Securities and Exchange Commission
Washington, D.C.

Securities Act of 1933
Rel. No. 8249 / July 10, 2003

Securities Exchange Act of 1934
Rel. No. 48162 / July 10, 2003

Investment Advisers Act of 1940
Rel. No. 2143 / July 10, 2003

Admin. Proc. File No. 3-9571

In the Matter of FEELEY & WILLCOX ASSET MANAGEMENT CORP. and MICHAEL J. FEELEY
c/o Paul Gonson, Esq. Kirkpatrick & Lockhart, LLP 1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036

OPINION OF THE COMMISSION

Broker-Dealer Proceeding
Investment Adviser Proceeding
Cease-and-Desist Proceeding
Grounds for Remedial Action
Fraud in the Sale of Securities
Failure to Disclose Conflict of Interest
Violation of Filing and Recordkeeping Requirements

Former registered investment adviser and individual respondent who had been associated with former registered investment adviser and with registered broker-dealer defrauded advisory clients by misstating and omitting material facts in connection with the purchase of securities. Former registered investment adviser violated Advisers Act by failing to disclose material facts and failing to disclose conflicts of interest, and by violating filing and books-and-records requirements and failing to allow Commission representatives access to books and records, and individual respondent caused and aided and abetted the investment adviser's violations. Held, it is in the public interest that individual respondent be barred from association with a broker or dealer or investment adviser with the right to reapply in a non-supervisory, non-proprietary capacity after two years; ordered to cease and desist from committing or causing any violations or any future violations of the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934; ordered to cease and desist from causing and aiding and abetting violations or any future violations of the antifraud provisions of the Investment Advisers Act of 1940 and of specified Advisers Act reporting and books-and-records requirements, and to disgorge with the former registered investment adviser, on a joint and several basis, $95,000 plus prejudgment interest; and to pay a civil money penalty in the amount of $15,000; further, it is in the public interest that the former registered investment adviser be ordered to pay a civil money penalty in the amount of $150,000.

Appearances:

Richard M. Phillips, Paul Gonson, and Ivan B. Knauer, of Kirkpatrick & Lockhart, LLP, for Feeley & Willcox Asset Management Corporation and Michael J. Feeley.

Robert Knuts, for the Division of Enforcement.

Appeal filed: June 26, 2000
Last brief received: October 2, 2000
Oral Argument held: June 4, 2003

I.

Feeley & Willcox Asset Management Corporation ("FWAM"), formerly a registered investment adviser,1 and Michael J. Feeley ("Feeley") appeal certain findings and the sanctions imposed by an administrative law judge. Feeley formerly was an associated person of the following entities: FWAM; Feeley & Willcox Securities, Inc. ("FWS"), formerly a registered broker-dealer; and Ernst & Co. ("Ernst"), a registered broker-dealer. Respondents appeal the law judge's finding that FWAM and Feeley engaged in fraud in the sale to public customers of securities in violation of Section 17(a) of the Securities Act of 1933,2 Section 10(b) of the Securities Exchange Act of 1934,3 and Exchange Act Rule 10b-5.4 They also appeal the law judge's determination that FWAM committed fraud in the sale of securities to investment advisory clients and violated its fiduciary duty to these clients by failing to disclose conflicts of interest in violation of Sections 206(1) and 206(2) of the Investment Advisers Act of 1940,5 and that Feeley aided and abetted and was a cause of those violations.

Respondents do not appeal the law judge's additional findings that FWAM failed to file and keep current mandated disclosures regarding FWAM's advisory business in violation of Section 204 of the Advisers Act and Advisers Act Rule 204-16 and that Feeley aided and abetted and was a cause of those violations. Nor do they contest her further findings that FWAM failed to keep required books and records and failed to allow Commission representatives access to FWAM's books and records in violation of Section 204 of the Advisers Act and Advisers Act Rule 204-27 and that Feeley aided and abetted and was a cause of those violations.

Based on her findings of misconduct the law judge concluded that it was in the public interest to bar Feeley from association with a broker or dealer or investment adviser with a right to reapply after two years in a non-supervisory, non-proprietary capacity; to order Feeley to cease and desist from committing or causing any violations or any future violations of the antifraud provisions of the Securities Act and the Exchange Act; to order Feeley to cease and desist from aiding and abetting and causing any violations or any future violations of the antifraud provisions or specified reporting and recordkeeping provisions of the Advisers Act; to order FWAM and Feeley jointly and severally to disgorge $95,000 plus prejudgment interest; and to order FWAM and Feeley to pay civil money penalties of $150,000 and $15,000 respectively.8 We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.9

II.

This case concerns, among other things, misrepresentations Feeley made to advisory clients in connection with Feeley's sales to these persons of debentures issued by a company he co-founded and controlled. Because the financial situation of that company is relevant to Respondents' liability, we describe that situation in some detail below and also relate Feeley's interactions with the four investors at issue.

A. Feeley has a law degree and a graduate business degree.

Starting in 1971, he worked for several financial institutions, eventually working as an institutional salesman for Brown Brothers Harriman & Co. ("Brown Brothers"). In 1986, Feeley left Brown Brothers and started his own business. Feeley began what he hoped would be a "wholistic" firm inspired by his conviction that "people should always be treated as ends and never means and that money should always be thought of as means and never ends." The company, Feeley & Willcox, Inc. ("FWI"), had two subsidiaries, FWS, a registered broker-dealer, and FWAM, a registered investment adviser.10 Almost all FWAM clients had accounts at FWS. Feeley held the following positions: he was president, director, treasurer, and a shareholder of FWI; he was president, secretary, and director of FWS; and he was chairman of the board, secretary, and compliance officer of FWAM. Peter Willcox, who is not a respondent here, was FWI's other director as well as an officer of FWI and FWAM. According to Arthur Gray, Jr., a successful and respected investment adviser who had been a mentor to Feeley, the FWI companies had great promise. In Gray's estimation, Feeley and Willcox very effectively combined their respective talents as a salesman and portfolio manager. Gray testified that the FWI companies enjoyed steadily increasing revenues and a favorable reputation in the late 1980s and early 1990s.

The FWI companies never realized their potential, however. In fact, FWI never earned a profit in any year. According to the testimony of Willcox, an unworkable capital structure and excessive debt undermined the companies' financial health. Feeley initially had capitalized FWI through the sale of "Series A" convertible debentures paying ten percent interest and maturing in 1996. In 1987, Feeley attempted to recapitalize FWI with an offering of stock accompanied by an effort to persuade debenture holders to convert their debt securities into equity. Neither the offering nor the conversion effort succeeded. In 1989, Feeley sold more of the convertible debentures originally sold in 1986. Feeley designated these debentures, which had the same terms and maturity date as the debentures sold in 1986, "Series B" debentures. By 1990, FWI's annual debt-service expense of $330,000 had, according to Willcox, not only turned small operating profits into losses but also stifled growth.

