

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

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 2214 / February 9, 2004**

**Admin. Proc. File No. 3-11201**

**In the Matter of NEVIS CAPITAL MANAGEMENT, LLC, DAVID R. WILMERDING, III, and JON C. BAKER, Respondents.**

**ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS AND CEASE-AND-DESIST ORDER**

**I.**

In these proceedings instituted on July 31, 2003, pursuant to Sections 203(e) and 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") and Section 9(b) of the Investment Company Act of 1940 ("Investment Company Act") and cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(k) of the Advisers Act, and Section 9(f) of the Investment Company Act, Respondents Nevis Capital Management, LLC ("Nevis Capital"), David R. Wilmerding, III ("Wilmerding") and Jon C. Baker ("Baker") (collectively, "Respondents"), have submitted an Offer of Settlement ("Offer") which the Securities and Exchange Commission ("Commission") has determined to accept.

**II.**

Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, Respondents consent to the entry of this Order Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

**III.**

On the basis of this Order and Respondents' Offer, the Commission finds that:

**Respondents**

1. Nevis Capital is a Maryland limited liability company, formerly known as Nevis Capital Management, Inc., with its principal place of business in Baltimore, Maryland. Nevis Capital has been registered with the Commission as an investment adviser since 1991. Between December 1998 and December 1999, Nevis Capital provided investment advisory services to approximately 105 clients, including Snowdon Limited Partnership ("Snowdon") and the Nevis Fund (or the "Fund"), and had at least \$706,000,000 in assets under management. Wilmerding and Baker shared responsibility for setting investment policy and strategy, managing client accounts and directing advertising for Nevis Capital.
2. Wilmerding, age 42, is a Maryland resident and is the President, director, and co-owner of Nevis Capital.
3. Baker, age 39, is a Maryland resident and is the Executive Vice-President, director, and co-owner of Nevis Capital.

## **Other Relevant Entities**

4. Snowdon Limited Partnership is an unregistered investment company organized as a Maryland limited partnership, which was formed by Nevis Capital in 1993 and for which Nevis Capital serves as investment adviser and General Partner. Nevis Capital employs investment objectives and strategies for Snowdon that are substantially similar to those for its other clients except that Snowdon is permitted to engage in short sales and is authorized to invest in private companies. Snowdon also differs from other clients because it pays Nevis Capital both a flat management fee of 1% of net assets and a performance-based fee of 20% of profits, above a high-water mark. Nevis Capital's standard practice with its other clients is to charge a flat management fee, typically ranging from 1% to 1.5% of net assets.

5. Nevis Fund is a Maryland corporation formed by Nevis Capital that is a no-load, non-diversified, open-end management investment company registered with the Commission under the Investment Company Act with an inception date of June 29, 1998. Wilmerding and Baker serve as two of the five directors of the Fund.

## **Background**

6. From approximately December 1998 through July 2000, Nevis Capital, Wilmerding, and Baker inequitably allocated all shares of initial public offerings ("IPOs") acquired by Nevis Capital to only two of their clients, the Nevis Fund and Snowdon, and failed to disclose this practice to their other clients, most of which were eligible to participate in IPOs. This allocation was contrary to the Respondents' claims in Nevis Capital's Form ADV amendment that the firm would treat all of its clients equally, on a pro-rata basis. These IPO shares had a significant positive impact on the performance of the Nevis Fund and Snowdon, which benefited those entities, and the Respondents. In fact, the Nevis Fund became one of the top performing mutual funds between May 31, 1999 and December 31, 1999, due to IPO investments.

7. Specifically, between December 1998 and December 1999, Nevis Capital, through Wilmerding and Baker, purchased shares of 83 IPOs for a total of approximately 2,857,000 shares. Respondents then allocated shares of 69 of the 83 IPOs or approximately 993,000 shares to the Nevis Fund and shares of 31 of the 83 IPOs or approximately 1,864,000 shares to Snowdon. The Respondents did not allocate IPO shares to any of their other investment advisory clients, the majority of which were eligible and financially able to invest in IPOs.

