

1 STATE OF OREGON
2 DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
3 DIVISION OF FINANCE AND CORPORATE SECURITIES
4 ENFORCEMENT SECTION
5 BEFORE THE DIRECTOR OF THE
6 DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

6 In the Matter of:) Agency Case No. S-05-0001;
7 JOSEPH M. BLACKWELL AND) OAH Case #119766
8 BLACKWELL DONALDSON & COMPANY,)
9)
10) FINAL ORDER
11 Respondents.)
12)

13 INTRODUCTION

14 The Director of the Department of Consumer and Business
15 Services ("the Director") adopts the Proposed Order dated July
16 29, 2005, of Administrative Law Judge Anthony A. Behrens. For
17 accuracy, clarity and completeness, the Director has added this
18 Introduction section, and amended the following sections of the
19 ALJ's Proposed Order: History of the Case; the ALJ's footnotes
20 (for grammar only at footnotes 1 - 3, 9, 12); and the Notice of
21 Review and Appeal Rights. The Director has replaced the
22 Proposed Order section on page 32 of ALJ Behrens' decision, with
23 an Order stating the action taken by the Department of Consumer
24 and Business Services as a result of the facts found and the
25 legal conclusions arising therefrom, pursuant to OAR 137-003-

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1 0665(2) (b). The Director's modifications are not substantial
2 and do not change any finding of fact, the outcome of the order,
3 or the basis for the order.

4 HISTORY OF THE CASE

5 On January 4, 2005, the Department of Consumer and Business
6 Services, Division of Finance and Corporate Securities ("the
7 Division"), issued one document containing an Order Revoking
8 Broker-Dealer License of Blackwell Donaldson & Company, an Order
9 Suspending, Restricting, and Conditioning the Securities
10 Salesperson License of Joseph M. Blackwell, an Order to Cease
11 and Desist, an Order Imposing Civil Penalties, and a Notice of
12 Right to Hearing (collectively "the January 2005 Order" or
13 depending upon context, "the order"). On January 11, 2005,
14 Blackwell Donaldson & Company and Joseph M. Blackwell
15 (collectively "the Respondents") filed a request for hearing.
16 On January 19, 2005, the Division referred this matter to the
17 Office of Administrative Hearings ("OAH"). The OAH appointed
18 Administrative Law Judge ("ALJ") Anthony A. Behrens to hear the
19 case.

20 A pre-hearing conference was held in this matter on February
21 8, 2005. On May 9, 2005, a status conference was held. On May 18,
22 2005, a hearing was held in the Labor and Industries building at
23 350 Winter Street in Salem, Oregon. The Respondent Joseph M.
24 Blackwell, former president and chief executive officer of
25 Respondent Blackwell Donaldson & Company ("BDC"), appeared at the
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1 hearing. Both Mr. Blackwell and BDC were represented by attorneys,
2 Richard M. Layne and Kimberly A. Kaminski. The Division was
3 represented by Caroline Smith, an Enforcement Officer employed by
4 the Division who acted in the capacity of a Special Assistant
5 Attorney General. David Tatman, the Division's Deputy
6 Administrator; Craig McCulloch, a Securities Examiner employed by
7 the Division; John M. Kailey, a Securities Examiner employed by the
8 Division; Steven D. Albrich, a Securities Examiner employed by the
9 Division; Joanne I. Kraft, a former employee and minority
10 shareholder of BDC; and Dale Laswell, the Division's Chief of
11 Licensing and Registration for Securities and Mortgage Lending,
12 testified on behalf of the Division. The Respondents presented no
13 testimonial evidence.

14 At the close of the Division's case, the Respondents filed
15 Motions for Directed Verdict. On May 25, 2005, the Division filed
16 its Response to Respondents' Motions for Directed Verdict. On May
17 31, 2005, the Respondents' filed a Reply to the Division's
18 Response. On June 9, 2005, Respondents' Motions for Directed
19 Verdict were denied. On June 17, 2005, the parties submitted
20 written closing arguments, and the record was closed.

