

**STATE OF ILLINOIS
SECRETARY OF STATE
SECURITIES DEPARTMENT**

IN THE MATTER OF: ANTHONY J. KIRINCIC

FILE NO. 0400629

NOTICE OF HEARING

TO THE RESPONDENT:

Anthony J. Kirincic
(CRD #: 1499511)
23 Villanova Lane
Dix Hills, New York 11743

c/o Kirlin Securities Inc.
6901 Jericho Turnpike
Syosset, New York 11971

You are hereby notified that pursuant to Section 11.F of the Illinois Securities Law of 1953 [815 ILCS 5} (the "Act") and 14 Ill. Adm. Code 130, Subpart K, a public hearing will be held at 69 West Washington Street, Suite 1220, Chicago, Illinois 60602, on the 6th day of April, 2005, at the hour of 10:00 a.m., or as soon as possible thereafter, before James G. Athas, Esq. or such other duly designated Hearing Officer of the Secretary of State.

Said hearing will be held to determine whether an Order shall be entered revoking Anthony J. Kirincic's (the "Respondent") registration as a salesperson in the State of Illinois and/or granting such other relief as may be authorized under the Act including but not limited to the imposition of a monetary fine in the maximum amount pursuant to Section 11.E(4) of the Act, payable within ten (10) business days of the entry of the Order.

The grounds for such proposed action are as follows:

1. That at all relevant times, the Respondent was registered with the Secretary of State as a salesperson in the State of Illinois pursuant to Section 8 of the Act. He also serves in the capacity of Designated Illinois Principal for his firm.

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2. That on August 9, 2004 NASD entered a Letter Of Acceptance, Waiver And Consent (AWC) submitted by the Respondent regarding File No. CAF040063 which sanctioned the Respondent as follows:
 - a. fined \$25,000; and
 - b. suspension as a Series 24 (General Securities Principal) for a period of thirty (30) days.
3. The AWC listed the following background information:
 - a. Kirlin Securities, Inc. has been a member of NASD since March 14, 1988 and has been registered with the Securities and Exchange Commission since December 3, 1987. The firm is based in Syosset, New York, and maintains 4 branch offices in the following cities: San Francisco, Rochester, NY, Iselin, NJ, and Princeton, NJ. Kirlin derives most of its revenue from retail business. It also engages in a limited amount of investment banking activity.
 - b. The Respondent entered the securities industry in 1986 as a General Securities Representative, Registered Options Principal and Financial and Operations Principal of a member of NASD. He worked at two firms prior to forming Lindner, Kirincic & Co., along with David Lindner (CRD #1305774) in 1987. Lindner, Kirincic & Co. was renamed Kirlin Securities, Inc. in 1988. He has been registered with Kirlin since 1988. He currently is registered with NASD as a General Securities Principal and Representative, Registered Options Principal, and Financial and Operations Principal. He has no recent relevant disciplinary history
4. That the AWC found:
 - (1) Brady Bonds are collateralized debt instruments issued by less developed countries to restructure outstanding, often defaulted, commercial debt obligations. U.S. Treasury zero coupon bonds with similar maturities collateralize the principal payment of Brady Bonds. Brady Bonds feature a rolling interest guarantee ranging from approximately 12 to 18 months (approximately 2 to 3 coupon payments), in which U.S. Treasury bonds collateralize interest payments for a limited period of time if the issuing country fails to honor an interest payment. Therefore, the interest payments, which usually are paid semi-annually, bear a higher risk of default. The bonds typically feature long-term maturity dates, are often issued at a discount, and have relatively high yields.

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- (2) There are no registration statements filed or in effect pursuant to the Securities Act of 1933 for the Brady Bonds. These securities are issued to Eligible Institutional Investors (namely, banks, insurance companies, investment companies registered under the United States Investment Company Act of 1940, employee benefit plans with total assets in excess of \$5,000,000, any corporation, partnership, or trust with assets not less than \$100,000,000, Qualified Institutional Buyers ("QIBs"), accredited investors, and qualifying non-U.S. persons) via a private placement or a foreign offering. The bonds generally are issued pursuant to an Exchange Agreement. Certain bonds typically are only transferable in denominations of 250 and greater (i.e., minimum denominations of \$250,000 par value). Therefore, the aftermarket in Brady Bonds predominantly involves purchases and sales by institutions and broker-dealers in an OTC, institutional broker-dealer market. There is practically no price or volume transparency to the public of the OTC, institutional dealer market in Brady Bonds.
- (3) In November 1995, Kirlin began purchasing Brady Bonds in 250 to 2,000 bond denominations from dealers, but never made a dealer market in Brady Bonds. Instead, the firm sold Brady Bonds, and sold interests in Brady Bonds to retail customers in lots smaller than 250, while continuing to hold the larger denomination bonds. Certain of these odd-lot interests were non-transferable to other firms, and illiquid to the dealer market. When customers wished to sell odd-lot interests they had purchased from Kirlin, they would have to sell such interests back to Kirlin. Kirlin, in turn, had to aggregate the customers' bonds in amounts of 250 or more before selling.
- (4) The firm, through the Director of Fixed-Income Trading and Trading Department Manager, and others ("Trading Department"), purchased and sold Brady Bonds in the inter-dealer market and traded with retail customers on behalf of the firm. In this role, the Trading Department executed trades in which the firm purchased Brady Bonds in 250 to 2,000 bond increments from dealers, and sold the bonds in much smaller denominations to its retail customers.
- (5) From November 1995 to November 1999, Kirlin, acting through its employees, sold approximately \$150 million worth of 9 Brady Bond issues (of 62 bonds on average) to approximately 3,400 retail accounts. Kirlin effected approximately 13,700 retail trades and generated approximately \$7,100,000 in gross sales credits.

