansen, founder and controlling shareholder of Seaboard, was chairman of the board of directors, chief executive officer, and president of Seaboard.

In 1994, Seaboard and Hansen, without admitting or denying the allegations contained in the Order Instituting Proceedings, consented to entry of the 1994 Order.2 The 1994 Order required that Seaboard and Hansen cease and desist from violating Advisers Act Sections 206(4) and 204, as well as Advisers Act Rules 206(4)-1(a)(5), 204-2(a)(16), and 204-2(e)(3). The order also

imposed a $1 million civil money penalty on Seaboard and required the firm to implement certain auditing and compliance review procedures.3 The Commission found that, among other things, Seaboard had advertised erroneously high-performance figures. After the issuance of the 1994 Order, the number of client accounts and the value of assets under Respondents' management declined significantly.

Both before and after the 1994 Order, on a quarterly basis, Respondents routinely prepared and mailed letters to their clients summarizing how individual accounts had performed during the previous quarter. These "client review letters" often compared Seaboard account performance with certain market benchmarks. Two sets of client review letters contained false and misleading information.

In January and February of 1995, Hansen prepared and sent to his clients a set of client review letters, the so-called "Lipper letters." The Lipper letters compared the performance of Seaboard's accounts with the performance of the average balanced account as reported by Lipper Analytical Services. However, Hansen altered the Lipper performance figure in the Lipper letters, claiming that Lipper had reported a decline in the average balanced account of approximately 7 percent. In fact, Lipper had reported a 2.14 to 2.45 percent decline in the performance of the average balanced account. Overstating the decline in the Lipper figure by several percentage points gave Seaboard clients the false impression that, while the value of their Seaboard accounts declined, Seaboard nevertheless had outperformed the Lipper Index.

In March 1995, Hansen sent two additional client review letters, the "Odd-Quarter letters." In the Odd-Quarter letters, Hansen falsely compared the performance of equity and bond components of Seaboard's balanced account with the performance of the Standard and Poors ("S&P") 500 Index4 and the Lehman Brothers Government/Corporate Bond ("Lehman") Index. Hansen falsely claimed that the equity portion of the Seaboard account doubled the performance of the S&P 500 Index when, in fact, Seaboard's performance barely equaled or fell below the S&P 500 Index. Similarly, Hansen misrepresented that the bond portion of the Seaboard account outperformed the Lehman Index, which it again did not.

Seaboard's internal review procedures required all written communications to be reviewed and approved by the Vice President of Compliance, Penny Kilpatrick, prior to being sent to clients. Kilpatrick routinely approved the "core text"5 of the client review letters. Seaboard portfolio managers had some discretion in tailoring the core text to particular clients; however, the review policy required that any material changes made to the core text be reviewed by the compliance officer for approval. Hansen did not secure approval of the Lipper and Odd-Quarter letters that he sent, as required by Seaboard's review policy.6

Sometime after Seaboard sent the Lipper letters, Commission staff received an anonymous complaint stating that Seaboard was violating the 1994 Order. This anonymous complaint consisted of a cover letter, three copies of the Lipper letter, which the complainant represented had been mailed to Seaboard clients, and a printout of a screen from Bloomberg Professional Service displaying the actual Lipper performance figure.

In March 1995, the staff conducted an examination of Seaboard, in part to investigate the allegations made by the anonymous complaint. During its review of Seaboard's client files, the staff located over thirty Lipper letters sent to individual clients, including the three attached to the anonymous complaint.7 On September 30, 1996, the Commission filed a complaint seeking a permanent injunction against Seaboard and Hansen.

III.

Respondents assert that the Division failed to prove "to the law judge's satisfaction" that they violated the Advisers Act or the 1994 Order. However, Sections 203(e) and 203(f)8 of the Advisers Act authorize the Commission to institute administrative proceedings and, when they are in the

public interest, to impose sanctions when an investment adviser or an associated person of an investment adviser is permanently enjoined from engaging in any act or practice in connection with activity as an investment adviser or in connection with the purchase or sale of a security. Respondents consented to the entry of an injunction prohibiting them from engaging in violations of Section 206 of the Advisers Act and the 1994 Order. The law judge's initial decision and the record make clear that the Division has met its burden of proof that Respondents were enjoined from activities as an investment adviser.