21 ALJ Anthony A. Behrens issued a Proposed Order on July 29,
22 2005. The Respondents filed Respondents' Objections to Proposed
23 Order on September 7, 2005. The Division filed the Agency's
24 Response to the Respondents' Objections to Proposed Order on
25 September 27, 2005.

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1 The Director of the Department of Consumer and Business
2 Services ("the Director") has reviewed the Proposed Order,
3 Respondents' Objections to Proposed Order, the Agency's Response to
4 the Respondents' Objections to Proposed Order, the record, and
5 issues the following Final Order:

ISSUES

7 (1) Whether Joseph M. Blackwell violated ORS 59.205(3) by
8 failing to pass the National Association of Securities Dealers
9 ("NASD") Series 9 (or 24) examination in willful or repeated
10 violation of the Order to Cease and Desist, Order Assessing
11 Civil Penalty, and Consent to Entry of Order issued on February
12 7, 2000 ("February 2000 Order of the Director" or "February 2000
13 Order" or, depending upon context, "the order") by the Director
14 of the Department of Consumer and Business Services ("the
15 Director").

16 (2) If Joseph M. Blackwell violated ORS 59.205(3) by
17 failing to pass the NASD Series 9 (or 24) examination in willful
18 or repeated violation of the February 2000 Order of the
19 Director, whether BDC also willfully or repeatedly violated the
20 February 2000 Order of the Director in violation of ORS
21 59.205(3).

(3) Whether BDC and/or Joseph M. Blackwell violated ORS 59.205(3) by failing to reasonably or diligently supervise BDC's associated persons in willful or repeated violation of the February 2000 Order of the Director.

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1 (4) Whether BDC and/or Joseph M. Blackwell violated ORS
2 59.205(13) by failing to reasonably supervise the salespersons
3 of BDC.

4 (5) Whether BDC and/or Joseph M. Blackwell violated OAR
5 441-205-0210 by failing to exercise diligent supervision of all
6 of its associated persons.

7 (6) Whether BDC and/or Joseph M. Blackwell violated ORS
8 59.135(4) and/or ORS 59.451 knowingly filed one or more
9 materially false statements with the Director.

10 (7) If Joseph M. Blackwell and/or BDC violated ORS 59.205(3)
11 in willful or repeated violation of the February 2000 Order of the
12 Director, what if any civil penalties should be imposed?

13 (8) If BDC and/or Joseph M. Blackwell violated ORS
14 59.205(13) and/or OAR 441-205-0210 by failing to reasonably
15 supervise the sales and/or associated persons of BDC, what if
16 any civil penalties should be imposed?

17 (9) If BDC and/or Joseph M. Blackwell violated ORS
18 59.135(4) and/or ORS 59.451 by knowingly filing one or more
19 materially false statements with the Director, what if any civil
20 penalties should be imposed?

21 (10) If Joseph M. Blackwell and/or BDC violated ORS
22 59.205(3) by willfully or repeatedly violating the February 2000
23 Order of the Director, and/or violated ORS 59.205(13) and/or OAR
24 441-205-0210 by failing to reasonably and/or diligently
25 supervise its sales and/or associated persons, and/or violated

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1 ORS 59.135(4) and/or ORS 59.451 by willfully filing one or more
2 materially false statements with the Director, what if any
3 regulatory measures should the Director take against Joseph M.
4 Blackwell and/or BDC?

5 EVIDENTIARY RULINGS

6 The Division's Exhibits A-1 through A-42 and the
7 Respondents' Exhibits R-1 through R-19 were admitted pursuant to
8 the parties' stipulation. Exhibit OAH-1, a tape of the May 9,
9 2005 status conference, was offered by the ALJ and was admitted
10 without objection. Exhibit OAH-2, the Division's written
11 opening statement, was offered by the Division and admitted as a
12 non-evidentiary exhibit over Respondents' objection in order to
13 save the time of the Division reading its entire argument into
14 the record. Pursuant to OAR 137-003-0600, the ALJ has wide
15 discretion in the conduct of the hearing and receipt of written
16 arguments and statements.