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- A. The nine Brady Bonds are as follows (with maturity date and International Securities Identification Number listed in parentheses): Republic of Argentina Par SER L-GP 5.250% (3/31/2023) (XS0043119147); Republica Federativa Do Brasil Par COLLTZ VAR 4.250% (4/15/2024) (XS0049985533); The Republic of Bulgaria Discount 6.526% (7/28/2024) (XS0051468873); The Republic of Ecuador Discount SR DISC FLT RT (2/28/2025) (XS0055571789); The Republic of Ecuador Par 3.250% (2/28/2025) (XS0055572084); Mexican Aztec US GVT CLT 7.609% (3/31/2008) (XS006295207 1); The United Mexican States Par 6.250%, Series A (12/31/2019) (XS0015157992); The Federal Republic of Nigeria Par 6.250% (11/15/2020) (XS0035901510); and, The Republic of Venezuela Par RE SER W-A 6.750% (3/31/2020) (XS0029483038).
- (6) There were no registration statements filed or in effect pursuant to the Securities Act of 1933 for the Brady Bonds discussed above, which eventually came to rest in the hands of the investing public. There were no exemptions from registration applicable to the transactions described above, which involved the use of the means or instruments of transportation or communication in interstate commerce or of the mails.
- (7) From November 1995 to November 1999, Kirlin, acting through its employees, participated, directly or indirectly, in undertakings involving the sale of Brady Bonds and interests in Brady Bonds with a view to the distribution of such securities, and thereby acted as underwriters of the Brady Bond securities, in violation of Section 5 of the Securities Act of 1933. By virtue of this conduct, Kirlin engaged in conduct that did not comply with high standards of commercial honor and just and equitable principles of trade, thereby violating NASD Conduct Rule 2110.
- (8) Kirlin, acting through its employees, developed and disseminated to the public the following types of advertising materials: newspaper advertisements, radio advertisements, term sheets (otherwise known as offering sheets), sales materials, letters to customers and slide presentations.
- (9) The advertising materials created by Kirlin and distributed to the public are considered to be either advertisements or sales literature, as those terms are defined under NASD Conduct Rules 2210(a)(1) and (2).

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- (10) NASD Conduct Rule 2210 sets forth standards for member firms to follow in communications with the public. NASD Conduct Rule 2210(d)(1)(A) requires that communications from member firms with the public be based on principles of fair dealing and good faith. NASD Conduct Rule 2210(d)(1)(A) further obligates a member firm engaged in public communications to "provide a sound basis for evaluating the facts in regard to any particular security or securities or type of security, industry discussed, or service offered. No material fact or qualification may be omitted if the omission, in light of the context of the material presented, would cause the communication to be misleading."
- (11) In preparing and disseminating the advertising materials, Kirlin, acting through its employees, failed to disclose material facts in regard to the Brady Bonds, such as the following:
 - a. The risks associated with the Brady Bonds, including the risk of default on interest payments;
 - b. The lack of liquidity and transferability of Brady Bonds was due to the fact that the Brady Bond was a part or share of the minimum denomination in which Brady Bonds trade.
- (12) In addition, NASD Conduct Rule 2210(d)(2)(M) provides the following guidance when making comparisons in advertisements or sales literature, "...the member must make certain that the purpose of the comparison is clear and must provide a fair and balanced presentation, including any material differences between the subjects of comparison."
- (13) Among the advertising materials, certain offering sheets described Brady Bonds as an alternative to U.S. government and corporate bonds. However, the advertisements failed to disclose relevant differences in the risks associated with the bonds, including the risk of default on Brady Bonds' interest payments. This omitted information was material.

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- (14) NASD Conduct Rule 2210(d)(1)(B) prohibits member firms from making "[e]xaggerated, unwarranted or misleading statements or claims ... in all public communications..." The rule also states that "no member shall, directly or indirectly, publish, circulate or distribute any public communication that the member knows or has reason to know contains any untrue statement of a material fact, or is otherwise false or misleading."
- (15) In preparing and disseminating certain advertising materials, Kirlin, acting through its employees, included exaggerated, unwarranted or misleading statements or claims about the Brady Bonds.
- (16) For example, certain advertising materials contained unwarranted implications that Kirlin was working directly with the U.S. government to issue bonds. Radio advertisements stated, "The U.S. Brady Bond program from Kirlin Securities," and Kirlin's "new United States Brady Bond program." These statements were unwarranted and misleading, because Kirlin was not involved with the United States government in creating or issuing Brady Bonds.
- (17) Many Brady Bond advertisements included inaccurate and unwarranted references to the United States. A New York Times advertisement and certain offering sheets listed "U.S. Brady Bonds" in large print. In other offering sheets, the United States flag was displayed prominently. These references were false, unwarranted and misleading, because Brady Bonds are foreign debt instruments and not U.S. government bonds.
- (18) Other advertisements included unwarranted references that Kirlin's Brady Bonds are superior. In a 1996 radio advertisement, the announcer stated, "Not all Brady Bonds are the same. Kirlin's program has bonds which are not backed by an agency or corporation but with the U.S. Treasury guarantee." Other radio advertisements made similar claims that not all Brady Bonds are the same, and that Kirlin offers only bonds that are 100% backed by U.S. Treasury securities. The implication that some Brady Bonds are backed by an agency or corporation is untrue, because all were backed solely by the issuing country. Similarly untrue is the implication that the backing is all-inclusive-covering interest-when, in fact, the backing is with respect to principal only.