8. The Respondents' allocation of all IPO shares to only the Nevis Fund and Snowdon was inequitable. As of December 31, 1998, the assets of the Nevis Fund and Snowdon comprised approximately 0.25% and 13.5%, respectively, of the total assets managed by Nevis Capital, yet these two clients were allocated all of the IPO shares purchased by Nevis Capital. This disproportionate allocation of IPOs to the Nevis Fund and Snowdon, clearly benefited those entities -- and Nevis Capital.

9. By allocating IPOs into the Nevis Fund when it had a small asset base, the Fund achieved returns ranging from 90.1% on May 31, 1999 to 286.1% on December 31, 1999. These returns subsequently were reported in the Fund's 1999 Annual Report dated June 25, 1999, and on the Nevis Fund website, in addition to appearing in various media reports, without an explanation of the impact of IPOs on those returns. After the Respondents publicized these returns, the net flow of investment dollars into the Nevis Fund increased from approximately \$9,000,000 during the Fund's first year to approximately \$70,000,000 during the six-month period from July through December 1999. By March 31, 2000, the Nevis Fund's net assets increased to approximately \$317,000,000. This increase in Fund assets resulted in a corresponding increase in the management fees paid by the Nevis Fund to Nevis Capital.

10. Nevis Capital's allocation of IPOs to Snowdon was more beneficial to Nevis Capital, Wilmerding, and Baker than allocating the IPO shares to its other clients because, in addition to the annual

management fee of 1% of net assets, Snowdon paid a performance-based fee to Nevis Capital of 20% of profits above a high-water mark.

11. Nevis Capital and Wilmerding also made false and misleading statements regarding their IPO allocation policy in the amendment to Nevis Capital's Form ADV filed on January 28, 1999, which was signed on behalf of Nevis Capital by Wilmerding. Part II, Item 9 of the Form ADV, entitled "Participation or Interest in Client Transactions," required Nevis Capital to indicate whether it "[b]uys or sells for itself securities that it also recommends to clients," and, if so, to describe "when the applicant . . . engages in these transactions and what restrictions, internal procedures, or disclosures are used for conflicts of interest in those transactions." In response, Nevis Capital and Wilmerding stated that

The officers and directors of Nevis [Capital] will also be clients of Nevis [Capital]. All clients will be treated equally (on a pro-rata basis) and if there is any problem accomplishing equal treatment, the interest of clients who are not related persons will be given priority.

The response fails to disclose that Respondents had allocated or would allocate all IPO shares to the Nevis Fund and Snowdon or that by allocating IPO shares in this manner, the Respondents could earn greater fees than if they allocated the IPO shares to their other clients.

12. Nevis Capital's investment in IPO shares on behalf of the Nevis Fund was primarily responsible for the Fund's outstanding performance. During the Nevis Fund's first fiscal year of operation through May 31, 1999, the Nevis Fund reported a return of 90.1%. During that period, all of the Fund's returns were attributable to gains from IPO investments. The Fund's reported return of 154.6% from inception through September 30, 1999, also was wholly attributable to the Fund's investment in IPOs. Even through the last quarter of 1999, IPOs played a substantial role in the Fund's gains. The Fund experienced a return of 286.1% from inception through December 31, 1999, with IPO investments accounting for approximately 86% (or 247 percentage points) of the Fund's 286.1% return during that period. Respondents did not analyze the contributions of IPO shares to the Fund's overall performance and did not disclose this information to the Fund's Board of Directors or investors.

13. Without the impact of first-day gains from IPOs, the Nevis Fund's returns through May 31, 1999, September 30, 1999, and December 31, 1999, would have been approximately -8.7%, -5.3% and 38.7%, respectively, rather than the Fund's reported returns of 90.1%, 154.6% and 286.1%.<sup>1</sup>

14. The Respondents made misrepresentations and omitted material information regarding the role of IPOs in the Nevis Fund's performance between December 1998 and December 1999. They made affirmative misrepresentations in Nevis Capital's Annual Report for the fiscal year ended May 31, 1999 and Wilmerding made false and misleading statements to three reporters for SmartMoney.com, which the Respondents subsequently adopted by linking the reporters' articles to Nevis Capital's website. In addition, the Respondents omitted material information from the Fund's prospectus, periodic reports, and advertisements on Nevis Capital's website.

