

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 53201 / January 31, 2006

INVESTMENT ADVISERS ACT OF 1940  
Rel. No. 2477 / January 31, 2006

Admin. Proc. File No. 3-11762

In the Matter of  
SCHIELD MANAGEMENT COMPANY  
and

MARSHALL L. SCHIELD  
c/o Edward T. Lyons, Jr., Esq.  
Jones & Keller, P.C.  
1625 Broadway, Suite 1600  
Denver, Colorado 80202

OPINION OF THE COMMISSION

INVESTMENT ADVISER PROCEEDING  
BROKER-DEALER PROCEEDING

Ground for Remedial Action

Consent Injunction

Registered investment adviser and its majority owner and former president, who also was associated with a registered broker-dealer, were permanently enjoined, with their consent, from committing future violations of the securities laws. Held, it is in the public interest to revoke investment adviser's registration and to bar majority owner from association with any investment adviser or broker-dealer.

## APPEARANCES:

Edward T. Lyons, Jr. and Nathan D. Simmons, of Jones & Keller, P.C., for Schield Management Company and Marshall L. Schield.

Polly A. Atkinson and Robert M. Fufeld, for the Division of Enforcement.

Appeal filed: June 27, 2005

Last brief received: September 23, 2005

## I.

Schild Management Company (“SMC” or the “Firm”), a registered investment adviser, and Marshall Schild (“Schild”), its majority owner and former president, and former president of Schild Securities LLC, a former broker-dealer, 1/ appeal from the decision of an administrative law judge. 2/ The law judge found that SMC and Schild (together, “Respondents”) had been enjoined 3/ from committing future violations of Section 204 of the Investment Advisers Act of 1940 and Rule 204-2 thereunder. 4/ Based on that injunction, and on evidence introduced at the hearing in this proceeding, the law judge revoked SMC’s investment adviser registration and barred Schild from association with any investment adviser or broker-dealer. To the extent we make findings, we base them on an independent review of the record, except with respect to those findings of the law judge not challenged on appeal.

## II.

On July 23, 2003, the Commission filed an injunctive complaint against SMC and Schild in the United States District Court for the District of Colorado (the “Complaint”). The Complaint concerned the destruction and alteration of and the failure to produce requested documents during

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- 1/ Schild Securities LLC withdrew its broker-dealer registration in July 2004. SMC has been a registered investment adviser since Schild founded the Firm in 1972. Throughout most of the Firm’s thirty-three year history, Schild served as the Firm’s president.
- 2/ Schild Management Co. and Marshall L. Schild, Initial Decision Rel. No. 284 (May 24, 2005), 85 SEC Docket 1918.
- 3/ SEC v. Schild Management Company and Marshall L. Schild, Civ. No. 03-B-1332 (CBS) (D. Colo. Aug. 26, 2004). The district court also ordered SMC and Schild to pay civil money penalties of \$100,000 and \$75,000, respectively.
- 4/ 15 U.S.C. § 80b-4 and 17 C.F.R. § 275.204-2. Section 204 requires investment advisers to maintain books and records, and make those books and records available to Commission personnel for examination. Rule 204-2 establishes recordkeeping requirements for investment advisers.

the course of a Commission examination. More specifically, the Complaint alleged the destruction of company e-mails, the destruction of personal identification numbers (“PINs”) related to client and adviser accounts, and the alteration of Individual Position Review (“IPR”) logs, 5/ during a Commission examination.

On August 23, 2004, SMC and Schield consented to the entry of an injunction enjoining them from violating the provisions of the Advisers Act that require investment advisers to make and keep certain records and to make them available for examination by Commission representatives. 6/ In consenting to the injunction, Respondents acknowledged, under the terms of their respective consents, that “in any disciplinary proceeding before the Commission based on the entry of the injunction in this action,” they understood that they would “not be permitted to contest the factual allegations of the complaint in this action.” 7/ The district court entered the injunction order on August 26, 2004. 8/

On December 1, 2004, we authorized the institution of administrative proceedings against Respondents to determine whether they had been enjoined as alleged in the Order Instituting Proceedings (the “OIP”) and, if so, what remedial actions were appropriate in the public interest. The law judge held an administrative hearing at which Schield, Corey Colehour (Schield’s longtime business associate and his successor as president of SMC), and Susan Day, the Commission staff accountant who led the examination, testified. 9/ The law judge also accepted

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5/ Kevin Fay, a consultant who had been hired by SMC to assist with the Firm’s back office operations, testified at the hearing that an IPR “was basically a form that was filled out when it was determined by one of the operations people that a customer’s account did not match the model that that customer was being managed under.” IPR logs are spreadsheets summarizing these discrepancies.

6/ See supra note 4. See also SEC v. Schield Management and Marshall L. Schield, Civ. No. 03-B-1332 (CBS) (D. Colo. Aug. 23, 2004). The consent signed by Schield on behalf of SMC in his capacity as president of the Firm was dated August 23, 2003 instead of August 23, 2004, which is the date on which Schield’s individual consent was signed. It appears that the consents were signed concurrently, and that the August 23, 2003 date is a typographical error.

7/ In compliance with the Commission policy of not permitting a respondent to consent to a judgment that imposes a sanction while denying the allegation in the complaint, as codified at 17 C.F.R. § 202.5, Respondents agreed in their consents not to take any action that would “creat[e] the impression that the complaint is without factual basis.”

8/ See supra note 3.

9/ In addition, Kevin Fay, the consultant who had been hired by SMC, testified about the Firm’s back office operations. See supra note 5. Other witnesses called by Respondents  
(continued...)

into the record other documentary evidence related to the allegations underlying the Complaint. The law judge concluded that Respondents “prevented the examination, destroyed e-mails, and forced the Commission to spend approximately \$100,000 to preserve [SMC] records.” Moreover, the law judge found that, although Schield was sincerely remorseful about his actions, his assurances that he was no longer interested in managing money in the future and had taken steps to prevent future violations, were “not credible.” Based on these findings, the law judge determined that the public interest required that the Firm’s registration be revoked and that Schield be barred from association with any investment adviser or broker-dealer.