17 FINDINGS OF FACT

18 (1) From May 31, 1979 until December 31, 2004, Joseph M.
19 Blackwell was BDC's President, Chief Executive Officer ("CEO"),
20 Chief Financial Officer ("CFO"), Chief Operating Officer
21 ("COO"), 75 percent majority owner, and Control Person. (Ex.
22 A4, p.4 and A6, p.2.) During the majority of that time period,
23 Mr. Blackwell was also BDC's Chief Compliance Officer ("CCO").
24 (Ex. A4, p.4.)

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1 (2) On December 20, 1969, Mr. Blackwell passed the NASD
2 Series 00 Exam. (Ex. A23, p.1). The Series 00 Exam is the NASD
3 exam that existed before the Series 24 Exam. (Test. of Kailey
4 and Laswell.) The Series 24 Exam and Series 00 Exams are
5 general securities principal exams. (Test. of Kailey.) Mr.
6 Blackwell has never passed a Series 24 Exam, but by virtue of
7 Mr. Blackwell's passing of the Series 00 Exam, Mr. Blackwell was
8 qualified to be a general securities principal. (Test. of
9 Laswell.) Although the State of Oregon does not license
10 securities supervisors or compliance officers, securities
11 industry standards generally dictate that in order to be
12 qualified as a securities supervisor or compliance officer, a
13 person must have passed a general securities principal exam.
14 (Test. of Tatman, Kailey, and Laswell.)

15 (3) BDC was a securities broker-dealer licensed in the
16 State of Oregon from October 24, 1981 until January 4, 2005.
17 (Ex. A2, p.1 and Ex. A6, p.5.) Mr. Blackwell was licensed by
18 the State of Oregon as a securities salesperson to BDC from
19 approximately December 31, 1988 until January 3, 2005. (Ex. A4,
20 p.5.)

21 (4) On February 7, 2000, the Director issued the February
22 2000 Order. (Ex. A2, pp.1-18.) BDC was the sole named
23 respondent of the February 2000 Order. (Ex. A2, p.1.) On
24 January 14, 2000, Mr. Blackwell, in his capacity as President of
25 BDC, consented to the terms of the February 2000 Order on behalf
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1 of BDC, without admitting or denying the facts alleged therein.
2 (Ex. A2, p.16-17.) The February 2000 Order's Findings of Fact
3 and Conclusions of Law are incorporated herein by this
4 reference.¹

5 (5) By consenting to the terms of the February 2000 Order,
6 Mr. Blackwell agreed that BDC would "fully comply with the terms
7 and conditions" of the February 2000 Order. (Ex. A2, p.17.)
8 The February 2000 Order found, in part, that BDC failed to
9 reasonably and diligently supervise its salespeople and
10 associated persons and that this failure to supervise resulted
11 in significant losses to Oregon investors. (Ex. A2, pp. 5-6.)
12 The order directed BDC, in part, to cease and desist from: (a)
13 Failing to diligently supervise the securities activities of all
14 associated persons, pursuant to OAR 441-205-0210; (b) Failing to
15 establish, maintain, and enforce written procedures pursuant to
16 OAR 441-205-0210(3); (c) Failing to review the form, content and
17 filing of all correspondence related in any way to the purchase
18 or sale or solicitation for the purchase or sale of securities
19 pursuant to OAR 441-205-210(3)(d); Failing to periodically
20 inspect each business office of the broker-dealer to insure that
21 the written procedures are enforced pursuant to OAR 441-205-
22 0210(4); and (e) Violating any of the provisions of ORS Chapter
23 59 and OAR Chapter 441. (Ex. A2, p. 14.) The February 2000

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25 ¹ The ALJ did not make a finding as to the truth of the Findings of Fact and Conclusions of Law. Rather, he made a
26 finding as to what the Director found and concluded.



1 Order further directed Mr. Blackwell to take and pass the NASD
2 Series 9 and Series 10 exams by August 7, 2000. (Ex. A2, pp.
3 15-16.)