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- (19) In addition, numerous advertisements made unwarranted and exaggerated references to safety and credit quality. Offering sheets touted the safety of the Brady Bonds in the following manner:

Safety First-No Brady Bond has ever missed on a coupon payment. The Bonds are denominated in U.S. dollars to remove any direct currency risk. This means that despite what happens to the country's currency, the coupon rate is paid in U.S. dollars.

Certain radio advertisements began:

If you're an investor, the one thing you want to be sure about, in today's uncertain world, is safety. Then of course you would want a high return for your money. Few investments can match the 11% yield to maturity offered on the new U.S. Brady Bond program from Kirlin Securities. That's right 11% and you can enjoy the income and quality you deserve.

These descriptions are exaggerated and inaccurate, because each Brady Bond carried with it risks that the issuing country would default on interest payments.

- (20) Many offering sheets contained unwarranted and misleading references to liquidity. The bonds were repeatedly described as "the most liquid Bradys." This description is false and unwarranted because certain Brady Bonds sold by Kirlin were a part or share of the minimum denomination in which Brady Bonds trade, rendering the bonds illiquid to the dealer market.
- (21) In addition, certain advertisements featured an unwarranted and misleading focus on short-term historical performance. For example, offering sheets for the Ecuador Par Brady Bond illustrate monthly historical performance for periods of 5 to 23 months, even though the maturity date of the bond is 2025. The offering sheets also provide the total return for the designated period. This focus on short-term historical performance is unwarranted and misleading, given that Brady Bonds had maturity dates that were many years in the future.
- (22) NASD Conduct Rule 2210(d)(2)(C) states that communications "must not contain promises of specific results, exaggerated or unwarranted claims or unwarranted superlatives [or] forecasts of future events which are unwarranted."

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- (23) NASD Conduct Rule 2210(d)(2)(N) provides the following guidance as to communications with the public, "investment results cannot be predicted or projected. Investment performance illustrations may not imply that gain or income realized in the past will be repeated in the future."
- (24) Certain advertising materials featured communications that contained unwarranted forecasts of future events or projected investment results. For example, an offering sheet advertising U.S. Brady Bonds contained language which projected investment results as follows, "U.S. Brady Bonds-8.27% Projected Yield." Offering sheets for Ecuador discount Brady Bonds featured similar projections of investment results, thereby offering an unwarranted forecast of future events, "9.76% Projected Cash flow yield- Attractive Discount to Par Value-Projected yield based on current 6.43% cpn at a price of only 68.25." Another offering sheet included the following projection, "Invest approximately \$13,650 TODAY and enjoy a current coupon income of \$1,286, a projected cashflow yield of 9.76%."
- (25) Omission of such information listed in paragraphs 11 and 13 above caused the advertising materials to be misleading. The statements referenced in paragraphs (16-21) and (24) above were material and resulted in the dissemination of misleading communications about Brady Bonds to the public. In distributing these advertising materials to the public, Kirlin, acting through its employees, failed to comply with principles of fair dealing with the public and failed to provide a sound basis for evaluating facts regarding the Brady Bonds. By virtue of this conduct, Kirlin violated NASD Conduct Rules 2110, and 2210(d)(1)(A), (d)(1)(b), (d)(2)(C), (d)(2)(M) and (d)(2)(N).
- (26) From January 1997 to November 1999, Kirlin, acting through its employees, dominated and controlled the retail market for the Brady Bonds, such that there was no independent, competitive retail market for those securities. Such domination and control is reflected in the fact that Kirlin retailed Brady Bonds that ostensibly were established for institutional trading or interdealer trading. Furthermore, in many transactions the firm sold interests in Brady Bonds to retail customers in smaller denominations than the minimum lots traded by broker dealers and institutional investors (while continuing to hold the larger denominations bonds). The firm then sold to only their own retail customers these odd lots,

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which were not marketable in the institutional dealer market for Brady Bonds the only active and competitive market for such bonds. Retail customers generally were unable to transfer their odd-lot interests away from Kirlin, and therefore were dependent upon the firm for market information and liquidity.