Hansen raises a variety of defenses to the violations that were the basis for the injunction. Hansen claims that he did not intend to deceive or defraud his clients. He asserts that, at the time that he prepared the Lipper letters, he believed that he correctly reported the performance of the Lipper Index.9 When he discovered that the Lipper performance figure he had reported was inaccurate, he promptly mailed correction letters to all of his clients.10 He further claims that he pointed out his error to Commission staff when they conducted the 1995 examination. Hansen also urges that the erroneous comparisons in the Odd-Quarter letters were discovered in the drafting stage, and only two Odd-Quarter letters were mistakenly sent. He argues that the errors in reporting the various market indices in both the Lipper and Odd-Quarter letters were not material and caused no economic harm to his clients. Hansen also asserts that the client review letters at issue do not constitute "advertising" under the Advisers Act. Hansen raises many of these issues for the first time on appeal. We have long refused to permit a respondent to attack the merits of a previous civil proceeding.11

Rather, the issue before us is the impact of the 1998 injunction in evaluating the public interest.12 Although the District Court made no findings in connection with the 1998 injunction, allegations in the complaint are given "considerable weight" in assessing what sanction may be in the public interest.13 In addition, the record includes Seaboard's and Hansen's responses to requests for admissions in the injunctive action, in which various admissions are made by Respondents.14 We look to the information in the record concerning the circumstances relating to the injunction to determine what action, if any, is in the public interest.15

IV.

When Congress grants an agency the responsibility to impose sanctions to achieve the purposes of a statute, "'the relation of remedy to policy is peculiarly a matter for administrative competence'."16 In determining whether a sanction under Advisers Act Section 203(f) is in the public interest, we look to the egregiousness of the respondents' actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondents' assurances against future violations, the respondents' recognition of the wrongful nature of their conduct, and the likelihood that the respondents' occupations will present opportunities for future violations.17

We conclude that the Respondents' conduct was egregious. Respondents overstated the performance of client portfolios by making inaccurate and false comparisons to market indices.18 These misstatements were designed to encourage Seaboard's clients to maintain their accounts at Seaboard at a time when Seaboard was losing customers. Bruce DiPietro, Seaboard's research director, testified before the law judge that Hansen had told DiPietro that Hansen had sent the misleading letters to "help Seaboard."19 Contrary to the Respondents' assertions, their misrepresentations overstating Seaboard's performance as against market benchmarks were material.20

While Hansen makes various arguments that he did not act with scienter in sending the Lipper and Odd-Quarter letters, Hansen previously consented to an injunction with respect to his conduct.21Moreover, the record here demonstrates that Hansen intentionally circumvented Seaboard's review procedures. As an officer of Seaboard, Hansen was well aware of the proper review procedures and his responsibility to secure final approval of his client communications from the Vice President of Compliance.

Hansen notes that the law judge concluded that Hansen had not acted with "a high degree of scienter." In making this determination, however, the law judge relied, in part, on a finding that Hansen had included in the Lipper letters a printout of a Bloomberg screen reporting the correct Lipper Index figure. Hansen, however, has never contended that he attached the printout to the Lipper letters.22 In fact, in the oral argument before us, Hansen admitted that he did not send the Bloomberg printout with the Lipper letters. We accordingly conclude that the printout of the Lipper Index figure was not attached to the Lipper letters. For the reasons discussed above, we conclude that Respondents acted with a high degree of scienter.

Respondents have a lengthy disciplinary history. In addition to the injunction at issue here and the Commission's 1994 Order, Respondents have been the subjects of various regulatory actions. In 1991, Seaboard, without admitting or denying liability, consented to the entry of a cease-and-desist order by the State of North Carolina with respect to soliciting accounts without proper registration in the state.23 In 1995, without admitting or denying liability, Seaboard and Hansen consented to the entry of an order by the Virginia State Corporation Commission concerning Virginia state law violations, including misrepresenting past performance to clients.24

After the imposition of the 1998 injunction, moreover, Hansen failed to disclose the injunction in the Form U-4, Uniform Application for Securities Industry Registration or Transfer, that he filed with the Commonwealth of Virginia to become associated with a newly-created investment adviser, Back Bay Advisors, L.L.C. ("Back Bay"). In response to the question 22C(1), "Has any domestic or foreign court ever enjoined you in connection with any investment activity," Hansen answered "no."25 Hansen claims that he confused the concept of a consent settlement with the terms "injunction" and "enjoined." Since Hansen signed the consent and was represented by counsel when he consented to the injunction, he should have understood the nature of the order entered against him.