4 (6) On August 4, 2000, through an attorney, Mr. Blackwell
5 and BDC requested that the Division grant Mr. Blackwell
6 additional time to take the NASD Series 9 and 10 exams. (Ex.
7 A3, p. 3.) The extension was granted on August 9, 2000. (Ex.
8 A3, p. 3.) On October 3, 2000, Mr. Blackwell took and passed
9 the NASD Series 10 exam. (Ex. A23, p. 1.) On October 4, 2000;
10 November 9, 2000; and January 23, 2001, Mr. Blackwell took and
11 failed the NASD Series 9 exam. (Ex. A23, p. 1.) Mr. Blackwell
12 did not take the NASD Series 9 exam again and has never taken
13 the NASD Series 24 exam. (Ex. A23, p. 1.)

14 (7) On November 14, 2000, Mr. Blackwell in his capacity as
15 president of BDC signed an Order to Cease and Desist with
16 Consent to Entry of Order ("November 2000 Order") on behalf of
17 BDC, admitting the factual allegations, and consenting to the
18 terms, contained therein. (Ex. A3, pp. 4-5.) The November 2000
19 Order, which was subsequently issued on November 28, 2000,
20 alleged and found that BDC violated the February 2000 Order
21 through Mr. Blackwell's failure to pass the NASD Series 9 exam.

22 (Ex. A3, pp. 3-4.) The November 2000 Order directed BDC to
23 comply with the February 2000 Order. (Ex. A3, p. 4.) The

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1 November 2000 Order's Findings of Fact and Conclusions of Law
2 are incorporated herein by this reference.²

3 (8) On November 28, 2000, Caroline Smith, who at the time
4 was the Division's Securities Compliance Officer handling the
5 Division's case and investigation against BDC, sent Keith
6 Ketterling, BDC's attorney, a letter stating that the Division
7 would allow Mr. Blackwell to pass the NASD Series 24 exam in
8 lieu of the NASD Series 9 exam if Mr. Blackwell desired. (Ex.
9 A20, p.1; Ex. A21, p.1; and Ex. A9, p. 20.) The letter also
10 states that, "If Mr. Blackwell does not take and pass the Series
11 9 or Series 24 within 30 days from the date of this letter, then
12 a new supervisor of Blackwell Donaldson & Company will have to
13 be appointed immediately, and other sanctions may follow." (Ex.
14 A21, p.1, emphasis in the original.) There was no notice of the
15 right to a hearing or notice of contested case rights
16 accompanying the letter. (Ex. A22, p.1.)

17 (9) On January 3, 2001, Ms. Smith sent a letter to Mr.
18 Ketterling stating in part that because Mr. Blackwell had failed
19 to pass either the NASD Series 9 or 24 exams, BDC must appoint a
20 new supervisor. (Ex. A26, p.1.) The letter also requests that
21 Mr. Ketterling confirm in writing by January 13, 2001, that BDC
22 "has appointed [Joanne Kraft] or another qualified principal[]
23 to replace Mr. Blackwell as compliance officer of Blackwell
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25 ² The ALJ found not only as to the existence of the Findings of Fact and Conclusion of Law, but the ALJ also made
26 a finding as to the truth of both, because Mr. Blackwell, on behalf of BDC, admitted to the allegations against him.





1 Donaldson & Company, until Mr. Blackwell takes and passes the
2 Series 9 or the Series 24 exam." (Ex. A26, p.1.) On January
3 12, 2001, Mr. Ketterling sent a letter to Ms. Smith, with a copy
4 to Mr. Blackwell, acknowledging receipt of Ms. Smith's January
5 3, 2001 letter. (Ex. A27, p. 1.)

6 (10) On January 16, 2001, Ms. Smith sent a letter to Mr.
7 Ketterling stating in part, "Please confirm in writing that Ms.
8 Joanne Kraft, or another qualified principal, has replaced Mr.
9 Blackwell as compliance officer of Blackwell Donaldson &
10 Company, until Mr. Blackwell takes and passes either the Series
11 9 or the Series 24 exam. As far as the Director is concerned,
12 if a suitable, qualified person has replaced Mr. Blackwell as
13 compliance officer of Blackwell Donaldson & Company, then Mr.
14 Blackwell may take as much time as he needs to take and pass
15 either the Series 9 or the Series 24 exam." (Ex. A28, p.1.)
16 There was no notice of the right to a hearing or notice of
17 contested case rights accompanying the letter. (Ex. A28, p.1.)
18 On January 29, 2001, Mr. Ketterling sent a letter to Ms. Smith,
19 with a copy to Mr. Blackwell, stating, "This letter is to advise
20 you that Joanne Kraft is the acting compliance officer at
21 Blackwell Donaldson & Company." (Ex. A29, p.1.)