### III.

The record establishes that, as alleged in the OIP, Respondents were enjoined from committing future violations of Advisers Act Section 204 and Rule 204-2 thereunder. The record also establishes that, as alleged in the Complaint, SMC, at Schield’s direction, destroyed and altered documents it was required to produce during the course of a Commission examination. All of the misconduct alleged in the Complaint occurred during the course of a Commission examination that covered a period of ten days, from May 27, 2003 until June 6, 2003. 10/

The Commission Examination. On May 27, 2003, the Commission commenced a “cause” examination of SMC’s books and records. 11/ Day testified at the hearing that, in conducting this examination, the staff was focusing on the use by Firm personnel “of client or advis[e]r PIN numbers to make trades or place transactions” and the Firm’s failure to “reimburs[e] clients for

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9/ (...continued)

testified about SMC’s investment acumen, Schield’s good character, and mutual fund industry standards in general.

10/ As indicated, in consenting to the injunction, Respondents acknowledged that they would not be permitted to contest the allegations in the injunctive proceeding in any subsequent “disciplinary proceeding before the Commission . . . .” We have relied on these allegations, and on the other evidence accepted into the record at the administrative hearing, in making our findings.

11/ At the hearing, Day explained that a cause examination, as opposed to a routine examination, usually occurred on a “surprise basis” and could be based on a customer complaint, a concern arising from reviewing filings, or on other information. According to Day, the examination here was initiated in response to e-mail communications from an “anonymous source,” who informed her that “records were being destroyed and altered” at SMC. Schield speculated that the informant might have been a disgruntled former employee. Neither Day’s testimony, nor other evidence in the record, provides further information regarding this unidentified informant.

trading errors.” <sup>12/</sup> According to Day, on May 27, 2003, she hand-delivered to SMC’s compliance officer a list of Firm books and records requested for review that she had prepared in advance of the examination. Among the items requested on that list were copies of “all e-mail correspondence, both internally and externally, since January 2003” and a “list of trading errors . . . that occurred in client or proprietary accounts during the period [since October 31, 2001] . . . and a summary of the error[s] and [their] ultimate disposition, including the conditions of any financial settlement.”

Day testified that, as the examination progressed, she grew concerned at SMC’s “lack of production” of certain requested documents. For example, the Firm did not provide the examiners with copies of “all e-mail correspondence” as requested because two of its employees during the examination deleted e-mails that were responsive to the examiners’ request. At the hearing, Schield conceded that Firm personnel had deleted e-mails, as alleged, based on instructions he gave them. He claimed, however, that those instructions related exclusively to “personally embarrassing” e-mails, and that, in deleting other, business-related e-mails, <sup>13/</sup> SMC employees misconstrued his instructions. <sup>14/</sup> SMC also misrepresented as complete the e-mails it produced to the staff during the examination, despite the fact that the Firm did not include the destroyed e-mails.

In addition, the Firm failed to provide the examiners, as requested, with a complete list of the “trading errors,” i.e., discrepancies between client investment models and trades in client accounts, as summarized in the IPR logs. According to Day, the examiners suspected during the examination that the records they had requested were not being produced by the Firm because they were furnished with several different, inconsistent versions of IPR logs. Moreover, the staff found that these records were incomplete and inaccurate. Day described how one version of the IPR logs that SMC produced to the examiners showed only the discrepancies for which the Firm’s clients had been reimbursed but did not identify those discrepancies for which clients had not been reimbursed. Another version showed discrepancies that resulted in gains for the Firm’s clients, but did not show losses.

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<sup>12/</sup> Day testified that, among other things, the examination sought to determine whether Schield and SMC “were improperly obtaining these PINs . . . .”

<sup>13/</sup> The deleted e-mails related to a dispute involving investment decisions made on behalf of one of the Firm’s larger client accounts.

<sup>14/</sup> At the hearing, Schield explained that he met with SMC personnel during the examination and had “about a two-minute conversation with every single person who was on the list” to instruct them to delete what he characterized as “vulgar” e-mails. Schield explained further that he did not learn that two SMC employees had deleted business-related e-mails until some unspecified period later. It is undisputed that, eventually, the Firm was able to recreate, or otherwise recover, the deleted e-mails, with the result that hard copies of all the deleted e-mails were finally delivered to the Division.

According to Day, the staff “asked for a list of all trading errors, and we received only the trading errors that they reimbursed. We wanted to see every trading error, whether or not it resulted in a gain or a loss, whether it was reimbursed or not.” Lacking access to a full and complete summary of the trading errors in client accounts, the examiners were unable readily to determine the extent of the amounts the Firm owed its clients for such errors. Moreover, the staff began to be concerned, based on its review of the records SMC had provided, that the Firm might be altering or even destroying documents.

As a result, on June 3, 2003, Day, together with her supervisor and an attorney from the Division of Enforcement (the “Division”) met with Schield and his attorney while the examination was still taking place, to warn them that “[the examiners] need[ed] the records and [they] need[ed] to be provided with them promptly.” Day testified at the hearing that, in her experience, this was the first time that she had felt compelled to ask her supervisor to meet with a firm under examination. <sup>15/</sup> Despite this meeting, SMC personnel continued to be uncooperative. According to Day, “around June 4, [2003, SMC employee] Jeremy Menzel provided us with [an IPR] record that included only trader [sic] errors that resulted in gains, when we asked for all trading errors. And it was clear from the conversation that I had with him -- was that he was told just give us the gains.” <sup>16/</sup>

At the hearing, Colehour conceded that the IPR records “were not the way we would want them to be” at the time. Kevin Fay, a consultant who had been hired to assist with the Firm’s back office operations after the Division had initiated its investigation, testified at the hearing that, while some of the IPRs were located in one place at the Firm, “many of them [were] spread all over through many different offices [on] many different desks.” <sup>17/</sup>

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<sup>15/</sup> Day testified that, at the time of the hearing, she possessed ten years’ experience conducting compliance examinations of investment advisers and investment companies and had conducted “over 150 investment advis[e]r examinations.”