- (27) In effecting transactions with its retail customers from January 1997 to November 1999, Kirlin, acting through its employees, was required to determine markups on the basis of the firm's contemporaneous cost, and, having failed to do so, charged its retail customers excessive markups in approximately 1,480 Brady Bond transactions. The excessive markups for the approximately 1,480 Brady Bond transactions were in excess of 4% over the prevailing market price. This resulted in excessive markups in these transactions of approximately \$642,186.36. Those transactions and the resulting excessive markups are reflected on Attachment A to this AWC. By reason of the foregoing, Kirlin violated NASD Conduct Rules 2440 and 2110.
- (28) In effecting transactions with its retail customers from January 1997 to November 1999, Kirlin, acting through its employees, was required to determine markups on the basis of the firm's contemporaneous cost, and, having failed to do so, charged its retail customers fraudulently excessive markups in at least 89 Brady Bond transactions. The fraudulently excessive markups for at least 89 Brady Bond transactions were as high as 19% over the prevailing market price. This resulted in fraudulently excessive markups in these transactions of at least \$36,000.
- (29) From January 1997 to November 1999, Kirlin, acting through its employees, knowingly or recklessly charged these fraudulently excessive markups. By reason of the foregoing, Kirlin violated Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120 and 2440.
- (30) The Respondent, as President of Kirlin, ultimately was responsible for all supervisory functions and supervisory systems at the firm, including supervision of the advertising, markup, and sales of Brady Bonds. He delegated to another principal of the firm ("the principal") the responsibility of supervising the firm's compliance, sales, marketing, and trading functions from November 1995 to May 1998. However, he, in certain respects, failed reasonably to investigate to ensure that the principal was properly exercising the authority delegated to him by the Respondent .

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- (31) In particular, Kirlin, acting through the Respondent, failed to conduct an adequate review to determine whether:
 - a) the firm could sell Brady Bonds and interests in Brady Bonds without registration under Section 5 of the Securities Act;
 - b) the firm's Brady Bond advertising materials were reviewed properly before being distributed to the public; and
 - c) the Brady Bonds were being marked up excessively.
- (32) The Respondent also instituted or was ultimately responsible for a supervisory system that was inherently flawed, by placing the principal in charge of Kirlin's Sales, Marketing, Trading and Compliance Departments simultaneously.
- (33) From November 1995 to May 1998, Kirlin, acting through the Respondent, failed to establish and maintain an adequate supervisory system in connection with the advertising, and sale of Brady Bonds.
- (34) By virtue of this conduct, Kirlin and the Respondent violated NASD Conduct Rules 2110 and 3010(a).
- (35) NASD Conduct Rule 3010(b) requires each member to establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives and associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and NASD rules.
- (36) The Respondent, as the firm's President, was ultimately responsible for the promulgation and distribution of the firm's written supervisory procedures manual.
- (37) Between November 1995 and November 1999, a substantial portion of Kirlin's revenues was derived from the sale of Brady Bonds. Yet, the firm, through the Respondent, failed to establish, maintain or enforce written supervisory controls or procedures to address the distribution and sale of Brady Bonds. In fact, the firm's written supervisory procedures made no mention of Section 5 or the concept of unregistered securities. Nor did the firm's written supervisory

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procedures address proper markups for Brady Bonds. In particular, the written procedures failed to identify how the firm's principals were to review transactions for excessive pricing and markups, when such a review should take place, and how to determine markups if the firm was dominating and controlling the trading of a security. At all times relevant to the Complaint, the written supervisory procedures were not reasonably designed to achieve compliance with applicable securities laws and regulations, and NASD rules.

- (38) By reason of the foregoing, Kirlin and the Respondent violated NASD Conduct Rules 2110 and 3010(b).
- (39) Section 17(a) of the Securities Exchange Act of 1934, and SEC Rule 17a-4(b)(4) promulgated thereunder, requires that broker-dealers shall preserve for a period of not less than three years, "Originals of all communications received and copies of all communications sent by such member, broker or dealer (interoffice memoranda and communications) relating to his business as such." NASD Conduct Rule 3110 requires members to make and keep accurate records required by Section 17(a) of the Exchange Act and the rules promulgated thereunder.
- (40) At all times relevant to this Complaint, Kirlin's written supervisory procedures assigned responsibility to the Respondent for ensuring that the firm's books and records were properly prepared and maintained in accordance with SEC Rule 17a-4.
- (41) Between November 1995 and November 1999, the firm created Brady Bond inventory sheets ("inventory sheets"), which were distributed to the sales force daily. The inventory sheets provided information about each Brady Bond's coupon rate, date of maturity, current yield, price, interest, and sales credit given to the registered representative. The firm produced hard copies of the inventory sheets from 1995 to 1998, and electronic copies from 1998 to 1999.
- (42) At all times relevant to the Complaint, the Respondent was aware of the existence of the inventory sheets, but failed to take steps to ensure that they were preserved.
- (43) Between November 1995 and November 1999, Kirlin failed to maintain either hard or electronic copies of the inventory sheets, and instead discarded the inventory sheets on a daily basis.