22 (11) Ms. Kraft became BDC's acting compliance officer in
23 January 2001. (Test. of Kraft.) Ms. Kraft knew that the
24 Division had restricted Mr. Blackwell from being BDC's
25 compliance officer until Mr. Blackwell had passed either the
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1 NASD Series 9 or Series 24 exam. (Test. of Kraft.) In March
2 2003, Mr. Blackwell informed Ms. Kraft that he was going to
3 replace her as BDC's compliance officer. (Test. of Kraft.) Mr.
4 Blackwell told Ms. Kraft that he was allowed to be the
5 compliance officer again, because he had come very close to
6 passing one of the required NASD exams. (Test. of Kraft.) Mr.
7 Blackwell resumed the position and duties of BDC's compliance
8 officer in March 2003. (Test. of Kraft.)

9 (12) During Ms. Kraft's tenure as BDC's compliance
10 officer, she reviewed and signed BDC's trade confirmations.
11 (Test. of Kraft.) Ms. Kraft reviewed trade blotters but was
12 never informed that she was to sign them. (Test. of Kraft.)
13 Ms. Kraft also reviewed and signed trade tickets. (Ex. A9, p.
14 36.) Ms. Kraft did not conduct any onsite branch inspections.
15 (Test. of Kraft.)

16 (13) According to BDC's compliance manual in effect from
17 2002 to 2004, all outgoing correspondence was to be reviewed,
18 approved, and initialed by Mr. Blackwell, all trade
19 confirmations were to be reviewed and initialed by Mr.
20 Blackwell, and all trade blotters were to be signed by Mr.
21 Blackwell.³ (Ex. A8, pp. 1050, 1061, and 1098.)

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24 ³ The ALJ found that the compliance manual found in Exhibit A8 shows revisions and revision dates. According to
25 the manual, only one revision was made in 2003: Page 34.1 was added to the manual in November 2003. (Ex. A8,
p. 1057.) The manual shows that no other revisions were made in 2002 and 2004. Therefore, because the manual

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1 (14) During Ms. Kraft's tenure as BDC's compliance
2 officer, Mr. Blackwell continued to perform some of the duties
3 that a compliance officer would customarily perform. (Ex. A9,
4 pp. 53-55.) Some of these duties included calling compliance
5 meetings, covering compliance topics at compliance meetings,
6 reviewing transactions, signing trade tickets, and signing new
7 account forms. (Ex. A9, pp. 36, 38, 42-43, and 53-55.)

8 (15) On July 8, July 9, and July 10, 2003, Craig
9 McCulloch, John M. Kailey, and Steven D. Albrich, securities
10 examiners employed by the Division, conducted a field
11 examination of BDC. (Test. of McCulloch.) Prior to the field
12 examination, the examiners faxed a document request to BDC
13 listing all of the records that the examiners wanted to review.
14 (Test. of McCulloch.) The document request listed, in part:
15 trade blotters, trade tickets, trade confirmations, incoming and
16 outgoing correspondence, branch audit reports, and main office
17 exam audit reports. (Test. of McCulloch.) With the exception
18 of the main office exam audit reports and the branch audit
19 reports, Mr. Blackwell provided the requested documents. (Test.
20 of McCulloch.)

21 (16) On the morning of July 8, 2003, Mr. Albrich asked Mr.
22 Blackwell to provide the branch audit reports. (Test. of
23 Albrich.) Mr. Blackwell informed Mr. Albrich that he would

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25 shows 2002 to 2004 revisions and the provisions discussed in Paragraph 13 are not shown to be revised, more likely
26 than not, these provisions were in effect during the 2002 to 2004 time period.