<sup>16/</sup> In addition to that particular conversation with Menzel, Day testified that, when she “sat in and listened” to the Commission investigative proceeding which led to the civil action against Respondents, she heard Menzel say during his questioning that Schield had told him to provide the examiners with gains. Respondents’ counsel, who admitted that he had seen Menzel’s investigative testimony previously, objected to the introduction of such testimony. The law judge stated that she did not “think [Day] should be allowed to say what she heard in the investigative proceeding” and did not base any of her findings on that part of Day’s testimony. Under the circumstances, including the law judge’s decision not to use this evidence and Respondents’ apparent reliance on this decision, we decline to base any of our findings on Day’s testimony concerning what she heard Menzel say in the investigative proceeding.

<sup>17/</sup> At the hearing, Day conceded that, during the examination, SMC personnel seemed confused about what additional trading error information was required by the examiners.

(continued...)

In addition, although the examiners had asked the Firm for records documenting each instance in which SMC had used a PIN to make a transaction, as alleged in the Complaint, SMC “did not produce the records to the examiners.” The record contains an e-mail dated June 5, 2003 from Menzel to SMC personnel directing them to send him a list of broker PINs and to “destroy your copy, or delete them from any instructions you have.” <sup>18/</sup> Menzel’s e-mail signaled a departure from the Firm’s practice, as alleged in the Complaint, of “using PINs issued to its clients by certain mutual funds to trade in its clients’ accounts and to circumvent trading restrictions imposed by [those] mutual funds.” <sup>19/</sup> This abrupt instruction from Menzel, coming as it did during the examination, provoked one SMC employee to request in an e-mail to Menzel that a meeting be held “to discuss this big change” as there were “questions and concerns about this.” <sup>20/</sup> In addition to ordering the destruction of documents related to the PINs, Menzel did not provide the examiners with the list that he had prepared of the previously-used PINs. This list was not produced to the Commission until four months later, on October 27, 2003, pursuant to a subpoena issued by the district court in connection with the Commission investigation of the Firm. By failing to provide the examiners with the requested records, SMC hampered their ability to understand the Firm’s use of PINs to trade in its clients’ accounts.

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<sup>17/</sup> (...continued)

However, when she was asked who caused that confusion, she responded “I believe Marshall [Schield] did.” The list of books and records that Day handed to SMC’s compliance officer at the outset of the examination contained a straightforward request for “a list of trading errors” and a summary of their “ultimate disposition, including the conditions of any financial settlement.”

<sup>18/</sup> Menzel informed SMC personnel that, thereafter, he would store the PINs “in a secure manner so we have a record of which ones we have used in the past.”

<sup>19/</sup> Prior to the examination, SMC, in order to comply with privacy regulations, had been engaged in an internal effort to discontinue the practice of using PINs to access customer accounts. At the hearing, Schield testified that he had instructed Menzel to “get all . . . the PINs back from all these funds [sic] coordinators . . . [y]ou get them back and make sure that they no longer have them, that they don’t have -- the fund coordinators do not have the broker PINs anymore.” The record shows that Schield sent an e-mail to Menzel two months before the examination asking Menzel to “write up a policy on the use of [PIN] numbers” for the Firm manual. Menzel followed-up with an e-mail to Schield a few weeks before the examination informing him that Menzel had “instructed all [f]und [c]oordinators to no longer request any more PINs from [a]dvis[e]rs, as well as not to accept them if offered . . . .” At the hearing, Schield stated that he didn’t “supervise [SMC personnel], so I [didn’t] ask them” whether they were still using PINs after Menzel had instructed them not to do so.

<sup>20/</sup> Neither the author of that e-mail nor Menzel testified at the hearing.

As the examination continued, the staff became increasingly troubled by the Firm's uncooperative attitude. According to Day, records "were being altered or cleansed" and the examiners "would make a request for documents, and different documents would come back in different versions . . . . We were concerned that records were being destroyed and the information was not being provided to us." Day stated that she became "concerned that there was a control in the information where we would make requests and Marshall [Schield] was directing employees to provide us with different information than we were requesting. We were concerned about the accuracy of the records." Day testified that Schield "was hindering the [examination] process." She asserted that "there was a tone that a dominant individual controlled the process and controlled the document production . . . . We were being provided with records that were filtered."

Eventually, according to Day, the Commission staff became so concerned about the possibility that necessary documents were being, or would be, destroyed by the Firm that the staff decided to spend "about a hundred thousand dollars" in order "to preserve all data that was on [SMC's] computer system." 21/ Finally, on June 6, 2003, the staff determined that the examination should be halted. Day testified at the hearing that the examination was halted because "we were not receiving documents." 22/ Thereafter, an investigation of the Firm was begun. 23/

The Injunctive Complaint. On July 23, 2003, the Commission filed its injunctive complaint against Respondents. The Complaint alleged, among other things, that "[a]t the direction of" Schield, SMC "destroyed and altered documents it was required to produce" during a Commission examination, and that Schield "directed [SMC] personnel to destroy e-mails,

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21/ According to Day, "there was a huge concern [about] the integrity of the information," and that, unless the staff acted as it did, there could be "deletion and destruction and altering of records."

22/ According to Day, when the examination was halted, she "was asked [by the Division] to serve subpoenas, and the examination process was no longer being conducted. It became an investigation."