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- (44) By reason of the foregoing, the Respondent caused Kirlin to violate Section 17(a) of the Securities Exchange Act of 1934 and Rule 17a-4 promulgated thereunder, in violation of NASD Conduct Rules 2110 and 3110.
- (45) Between October 1, 1999 and December 31, 1999, Kirlin, through its employees, obtained at least \$622,703.12 in undisclosed profits in at least 90 transactions with a customer. Knowing that the customer had placed, or was about to place orders, Kirlin, through its employees, took positions to match the customer's orders. The firm then executed the customer's orders as principal transactions later the same day, taking the intra-day profits from those transactions for itself. Kirlin did not disclose to the customer that it had taken secret profits from these transactions. In addition to engaging in this fraudulent conduct, Kirlin created false books and records, failed to give the customer best execution, failed to properly report transactions, and failed to establish and maintain adequate supervisory procedures.
- (46) From October through December 1999, Kirlin's trading focused on facilitation of retail orders and the majority of its trading income came from principal transactions with its customers, matching principal positions with customer orders executed on the same day. Kirlin's at risk trading in securities in which Kirlin did not make a market was an insignificant part of Kirlin's trading in its proprietary accounts. Kirlin told its equities trader that the firm expected him to get information from the branches indicating where they expected to generate order flow, and take principal positions in anticipation of that retail order flow. The only time Kirlin took a large position in a non-market maker stock was when the firm expected to receive a matching customer order.
- (47) In or about June 1999, the customer opened three accounts at Kirlin's San Francisco Branch office.
- (48) The customer was very conscious of price. When he opened the accounts at Kirlin, he told his registered representative at Kirlin that he had accounts with another brokerage firm but was concerned that the other brokerage firm had been charging him too much in commissions. Kirlin agreed to charge the customer a fixed price commission, markup or markdown for executing his trades. For transactions of 10,000 shares or more, the charge was between 3 and 4 cents per share and for transactions below 10,000 shares, it was between 5 and 8 cents per share.

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- (49) The customer understood that the agreed upon charge included all amounts Kirlin would make from the transactions. Kirlin did not inform the customer that it might earn trading profits from his trades.
- (50) Between October 1, 1999 and December 31, 1999, Kirlin effected 185 trades in the customer's accounts, 151 of them as principal trades.
- (51) For each of the principal trades, Kirlin, through its employees, learned through communications with the customer or his authorized agents that the customer would place orders for the securities. Kirlin then took a position (long or short) in those securities in its inventory account. In at least 90 instances where the positions increased in value, the firm offset the position later the same day by trading with one of the customer's accounts at prices that were financially favorable to the firm. Kirlin took profits from these transactions and did not disclose to the customer that it had done so. Kirlin was not at risk in these transactions because it knew, at the time it established the positions, that it would sell the securities to, or purchase them from, the customer.
- (52) Kirlin realized at least \$622,703.12 in undisclosed trading profits from at least 90 trades. Of those undisclosed profits, 50% was paid out to the registered representative, while approximately 0.125% was paid out to the San Francisco branch sales manager. [T]he San Francisco Branch Office manager, did not directly receive any of the undisclosed trading profits. Consequently, Kirlin retained at least \$233,513.67 in undisclosed trading profits.
- (53) In 51 trades with the customer, when the position did not increase in value, Kirlin, through its employees, treated the transaction as a riskless principal trade and provided the position to the customer at the price that Kirlin had paid or received.
- (54) Kirlin realized secret profits on at least 90 transactions in which the firm took undisclosed "trading profits." The confirmations sent by Kirlin to the customer did not disclose the trading profits the firm took on these transactions and misrepresented to the customer the amount of compensation the firm had received.
- (55) The principal trades were contemporaneous offsetting transactions. Treating the transactions as true principal transactions and failing to disclose the "trading profit" was deceptive, manipulative and fraudulent.

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- (56) By virtue of this conduct, Kirlin violated Sections 10(b) and 15(c) of the Securities Exchange Act of 1934, Rules 10b-5 and 15c1-2 thereunder, and NASD Conduct Rules 2110 and 2120.
- (57) Kirlin, through its employees, positioned the firm between the customer's accounts and the market when it engaged in the principal trades described above. As a result, Kirlin failed to give the customer best execution on at least 90 trades, when it took "trading profits." Kirlin also failed to give the customer best execution when it executed 38 principal transactions, at prices less favorable than the prevailing inter-dealer price at the time of the trade.
- (58) By virtue of this conduct, Kirlin violated NASD Conduct Rules 2320 and 2110.
- (59) Approximately 60% of the customer's orders were unsolicited. However, the firm's records failed to reflect that fact on numerous occasions.
- (60) Kirlin also failed to maintain trading tickets for 5 of the customer's transactions.
- (61) The time stamps on numerous order tickets do not reflect the time the customer placed the order. In addition, Kirlin, through its employees, time-stamped order tickets for eleven of the customer's trades after Kirlin reported the trades.
- (62) Kirlin reported 18 transactions before it time-stamped order tickets for the customer's order as received. In 6 transactions, Kirlin executed the transactions before it time-stamped the orders as received.