By 1991, FWI's financial situation had deteriorated so badly that Feeley and Willcox could draw only about $17,000 each in compensation for the year. Most of the other staff had taken salary reductions. Despite these sacrifices, FWI continued to lose money. In late 1991 or early 1992, Willcox told Feeley that he could not absorb further financial sacrifices for FWI and suggested a refinancing plan that Feeley rejected. Feeley made his own proposal to Willcox: they would "drive" FWI to an operating profit for the first six months of 1992 by increasing revenue and cutting costs, while also drawing $5,000 in monthly compensation; Feeley would use the reported operating profit to support a $3 million equity offering that would be completed by September 30, 1992, when an interest payment on the debentures would be due. Willcox agreed to Feeley's plan based on his understanding that FWI would issue no more debt. After a sustained effort, FWI showed an operating profit for the first six months of 1992, and Feeley began preparation of the equity offering documents.

FWI nonetheless remained financially troubled. In a deficiency letter dated July 16, 1992, Commission staff warned Feeley and FWAM that FWI could be insolvent and that it would be unlawful to fail to disclose this fact to FWAM advisory clients. In July or August 1992, computer malfunctions delayed Feeley's production of the equity-offering documents and prevented Feeley from initiating the equity offering. Feeley did not tell Willcox about the delay. On September 16, 1992, through counsel, FWI responded to the Commission's July 16, 1992, letter, stating that FWI was not insolvent, in part because of the anticipated success of the equity offering. FWI's letter did not reveal to the Commission's staff that the offering would be delayed.

FWI's management was also beginning to show signs of stress. In the autumn of 1992, FWI's Chief Financial Officer ("CFO") resigned because of FWI's deteriorating finances. Willcox, although an officer and director of FWI, did not learn of this resignation until some weeks after the CFO had left.

Because Feeley could not even begin the equity offering (much less complete it) by September 30, 1992, he decided, on his own, to sell more debentures ("Series C debentures") or "bridge loans" to fund FWI until he could complete the equity offering.11 On or about September 29, 1992, Feeley drafted a document titled "Unanimous Written Consent of Directors" authorizing the sale of up to $500,000 of Series C debentures paying 12 percent interest with a June 30, 1993, maturity. The debentures were sold as units that included warrants to purchase up to 25,000 shares of FWI common stock at a $10 per share exercise price. Willcox refused to sign the resolution when Feeley's secretary asked him to sign it, and resigned as a director of FWI over the debenture sale.12

Despite Willcox's resignation from the Board of Directors and refusal to sign the "Unanimous Resolution," Feeley went ahead with the sale of the Series C debentures. Feeley sold Series C debentures to 10 or 12 FWAM advisory clients in two lots: the first lot between September 29 and October 13, 1992, and the second in March 1993. These sales realized approximately $300,000.

The proceeds of the Series C debenture sale did not solve FWI's financial difficulties. FWI continued to make interest payments on the Series A and B debentures only through September 30, 1993; thereafter, FWI failed to make any required interest payments. Further, as the June 30, 1993, maturity date for the Series C debentures approached, Feeley requested that the holders roll over the debentures for a further six months. The four investors involved in this proceeding consented to this and to subsequent rollover requests that eventually put the maturity date at December 31, 1994.

FWI's financial problems flowed down to its subsidiaries. In early 1995, FWS voluntarily suspended operations when the New York Stock Exchange, Inc. ("NYSE") advised FWS that the firm lacked the necessary capital to continue trading under NYSE rules.13

On January 31, 1995, Feeley concluded a financing agreement with Ernst, a firm that recently had agreed to clear trades for FWS. Under this financing agreement, FWS borrowed $50,000 in cash and $100,000 in securities that FWS could use as capital under the NYSE's rules. The Ernst financing allowed FWS to resume operations.14 Feeley promised to work as a registered representative for Ernst if FWS did not repay the loan. Feeley also extended an oral promise to repay the loans personally if FWS defaulted. Ultimately, FWS could not repay the loans, and ceased operating on March 31, 1995.15

After FWS ceased operations, Ernst management insisted that Feeley replace his oral assurance of repayment with a more formal recognition of Feeley's personal assumption of the repayment obligation. On April 1, 1995, Feeley transferred all of his licenses and customer accounts to Ernst and became an Ernst registered representative. Feeley also executed a Promissory Note and Collateral Agreement for the benefit of Ernst, agreeing that Ernst would retain half of Feeley's net commissions to reduce FWS's debt, for which Feeley had assumed personal responsibility. At the same time, Feeley continued to advise FWAM's advisory clients.

By letter dated April 6, 1995, Feeley notified most of his FWAM advisory clients that "Ernst [had] been very helpful . . . and I [Feeley] made a personal commitment to their leaders to move my licenses and brokerage business should it become necessary to dissolve [FWS]." The notification letter enclosed forms the clients could execute to transfer their accounts from FWS to Ernst. Subsequently, the FWAM advisory clients involved in this proceeding became Ernst customers.16 Feeley did not disclose to his FWAM advisory clients that he would be receiving commissions from Ernst in connection with all trades he recommended to and executed for FWAM advisory clients, and that he would use these commissions to repay the debt FWS owed Ernst that Feeley had personally guaranteed.

The record reflects that Ernst executives had wanted to disclose this information to Feeley's advisory clients in the spring of 1995 and had drafted a disclosure letter for Feeley's signature. Feeley consulted with counsel about the letter, and Ernst ultimately sent the letter in September 1996, over a year after it was presented to Feeley. The letter disclosed, in pertinent part:

[FWAM] has used and intends to continue to use Ernst as the principal broker to effect securities transactions for your account with Ernst.

As is customary in the securities industry, Feeley as an Ernst [registered representative], will personally receive a portion of the commissions you will pay to Ernst to effect securities transactions in your Ernst brokerage account . . . . Your account is charged Ernst's standard rate of commissions.

* * *

In February, 1995, Ernst, as lender, entered into certain subordinated loan transactions with [FWS] totaling $150,000.

Feeley who was affiliated with [FWS], agreed to guarantee payment of those amounts to Ernst and gave Ernst his note for approximately $150,000. . . . By arrangement between Ernst and Feeley, a portion of any commissions earned by Feeley as an Ernst [registered representative] is retained by Ernst toward payment of Feeley's note to Ernst.

Feeley left Ernst in late September or early October 1997, having repaid Ernst $50,000 plus interest.

B. Four of FWAM's and Feeley's advisory clients are involved in this proceeding: Sandra Feeley17 , Simon Leventhal, Patrick Murphy, and James Donahue.

1. Sandra Feeley. Sandra Feeley is a self-employed hair stylist whose job offered no retirement benefits. In August 1987, she engaged FWAM as an adviser with respect to her entire retirement savings and established an FWS account to which she added as she could. Sandra Feeley had little investment knowledge or experience. Because she was investing for her retirement, she told Feeley to invest in low-risk investments that she could buy and hold. She trusted Feeley completely, invariably followed his advice, and gave him trading discretion in her account.

When Feeley recommended that Sandra Feeley purchase the Series C debentures, he said that, despite the risk that every investment had, investing in FWI was "the way she should go." He disclosed nothing about FWI's finances including that FWI was in financial difficulty. He did not disclose that he and FWAM would benefit from her purchase of the debentures,18 nor did he provide any evaluation of FWI's ability to meet its repayment obligations. Sandra Feeley purchased a one-year, $25,000 Series C debenture dated March 26, 1993. Given Feeley's unconditional recommendation, Sandra Feeley believed that she was making an investment that matched the goals she expressed to Feeley, and that her investment in the FWI debenture was earning money that she needed for her retirement.