1 provide them. (Test. of Albrich.) After the examiners returned
2 from a break, Mr. Albrich asked Mr. Blackwell again if Mr.
3 Blackwell would provide the branch audit reports. (Test. of
4 Albrich.) Mr. Blackwell subsequently provided what he
5 represented as the branch audit reports. (Test. of Albrich.)

6 (17) The documents that Mr. Blackwell represented as the
7 branch audit reports were two hand written documents dated
8 August 10, 2001 and September 18, 2002. (Test. of Kailey, Ex.
9 A19, p.1, and Ex. A20, p.1.) To Messrs. McCulloch, Kailey, and
10 Albrich, the documents appeared to have been written in the same
11 ink. (Test. of McCulloch and Kailey.) The documents were both
12 written on the same notepad paper. (Test. of Kailey, Ex. A19,
13 p.1, and Ex. A 20, p.1.) Messrs. McCulloch, Kailey, and Albrich
14 believed that Mr. Blackwell drafted the documents on July 8,
15 2003, in response to their request for branch audit reports
16 rather than on August 10, 2001 and September 18, 2002 as the
17 documents purport. (Test. of McCulloch and Kailey.)

18 (18) On July 8, 2003, Mr. Kailey asked Mr. Blackwell if
19 any other regulatory agency had conducted an audit of BDC.
20 (Test. of Kailey.) Mr. Blackwell told Mr. Kailey that the NASD
21 had conducted an audit months prior. (Test. of Kailey.) Mr.
22 Kailey then asked Mr. Blackwell if the NASD had issued a
23 deficiency letter or any findings. (Test. of Kailey.) Mr.
24 Blackwell informed Mr. Kailey that he had not yet received any
25 information from the NASD concerning the NASD audit and that it

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1 usually took the NASD a long time to issue findings. (Test. of
2 Kailey.) In fact, the NASD issued a letter of caution to Mr.
3 Blackwell and BDC on June 19, 2003. (Ex. A21, pp. 1-2.) The
4 letter of caution is typical of the letters of caution issued by
5 the NASD. (Test. of Kailey.) After most NASD audits, the NASD
6 will issue a similar letter of caution. (Test. of Kailey.) It
7 is quite common and almost routine for broker-dealers to receive
8 such letters. (Test. of Kailey.)

9 (19) On July 9, 2003, Mr. Kailey learned that the NASD had
10 issued a letter of caution to Mr. Blackwell and BDC on June 19,
11 2003. (Test. of Kailey.) The letter was addressed to Mr.
12 Blackwell at BDC's mailing address. (Ex. A21, p. 2.) On July
13 10, 2003, Mr. Kailey asked Mr. Blackwell again if Mr. Blackwell
14 had received a copy of the NASD's findings. (Test. of Kailey.)
15 Mr. Blackwell told Mr. Kailey that Mr. Blackwell had not yet
16 received findings from the NASD. (Test. of Kailey.) Mr.
17 Blackwell responded to the NASD letter on August 18, 2003. (Ex.
18 A22, pp. 2-3.)

19 (20) During their field examination, Messrs. McCulloch,
20 Kailey, and Albrich identified what they considered several
21 deficiencies with BDC's records and its supervisory and
22 compliance system. (Ex. A1, p.1.) In reviewing the records,
23 Messrs. McCulloch, Kailey, and Albrich found no evidence that
24 BDC was supervising its out-of-state registered representatives.
25 (Ex. A1, p.1.) In his nearly five years of experience as a
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1 securities examiner with the Division, Mr. McCulloch has not
2 seen branch audit reports with as little detail as those
3 provided by Mr. Blackwell dated August 10, 2001 and September
4 18, 2002. (Test. of McCulloch.) These reports were the worst
5 that Mr. McCulloch had ever seen. (Test. of McCulloch.)
6 Usually branch audit reports will detail inspections of
7 correspondence, trade blotters, trade confirmations, and trade
8 tickets. (Test. of McCulloch.)