23/ After the examination had been halted and the investigation initiated, SMC hired consultant Kevin Fay to improve its back office operations. Fay testified that SMC "had spent money previously . . . trying to fix" the "back office situation," but it "hadn't been done. The people that they had looked at and relied on to get that done . . . simply did not do so." According to Fay, he was unable to correct the Firm's back office problems because the Commission's injunctive action and the publicity it generated "threw the company into, obviously, a major state of chaos" that precipitated "a solid assessment of where the company was . . . its possibilities of survival . . . [and] how to get there and deal with the crisis that was at hand." Fay asserted that, "[g]iven the situation where the company was, which was losing customers, losing revenue, dealing with the reimbursement of the IPRs . . . the money wasn't there to improve the back office."



tamper with logs reflecting losses suffered by clients due to trading errors, and destroy [PINs] used in trading.”

When the Division commenced its injunctive action in the district court on July 23, 2003, Respondents agreed to the immediate entry of a temporary restraining order that required them to produce an accounting of all trading errors by October 31, 2003. Respondents subsequently produced, by that date, an accounting of the trading errors. The letter accompanying the accounting explained that SMC had instructed its employees “to search their workspace and files for any and all IPRs[,]” which were then “reviewed to verify the calculation of any gain or loss realized by the account or to calculate a gain or loss on those where it had not been done previously.” The letter described how SMC had produced the accounting after Firm personnel had “identified, logged and reviewed over 1,780 IPRs, spanning the period from 1999 into 2003.” The accounting demonstrated that, since 1999, the Firm had reimbursed its clients more than \$220,000 for trading errors. The accounting also revealed that SMC still owed its clients more than \$592,000 for trading errors that occurred between 1999 and 2003, in addition to the approximately \$220,000 that it had already paid out. 24/

Asset Sale and Proposed Transfer of Control. Following initiation of the injunctive action in mid-2003, SMC and Schield made efforts which they assert were intended to prevent future violations of the provisions alleged in the injunctive action. When their attempts to improve SMC’s back office operations faltered, they decided to sell their client accounts. On December 16, 2003, SMC sold its assets, including its client accounts, to asset manager Clarke Lanzen Skalla Investment Firm, LLC (“Clarke Lanzen”) for approximately \$5 million. 25/ At the same time, SMC entered into an investment research agreement with Clarke Lanzen in which the Firm agreed to provide Clarke Lanzen with research in return for fee-based compensation. At the hearing in this proceeding, Schield testified that SMC no longer managed or traded any client accounts. 26/

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24/ At the hearing, Colehour claimed that he was unaware of the extent of the trading errors because their magnitude “was never discussed.” Schield testified at the hearing that he and Colehour later reimbursed their clients for all of the losses the clients had incurred as a result of trading errors. Colehour echoed Schield’s testimony, asserting that he and Schield paid over \$500,000 of their own money to reimburse those clients for trading errors. The Division does not dispute these assertions.

25/ The record contains a copy of the asset purchase agreement for this transaction (the “Asset Purchase Agreement”). According to Schield, only those clients who consented to the transfer had their accounts assigned to Clarke Lanzen, while the accounts of the non-consenting clients were terminated.

26/ According to Schield, SMC had seven employees at the time of the hearing, including his ex-wife and his son, Troy Schield.

Following entry of the consent injunction, and shortly before the hearing was held in this proceeding, Schield agreed to sell his interests in SMC to Colehour Acquisition, LLC (“Colehour Acquisition”) for approximately \$4 million (subject to reduction by distributions and other payments to Schield in respect of his ownership interests), pursuant to a Stock and Partnership Interest Agreement executed on February 14, 2005 (the “Stock Agreement”). <sup>27/</sup> The Stock Agreement provides that the sale is to close on February 14, 2008, subject to certain conditions precedent. <sup>28/</sup> The Stock Agreement calls for Colehour Acquisition to deliver to Schield on that future date a promissory note in the amount of the remainder of the purchase price (as reduced by distributions and other payments), payable in monthly installments for a period of six years following the closing. The promissory note is to be secured by an assignment of seventy percent of the payments that SMC is scheduled to receive from Clarke Lanzen pursuant to the Asset Purchase Agreement. Effective upon execution, the Stock Agreement gave Colehour Acquisition “full power to vote and to control [Schield’s] 70 shares of SCI and [his] 70% limited partnership interest [in SMC.]”

Also on February 14, 2005, pursuant to the Stock Agreement, Schield resigned all positions he then held as an officer, employee, or director of SMC and SCI. Upon execution of the Stock Agreement, however, he entered into a consulting agreement with SMC to provide research and other services to the Firm. Those services include “tactical research, refinements and insight into existing SMC models,” quarterly “commentary” on SMC models, recording and presenting “webcasts and presentations on SMC models or tactical allocation techniques,” and the preparation of “one research report per year (similar to [the] report presently issued by SMC).” In return, SMC agreed to pay Schield a fee of “\$12,500 per month,” provide him with office space and equipment, and supply health insurance coverage for him, his family, and his “former wife.”

#### IV.

Under Section 203(e)(4) of the Advisers Act, consistent with the public interest, we may revoke the registration of any investment adviser that is enjoined from engaging in any conduct or practice in connection with its activity as an investment adviser. <sup>29/</sup> Under Section 203(f) of the

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<sup>27/</sup> Colehour is the president of Colehour Acquisition. SMC, a limited partnership, is owned by a general partner and two limited partners. The general partner is Schield Colehour, Inc. (“SCI”), which owns a 99% partnership interest in SMC. The limited partners are Schield and Colehour. Schield also owns 70% of the common stock of SCI.

<sup>28/</sup> The key conditions were that the current administrative proceeding against Schield and SMC be concluded, including all appeals and rights to appeal, and that SMC continues to be a registered investment adviser.

<sup>29/</sup> 15 U.S.C. § 80b-3(e)(4).

Advisers Act, 30/ consistent with the public interest, we may discipline a person associated with an investment adviser if, among other things, the associated person has been enjoined from any act or practice specified in Advisers Act Section 203(e)(4). 31/ Under Section 15(b)(6) of the Securities Exchange Act of 1934, consistent with the public interest, we may bar a person associated with a broker-dealer if the associated person is enjoined from, among other things, engaging in any conduct or practice in connection with the activity of an investment adviser. 32/ Both Respondents were, as discussed, enjoined in connection with SMC's activities as an investment adviser.