In 1995, Sandra Feeley authorized the transfer of her FWS account to Ernst. When she asked Feeley after the account was transferred why the transfer was necessary, he told her that the transfer was part of a "corporate restructuring." He did not disclose to her that he had personally guaranteed FWS's loan from Ernst or that he would be earning commissions from Ernst that he would be using to perform on that personal guarantee.

On March 22, 1996, Feeley sent Sandra Feeley a letter signed by Feeley as President of FWI, promising to repay principal first and then calculate the interest due. Although in this letter Feeley also promised her that he would, to the best of his ability, make regular payments every quarter, Sandra Feeley has had to dun Feeley every quarter to assure she receives the promised payments. Sandra Feeley received her first repayment of principal in 1996. As of August 31, 1998, Sandra Feeley had been repaid about $12,000 of her $25,000 investment.

2. Patrick Murphy. Patrick Murphy is an actor and college drama professor. He engaged FWAM as an investment adviser in October 1988, after inheriting approximately $150,000. Murphy told Feeley that he knew nothing about investments, would not do investment research, and would rely on Feeley's advice. Murphy directed Feeley to invest in conservative, long-term, low-risk investments because he did not want to risk his retirement funds. Murphy gave Feeley discretion to trade in his account.

In late September 1992, Feeley recommended to Murphy that he purchase a FWI Series C debenture with a June 30, 1993 maturity date. Feeley characterized this as a "wonderful opportunity" with a substantial return and told Murphy that he had to act quickly if he wanted to take advantage of it. Feeley did not disclose FWI's financial condition. Further, he provided no evaluation of FWI's ability to meet its repayment obligations. Nor did he disclose that he and FWAM would benefit financially from Murphy's purchase of the debentures. Murphy bought the Series C debenture. Shortly afterwards, on Feeley's recommendation, Murphy bought another Series C debenture with the same maturity date. Feeley never mentioned risk; if he had, Murphy would not have bought the $50,000 in debentures, which represented about one-quarter of his total portfolio value.

Murphy was not paid interest due on, nor repaid principal invested in, these debentures. Around the fourth quarter of 1995, Murphy learned that, even though the debentures had matured, he did not have access to the money he had invested. Only then did Murphy understand that he might lose his investment.

Feeley did not notify Murphy that his account had been transferred to Ernst in March or April 1995.19 Nor did he furnish Murphy his Ernst address or telephone number. Murphy was forced to track Feeley down, and when Murphy succeeded, Feeley reported only that "the company [FWS] folded." Feeley did not disclose to Murphy his commission arrangement with Ernst. When pressed about FWI's debt to Murphy, Feeley told Murphy that he would be repaid but did not set a schedule for repayment.

Murphy terminated his relationship with FWAM in April 1997 and transferred the funds in his Ernst account to another broker-dealer. Later in 1997, Feeley calculated that he owed Murphy about $90,000 in principal and accrued interest on the Series C debentures. Feeley has not honored his informal commitment to pay Murphy $1,000 quarterly and has refused to sign a document formally acknowledging his debt to Murphy, determining its amount, and establishing a binding repayment schedule. As of July 31, 1998, Feeley had repaid Murphy $7,000 of the $90,000 he owed him.

3. Simon Leventhal. Simon Leventhal is a New Jersey dentist. On September 8, 1987, he engaged FWAM to manage funds for his retirement. Leventhal had no investment experience and explained to Feeley that he wanted most of his retirement funds in low-risk investments, some in moderate-risk investments, and none in high-risk investments. Leventhal gave Feeley discretion to trade in his account.

In October 1992, Leventhal agreed to loan FWI $25,000 at 12 percent annual interest for one month. His FWAM statement characterized the transaction as a "bridge loan." Feeley had recommended this loan as a good investment and as consistent with Leventhal's goals and directives. Feeley stated that the loan would capitalize FWI and improve its financial footing. Feeley did not disclose any information about FWI's financial condition. Nor did Feeley disclose that he and FWAM would benefit from Leventhal's loan, or offer an evaluation of FWI's ability to meet its repayment obligations. At Feeley's request, Leventhal extended the maturity date on the promissory note first to December 31, 1992, then to December 31, 1993, and finally to December 31, 1994.

In March or April 1995, Feeley transferred Leventhal's account to Ernst with Leventhal's consent. Feeley did not disclose to Leventhal his commission arrangement with Ernst. As of September 2, 1998, Feeley had paid Leventhal none of the principal or interest due on his loans.

4. James Donahue. James Donahue already had retired when he opened an account with Feeley at Brown Brothers. Donahue transferred his account to FWAM and FWS on May 28, 1986. Donahue did not give Feeley trading discretion in his account, but he always followed Feeley's recommendations. Donahue, a long-time investor, had a graduate business degree and a layman's understanding of investments. He told Feeley that preservation of capital was of paramount importance to his financial planning. Donahue wanted low-risk investments and relied upon his portfolio with FWAM to finance a large part of his retirement.

In September 1992, when Feeley recommended that Donahue purchase a Series C debenture, Feeley disclosed nothing about FWI's financial condition. Nor did he disclose that he and FWAM would benefit from Donahue's purchase of the debentures, or offer an evaluation of FWI's ability to meet its repayment obligations. Donahue was reassured by Feeley's description of the $20,000 Series C debenture paying 12 percent annual interest as "a great opportunity" for Donahue to participate in FWI's growth while receiving above-market returns. At that time, however, FWI was not growing but contracting. In all, Donahue invested a total of $60,000 in three Series C debentures.

Feeley moved Donahue's account to Ernst in March or April 1995, after advising Donahue that FWS had failed. He did not tell Donahue that he (Feeley) would be earning commissions on any transactions that he effected for Donahue's account at Ernst. Feeley has promised to repay Donahue. As of early 1998, Donahue had been repaid a total of $2,500 on his $60,000 investment. The failure of his Series C debentures has caused Donahue to revise his retirement plans to account for the reduced value of his portfolio.

C. The law judge made several findings of violation that Respondents have not appealed.

The facts underlying those findings are described here briefly, as is Respondents' reluctant and incomplete compliance with Commission requests for documents and testimony.

As an investment adviser, FWAM was required to keep on file with the Commission current information regarding its business, personnel, and operations, by updating as necessary the Form ADV it filed when it applied for registration as an investment adviser.20 FWAM filed its last amended Form ADV on January

27, 1994. On November 27, 1995, Commission field examiners went to the office address listed as FWAM's principal place of business to examine FWAM's books and records. The examiners found neither FWAM nor Feeley at the listed address. When the examiners located Feeley, he invited them to a location he described as his apartment to conduct their examination.21

The examiners discovered that FWAM had undergone several personnel and operational changes that FWAM had not disclosed in amended Forms ADV. As already described, it had changed the address of its principal place of business. In addition, FWAM had not filed an amended Form ADV to notify the Commission that Peter Willcox, described as a "control person" on FWAM's March 15, 1993, Form ADV, had not worked for FWAM in any capacity after March 1995. Nor had FWAM filed an amended Form ADV to notify the Commission that, of the nine individuals the March 15, 1993, Form ADV had identified as performing investment advisory services, only Feeley remained in FWAM's employ after March 31, 1995. The examiners also found deficiencies in the Forms ADV signed by Feeley on October 30, 1992, and March 15, 1993. These filings indicated that FWAM had custody of client funds or securities but did not include as attachments balance sheets as required by the regulations.