We conclude that Respondents do not understand the regulatory and fiduciary responsibilities of an investment adviser.26 They do not appreciate that the misrepresentations of the performance of Seaboard client portfolios in comparison to the market in the client review letters were material. Instead, Hansen characterizes these misrepresentations as "touch fouls," minor mistakes that he corrected upon discovery.27

As noted, Hansen has applied to become associated with the investment adviser, Back Bay. Because it appears that Hansen will continue to pursue a career in the field of investment advising, he would have the opportunity to commit future violations.

We conclude that it is in the public interest to revoke the registration of Seaboard and to bar Hansen from association with any investment adviser.

An appropriate order will issue.28

By the Commission (Chairman LEVITT and Commissioners HUNT and UNGER); Commissioner Carey not participating.

Jonathan G. Katz
Secretary

Footnotes

1 Although it remains registered as an investment adviser, Seaboard ceased doing business in 1997.

2 Seaboard Investment Advisers, Inc., Advisers Act Rel. No. 1431 (Aug. 3, 1994), 57 SEC Docket 837.

3 The 1994 Order required Seaboard to hire a "special review person" to review and make recommendations regarding Seaboard's policies and procedures governing advertising, as well as the maintenance of records relating to advertising.

4 The Odd-Quarter letters did not identify the S&P 500 Index by name. Instead, the letters stated, "[y]our equities have nearly doubled the comparable market returns over the last three months."

The conclusion that the Odd-Quarter letters referred to the S&P 500 Index is supported by the record. Hansen does not dispute that the Odd-Quarter letters referred to the S&P 500 Index. Moreover, Bruce DiPietro, former Director of Research for Seaboard, testified that it was Seaboard's practice to compare its equity accounts with the S&P 500 Index. The Division also introduced 4th Quarter Performance letters prepared by Seaboard that compared Seaboard's performance to the S&P 500 Index and another index.

Furthermore, the Division's expert testified that "comparable market returns" referred to the S&P 500 Index, which is widely used in evaluating equity accounts. The expert further observed that the majority of stocks held in the Seaboard client portfolios at issue were included in the S&P 500.

5 The core text of the Lipper letter was identical to the text of the Lipper letters Hansen mailed with two exceptions: (1) the core text did not include Hansen's sentence in the first paragraph stating that, "Even Lipper Analytical Services pronounced 1994 as, 'just plain no fun,' as they reported that the typical balanced fund lost approximately 7% for the year;" and (2) portfolio managers were permitted to "customize" portions of the second paragraph not at issue in this proceeding.

6 Although Hansen claims that he thought the Lipper letters had been approved by Kilpatrick, Commission branch chief Timothy Simons testified that, during his examination, Kilpatrick gave him the core text of the Lipper letter that she had approved. That approved core text, described in n.5 supra, did not refer to the Lipper Index. The record does not indicate whether Kilpatrick reviewed any version of the Odd-Quarter letters.

7 The record does not indicate how the staff discovered the Odd-Quarter letters.

8 15 U.S.C. § 80b-3(e),(f).

9 Hansen has provided different explanations for his belief that the Lipper number he reported in the Lipper letters was correct. In the 1998 injunctive action, Hansen claimed that the Lipper figure that he reported represented the difference between the high point and low point of the Lipper Index during 1994.

While Hansen continues this claim here, he now also asserts that he derived the Lipper figure reported in the Lipper letters by excluding reinvested income and dividends from Lipper's actual results. Hansen did not retain any supporting documentation in his files substantiating his version of the source of the Lipper figure. In any event, the Division's expert testified that Hansen's purported calculation was not mathematically correct.

Moreover, Hansen's Lipper letters presented the performance of his client portfolios that included reinvested dividends and income. We agree with the Division's expert who testified that, even accepting Hansen's explanation, the Lipper letters would be misleading because they compared total return on the Seaboard accounts with a Lipper figure that excluded reinvested dividends and income.

10 The record shows that Hansen did send correction letters to his clients; those correction letters were dated shortly after the staff's examination.

11 See Demitrios Julius Shiva, 52 S.E.C. 1247 (1997). See generally Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).