15. In the Manager's Discussion and Analysis of Fund Performance ("MD&A") in the Nevis Fund's Annual Report for the fiscal year ended May 31, 1999, which Wilmerding drafted with Baker's assistance, Respondents stated that the Fund had benefited from market volatility and the Fund's ability to purchase a number of securities at attractive prices. Respondents said that "the Fund's relatively small asset base enabled us to be more nimble with purchases and sales than we could have been with a much larger asset base." The MD&A then gave the misleading impression that certain holdings had contributed to the Fund's returns through May 31, 1999: namely, Vitesse Semiconductor Corp. ("Vitesse") and Staar Surgical, Co. ("Staar"), which had appreciated 305% and 60%, respectively, during the preceding five to seven months. The shares of Vitesse and Staar held by the Nevis Fund actually had appreciated by much smaller amounts because the Nevis Fund held those securities for only one business day and 13 business days, respectively, during the fiscal

year, rather than the five- to seven-month periods referenced in the Report. Respondents did not disclose in the Annual Report the actual holding periods for these two securities, nor did they disclose that the Fund's performance was primarily attributable to IPO investments.

16. Wilmerding gave an interview to the author of the SmartMoney.com article entitled "A New Champion" dated July 29, 1999, in which he understated the impact of IPO investments on the Nevis Fund's performance. In the interview, Wilmerding discussed Nevis Capital's general investment philosophy for all of its investment advisory clients, and attributed the Fund's success to the Respondents' philosophy of analyzing company earnings and their long-term investment strategy. He did not inform the reporter that the Fund's extraordinary performance was primarily attributable to IPOs; thus, the article indicated that "some" of the Fund's performance was related to IPO investments. As a result, the article published by SmartMoney.com contained misleading information about the Nevis Fund. It focused on non-IPO securities that had appreciated significantly since the first of the year, such as Vitesse, when the Fund did not hold that security throughout much of the period of appreciation.

17. Thereafter, Wilmerding misrepresented to the author of the SmartMoney.com article entitled "Top of the Charts: Running Start," dated October 1999, that the Nevis Fund's success was attributable to the Respondents' strategy of looking at long-term earnings growth, citing, as an example, the non-IPO security, Rational Software. As a result, the article published contained false and misleading information suggesting that the Fund had achieved its returns because it had "stockpile[d]" Rational Software shares, which had appreciated in value by 174% from its market low price. In fact, although it had purchased some Rational Software shares near the market low, the Nevis Fund did not "stockpile" Rational Software shares at the market-low price, its total Rational Software position did not appreciate by 174%, and the Nevis Fund actually had an unrealized net loss totaling approximately \$38,500 on its Rational Software position through September 30, 1999. Wilmerding also failed to disclose, and so the published article did not indicate, that the Fund's exceptional performance was primarily attributable to IPO investments.

18. Wilmerding also misrepresented the impact of IPOs on the Nevis Fund's performance to the author of the SmartMoney.com article entitled "From Out of Nowhere" dated December 28, 1999. The article reports a question to Wilmerding about the extent of the Nevis Fund's investment in IPOs as follows:

SmartMoney.com: How many IPOs did you involve yourself with?

DW: It's not a lot. To give you an idea, given that this fund started at \$9.99 on 12/13/98 and is at \$34 and change today, we made a distribution in November that was only \$2.65. Which is basically a combination of what trading we did do and a couple IPOs. So the bulk of the gain here is unrealized.

The Fund actually had purchased shares of 69 IPOs between December 1998 and December 1999. The article did not state that the Fund's exceptional performance was primarily attributable to these IPO investments and Wilmerding's responses imply the contrary.

19. Baker, in consultation with Wilmerding, directed Nevis Capital's administrative assistant to arrange for all three SmartMoney.com articles to be linked to Nevis Capital's website. All three Respondents adopted the false and misleading information in all three SmartMoney.com articles by linking those articles to Nevis Capital's website.