An investment adviser must make and keep true, accurate, and current records as specified in the Advisers Act rules.22 The adviser must maintain these books and records in an easily accessible place for at least five years, and in an "appropriate office of the investment adviser" for the first two years.23

Feeley testified that, after March 31, 1995, FWAM's financial recordkeeping was done exclusively in a check register. FWAM kept no journals, ledgers, or financial statements. Feeley characterized FWAM's recordkeeping as "casual." Despite the examiners' requests, FWAM did not produce contemporaneous records or order memoranda regarding client transactions, although Feeley testified -- and told the examiners at the time of their inspection -- that FWAM kept records of orders placed for clients, transaction slips, and quarterly account appraisals in the individual client files, along with bills and related records of charges for advisory services.

All records that the Advisers Act requires investment advisers to keep and maintain are subject to inspection by representatives of the Commission at times the Commission deems appropriate.24 During the inspection, Feeley promised, but failed, to provide most of the records the examiners requested.25

After the inspection, the Commission initiated an informal inquiry into FWAM's business practices, and later authorized issuance of a formal order directing private investigation and authorizing the taking of testimony. During each stage of these proceedings, from investigation through the hearing, Respondents' compliance with Commission subpoenas has been reluctant and incomplete, even after a subpoena enforcement proceeding resulted in an order to produce.

III.

The law judge found that Feeley and FWAM violated the antifraud provisions of the Securities Act and the Exchange Act, and that FWAM violated the Advisers Act, and that Feeley aided and abetted and was a cause of those violations. Respondents have contested only the law judge's conclusion that Feeley acted willfully and with scienter. They have not challenged the law judge's findings with respect to any of the other elements of these charged violations.

The law judge also found that FWAM violated filing and books-and-records provisions of the Advisers Act and that Feeley aided, abetted, and was a cause of those violations. Feeley has not appealed these findings, or the law judge's determination that Feeley controlled FWAM to the extent that FWAM and Feeley were alter egos.26 The law judge's determination about the relationship between Feeley and FWAM was, as we indicate throughout this opinion, well supported.

A. Violations of the Antifraud Provisions of the Securities Act and Exchange Act and Rule 10b-5.

Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5 prohibit fraudulent practices in connection with securities transactions.27 When a person acting with

scienter "omits to disclose material information necessary to make his statements not misleading to customers about an investment he is recommending, including known risk-factors and negative information" about the investment, that person violates these antifraud provisions.28

1. Materiality

The Supreme Court has stated that to fulfill the materiality requirement "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."29 The deteriorating financial condition of an issuer of debt securities, such as the debentures at issue here, is material information.30 Like any debenture, the Series C debentures were unsecured loans from the purchaser to the issuer, the repayment of which was entirely dependent on the issuer's general credit. Murphy, for example, testified that he would not have bought the Series C debentures had he known how risky they were. Feeley, however, failed to disclose any information regarding FWI's financial health when recommending that the four clients whose transactions are at issue in this proceeding purchase the Series C debentures.

In addition, Feeley misrepresented material facts. He mischaracterized the debentures as a good investment, advising his clients that the debentures were an opportunity to participate in FWI's growth, when he knew that FWI was contracting. He also told his clients that the proceeds from the debentures would be used to recapitalize FWI, while the record suggests that the proceeds were to be used to pay interest to the holders of earlier-issued debentures.31 As the law judge found, no evidence supports Feeley's assertion that FWI did not need the proceeds of the Series C debentures to make the September 30, 1992, interest payment to the holders of the Series A and Series B debentures.32

2. Scienter and Willfulness

Scienter is "a mental state embracing intent to deceive, manipulate or defraud."33 We conclude that Feeley acted with the requisite scienter when he, in what appears to be a last-ditch effort to save FWI, determined that he would promote the debentures to his clients, among whom were the four unsophisticated and risk-averse clients at issue here, by recommending them as a good investment and by failing to provide any evaluation of FWI's ability to meet its repayment obligations, or to disclose FWI's poor financial condition. When Feeley recommended that Sandra Feeley, Murphy, Leventhal, and Donahue purchase Series C debentures, Feeley knew that they trusted him absolutely. Sandra Feeley, Murphy, and Leventhal had told Feeley that they had no investment experience and each of them had given Feeley discretion to trade in his or her account. Although Donahue's testimony reflects that he had a modicum of investment experience, he, too, followed Feeley's recommendations. Feeley also knew that the funds invested by these four risk-averse advisory clients were for their retirements.

Respondents argue that the Division has not established the requisite intent to defraud. Feeley maintains that, because he sincerely thought that the debentures were good investments for these clients, he conclusively lacked scienter.

The record refutes this argument. Feeley is a securities professional with a graduate business degree and a law degree. He has worked in the securities industry since 1971. The record establishes Feeley's intimate knowledge of FWI's financial troubles, and of other FWI insiders' responses to those troubles. For example, Willcox, FWI's co-director and co-founder (with Feeley) adamantly opposed the selling of debentures and resigned his directorship rather than sign the resolution authorizing their sale. FWI's CFO also resigned because of FWI's deteriorating finances. Feeley had even been warned directly by the Commission's staff in a July 16, 1992, letter that FWI could be insolvent and that failure to notify FWAM's customers of this fact would violate the Advisers Act.

The law judge rejected outright Feeley's testimony that he sincerely believed that he had not acted improperly. Although Feeley argues vehemently to the contrary, the law judge's decision made quite clear her conclusion that Feeley's misstatements and omissions were deliberate lies. Indeed, the law judge found that Feeley "lied when he characterized the Series C debentures as a good investment and in describing how the funds raised by the offering would be used," and that "Feeley acted with scienter in that he deliberately lied to people he knew trusted him as part of a scheme to defraud to obtain funds

needed to continue [FWI]." In making these deceit findings, the law judge discredited Feeley's assertions of good faith. We see no reason whatsoever to disagree.34

Further, the law judge found that, "however [implausibly] optimistic Mr. Feeley was about the firm's future, he knowingly or recklessly omitted material information and made material misrepresentations to investors." A showing of recklessness is sufficient to satisfy the scienter requirement.35 At a minimum, recklessness is established on this record.

Under the Wonsover standard, which guides our consideration of the issue, the actions here were willful, in that Respondents intended to do the acts that constituted the violation.36 Accordingly, we find, as did the law judge, that FWAM and Feeley willfully violated Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5.

B. Violations of the Advisers Act and Rules Thereunder.

1. Antifraud Violations

Sections 206(1) and 206(2) of the Advisers Act by their terms protect "clients" or "prospective clients" of an investment adviser.37 A demonstration of scienter is necessary for finding a violation of Section 206(1) but not for finding a violation of Section 206(2).38 FWAM was a registered investment adviser, and Sandra Feeley, Patrick Murphy, Simon Leventhal, and James Donahue were FWAM's clients. Our analysis of Respondents' actions under the Securities Act and the Exchange Act leads us to find that FWAM also willfully violated Sections 206(1) and 206(2) of the Advisers Act by omitting and misstating material facts, as identified supra in Section III.A, about the Series C debentures Feeley recommended to investment advisory clients Sandra Feeley, Murphy, Leventhal, and Donahue, and that Feeley willfully aided and abetted and was a cause of these violations.39

We also conclude that FWAM willfully violated the Advisers Act antifraud provisions and that Feeley willfully aided and abetted and caused these violations by failing to disclose two conflicts of interest. First, they failed to disclose that FWAM and Feeley benefitted from the clients' purchase of the debentures.40 Thereafter, FWAM and Feeley failed to disclose that Feeley would earn a commission from every trade he recommended if the clients transferred their accounts to Ernst.