For the most part, Respondents do not dispute the factual bases for the injunction. Specifically, they admit that Firm personnel destroyed certain e-mails, furnished incomplete or inaccurate documents, and did not provide documents that were responsive to the Commission examiners' requests. Respondents deny, however, that they intentionally sought to impede the Commission's examination. Rather, they blame the destruction of, and failure to provide, documents on, in effect, confusion, poor communication, and innocent misunderstanding among themselves, other SMC personnel, and Commission staff. 33/ The factual allegations in the Complaint establish that Schield ordered, and SMC implemented, the destruction and alteration of documents requested in connection with a Commission examination and that Respondents also were responsible for the Firm's failure to produce documents requested as part of that

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30/ 15 U.S.C. § 80b-3(f).

31/ 15 U.S.C. § 80b-3(e)(4). This section authorizes us to impose sanctions on a person who has been enjoined from engaging in conduct in connection with the activity of an investment adviser.

32/ 15 U.S.C. § 78o(b)(6).

33/ Respondents claim that both they and the examiners were confused about what documents were requested with respect to trading errors. For example, Respondents concede that they delayed providing the staff with requested summaries of SMC customer trading errors, but blame the delay on confusion. Although Day testified that SMC personnel might have been confused about what was requested, she blamed any such confusion on Schield. *See supra* note 17. There is no evidence that the examiners were confused about their own document request. Nor do we believe that SMC personnel could have been confused concerning the May 27, 2003 document list that Day hand-delivered to SMC's compliance officer requesting a "list of trading errors . . . that occurred in client or proprietary accounts during the period featuring the transaction date, the security, the account and broker-dealer involved, and a summary of the error and its ultimate disposition, including the conditions of any financial settlement."

examination. <sup>34/</sup> The destruction of and failure to produce records were not the result of confusion and innocent mistake.

We give considerable weight to the injunctive allegations in assessing the public interest in administrative proceedings based on consent injunctions. <sup>35/</sup> We have held that where, as here, respondents consent to an injunction, “they may not dispute the factual allegations of the injunctive complaint in [a subsequent] administrative proceeding.” <sup>36/</sup> Indeed, Schield and SMC acknowledged that, as part of their settlement of the injunctive action, they understood that they would not be permitted “to contest the factual allegations” in any “disciplinary proceeding before the Commission based on entry of the injunction.”

Respondents concede that Commission precedent precludes them from challenging the Complaint’s allegations, but assert that they are free to establish “facts in mitigation [of] those allegations.” We recognize that a respondent in a “follow-on” proceeding may introduce evidence regarding the “circumstances surrounding” the conduct that forms the basis of the underlying proceeding as a means of addressing “whether sanctions should be imposed in the

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<sup>34/</sup> While acknowledging that, generally, they are bound by and cannot deny the allegations in the Complaint, Respondents argue that the law judge erred in basing her decision in part on certain allegations made in the initial paragraph of the Complaint. Among other things, this paragraph stated that “[a]t the direction of . . . Schield, [SMC] destroyed and altered documents it was required to produce [and] . . . tamper[ed] with logs reflecting losses suffered by clients due to trading errors . . . .” Respondents seem to be arguing that, because this paragraph was labeled “Summary,” rather than “Factual Allegations” as subsequent paragraphs were labeled, Respondents are not bound by the allegations in the initial paragraph (as they are bound, admittedly, by the allegations contained in the subsequent paragraphs, which Respondents claim contradict the allegations in the initial paragraph). Respondents do not provide any authority for drawing such a distinction among the different paragraphs of the Complaint, and we decline to do so. Moreover, we find that the allegations contained in the Summary paragraph, including those related to the destruction of and tampering with documents, are fully consistent with, or supported by, the other allegations in the Complaint, and with the evidence in the record.

<sup>35/</sup> Salim B. Lewis, Securities Exchange Act Rel. No. 51817 (June 10, 2005), 85 SEC Docket 2472, appeal docketed, No.05-1317 (D.C. Cir. Aug. 9, 2005). We also have held that the existence of a consent injunction is a sufficient basis for revoking a respondent’s investment adviser registration, if such revocation is in the public interest. See Michael Batterman, Investment Advisers Act Rel. No. 2334 (Dec. 3, 2004), 84 SEC Docket 1349, 1355.

<sup>36/</sup> Marshall E. Melton, Investment Advisers Act Rel. No. 2151 (July 25, 2003), 80 SEC Docket 2812, 2824-25.

public interest.” 37/ However, we, like the law judge, consider certain of Respondents’ assertions to be in conflict with the allegations in the Complaint and therefore not consistent with relevant precedent. For example, Respondents claim that the alleged destruction of records relating to broker PINs is “complete fiction.” Such misconduct was expressly alleged in the Complaint, however, and thus Respondents are precluded from challenging it. 38/

In addition to the allegations made in the injunctive action, the evidence introduced in this proceeding independently establishes that Respondents were responsible for the destruction of PINs that had been requested by Commission examiners. As discussed, the record contains an e-mail from Menzel, sent during the examination and after the examiners had requested information concerning PINs, directing SMC personnel to send him a list of the PINs they possessed and to destroy their copy of the PINs. As mentioned, neither Menzel nor anybody else at SMC provided these PIN records to the staff during the examination. 39/

Respondents assert that the effort to discard the PINs was underway before the examination, and was not intended to thwart the examiners’ efforts. Menzel’s e-mail, however, demonstrates that SMC personnel were instructed to destroy their own copies of the PINs after the examination had been initiated. Indeed, the modification to the Firm’s policy regarding the use and retention of PIN information that this directive represented was so significant that an SMC employee requested that a meeting be held to “discuss this big change.”