9 (21) The trade blotters, which show all of BDC's
10 securities purchases and sales for the month of May 2003, were
11 not signed or initialed and show no signs of supervisor review;
12 however, Ms. Kraft did review them. (Ex. A13, pp.1-23; Ex. A9,
13 p.37.) Several pieces of BDC's incoming and outgoing
14 correspondence dated March 2003 through June 2003 concerning the
15 purchase, sale, and solicitation of securities bear no evidence
16 of supervisor review. (Test. of McCulloch and Ex. A17, pp.1-9,
17 11-13, 15-26, and 28-34.) Much of this incoming and outgoing
18 correspondence was not signed by Mr. Blackwell or Ms. Kraft.
19 (Test. of McCulloch; Ex. A17, pp. 1-9, 11, and 15-19; and Ex.
20 A29, p. 1.) Several trade confirmations dated in May and June
21 2003 lack evidence of supervisor review and lack signatures from
22 either Ms. Kraft or Mr. Blackwell. (Test. of McCulloch and Ex.
23 A11, pp. 3, 4, 8-12, 15, 20, 21-23, and 36.) Several trade
24 confirmations dated in May and June 2003, however, were signed
25 by Mr. Blackwell. (Test. of McCulloch and Ex. A11, pp. 2, 14,

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1 16, 17, 19, 24-32, 34, 35, and 37-39.) Several trade tickets
2 dated in May and June 2003 lack evidence of supervisor review
3 and lack signatures from either Ms. Kraft or Mr. Blackwell.
4 (Test. of McCulloch and Ex. A11, pp. 1, 3-13, 15, 18, 23, 26-
5 33, and 37.) Some trade tickets dated in May and June 2003,
6 however, were initialed by Mr. Blackwell. (Test. of McCulloch
7 and Ex. A11, pp. 20-22, 34, 37-39.)

8 (22) It is common practice in the securities industry for
9 broker-dealer firms to have their compliance officers initial
10 trade blotters, incoming and outgoing correspondence, and other
11 documents typically reviewed by compliance officers. (Test. of
12 McCulloch.) This is done in order to prove that these records
13 have been reviewed. (Test. of McCulloch.)

14 (23) During their field examination of BDC, Messrs.
15 McCulloch, Kailey, and Albrich did not meet with Ms. Kraft.
16 (Test. of McCulloch.) They had expected to meet with Ms. Kraft,
17 because the documents and records that they reviewed were the
18 responsibility of BDC's compliance officer, it is customary to
19 meet with the compliance officer during a field examination, and
20 they believed Ms. Kraft to be the compliance officer. (Test. of
21 McCulloch.)

22 (24) In 2003 and 2004, mail addressed to BDC was received
23 in the mailroom of the building BDC occupied. A mailroom
24 employee would bundle BDC's mail for pick up by a BDC employee.
25 Usually Mr. Blackwell, Ms. Kraft, or a secretary would pick up
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1 BDC's mail from the mailroom. The mail was then usually placed
2 in a conference room and if neither Mr. Blackwell nor Ms. Kraft
3 picked up the mail, they were alerted that the mail had arrived.
4 Sometimes a secretary would take the mail directly to Ms. Kraft
5 or Mr. Blackwell instead of to the conference room. (Ex. A9,
6 pp. 62-63.)

7 (25) Neither Ms. Kraft nor Mr. Blackwell opened or
8 reviewed mail addressed to BDC's registered representatives and
9 salespeople. (Ex. A9, pp.16-17.) Rather, the mail was
10 distributed directly to the registered representatives and
11 salespeople to whom it was addressed. (Ex. A9, pp. 16-17.)

12 CONCLUSIONS OF LAW

13 (1) Joseph M. Blackwell violated ORS 59.205(3) by failing
14 to pass the NASD Series 9 (or 24) examination in willful
15 violation of the February 2000 Order of the Director.

16 (2) BDC willfully violated the February 2000 Order of the
17 Director in violation of ORS 59.205(3) as a result of Mr.
18 Blackwell's failure to pass the NASD Series 9 (or 24)
19 examination.

20 (3) BDC and Joseph M. Blackwell violated ORS 59.205(3) by
21 failing to reasonably and diligently supervise BDC's associated
22 persons in willful violation of the February 2000 Order of the
23 Director.

24 (4) BDC and Joseph M. Blackwell violated ORS 59.205(13) by
25 failing to reasonably supervise the salespersons of BDC.