As a fiduciary to its advisory clients, FWAM owed Sandra Feeley, Murphy, Leventhal, and Donahue a duty of "utmost good faith, and full and fair disclosure of all material facts."41 In practical terms, when clients receive a recommendation from their investment adviser, that recommendation must be coupled with disclosure regarding any financial interest the adviser may have in the transaction.42 FWAM, through Feeley, breached that duty by failing to disclose to the four advisory clients that Feeley and FWAM had a financial interest in the recommended debentures, as they were issued by an entity that Feeley co-founded and controlled and that was FWAM's parent company.43

A distinct and separate violation occurred when FWAM, acting through Feeley its principal, failed to disclose to the advisory clients that Feeley had a direct financial interest in having clients open and maintain securities brokerage accounts with Ernst.44 The letter Ernst ultimately sent to FWAM's advisory clients disclosed that, at the time Feeley made the transfer recommendation, he was a registered representative and would be earning commissions from any transaction that Ernst executed for them. Ernst further disclosed that Feeley was obligated to use those commissions to repay a personal debt to Ernst.45 As an investment adviser, FWAM served its clients as a fiduciary and owed them a duty of loyalty: a fiduciary and its principal are not entitled to benefit from the fiduciary relationship except to the extent provided for by fees and compensation the client expressly consents to pay.46 A loyal investment adviser must give disinterested advice.47 But, as recognized in a leading treatise on the Advisers Act, "[a]n adviser who has a pecuniary interest in a client's transaction other than the agreed fee cannot give disinterested advice. The adviser must disclose that interest to clients or be liable under the antifraud provisions of subsections 206(1), (2), and (4) of the Advisers Act."48

On this record, we find, as did the law judge, that FWAM breached its duty to disclose its principal's direct financial interest in the account transfer recommended by that principal and that FWAM, through Feeley, acted with scienter.

Feeley, during an extended colloquy with the law judge, would not acknowledge that his recommendation that his advisory clients purchase FWI debentures or move their accounts to Ernst without disclosure of his and FWAM's respective interests constituted a failure to disclose a conflict of interest.49 The crux of Feeley's argument is that he was exercising his "wholistic" approach to the provision of investment advice in all of his dealings at issue in this proceeding. According to Feeley, there was an "alignment" of interests among himself, FWI, and his advisory clients because of careful integration into his investment recommendations of risks and rewards. According to Feeley, he had balanced and evaluated his own and his company's (undisclosed) interests with his clients' interests and determined to his own satisfaction that there was an "alignment" of interests making disclosure of his and his company's interests superfluous. In 1963, the Supreme Court rejected the reasoning advanced by Feeley to justify his withholding information from his clients. In Capital Gains Research Bureau, the Court held that investment advisers owe a special duty of disclosure to advisory clients:

An investor seeking the advice of a registered investment adviser must, if the legislative purpose [of the Advisers Act] is to be served, be permitted to evaluate such overlapping motivations, through appropriate disclosure, in deciding whether an adviser is serving two masters or only one, especially if one of the masters happens to be economic self-interest. 50

It is the client, not the adviser, who is entitled to make the determination whether to waive the adviser's conflict. Of course, if the adviser does not disclose the conflict, the client has no opportunity to evaluate, much less waive, the conflict. If Feeley's claim is that he sincerely believed that there was no conflict of interest in his recommendation to his customers that they purchase the FWI debentures and, later, move their accounts to Ernst without disclosure of his financial interest, this belief, even if credited (which it was not),51 evidences reckless disregard of his fiduciary obligations.

Feeley was the agent through whom FWAM dealt with Sandra Feeley, Murphy, Leventhal, and Donahue. As is clear from our foregoing discussion, we find that Feeley was aware that his actions were part of the overall scheme to mislead the clients and that he knowingly and substantially assisted the antifraud violations. Accordingly, we find that Feeley willfully aided and abetted and caused FWAM's violations of the Advisers Act.52

2. Reporting and Recordkeeping Violations

FWAM and Feeley have not appealed the law judge's findings that FWAM willfully violated Section 204 of the Advisers Act and Advisers Act Rules 204-1 and 204-2, and that Feeley willfully aided and abetted and caused those violations. These provisions mandate compliance with specified reporting and record-keeping obligations.

As the law judge found, FWAM violated Section 204 of the Advisers Act and Advisers Act Rules 204-1 and 204-2 by

> (1) failing to file amended Forms ADV to reflect substantial changes in the personnel, business, and operations of FWAM;
>
> (2) failing to grant Commission representatives access to FWAM books and records; and,
>
> (3) failing to maintain required books and records. Further, Feeley aided and abetted and was the cause of each of FWAM's violations. Feeley was the individual responsible for FWAM's compliance with the federal securities laws, and as such he knowingly or recklessly substantially assisted FWAM in the commission of those violations.

IV.

In considering the appropriate sanctions in the public interest, our discretion is guided by the factors the United States Court of Appeals for the Fifth Circuit identified in Steadman v. SEC.53 These factors are the egregiousness of a respondent's actions; the isolated or recurrent nature of the violation; the degree of scienter involved; the sincerity of the respondent's assurances against future violations; respondent's recognition of the wrongful nature of its conduct; and the likelihood that the respondent will have opportunities for future violations.

A. Bar from Association

The law judge ruled that, in determining whether a bar was appropriate, the five-year statute of limitations set forth in 28 U.S.C. § 2462 prevented her from considering violations that occurred before March 27, 1993. The Division did not appeal this finding. Accordingly, like the law judge, we have considered only a portion of the antifraud findings: Advisers Act violations stemming from the failure to disclose that Feeley had an economic interest in the transfer of accounts from FWS to Ernst. We also have considered the unappealed findings that Feeley was a cause of and aided and abetted FWAM's violations of the Advisers Act reporting and recordkeeping provisions. The failure-to-disclose violation is serious, and the reporting and recordkeeping violations, standing on their own, also call for a significant sanction in the public interest.

We, in addition, have taken into account the fact that, throughout the hearing, Feeley would not acknowledge to the law judge the conflicts among his clients' interests, his own interest, and his firm's interests, conflicts that were patent here. Feeley's lack of candor at the hearing and approach to the conflict-of-interest issues reflect poorly on his ability to conform his professional behavior to regulatory norms, as does Feeley's lack of cooperation with the staff's investigation. Feeley's disregard of his clients and of the Commission's rules and processes suggests a substantial likelihood that Feeley, if given the opportunity, would repeat his misconduct. We conclude that a bar with a right to reapply in a non-supervisory, non-proprietary capacity after two years is a measured response to Feeley's wrongdoing when evaluated against the Steadman factors and is appropriate in the public interest.54

Feeley argues that the law judge exceeded her authority in barring him from association with a broker-dealer. Feeley argues that, because he is being sanctioned only for violations of the Advisers Act, the broker-dealer bar is inappropriate under the decision of the United States Court of Appeals for the District of Columbia Circuit in Teicher v. SEC.55

In Teicher, Ross Frankel was associated with a broker-dealer, but not with an investment adviser, when he violated the antifraud provisions of the securities laws.56 The Commission, acting pursuant to Exchange Act Section 15(b)(6), barred Frankel from association with an investment adviser. The Teicher court found that the Commission exceeded its statutory authority, given that Frankel was not and never had been associated with an investment adviser.57 Here, in contrast, Feeley, was a "person . . . associated with a broker or dealer" at the time of the charged violations.