Similarly, Respondents do not directly deny the Complaint’s allegation that they directed SMC personnel to destroy documents -- e-mails -- that were responsive to the examiners’ request. Respondents claim, however, that the destruction was the result of a misunderstanding between SMC management and other Firm personnel, and not in any way part of an effort to thwart the Commission’s examination. Schield testified at the hearing that he “was just giving [his employees] a sort of heads-up” when he suggested that they “clean . . . up” certain personal e-mails. 40/ We note that the examiners requested copies of “all e-mail correspondence,” rather than copies of some e-mail correspondence or expurgated e-mail correspondence. It seems to us, as it did to the law judge, implausible that an employer, in the midst of a cause investigation by Commission examiners, would respond to a document request by telling certain employees, as Schield did, that “if [they] had something that was personally embarrassing, [they] might want to

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37/ Blinder, Robinson & Co., Inc. v. SEC, 837 F.2d 1099, 1109 (D.C. Cir. 1988).

38/ The Complaint alleged that Schield directed SMC personnel to “destroy [PINs] used in trading” and that each securities trader at SMC who had PINs “was directed to remove the PINs from the records.”

39/ Eventually, as mentioned, the records were provided pursuant to a subpoena.

40/ Schield testified that, around August 2004, in order to prevent the destruction of future e-mails, SMC “got the software” so that “no e-mail can be deleted regardless [of] who it is from.”

clean that up.” <sup>41/</sup> Nor can we accept Schield’s claim that it was that advice, and nothing more, that led SMC personnel to destroy business-related e-mails. Based on her consideration of, among other things, the credibility of the various witnesses, the law judge rejected Schield’s claims that Respondents’ conduct was the result of confusion or innocent mistake and found instead that Schield “knowingly caused the firm to fail to comply with the Commission’s information request necessary to perform the examination” and that he “knew that his actions were unlawful” and would thwart the Commission examination; we see no basis for disturbing that finding. <sup>42/</sup>

Respondents make various procedural arguments. They contend that the exclusion of Colehour from the hearing room during the testimony of other witnesses denied SMC a fair hearing on due process grounds because Schield, who was present, no longer held an official position with the Firm. Respondents argue that Colehour’s exclusion denied SMC an opportunity to confront its accuser, to “appear in person,” and to participate “with counsel” in the proceeding.

Rule 111 of our Rules of Practice authorizes a hearing officer “to do all things necessary and appropriate to discharge his or her duties,” including “regulating the course of a proceeding and the conduct of the parties and their counsel.” <sup>43/</sup> The rule is broadly worded to permit a law judge to exercise discretion as to which witnesses to allow and which ones to exclude from the hearing room during the testimony of other witnesses. Moreover, we have stated previously that “rulings on whether or not to sequester witnesses are within the sound discretion of the tribunal that makes them.” <sup>44/</sup>

We note that, at the beginning of the hearing, the Division asked the law judge to sequester Colehour because it was concerned that the testimony of the other witnesses might color Colehour’s subsequent testimony. The law judge granted the Division’s request, noting that Schield, not Colehour, had a “controlling interest” in SMC. The law judge noted further that Colehour was not identified as an officer of the Firm on Respondents’ witness list. Indeed, Colehour did not become SMC’s president until shortly before the hearing in this proceeding was

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<sup>41/</sup> Indeed, this instruction from Schield was inconsistent with the plain language of the staff’s document request regarding e-mails.

<sup>42/</sup> The credibility determination of an initial fact finder is entitled to considerable weight and deference because it is based on hearing the witnesses’ testimony and observing their demeanor. See Rita J. McConville, Exchange Act Rel. No. 51950 n.21 (June 30, 2005), \_\_\_ SEC Docket \_\_\_; Daniel Joseph Alderman, 52 S.E.C. 366, 368 n.6 (1995), aff’d, 104 F.3d 285 (9th Cir. 1997); Jonathan Garrett Ornstein, 51 S.E.C. 135, 137 (1992).

<sup>43/</sup> 17 C.F.R. § 201.111(d).

<sup>44/</sup> Larry A. Duban, 47 S.E.C. 912, 917 n.11 (1983). See also Tasty Baking Co. v. NLRB, 254 F.3d 114, 123 (D.C. Cir. 2001) (holding that a law judge has “considerable discretion” in determining which witnesses are essential to the proceeding).

held, and Respondents did not inform the law judge of Colehour's status until the question of sequestration arose during the hearing. In any event, we do not believe that Colehour's exclusion prejudiced SMC. Respondents Schield and SMC are (and were) represented jointly by the same counsel, have filed joint pleadings, and appear to share common objectives in their handling of this proceeding. Contrary to Respondents' claim, we believe that the presence of Schield -- who founded the Firm, led it as president for thirty-three years, and continues to own a controlling interest in the Firm -- throughout the hearing ensured that SMC was able to participate effectively in the proceeding and, therefore, was not prejudiced by Colehour's exclusion.

Respondents assert that the law judge rebuffed their efforts to present evidence that would "lend true perspective" to the factual allegations against them and to present their defenses or facts in mitigation of the allegations in the Complaint. Respondents do not identify evidence that the law judge excluded nor any specific instances where she prevented them from mounting a defense or from presenting facts. Thus, we find no support for Respondents' contention.

## V.

In evaluating whether an administrative sanction serves the public interest, we consider, among other things, the egregiousness of a respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the likelihood that the respondent's occupation will present opportunities for future violations. 45/ We also consider the extent to which the sanction will have a deterrent effect. 46/ The appropriate sanction depends on the facts and circumstances of each case. 47/

We have held previously that the failure to cooperate with a Commission examination constitutes "serious misconduct" justifying strong sanctions. 48/ We believe that strong sanctions

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45/ See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

46/ See, e.g., Monetta Fin. Servs., Inc., Advisers Act Rel. No. 2438 (Oct. 4, 2005), \_\_ SEC Docket \_\_; Ahmed Mohamed Soliman, 52 S.E.C. 227, 231 n.12 (1995) (stating that the selection of an appropriate sanction involves consideration of several elements, including deterrence); Lester Kuznetz, 48 S.E.C. 551, 554 (1986) (noting that the sanction of a bar "serves the purpose of general deterrence").