20. The Respondents omitted material information from several documents, including the Nevis Fund's prospectus, periodic reports and advertisements, which made the remaining information therein false and misleading.

21. For example, in the Nevis Fund's Prospectus dated September 24, 1999, the Respondents reported the Nevis Fund's first fiscal year return of 90.1% but they did not disclose the substantial

extent to which this performance was attributable to IPO investments or that such returns could not be sustained as the asset base for the Fund increased. Furthermore, the Prospectus contained information misleading to shareholders and prospective investors, in that it emphasized the Respondents' "long-term approach to investing" and their in-depth analysis of companies' earnings growth when such strategies did not apply to the Fund's IPO investments. Wilmerding and Baker both reviewed the Prospectus before it was filed with the Commission electronically and made available to prospective investors by the mails and on Nevis Capital's website.

22. Furthermore, on November 15, 1999, the Nevis Fund issued a Supplement to the Prospectus dated September 24, 1999, which indicated that the Fund "may participate" in IPOs. The Supplement did not state that the Fund already had participated in IPOs or that Fund's past performance was primarily attributable to IPO investments. Wilmerding and Baker both reviewed the draft prospectus supplement, before it was filed with the Commission electronically and made available to prospective investors by the mails.

23. The Nevis Fund's Semi-annual Report for the period ending November 30, 1999 also did not disclose the extent of the impact of IPOs on the Fund's performance. Wilmerding and Baker prepared the letter to shareholders accompanying the Semi-annual Report, which noted that the Fund had strong returns, but they did not disclose that those returns were primarily attributable to IPO investments. Wilmerding and Baker reviewed the entire Semi-annual Report before it was filed with the Commission electronically and made available to shareholders via the mails.

24. A Press Release dated July 1, 1999, which was drafted by Nevis Capital's administrative assistant, reviewed by Wilmerding and Baker and posted on Nevis Capital's website by its administrative assistant at the direction of Wilmerding and Baker, also did not disclose the impact of the Nevis Fund's IPO investments. In the Press Release, the Respondents highlight the Nevis Fund's one-year cumulative return of 109.6%, with Baker and Wilmerding attributing "a great deal of the Fund's success to its concentrated portfolio of growth companies." The Press Release, however, does not disclose that the Nevis Fund had participated in IPOs or that the Fund's performance was primarily attributable to IPO investments.

25. Nevis Capital's website, which contains several pages advertising Nevis Capital's investment advisory services with links to pages pertaining solely to the Nevis Fund, also failed to disclose the impact of IPOs on the Fund's performance. On the "Summary" page, Respondents compared the Fund's returns with the returns of the S&P 500 and the Russell 2000 with a bar chart. On the "Performance" page, the Respondents displayed the Fund's returns in a chart. Neither page disclosed that the Nevis Fund had participated in IPOs, or that the Fund's returns were primarily attributable to IPO investments, or that such returns might not be sustainable as the asset base for the Fund increased. In addition, while the "Prospectus" page included a copy of the Fund's Prospectus dated September 24, 1999 in both HTML and PDF formats, the Respondents only updated that page to include the November 15, 1999 Supplement to the Prospectus in the PDF format, but not the HTML format.

26. As a result of the conduct described above, Nevis Capital willfully violated Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder, which prohibit fraudulent conduct by an investment adviser, by making false and misleading statements, omitting material information, and engaging in fraudulent and deceptive practices.

27. As a result of the conduct described above, Wilmerding and Baker willfully aided and abetted and caused Nevis Capital's violations of Sections 206(1), 206(2) and 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder, which prohibit fraudulent conduct by an investment adviser, by making false and misleading statements, omitting material information, and engaging in fraudulent and deceptive practices.