From 1986 through March 31, 1995, Feeley was associated with FWS, then a registered broker-dealer. From April 1, 1995, through September or October 1997, Feeley was associated with Ernst, also a registered broker-dealer. Section 15(b)(6), the relevant sanctions provision in both Teicher and this matter, states, in pertinent part

With respect to any person who . . . at the time of the alleged misconduct, . . . was associated . . . with a broker or dealer . . . the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar such person from being associated with a broker or dealer . . . if the Commission finds, on the record, after notice and opportunity for a hearing that such censure, placing of limitations, suspension, or bar is in the public interest and that such person - -

> (i) has committed or omitted any act or omission enumerated in subparagraph (A), (D), (E), or (G) of paragraph (4) of this subsection.58

Section 15(b)(4)(D) of the Exchange Act, in turn, encompasses any person who

> (D) has willfully violated any provision of the Securities Act of 1933, the Investment Advisers Act of 1940 . . . [the Exchange Act of 1934], the rules or regulations under any of such statutes . . . or is unable to comply with any such provision.59

Accordingly, Feeley may be barred from association with a broker or dealer based on his violations of the Advisers Act.

Feeley also argues that the law judge did not have the authority to bar him from association with an unregistered investment adviser. As Feeley has acknowledged, on this issue Teicher controls and directly supports the conclusion that the Commission is authorized by statute to impose an investment adviser bar that prohibits association with unregistered, as well as registered, investment advisers.60

Accordingly, we order that Feeley be barred from association with any broker or dealer or investment adviser, whether registered or unregistered, with a right to reapply in a non-supervisory, non-proprietary capacity after two years.

B. Civil Money Penalties

The law judge also determined to consider only misconduct within five years of the issuance of the Order Instituting Proceedings in evaluating whether, and at what level, to impose a civil monetary penalty. The Division has not appealed that determination. With respect to the assessed civil money penalties, Section 21B of the Exchange Act and Section 203(i) of the Advisers Act authorize the Commission to impose civil money penalties on any person who has willfully violated or aided and abetted the violation of the Securities Act, the Exchange Act or, as here, the Advisers Act.61

The law judge found it to be in the public interest to assess a civil money penalty on FWAM as the primary violator and on Feeley as an aider and abettor of FWAM's violations of Advisers Act Sections 206(1), 206(2), and 204 and of Advisers Act Rules 204-1 and 204-2. The law judge found further that FWAM's and Feeley's fraudulent conduct and disregard of the books-and-records regulations were blatant and treated the antifraud violations, the failure to file amendments to the Form ADV, and the failure to keep prescribed books and records and grant access to Commission investigators as three separate illegal acts and assessed civil money penalties for each. We agree with these findings, and we conclude that the civil money penalties that the law judge imposed, $15,000 on Feeley and $150,000 on FWAM, are appropriate in the public interest.

C. Cease-and-Desist Proceeding

In evaluating the need for a cease-and-desist order we look to whether there is some risk of a future violation, and we consider that in the ordinary case, and absent evidence to the contrary, a finding of a past violation raises a sufficient risk of future violation to warrant issuance of a cease-and-desist order.62 Further, "[a]long with the risks of future violations, we . . . consider our traditional factors in determining whether a cease-and-desist order is an appropriate sanction based on the entire record."63 The record as a whole, our findings of violation, and our consideration of the traditional Steadman factors -- specifically the egregiousness of Feeley's violations and the opportunity for future violations -- lead us to conclude, as did the law judge, that issuance of a cease-and-desist order against Feeley also is warranted.64 Feeley abused his advisory clients' trust (by both omitting material facts and by making misrepresentations) and flouted the Commission's adviser reporting and recordkeeping requirements. These facts counsel that we grant the Division's request for cease-and-desist relief.

D. Disgorgement

The law judge imposed joint and several disgorgement in the amount of $95,000, plus pre-judgment interest, on FWAM and Feeley on the basis of all their conduct on the record.65 As the law judge explained, the record reflects that FWAM and Feeley were unjustly enriched by the approximately

$138,000 invested by the four advisory clients, little of which has been repaid.66 Once the Division established that the proposed disgorgement was reasonable, the Division met its initial burden. Respondents have not established, as it is their burden to do, given the Division's showing, that the amount is unreasonable.67 In light of the record, the law judge's award of $95,000 (the full amount of the Division's request) is conservative. Accordingly, we order joint and several disgorgement in the amount of $95,000, as well as payment of prejudgment interest on that amount.68

An appropriate order will issue.69

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, ATKINS and CAMPOS).

Jonathan G. Katz
Secretary

Securities and Exchange Commission
Washington, D.C.

Securities Act of 1933
Rel. No. 8249 / July 10, 2003

Securities Exchange Act of 1934
Rel. No. 48162 / July 10, 2003

Investment Advisers Act of 1940
Rel. No. 2143 / July 10, 2003

Admin. Proc. File No. 3-9571

In the Matter of FEELEY & WILLCOX ASSET MANAGEMENT CORP. and MICHAEL J. FEELEY
c/o Paul Gonson, Esq. Kirkpatrick & Lockhart, LLP 1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Order Imposing Remedial Sanctions

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

ORDERED that Michael J. Feeley ("Feeley") be barred from association with any broker or dealer or investment adviser with the right to reapply in a non-supervisory, non-proprietary capacity after two years; and it is further

ORDERED that Feeley cease and desist from committing or causing any violations or any future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5; and that Feeley cease and desist from causing and aiding and abetting violations or any future violations of Section 206(1), Section 206(2), and Section 204 of the Investment Advisers Act of 1940 and Advisers Act Rules 204-1 and 204-2; and it is further

ORDERED that Feeley and Feeley & Willcox Asset Management Corp. ("FWAM") jointly and severally disgorge $95,000, and pay prejudgment interest as described at 17 C.F.R. § 201.600(b), due from March 26, 1993, and that interest shall continue to accrue on all funds owed until they are paid; and it is further

ORDERED that Feeley pay a civil money penalty of $15,000 and that FWAM pay a civil money penalty of $150,000.

Feeley's and FWAM's payments of the civil money penalties and joint and several disgorgement 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) delivered by hand or courier to the Comptroller, Securities and Exchange Commission, Operations Center 6432 General Green Way, Stop 0-3, Alexandria, Virginia 22312 within thirty days of the date of this order; and (iv) submitted under cover letter which identifies Feeley and FWAM as the respondents in Administrative Proceeding No. 3-9571. A copy of this cover letter and check shall be sent to Robert Knuts, Counsel for the Division of Enforcement, Securities and Exchange Commission, Northeast Regional Office, 233 Broadway, New York, New York 10279; and it is further

ORDERED, that within sixty (60) days after payment of funds or other assets, in accordance with the disgorgement required by this Order, the Division of Enforcement shall submit a proposed plan for the administration and distribution of disgorgement funds in accordance with Rule 610 of our Rules of Practice.