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- (63) Kirlin failed to maintain accurate records of the time of receipt of the customer's orders and the instructions the customer gave in making those orders. Kirlin failed to make and keep memoranda of each order from the customer showing the terms and conditions of the order or instructions and of any modification or cancellation thereof, the account for which the trade was entered, the time of entry, the price at which it was executed and, the time of execution. Kirlin also failed to mark limit orders and market orders with restrictions and the conditions of each order on order and trading tickets. Kirlin failed to accurately record the terms and conditions on the customer's limit orders. Kirlin also failed to keep identifiable contemporaneous records showing whether an order was a market order or a limit order.
- (64) By virtue of this conduct, Kirlin violated Section 17(a) of the Securities Exchange Act of 1934 and Rules 17a-3(a)(6) and (7), and NASD Conduct Rules 3110 and 2110.
- (65) When Kirlin sent confirmations to the customer it was required to disclose whether it was acting as agent for the customer, as agent for some other person, as agent for both the customer and another person, or as principal for its own account. If a broker or dealer is acting as a principal, it must disclose whether it is a market maker in the security other than as a block positioner. Kirlin must also disclose the source and amount of any commission or other remuneration received or to be received by such member in connection with the transaction.
- (66) Kirlin sent confirmations to the customer for at least 90 trades that failed to disclose the profits the firm received. By virtue of this conduct, Kirlin violated Rule 10b-10(a)(2) under the Exchange Act and NASD Conduct Rules 2230, 3110 and 2110.
- (67) Kirlin treated the 51 trades with the customer in which it did not take secret profits as riskless principal transactions but provided the customer with confirmations describing them inaccurately as principal transactions.
- (68) By virtue of this conduct, Kirlin violated Rule 10b-10(a)(2) under the Exchange Act and NASD Conduct Rules 2230, 3110 and 2110.
- (69) Kirlin, through its employees, filled 70 orders by matching them with orders from another customer, at least 29 of which were agency

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cross trades. As to those trades, which were crosses with another customer account, Kirlin sent the customer confirmations that failed to disclose (a) the amount of all commission or remuneration and (b) either the name of the person from whom the security was purchased or to whom it was sold or the fact that such information would be furnished upon request.

- (70) By virtue of this conduct, Kirlin violated Rule 10b-10 under the Exchange Act and NASD Conduct Rules 2230, 3110 and 2110.
- (71) For 51 principal trades with the customer in which Kirlin did not take undisclosed profits, the firm reported or confirmed the trades as principal transactions and did not submit either (a) a clearing-only report with a capacity indicator of riskless principal or (b) a non-tape, non-clearing report with a capacity indicator of "riskless principal" on these its riskless principal trades. By virtue of this conduct, Kirlin violated NASD Marketplace Rules 4632(d)(3)(B)(i)-(ii), 6130, and 6420(d)(3)(B)(i), (ii) and NASD Conduct Rule 2110.
- (72) For 29 trades that were crossed with another customer account, Kirlin executed the trades as riskless principal transactions, while matching them with the other customer account. Kirlin reported those trades as principal transactions, even though it knew at the time that they were riskless cross trades. By virtue of this conduct, Kirlin violated NASD Marketplace Rules 4632(d)(2), 6130, 6420(a)(2)(A), and (d)(2) and NASD Conduct Rule 2110.
- (73) Kirlin never submitted or confirmed eleven trades with the customer to ACT, in violation of NASD Marketplace Rules 4632, 6130, and 6420 and NASD Conduct Rule 2110.
- (74) Kirlin reported one transaction more than 90 seconds after execution, in violation of NASD Marketplace Rules 4632(a)(2) and (b)(4) and NASD Conduct Rule 2110.
- (75) From October 1999 to December 31, 1999, Kirlin failed to establish and maintain supervisory procedures that were reasonably designed to achieve compliance with the federal securities law and NASD rules. Kirlin's written procedures did not contain specific policies or procedures relating to interpositioning, and the firm had no procedures to monitor or supervise interpositioning. Kirlin also did not designate a principal with specific supervisory responsibility for interpositioning.

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- (76) Kirlin also failed to establish and maintain supervisory procedures reasonably designed to achieve compliance with requirements relating to front-running. While the firm's written procedures defined front running and provided a procedure for detecting the activity, the procedures did not identify who was responsible for implementing those procedures or indicate what action Kirlin should take when it finds a violation.
- (77) Kirlin also failed to establish and maintain adequate supervisory procedures relating to best execution because its procedures failed to specify what steps should be taken to implement the procedures.
- (78) Kirlin also failed to establish and maintain supervisory procedures reasonably designed to ensure that its books and records complied with applicable recordkeeping requirements. The firm did not appropriately delegate responsibility for this function or specify what steps should be taken to implement the procedures.
- (77) Kirlin also failed to establish and maintain supervisory procedures reasonably designed to achieve compliance with trade reporting requirements. The firm's written procedures contained only limited and ineffective policies and procedures relating to trade reporting.
- (80) By virtue of this conduct, Kirlin violated NASD Conduct Rules 3010 and 2110.
- (81) AiLin Dorsey (Dorsey) from 1998 through September 2001, was registered with Kirlin as a General Securities Representative, General Securities Principal and Registered Options Principal. During the relevant period, she worked in Kirlin's San Francisco office as a branch manager. She had responsibility for the sales staff and securities personnel in that office. The San Francisco Branch Office also had a Branch Sales Manager who was registered as a General Securities Principal during the relevant period.
- (82) In the course of her supervisory duties, Dorsey reviewed numerous documents that should have alerted her to problems in trading with the customer's accounts. She reviewed, among other documents, trading tickets and daily trading blotters.
- (83) From her review of those documents, Dorsey knew or should have known that the majority of the customer's trades involved large undisclosed concessions taken by the Firm, in addition to the

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commissions, markups or markdowns. Despite that knowledge, she failed to make reasonable inquiry into these transactions or conduct adequate follow-up.