## Undertakings

Respondents undertake:

28. to retain, within 45 days of the date of entry of the Order accepting the Offer of Settlement ("Order"), the services of an Independent Consultant not unacceptable to the Commission's Staff to conduct an in-depth review of Nevis Capital's: (i) policies, procedures, and practices relating to allocation of IPO shares among clients; (ii) disclosures of its policies, procedures, and practices relating to allocation of IPO shares; (iii) disclosures relating to performance advertising; (iv) policies, procedures, and practices in communicating with members of the press; (v) policies, procedures, and practices relating to its use of media reports and press releases for advertising purposes; (vi) policies, procedures, and practices relating to the Respondents' interaction with the Nevis Fund Board of Directors, including a consideration of the information provided to Board members and the issues addressed at meetings of the Board; and (vii) policies, procedures, and practices relating to the Respondents' interaction with Nevis Fund counsel and with the Nevis Fund administrator. Such a review will be for the purpose of determining compliance with the federal securities laws and to recommend policies and practices designed to ensure such compliance. Respondents shall cooperate fully with the Independent Consultant and shall adopt and implement the policies and practices recommended by the Independent Consultant. To the extent that such recommendations are directed expressly to the Nevis Fund, as opposed to the Respondents or to the Respondents' interaction with the Nevis Fund, such recommendations, and only such recommendations, shall be subject to the approval of the independent members of the Nevis Fund Board of Directors;

29. to require the Independent Consultant, at the conclusion of the review, which in no event shall be more than 120 days after the entry of the Order, to submit a Report to Nevis Capital, the Board of Directors of the Nevis Fund, and the Commission's Staff. The Report shall address the issues described in paragraph 28 of these undertakings, and shall include a description of the review performed, the conclusions reached, the Independent Consultant's recommendations for changes or improvements to the policies, procedures, and practices of Nevis Capital and the Nevis Fund, and a procedure for implementing the recommended changes or improvements to such policies, procedures, and practices;

30. to adopt, implement, and maintain all policies, procedures, and practices recommended in the Report of the Independent Consultant, subject to the following limitations: (a) to the extent that such recommendations are directed expressly to the Nevis Fund, as opposed to the Respondents or to the Respondents' interaction with the Nevis Fund, such recommendations, and only such recommendations, shall be subject to the approval of the independent members of the Nevis Fund Board of Directors; and (b) provided, however, that within 150 days after the entry of the Order, Nevis Capital shall in writing advise the Independent Consultant, the Board of Directors of the Nevis Fund, and the Commission's Staff of any recommendations that it deems to be unnecessary or inappropriate. With respect to any recommendation that Nevis Capital considers unnecessary or inappropriate, Nevis Capital need not adopt that recommendation at that time but shall propose in writing an alternative policy, procedure, or practice designed to achieve the same objective or purpose. As to any recommendation with respect to Nevis Capital's policies, procedures, and practices on which Nevis Capital and the Independent Consultant do not agree, such parties shall attempt in good faith to reach an agreement within 180 days of the date of entry of the Order. In the event Nevis Capital and the Independent Consultant are unable to agree on an alternative proposal acceptable to the Commission's Staff, Nevis Capital will abide by the determinations of the Independent Consultant.

31. to further retain the Independent Consultant to provide training services, in addition to the in-depth review, Report, and recommendations, as set forth above, to Wilmerding, Baker, and to all Nevis Capital employees who bear any responsibility for advertising, marketing, and/or media interaction. Such training shall provide information and guidance regarding all of the policies, procedures, and practices recommended relating to advertising, marketing, and/or media

interaction, as well as the bases for those recommendations, which training shall be completed within 30 days from the submission of the Report;

32. to disseminate, within 30 days of the date of the Order, at its own expense, a copy of the Order to all Nevis Capital clients, as well as all individual investors (be they natural persons or entities) in the Nevis Fund and in the limited partnerships managed by Nevis Capital, as of the date of the Order; and

33. to disseminate, for a period of one (1) year following the date of the Order, at its own expense, a copy of the Order to all prospective Nevis Capital clients, including prospective individual investors (be they natural persons or entities) in the Nevis Fund and in the limited partnerships managed by Nevis Capital.