By the Commission.

Jonathan G. Katz
Secretary

Footnotes

1 On January 31, 2000, independently of this matter, the Commission canceled FWAM's registration "having found that the registrant [FWAM] is no longer in existence or is not engaged in business as an investment adviser." Order Cancelling Registration Pursuant to Section 203(h) of the Investment Advisers Act of 1940, File No. 801-28021.

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. §§ 80b-6(1), 80b-6(2).

6 15 U.S.C. § 80b-4, 17 C.F.R. § 275.204-1.

7 15 U.S.C. § 80b-4, 17 C.F.R. § 275.204-2.

8 The law judge declined to order FWAM to cease and desist. The Division did not appeal this determination, and, consequently, it is not before us on review.

The law judge based the bar order and her imposition of civil money penalties solely on post-March 27, 1993, conduct. She found, sua sponte, that conduct prior to that date was outside the applicable statute of limitations, 28 U.S.C. § 2462. The Division asserts in its briefs to us that Respondents had not asserted a statute of limitations defense at the hearing or in their post-hearing briefs because they had agreed not to do so in a tolling agreement with the Division of Enforcement. Respondents argue that the issue is not before us because the Division did not appeal the law judge's finding, and do not concede that its terms are as described by the Division. The agreement is not in the record, nor was it presented to the law judge. In any event, we are not called upon to resolve the reach of the purported agreement because the Division did not appeal the law judge's finding on the statute of limitations issue. See Commission Rules of Practice 410, 17 C.F.R. § 201.410. Our opinion should not be read as expressing a view as to the appropriateness of the law judge's ruling on the statute of limitations issue.

9 Rule of Practice 451(d), 17 C.F.R. §201.451(d), permits a member of the Commission who was not present at oral argument to participate in the decision of the proceeding if that member has reviewed the oral

argument transcript prior to such proceeding. Commissioners Glassman, Atkins, and Campos have reviewed the transcript of the oral argument.

10 We refer to FWI, FWS and FWAM collectively as the "FWI companies."

11 Throughout the record, the parties used the terms "Series C debentures" and "bridge loans" interchangeably to refer to the same security.

12 After his resignation, Willcox wrote several memoranda complaining that Feeley managed negative information regarding FWI's finances so completely that Willcox had only a vague idea of events within the FWI companies. Willcox remained employed at FWAM until 1995.

13 FWS's comptroller initially had identified this capital problem the previous autumn, when he determined that a loan to FWI from another enterprise in which Feeley was involved was not properly collateralized under NYSE rules. Feeley contradicted FWS's comptroller, and FWS, relying on Feeley's interpretation, continued to operate until the NYSE identified and acted upon FWS's capital deficit.

14 In voluntarily suspending operations, FWS had agreed to restate its net capital reports for part of 1994, an undertaking that was complicated by the refusal of FWI's accountants to release any files or reports until FWI paid its bill. Feeley did not disclose to Ernst that FWS already had voluntarily suspended operations in early January at the urging of the NYSE. Feeley told Ernst that FWS needed the financing because it had to restate its 1994 financial reports and could not obtain certified financial statements. Feeley further informed Ernst that, because of this situation, there was a "possibility" that the NYSE might take action against FWS.

15 FWS had spent the $50,000 cash by then, but the securities remained in the FWS capital account (and were still in the account as of the hearing date).

16 It appears that one of the customers at issue here, Patrick Murphy, did not give his consent before his account was moved to Ernst. The record does not reflect how the move was accomplished without Murphy's consent, nor does Feeley contest that Murphy did not consent before the move.

17 Sandra Feeley is not related to Respondent Michael Feeley.

18 When Feeley's advisory clients purchased FWI debentures, FWI, FWAM's corporate parent, benefitted. Feeley benefitted because he was an officer, director and shareholder of FWI and FWAM.

19 See supra note 16.

20 Among the information required to be kept current is contact information (address and telephone number of the principal place of business), information regarding key personnel, and operations information. See generally Advisers Act Rule 204-1, 17 C.F.R. § 275.204-1.

21 At the hearing, Feeley testified that the location to which he invited the examiners was the office of another enterprise in which Feeley had an interest.

22 15 U.S.C. § 204; 17 C.F.R. § 275.204-2(a).

23 17 C.F.R. § 275.204-2(e)(1).

24 Advisers Act § 204, 15 U.S.C. § 80b-4.

25 Specifically, the examiners requested, but did not receive, financial statements; general or auxiliary ledgers; balance sheets or income statements; records of cash receipts or disbursements; trial balances of financial statements; order memoranda for client transactions; bills and statements regarding trial balances; and a complete list of Feeley's personal securities transactions for 1995 and several prior years.

26 Specifically, the law judge found that "[t]he unanimous evidence is that the actions of [FWAM] and Mr. Feeley are one and the same."

27 Securities Act § 17(a), 15 U.S.C. § 77q(a), Exchange Act § 10(b), 15 U.S.C. § 78j(b), Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5.

28 Joseph J. Barbato, Securities Act Rel. No. 7638 (Feb. 10, 1999), 69 SEC Docket 178, 192.

29 Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988)(quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

30 First Pittsburgh Sec. Corp., 47 S.E.C. 299, 303 (1980).

31 See Riedel v. Acutote of Colorado, 773 F. Supp. 1055, 1068 (S.D. Ohio 1991) (use of proceeds a material fact); see also Joseph P. Tufo, Securities Act Rel. No. 7672 (Apr. 28, 1999), 69 SEC Docket 2002, 2005 (settled order) (same).

32 At oral argument, counsel acknowledged that Feeley "did not disclose that the proceeds were going to pay the interest [] on the debt that had been previously incurred."

33 Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

34 At a later point the law judge observed that "Mr. Feeley's explanations of the events in dispute are brazen and unrealistic," and referred to "Mr. Feeley's tortured rationalizations."

35 See Greebel v. FTP Software, Inc., 194 F.3d 185, 198 n.12 (1st Cir. 1999) (collecting cases). Respondents advise that they challenge the claim that recklessness satisfies the scienter requirement in order to preserve the argument for further appeal.

36 Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000) (willfulness means "no more than that the person charged with the duty knew what he was doing. It does not mean that, in addition, he must suppose that he is breaking the law"). See Marc N. Geman, Exchange Act Rel. No. 43963 (Feb. 14, 2001), 74 SEC Docket 999, 1033-34 (citing Wonsover).

Respondents argue that the Commission improperly has used a two-track application of the willfulness standard that discriminates against respondents who contest administrative charges and favors those who settle with the Commission. Specifically, Respondents argue that our statement in the settled order in Christopher LaPorte, that "the Commission evaluates on a case-by-case basis whether the respondent knew or reasonably should have known under the particular facts and circumstances that his conduct was improper" evidences the application of a subjective standard for willfulness in settled cases. Christopher LaPorte, Exchange Act Rel. No. 39170 (Sept. 30, 1997), 65 SEC Docket 1623, 1627 n.2. To the contrary, as reflected in LaPorte and other cases resolving administrative proceedings, settled and contested, we make an objective assessment of a respondent's culpability. The LaPorte settled order describes the factors the Commission considered in finding culpability in that case, as does the Credit Suisse settlement on which Feeley also relies. See Credit Suisse First Boston Corp. , Securities Act Rel. No. 7498 (Jan. 29, 1998), 66 SEC Docket 1241. Under the LaPorte formulation, in any event, Feeley acted willfully as he "reasonably should have known under the particular facts and circumstances that his conduct was improper."