- (84) Dorsey also knew that the Firm had agreed to charge the customer a fixed rate of commission, markup or markdown, depending on the size of the trade. Dorsey knew or should have known from her review of documents that the Firm was earning more than the fixed rate agreed to by the customer, and that the confirmations sent to the customer did not disclose those amounts. However, she failed to detect these problems.
- (85) Dorsey failed in her supervisory duties, as described above. This failure allowed the trading misconduct to continue.
- (86) By virtue of this conduct, Dorsey violated NASD Conduct Rules 3010 and 2110.
- (87) From July 1999 through December 1999 and from August 2000 through December 2000 ("the review periods"), Kirlin effected 118 transactions in its San Francisco branch office in highly liquid securities as either principal or agent at prices that were not fair and reasonable taking into consideration all relevant circumstances.
- (88) The total amount received by Kirlin and its representatives from the 118 transactions at issue exceeded \$600,000, including \$75,260.00 on a single transaction.
- (89) Conduct Rule IM-2440 identifies 7 relevant factors that should be considered in determining the fairness of a commission, mark-up or mark-down ("charge"). They are: (1) the type of security involved; (2) the availability of the security in the market; (3) the price of the security; (4) the amount of money involved in the transaction; (5) disclosure to the customer; (6) the pattern of charges; and (7) the nature of the member's business.
- (90) Kirlin operated a retail business during the review periods. It did not offer customers any type of additional or special services that would warrant increased charges.

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- (91) Of the 118 transactions at issue, [Paul] Garvey charged excessive amounts on 9 principal transactions, with total charges of approximately \$64,000. For example, Garvey charged a \$10,000 commission on one trade for a riskless principal sale of a highly liquid security.
- (92) Garvey's 9 transactions involved highly liquid securities, including SBA Communications Corp., Atmel Corp., and Commerce One Inc.
- (93) Garvey determined the amount to be charged on each of the 9 transactions. In determining those amounts, Garvey failed to take into account the factors identified in Conduct Rule IM-2440 that should be considered in determining the fairness of charges.
- (94) Of the 118 transactions at issue, [Brian] McEnery charged excessive amounts on 9 principal transactions, with total charges of approximately \$115,000. For example, McEnery charged \$28,560 on one trade for a riskless principal sale of a highly liquid security.
- (95) McEnery's 9 transactions involved highly liquid securities, including Knight Trading Group Inc., Bear Stearns Companies Inc., and Broad Vision Inc.
- (96) McEnery determined the amount to be charged on each of the 9 transactions. In determining those amounts, McEnery failed to take into account the factors identified in Conduct Rule IM-2440 that should be considered in determining the fairness of charges.
- (97) The Kirlin registered representatives who effected the transactions at issue in this matter knew or should have known the relevant factors enumerated in Conduct Rule IM-2440 and should have considered them in determining the fairness of the charges. In the August through December 2000 review period, those factors were also enumerated in the Firm's written supervisory procedures. However, Kirlin's registered representatives failed to adequately take those factors into account in determining the amount of the charges for the 118 transactions.

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- (98) In the 118 transactions at issue, Kirlin's registered representatives charged amounts that exceeded fair and reasonable prices by \$169,032.32. In 9 of those transactions, McEnergy charged \$48,107.99 in excess of fair and reasonable prices. In another 9 of the 118 transactions, Garvey charged \$26,185.39 in excess of fair and reasonable prices.
- (99) The Firm retained between 50 and 70% of all the charges received from the customers, and the registered representatives received between 30 and 50%.
- (100) Dorsey, as a registered principal, reviewed and approved the amount charged on each of the transactions.
- (101) Each of the excessive charges was less than 5% of the principal cost of the transaction. Conduct Rule IM-2440 makes clear, however, that commissions, mark-ups and mark-downs under 5% may violate the rule. Given the factors enumerated in Conduct Rule IM-2440, including the type of securities involved, the availability of those securities, the amount of money involved in the transactions, disclosures to the customers, the pattern of charges, and the nature of the Firm's business, the amounts charged by Kirlin, Garvey and McEnergy were excessive.
- (102) By engaging in the course of conduct described above, Kirlin, Garvey and McEnergy violated NASD Conduct Rules 2110 and 2440.
- (103) From July 1999 through December 1999 and from August 2000 through December 2000, Kirlin was required to establish and maintain an adequate supervisory system and to maintain and enforce written procedures reasonably designed to achieve compliance with applicable securities laws and regulations and NASD rules, including rules relating to markups, markdowns and commissions.
- (104) Kirlin failed to establish and maintain a supervisory system that was reasonably designed to achieve compliance with NASD rules relating to charges to customers. As a result of its failures to implement an adequate supervisory system and adequate written procedures, Kirlin was able to charge customers excessive amounts for transactions in violation of NASD rules.