34. to ensure the independence of the Independent Consultant, Nevis Capital, Wilmerding, and Baker: (i) shall not have the authority to terminate the Independent Consultant, without the prior written approval of the Commission's Staff; (ii) shall compensate the Independent Consultant, and persons engaged to assist the Independent Consultant, for services rendered pursuant to the Order at their reasonable and customary rates; (iii) shall not be in and shall not have an attorney-client privilege relationship with the Independent Consultant and shall not seek to invoke the attorney-client or any other doctrine or privilege to prevent the Independent Consultant from transmitting information, reports, or documents to the Commission or the Commission's Staff.

35. to require the Independent Consultant to enter into an agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any employment, consultant, attorney-client, auditing, or other professional relationship, directly or indirectly, with Nevis Capital, or any of its present or former affiliates, directors, officers or employees. The agreement will also provide that the Independent Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Independent Consultant in performance of his/her duties under this Order shall not, without prior written consent of the Commission's Staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship, directly or indirectly, with Nevis Capital, or any of its present or former affiliates, directors, officers or employees for the period of the engagement and for a period of two years after the engagement.

36. The Commission's Staff, in its sole discretion, may extend any of the procedural deadlines set forth in Sections III.28-III.32, above, for good cause shown, and upon a timely application, received in advance of the expiration of such deadline, from the Independent Consultant or from Respondents.

37. In determining whether to accept Respondents' Offer, the Commission has considered the undertakings, described in Paragraphs III.28 through III.35, to the extent that said undertakings apply to the Nevis Fund.

#### **IV.**

In view of the foregoing, the Commission deems it appropriate, and in the public interest, to impose the sanctions specified in the Respondents' Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 203(e) of the Advisers Act, Respondents Nevis Capital, Wilmerding, and Baker are hereby censured;

B. Pursuant to Section 203(k) of the Advisers Act, Respondent Nevis Capital shall cease and desist from committing or causing any violations and any future violations of Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder;

C. Pursuant to Section 203(k) of the Advisers Act, Respondents Wilmerding and Baker shall cease and desist from committing or causing any violations and any future violations of Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder;

D. IT IS FURTHER ORDERED that Respondent Nevis Capital shall, within 10 days of the entry of this Order, pay disgorgement and prejudgment interest in the amount of \$10,000.00 to the United States Treasury. Such payment shall be (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Nevis Capital as a Respondent in these proceedings, the file number of these proceedings, a copy of the cover letter and money order or check shall be sent to Merri Jo Gillette, Associate District Administrator, Securities and Exchange Commission, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

E. IT IS FURTHER ORDERED that Respondent Nevis Capital shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$1,690,000.00 to the United States Treasury. Such payment shall be (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Nevis Capital as a Respondent in these proceedings, the file number of these proceedings, a copy of the cover letter and money order or check shall be sent to Merri Jo Gillette, Associate District Administrator, Securities and Exchange Commission, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

Such civil money penalty may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 ("Fair Fund distribution"). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including tax purposes. To preserve the deterrent effect of the civil penalty, Respondent Nevis Capital agrees that it shall not, in any Related Investor Action, benefit from any offset or reduction of any investor's claim by the amount of any Fair Fund distribution to such investor in this proceeding that is proportionally attributable to the civil penalty paid by Respondent Nevis Capital ("Penalty Offset"). If the court in any Related Investor Action grants such an offset or reduction, Respondent Nevis Capital agrees that it shall, within 30 days after the entry of a final order granting the offset or reduction, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed against Respondent in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent Nevis Capital by or on behalf of one or more investors based on substantially the same facts as alleged in the Order in this proceeding.

F. IT IS FURTHER ORDERED that Respondent David R. Wilmerding, III shall, within 10 days of the entry of this Order, pay disgorgement and prejudgment interest in the amount of \$10,000.00 to the United States Treasury. Such payment shall be (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies David R. Wilmerding, III as a Respondent in these proceedings, the file number of these proceedings, a copy of the cover



letter and money order or check shall be sent to Merri Jo Gillette, Associate District Administrator, Securities and Exchange Commission, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