37 15 U.S.C. §§ 80b-6(1), 80b-6(2).

38 SEC v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963).

39 Respondents' Petition for Review claims that there should be no Advisers Act liability arising from any asserted misstatements because the very nature of the recommendations "bespeaks caution." First, they claim that, because the debentures carried a high interest rate, this was an indication that they were a risky investment. Respondents assert further that investors should have been alerted to Feeley's potential conflict of interest by the appearance of Feeley's name on the face of the debentures. Respondents argue that Feeley's failure to disclose either the risks of the investment or his and FWAM's financial interest in the

debenture sales was immaterial as a matter of law. See In re Donald J. Trump Casino Secs. Litigation, 7 F.3d 357, 376 (3d Cir. 1993). Respondents did not pursue this argument in their brief, but, to the extent it has continued vitality, we conclude that, as an initial matter, the defense does not apply here: there was no prospectus nor were there cautionary statements given to the four advisory clients in this proceeding, two predicates for the "bespeaks caution" defense. Id. at 364 (establishing elements of the "bespeaks caution" defense). More importantly, the defense is contrary to the presumption of the Advisers Act that an adviser's recommendations bespeak trust, not caution, because the adviser acts as a fiduciary to his or her client. Capital Gains Research Bureau, Inc., 375 U.S. at 194.

40 At oral argument, Feeley's counsel acknowledged that Respondents' ownership interest in FWI "presented a conflict of interest" that should have been disclosed.

41 SEC v. Capital Gains Research Bureau, 375 U.S. at 194.

42 Id. at 200.

43 Id.; as we found in Section III.A, supra, the failure to disclose material facts regarding the debenture purchases also violates the Securities Act and the Exchange Act.

44 See id. at 196. In contrast, FWAM disclosed to its advisory clients when they opened their accounts that FWS would execute trades for FWAM, that FWS would not always be able to offer the best execution, and that Feeley, a principal of FWAM, also was a principal of FWS.

45 Ernst was anxious that Feeley disclose his financial relationship with Ernst. In fact, Ernst ultimately disclosed the details of the relationship to Feeley's advisory clients when Feeley failed to do so.

46 2 Tamar Frankel & Ann Taylor Schwing, The Regulation of Money Managers Mutual Funds and Advisers, §§ 13.01[A], 13.02[E].

47 See Capital Gains Research Bureau, 375 U.S. at 186-89.

48 2 Frankel & Schwing at § 14.01[A].

49 We do not, as do Respondents, read the law judge's observations that "Feeley refused to admit that recommending Series C debentures to [FWAM] clients placed him in a conflict of interest" and that "Feeley repeatedly refused to acknowledge that he had a conflict of interest and attempted to obfuscate the issue . . ." as endorsements of Feeley's credibility and good faith. A refusal to admit the truth does not equate to lack of scienter or lack of improper motive. Feeley's testimony reflected laborious efforts -- through evasion, obfuscation, and, sometimes, lying -- to avoid acknowledging the truth. We find, as did the law judge, that Feeley was an utterly unreliable witness who operated during the period at issue exclusively in his own self-interest and at the expense (literally) of his clients.

50 Capital Gains Research Bureau, Inc., 375 U.S. at 196 (internal citations and quotation omitted).

51 The law judge found that Feeley: "refused to admit that recommending Series C debentures to [Feeley's advisory] clients placed him in a conflict of interest . . .;" "repeatedly refused to acknowledge that he had a conflict of interest and attempted to obfuscate the issue;" and "Mr. Feeley's attempt to rationalize his actions is unpersuasive." In sum, the law judge did not credit Feeley's protestations of sincerity regarding conflicts of interest.

52 To find that Feeley aided and abetted, the record must demonstrate "(1) the existence of an independent primary violation"; (2) knowledge by the alleged aider and abettor of the primary violation and his or her role in furthering the violation; and (3) "substantial assistance" by the defendant in the commission of the primary violation. SEC v. Fehn, 97 F.3d 1276, 1288 (9th Cir. 1996). See Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000).

Our findings that Feeley willfully aided and abetted FWAM's violations necessarily make him a "cause" of those violations. See Richard D. Chema, 53 S.E.C. 1049, 1059 n.20 (1998); Dominick & Dominick, Inc., 50 S.E.C.

571, 578 n.11 (1991). To conclude that a respondent aided and abetted another violation, we must find that he acted with scienter. A respondent is a "cause" of another's violation if the respondent "knew or should have known" that the respondent's act would contribute to the violation. Exchange Act Section 21C(a); Chema, 53 S.E.C. at 1059 n.20.

53 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

54 Although the conduct here might support a stronger sanction, the Division did not appeal.

55 177 F.3d 1016 (D.C. Cir. 1999).

56 Id. at 1017.

57 Id.

58 Exchange Act § 15(b)(6)(A), 15 U.S.C. § 78o(b)(6)(A).

59 Exchange Act § 15(b)(4)(D), 15 U.S.C. § 78o(b)(4)(D).

60 Teicher, 177 F.3d at 1017. In their briefs Respondents state that they raise this argument to preserve it for a possible appeal to an appellate court that has yet to decide the issue presented in Teicher.

61 Exchange Act § 21B(a)(1) and (2), 15 U.S.C. § 78u-2(a)(1) and (2); see also Advisers Act § 203(i), 15 U.S.C. § 80b-3(i).

62 KPMG Peat Marwick LLP, Exchange Act Rel. No. 43862 (Jan. 19, 2001), 74 SEC Docket 384, 436, petition denied, 289 F.3d 109 (D.C. Cir. 2002).

63 Id.

64 "Cease and desist proceedings are remedial in nature and not subject to [28 U.S.C.] Section 2462." Herbert Moskowitz, Exchange Act Rel. No. 45609 (Mar. 21, 2002), 77 SEC Docket 481, 500 (collecting cases).

65 Actions seeking disgorgement, like cease-and-desist proceedings, are not subject to the limitations period of 28 U.S.C. § 2462. Johnson v. SEC, 87 F.3d 484, 489 (D.C. Cir. 1996).

66 Respondents asserted in their Petition for Review that disgorgement was not appropriate because Feeley had not been unjustly enriched. Respondents did not pursue this argument in their briefs, and we reject it as unsupported.

67 SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 1996); SEC v. Patel, 61 F.3d 137, 140 (2d Cir. 1995).

68 Feeley has appended to his reply brief unauthenticated and unverified letters from former advisory clients, including the four advisory clients at issue, regarding amounts Feeley asserts he has paid them since the close of the hearing. Counsel for Feeley also made certain representations about Feeley's record of repayment, including that Sandra Feeley has been paid in full. Counsel offered to submit, post-argument, evidence of any repayment, but did not do so. These submissions and representations are not part of the record presented to us for review; accordingly, we have not considered them. Feeley will have the opportunity to submit evidence of repayment as part of the disgorgement collection process.

69 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.