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- (105) Kirlin's written procedures during the 1999 review period did not reflect the factors enumerated in NASD Conduct Rule IM-2440, but stated only that charges should be fair under the relevant circumstances. Kirlin's written procedures during the 2000 review period did reflect the factors enumerated in NASD Conduct Rule IM-2440, but failed to explain how those factors should be taken into account.
- (106) Kirlin took no action to ensure that its charges to customers were reasonable, given the factors enumerated in NASD Conduct Rule IM-2440. Despite the written procedures, the overriding consideration by Kirlin and its registered representatives in determining the amount of the charges was whether the amount was under 5%.
- (107) By virtue of this conduct, Kirlin violated NASD Conduct Rules 2110 and 3010(a) and 3010(b).
- (108) Dorsey was the registered principal assigned the responsibility of reviewing and approving the amount charged on each of the 118 transactions at issue.
- (109) In so doing, Dorsey failed to take appropriate action to ensure that the Firm's charges to customers were reasonable, given the factors enumerated in Conduct Rule IM-2440. Dorsey's overriding consideration in reviewing and approving the charges was whether the amount at issue was under 5%.
- (110) As a result of this failure, the Firm's representatives were able to charge customers excessive amounts for transactions in violation of NASD rules.
- (111) By virtue of this conduct, Dorsey violated NASD Conduct Rules 2110 and 3010(a).
- (112) Kirlin's Office of Supervisory Jurisdiction ("OSJ") located at 675 Third Avenue, New York, New York ("the Third Avenue OSJ"), operated from September 1999 through June 2001.
- (113) From September 1999 through June 2001, Kirlin failed to conduct an annual review of the Third Avenue OSJ.

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- (114) According to NASD Conduct Rule 3010(c), each member is required to conduct a review, at least annually, of the businesses in which it engages, which review shall be reasonably designed to assist in detecting and preventing violations of and achieving compliance with applicable securities laws and regulations, and with NASD Rules. Each member is also required to review the activities of each office, which shall include the periodic examination of customer accounts to detect and prevent irregularities or abuses and at least an annual inspection of each OSJ. Each member is required to inspect each of its branch offices according to a cycle which shall be set forth in the firm's written supervisory and inspection procedures. In establishing such cycle, the firm is required to give consideration to the nature and complexity of the securities activities for which the location is responsible, the volume of business done, and the number of associated persons assigned to the location. Each member is also required to retain a written record of the dates upon which each review and inspection is conducted.
- (115) According to the firm's Written Supervisory Procedures ("WSPs"), each branch office was required to be inspected by the Compliance Department on an annual basis.
- (116) The Respondent failed to ensure reasonably that the Compliance Department conducted an annual inspection of the Third Avenue OSJ.
- (117) Based on the foregoing, Kirlin and the Respondent violated NASD Conduct Rules 3010(c) and 2110.
- (118) From August 2000 through March 2001, Kirlin failed to report statistical and summary information regarding ten written customer complaints to NASD that were required to be reported through the Rule 3070 reporting system.
- (119) From August 2000 through March 2001, Kirlin failed to timely report statistical and summary information regarding 9 customer complaints to NASD that were required to be reported through the Rule 3070 reporting system.
- (120) Based on the foregoing, Kirlin violated NASD Conduct Rules 3070(c) and 2110.

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- (121) From January 2, 2000 through March 27, 2001, Kirlin, acting through its employees, failed to enforce the firm's procedures related to its review of corporate debt and municipal securities transactions.
 - (122) From April 13, 2001 through June 4, 2001, the Respondent did not enforce the firm's procedures related to review of equity securities or did not designate another supervisor at Kirlin to enforce the firm's procedures related to review of equity securities transactions.
 - (123) From April 13, 2001 through June 4, 2001, the Respondent had overall supervisory authority over the equity trading area of the firm's business.
 - (124) From April 13, 2001 through June 4, 2001, the Respondent failed to enforce, or delegate the responsibility of enforcing, the firm's procedures relating to review of equity securities transactions.
 - (125) Based on the foregoing, Kirlin and the Respondent violated NASD Conduct Rules 3010 and 2110.
5. That Section 8.E(1)(j) of the Act provides, inter alia, that the registration of a salesperson may be revoked if the Secretary of State finds that such salesperson has been suspended by any self-regulatory organization registered under the Federal 1934 Act or the Federal 1974 Act arising from any fraudulent or deceptive act or a practice in violation of any rule, regulation or standard duly promulgated by the self-regulatory organization.
 6. That NASD is a self-regulatory organization as specified in Section 8.E(1)(j) of the Act.
 7. That by virtue of the foregoing, the Respondent's registration as a salesperson in the State of Illinois is subject to revocation pursuant to Section 8.E(1)(j) of the Act.

You are further notified that you are required pursuant to Section 130.1104 of the Rules and Regulations (14 Ill. Adm. Code 130) (the "Rules"), to file and answer to the allegations outlined above within thirty (30) days of the receipt of this notice. A failure to file an answer within the prescribed time shall be construed as an admission of the allegations contained in the Notice of Hearing.

Furthermore, you may be represented by legal counsel, may present evidence, may cross-examine witness and otherwise participate. A failure to so appear shall

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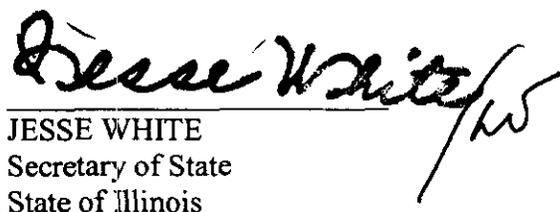
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constitute default, unless any Respondent has upon due notice moved for and obtained a continuance.

A copy of the Rules, promulgated under the Act and pertaining to hearings held by the office of the Secretary of State, Securities Department, is included with this Notice.

Delivery of Notice to the designated representative of any Respondent constitutes service upon such Respondent.

DATED: This 18th day of February 2005.


JESSE WHITE
Secretary of State
State of Illinois

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