12 See, e.g., Timothy Mobley, 52 S.E.C. 592, 594 (1996) (finding conduct providing basis for injunction was extremely serious and properly was considered in assessing public interest).

13 Charles Phillip Elliott, 50 S.E.C. 1273, 1277 (1992), aff'd, 36 F.3d 86 (11th Cir. 1994) (per curiam).

14 For example, at times, Hansen denies before us that he authored and mailed the Lipper and Odd-Quarter letters. However, he admitted both of these facts in his responses to requests for admissions in the injunctive action. And, in the oral argument before us, Hansen took "100 percent responsibility" for the Lipper letters.

15 Charles Phillip Elliott, 50 S.E.C. at 1277.

16 Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185 (1973) (quoting American Power Co. v. SEC, 329 U.S. 90, 112 (1946)).

17 Donald T. Sheldon, 51 S.E.C. 59, 86 (1992), aff'd, 45 F.3d 1515 (11th Cir. 1995) (citing Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd, 450 U.S. 91 (1981)).

18 See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180,194 (1963) (defining investment advisers' fiduciary duty as "an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' [their] clients").

19 The law judge credited the testimony of DiPietro. Respondents challenge this determination, but we have held repeatedly that credibility determinations by the fact finder are entitled to deference absent substantial evidence to the contrary. We find no reason to disturb the law judge's finding here. See, e.g., Martin Kaiden, Securities Exchange Act Rel. No. 41629 (July 20, 1999), 70 SEC Docket 439, 450 n.32.

20 See generally TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976) (information is material if a reasonable investor would consider it important in evaluating an investment).

21 Hansen also asserts that, when he discovered he could not justify the Lipper figures, he sent correction letters to his clients. DiPietro testified that, in his view, Hansen's correction letter needed "some stronger language." We agree. Hansen's correction letter reads as follows:

In much of the comparable information we related at year-end to stress this volatility, one statistic erroneously attributed to Lipper Analytical Services mentioned that the average adviser portfolio lost approximately 7%. Lipper primarily analyzes mutual funds, not advisers. While the average mutual fund was negative for the year, we used statistics from public indexes and the investment press that were not Lipper's. Our apologies to them and to those who might have re-quoted or paraphrased Lipper.

Although Hansen suggests that the Lipper figure he reported was incorrect, Hansen fails to acknowledge that the figure was "overstated."

22 In his responses to requests for admissions in the injunctive action, Hansen identified entirely different attachments to the Lipper letters. At the hearing, the staff examiner testified that the staff had received the printout with the anonymous complaint letter that instigated the staff's investigation of Seaboard. Hansen agreed, testifying that he acquired the printout from the Division staff when he reviewed the Division's proposed exhibits.

23 It appears that Hansen was not a party to this action.

24 We note that, during Hansen's appearance before us, he was asked whether he had any disciplinary history in Virginia or North Carolina. Hansen stated that, "The firm did, but I did not." Hansen in fact was named as a party in the Virginia action.

25 While in the accompanying Disclosure Reporting Page Hansen disclosed a "Civil Complaint Action" in which the SEC sought a permanent injunction, Hansen stated that the proceeding was "settled" and that, as a result, Seaboard and Hansen agreed to pay $50,000.

26 See Donald T. Sheldon, 51 S.E.C. at 87 n.124.

27 Hansen further contends that the injunction and any additional sanctions to be imposed are a result of the Commission's overzealous enforcement. As described above, Hansen claims that Respondents' alleged violations are not serious. He thus believes that they are not deserving of additional punishment. However, Hansen consented to the injunction he now attacks, which provides a basis for the sanction here. Hansen also makes various claims that Division staff's conduct during its investigation was harassing and improper. We believe that, based on the record before us, the staff behaved properly in its investigation and in its prosecution of this proceeding.

28 We have considered the contentions advanced by the parties. We have rejected or sustained the contentions to the extent that they are inconsistent or in accord with the views we express here.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 1918 / January 10, 2001

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In the Matter of SEABOARD INVESTMENT ADVISERS, INC. and EUGENE W. HANSEN
345 West Freemason Street
Norfolk, Virginia 23510

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that the investment adviser registration of Seaboard Investment Advisers, Inc. be, and it hereby is, revoked; and

ORDERED that Eugene W. Hansen be, and hereby is, barred from association with any investment adviser.

By the Commission.

Jonathan G. Katz
Secretary