G. IT IS FURTHER ORDERED that Respondent David R. Wilmerding, III, shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$140,000.00 to the United States Treasury. Such payment shall be (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies David R. Wilmerding, III as a Respondent in these proceedings, the file number of these proceedings, a copy of the cover letter and money order or check shall be sent to Merri Jo Gillette, Associate District Administrator, Securities and Exchange Commission, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

Such civil money penalty may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 ("Fair Fund distribution"). Regardless of whether any such Fair Fund distribution is made, amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including tax purposes. To preserve the deterrent effect of the civil penalty, Respondent David R. Wilmerding, III agrees that he shall not, in any Related Investor Action, benefit from any offset or reduction of any investor's claim by the amount of any Fair Fund distribution to such investor in this proceeding that is proportionally attributable to the civil penalty paid by Respondent David R. Wilmerding, III ("Penalty Offset"). If the court in any Related Investor Action grants such an offset or reduction, Respondent David R. Wilmerding, III agrees that he shall, within 30 days after the entry of a final order granting the offset or reduction, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed against Respondent in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent David R. Wilmerding, III by or on behalf of one or more investors based on substantially the same facts as alleged in the Order in this proceeding.

H. IT IS FURTHER ORDERED that Respondent Jon C. Baker shall, within 10 days of the entry of this Order, pay disgorgement and prejudgment interest in the amount of \$10,000.00 to the United States Treasury. Such payment shall be (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Jon C. Baker as a Respondent in these proceedings, the file number of these proceedings, a copy of the cover letter and money order or check shall be sent to Merri Jo Gillette, Associate District Administrator, Securities and Exchange Commission, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

I. IT IS FURTHER ORDERED that Respondent Jon C. Baker shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$140,000.00 to the United States Treasury. Such payment shall be (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Jon C. Baker as a Respondent in these proceedings, the file number of these proceedings, a copy of the cover letter and money order or check shall be sent to Merri Jo Gillette, Associate District Administrator, Securities and Exchange Commission, 701 Market Street, Suite 2000, Philadelphia, PA 19106.

Such civil money penalty may be distributed pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 ("Fair Fund distribution"). Regardless of whether any such Fair Fund distribution is made,

amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including tax purposes. To preserve the deterrent effect of the civil penalty, Respondent Jon C. Baker agrees that he shall not, in any Related Investor Action, benefit from any offset or reduction of any investor's claim by the amount of any Fair Fund distribution to such investor in this proceeding that is proportionally attributable to the civil penalty paid by Respondent Jon C. Baker ("Penalty Offset"). If the court in any Related Investor Action grants such an offset or reduction, Respondent Jon C. Baker agrees that he shall, within 30 days after the entry of a final order granting the offset or reduction, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the United States Treasury or to a Fair Fund, as the Commission directs. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed against Respondent in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent Jon C. Baker by or on behalf of one or more investors based on substantially the same facts as alleged in the Order in this proceeding.

J. Respondents shall comply, or cause compliance, with the undertakings enumerated in Section III above.

By the Commission.

Jonathan G. Katz  
Secretary

#### **Footnote**

1 "Impact" on performance was measured by the following procedure. The first-day gain on each IPO purchased by the Fund was calculated by multiplying the number of IPO shares purchased by the change in value between the initial offering price of the IPO and the price of the security on the first day of trading. Next, an "adjusted return" was computed for each day of the period being measured by calculating the Fund's return for that day excluding the first-day IPO gains. Starting with the day of the first IPO purchase, the "adjusted return" was then applied to the Fund's NAV for the previous day to compute the Fund's "adjusted NAV." For each day thereafter the adjusted return was applied to the Fund's "adjusted NAV" for the previous day to compute the Fund's "adjusted NAV" for the day. The change in the "adjusted NAV" over the period being measured was then used to compute the "adjusted return" for the Fund. The "impact" on the Fund's performance is the difference between the reported return and the "adjusted return" over the period being measured. The "adjusted return" extracts the compounding effect of the IPO gains over time from the Fund's reported return. This measure of impact is consistent with the method used by the Commission in other proceedings. See, e.g., *The Dreyfus Corp.*, Advisers Act Rel. No. 1870, 2000 SEC LEXIS 941 (May 10, 2000).