47/ See Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187 (1973); Batterman, 84 SEC Docket at 1358.

48/ Barr Financial Group, Inc., Advisers Act Rel. No. 2179 (Oct. 2, 2003), 81 SEC Docket 828, 843 (revoking investment adviser's registration and barring its president from associating with any investment adviser for, among other things, failing to cooperate with  
(continued...)

are warranted here in light of the evidence that Respondents knowingly sought to thwart the staff's efforts.

Respondents argue that a proper consideration of the relevant public interest factors justifies lesser sanctions than those imposed by the law judge. <sup>49/</sup> They assert that SMC's violations were nonrecurrent and committed without scienter. Moreover, they contend that they sincerely regret the misconduct and have taken significant steps to make future violations unlikely. In support of this claim, Respondents contend that there is little likelihood of future misconduct because SMC no longer has any customer accounts, the Firm has installed software that prevents the deletion of e-mails, and Schield has resigned all official positions with the Firm. Respondents assert that Schield has transferred voting control of the Firm to Colehour and has agreed to sell his ownership interests in SMC.

We disagree with Respondents' analysis of the "public interest" factors that they identify. The record establishes that, as the law judge found, Schield's actions were done knowingly. As discussed, SMC, at Schield's direction, deliberately deleted e-mails, furnished the staff with several different, inconsistent versions of requested IPR logs that were incomplete and inaccurate, and destroyed and withheld documents relating to client and adviser PINs. Indeed, Respondents did not produce the list of PINs until four months after the examination, and then only after the issuance of a subpoena. Respondents also failed to reimburse their clients for the bulk of the trading errors summarized in the IPR logs until after they submitted the court-ordered accounting to the Division four months after the examination.

We also note that there were, as Respondents acknowledge, significant administrative or back office deficiencies at the Firm that contributed to the misconduct at issue. As the law judge observed, and Respondents do not dispute, SMC had significant back office problems even before

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<sup>48/</sup> (...continued)  
a Commission examination).

<sup>49/</sup> Respondents argue that the law judge deviated from the Steadman requirements in failing to explain why lesser sanctions would not have been in the public interest. They assert that sanctions in addition to those already imposed in the civil proceeding against them are "unnecessary" because of the "remedial measures" that they have since implemented and the "additional protection" provided by the "outstanding permanent injunction" which assures their "continuing compliance." We disagree. Respondents' misconduct was serious and demonstrates that they pose a continuing threat to the investing public. See Barr Financial Group, Inc., 81 SEC Docket at 844. Under the circumstances, the public interest warrants the revocation of SMC's investment adviser registration and the barring of Schield from associating with any investment adviser or broker-dealer, and we have determined to impose those sanctions.



the 2003 examination. 50/ Fay testified that SMC had attempted to fix the “back office situation” in the past but that it “hadn’t been done.” Indeed, Schield’s own testimony, in which he expressed ignorance of the workings of the Firm’s back office operations, is consistent with other evidence in the record indicating that the Firm’s management did not place a high value on administrative matters. 51/

We note further that this is not the first time that Respondents have been subject to disciplinary proceedings. On May 31, 2000, SMC, Schield, and his son, Troy Schield, settled a Commission administrative proceeding without admitting or denying the findings that they had committed fraud over a period of nearly four years by publishing and distributing advertisements that materially overstated the performance of certain SMC investment programs. 52/ SMC, Schield, and Troy Schield agreed to be censured, to cease and desist from committing violations of the antifraud provisions of the Advisers Act, and to pay civil money penalties of \$50,000, \$25,000, and \$5,000, respectively.

While we acknowledge that the law judge found Schield’s expression of remorse to be sincere, 53/ and are aware of the efforts that Respondents have made to address the situation that contributed to their misconduct, we do not consider these efforts adequate to protect the public interest. Although Respondents identify numerous steps they have taken for the purpose of limiting Schield’s future role in the Firm and of preventing future violations by the Firm, we are unpersuaded that they will effectively ensure Schield’s exclusion from a central role in the Firm and an improvement in the Firm’s attitude toward its regulatory obligations. We note that Schield remains associated with the Firm as a consultant and provides significant services to SMC for a fee of \$12,500 per month. Under this consulting arrangement, SMC has outsourced production of its annual research report to Schield and continues to rely on his strategic research and insights into its investment models. Despite his purported status as a mere consultant, SMC provides

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50/ See *supra* note 23. At the hearing, Schield attempted to blame the Firm’s back office problems on a computer conversion, stating that SMC was “a year and a half behind on the last conversion” and that he and SMC personnel were “past the point of frustration” as a result.

51/ Schield testified at the hearing that “[u]ntil this came up, I didn’t even know there were [IPR] logs . . . how many logs there [were], how many they kept, how many different versions they had.”

52/ *In the Matter of Schield Management Company, Marshall L. Schield, and Troy M. Schield*, Advisers Act Rel. No. 1871 (May 31, 2000), 72 SEC Docket 1605 (settled order); *In the Matter of Schield Management Company, Marshall L. Schield, and Troy M. Schield*, Advisers Act Rel. No. 1872 (May 31, 2000), 72 SEC Docket 1610 (settled order).

53/ Specifically, the law judge found Schield’s “remorse at the impact of his actions on [SMC], its employees, and his family” to be “sincere.”

Schield with office space and equipment and health coverage for him and his family, and, at the time of the hearing, continued to employ his ex-wife and his son, Troy.

Even accepting Respondents' assertions that they have effectively isolated Schield from the management of the Firm, we are unpersuaded that Respondents' efforts to limit Schield's involvement in SMC are irrevocable. The \$4 million purchase price that Colehour Acquisition had agreed, provisionally, to pay to Schield for his SMC stock will be funded by SMC's earnings, which already have been negatively impacted by the injunction. Moreover, if Colehour defaults on his payments under the promissory note, Schield will regain voting control of SMC. Thus, the transfer pursuant to the Stock Agreement is conditioned on several variables, none of which may actually occur. In addition, the sale is not anticipated to close until 2008, at which time payments are scheduled to be made over six years, pursuant to a promissory note. If those conditions are not satisfied, voting control of SMC will revert to Schield. 54/

Indeed, it appears that most of the administrative measures taken by Respondents, including the decisions to relinquish SMC's customer accounts and to relieve Schield of his supervisory role at, and his voting control of, the Firm are largely reversible, at the Firm's option. Schield remains the majority owner of SMC and SCI. Moreover, such measures, to the extent they reduce the likelihood that Schield would play a significant role at SMC, presumably would have no effect on any such role Schield might assume at another firm. As Schield conceded at the hearing, absent a bar, there would be no obstacle to his being an investment adviser in the future at SMC or some other firm. 55/

Respondents' violations involved the destruction and alteration of, and the failure to provide, requested documents during the course of a Commission examination. The industry cannot tolerate an investment adviser that, holding a fiduciary position, would undermine the regulatory system by deliberately thwarting a Commission examination. 56/ In this connection,

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54/ When Division counsel asked Colehour whether control of SMC would revert to Schield if Colehour were unable to make the obligated payments under the Stock Agreement, Colehour responded, "Oh, I'm pretty sure I'll be able to pay [the promissory note] -- start paying on it."

55/ At the hearing, Division counsel asked Schield during cross-examination whether, aside from Schield's stated desire not to be an investment adviser, there would be any obstacle to Schield being an investment adviser in future if he were not barred from doing so. Schield replied, "No."

56/ See Soliman, 52 S.E.C. at 231 (noting that the role of an investment adviser is "an occupation which can cause havoc unless engaged in by those with appropriate background and standards") (quoting Joseph P. D'Angelo, 46 S.E.C. 736, 737 (1976), aff'd without opinion, 559 F.2d 1202 (2d Cir. 1977) (quoting with approval Marketlines, Inc. v. SEC, 384 F.2d 264, 267 (2d Cir. 1967), cert. denied, 390 U.S. 947 (1968)). We

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we note that Respondents' lack of cooperation during the examination necessitated repeated requests for documents and the convening of a meeting among Commission staff, a Commission supervisor, Schield, and his attorney to demand prompt production of withheld documents. As the lead examiner testified at the hearing, the need for such a meeting was unprecedented in the over 150 examinations that she had conducted over her ten-year career. Despite that meeting and the staff's repeated requests for documents, Respondents' lack of cooperation continued until the injunctive action was filed. Moreover, because of Respondents' actions, Commission staff was compelled to spend a significant amount of money to safeguard the Firm's records. The record demonstrates that Schield was responsible for SMC's misconduct.

Taken as a whole, the factual allegations in the Complaint and the record evidence introduced at the hearing indicate that strong sanctions should be imposed on Respondents. <sup>57/</sup> Despite Respondents' repeated attempts to "minimize [the] gravity" of their misconduct, <sup>58/</sup> the sanctions imposed will serve both as a means of "protecting the public" from harm at Respondents' hands and "as a deterrent to others." <sup>59/</sup> As we stated previously in a similar context, Respondents' actions "demonstrate[] either that [Respondents] fundamentally misunderstand the regulatory obligations to which they are subject or that they hold those obligations in contempt." <sup>60/</sup> In either case, Respondents' misconduct warrants their exclusion from the securities industry. Accordingly, we hold that, under the circumstances, it is in the

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<sup>56/</sup> (...continued)  
have stated previously that an "investment adviser is a fiduciary in whom clients must be able to put their trust." Soliman, 52 S.E.C. at 231. Cf. Hammon Capital Mgmt. Corp., 48 S.E.C. 264 (1985) (revoking investment adviser's registration and barring its president from association with any investment adviser where the firm failed to disclose a change in its business address and failed to file required annual reports for three years).

<sup>57/</sup> Respondents claim that the civil penalties assessed against them "more than covered" the \$100,000 expended by the Commission to preserve SMC records. We have referenced this \$100,000 amount not to justify the imposition of any monetary penalty, but rather to illustrate the serious adverse implications of Respondents' actions.

<sup>58/</sup> Soliman, 52 S.E.C. at 231.

<sup>59/</sup> Ralph W. LeBlanc, Exchange Act Rel. No. 48254 (July 30, 2003), 80 SEC Docket 2750, 2766.

<sup>60/</sup> Barr Financial Group, Inc., 81 SEC Docket at 844.

public interest to revoke SMC's investment adviser registration and to bar Schield from association with any investment adviser or broker-dealer.

An appropriate order will issue. 61/

By the Commission (Chairman COX and Commissioners GLASSMAN, ATKINS, CAMPOS and NAZARETH).

Nancy M. Morris  
Secretary

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61/ We have considered all of the contentions advanced by the parties. We have rejected or sustained these contentions to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Rel. No. 53201 / January 31, 2006

INVESTMENT ADVISERS ACT OF 1940

Rel. No. 2477 / January 31, 2006

Admin. Proc. File No. 3-11762

In the Matter of  
  
SCHIELD MANAGEMENT COMPANY  
  
and

MARSHALL L. SCHIELD

c/o Edward T. Lyons, Jr., Esq.  
Jones & Keller, P.C.  
1625 Broadway, Suite 1600  
Denver, Colorado 80202

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that the investment adviser registration of Schield Management Company be, and it hereby is, revoked; and it is further

ORDERED that Marshall L. Schield, be, and he hereby is, barred from association with any investment adviser or broker-dealer.

By the Commission.

Nancy M. Morris  
Secretary