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1 (5) BDC and Joseph M. Blackwell violated OAR 441-205-0210
2 by failing to exercise diligent supervision of all of its
3 associated persons.

4 (6) BDC and Joseph M. Blackwell did not violate ORS
5 59.135(4) or ORS 59.451 by knowingly filing one or more
6 materially false statements with the Director.

7 (7) A civil penalty of \$20,000.00 should be imposed
8 against Joseph M. Blackwell and BDC for willfully violating the
9 February 2000 Order of the Director in violation of ORS
10 59.205(3).

11 (8) A civil penalty of \$20,000.00 should be imposed
12 against Joseph M. Blackwell and BDC for violating ORS 59.205(13)
13 and OAR 441-205-0210.

14 (9) Because neither BDC nor Joseph M. Blackwell violated
15 ORS 59.135(4) or ORS 59.451 by knowingly filing one or more
16 materially false statements with the Director, no civil penalty
17 should be imposed.

18 (10) For violations of ORS 59.205(3), ORS 59.205(13), OAR
19 441-205-0210, and the February 2000 Order, the Director should

20 (a) revoke BDC's broker-dealer license, (b) suspend Joseph M.

21 Blackwell's salesperson's license for 90 days, (c) condition

22 Joseph M. Blackwell's salesperson's license to prohibit Mr.

23 Blackwell from acting as a supervisor for salespersons or

24 investment adviser representatives for a period of five years,

25 and (d) order BDC and Joseph M. Blackwell to cease and desist

26

1 from (1) willfully or repeatedly violating or failing to comply
2 with an order of the Director, (2) failing to reasonably and
3 diligently supervise the salespersons and all associated person
4 of the broker-dealer, (3) filing or causing to be made or filed
5 with the Director any statement, report or document which is
6 false in any material respect or manner, and (4) violating any
7 provision of the Oregon Securities Law, including ORS Chapter 59
8 and OAR Chapter 441.

9 **OPINION**

10 **Burden of Proof**

11 **1. Proof by a Preponderance of the Evidence**

12 The burden of presenting evidence to support a factual
13 assertion in a contested case proceeding is on the proponent of
14 that assertion. ORS 183.450(2). In this case, the Division,
15 because it is alleging that the Respondents committed violations
16 of statutes and rules, has the burden of proving its allegations
17 by a preponderance of the evidence. See *Cook v. Employment*
18 *Div.*, 159 Or App 175, 183 (1999) (the standard of proof in
19 administrative hearings is preponderance of the evidence absent
20 statutes prescribing another standard). Proof by a
21 preponderance of the evidence means that the proposition
22 asserted is more probably true than false. *Riley Hill General*
23 *Contractors v. Tandy Corp.*, 303 Or 390 (1989).

24 ///

25 ///



1 **2. Proof Beyond a Reasonable Doubt**

2 The Respondents assert that the Division must prove its
3 allegations beyond a reasonable doubt. (Respondents' Reply, pp.
4 29-31.) The Respondents rely on *Brown v. Multnomah County*
5 *District Court*, 280 Or 95 (1977) in support of their position.
6 The Respondents' reliance upon *Brown* is misplaced.

7 In an attempt to decriminalize some of the offenses in the
8 1975 vehicle code, the legislature designated first offense
9 driving under the influence of intoxicants ("DUII") charges as
10 infractions rather than crimes, setting the maximum penalty at
11 \$1,000.00 and removing any possibility of imprisonment. *Id.* at
12 100-01. In *Brown*, the Oregon Supreme Court considered whether
13 the State of Oregon could try a defendant for a first offense
14 DUII charge "without the safeguards guaranteed defendants in
15 criminal prosecutions." *Id.* at 96.

16 In determining whether the defendant was entitled to such
17 safeguards as the right to a jury trial, the right to counsel,
18 and the right to proof beyond a reasonable doubt of the
19 accusations against him, the Oregon Supreme Court considered
20 five distinct "indicia," noting that "none is conclusive." *Id.*
21 at 98-9, 102. Those indicia are: the type of offense, the
22 penalty, the collateral consequences, the punitive significance
23 of the sanction, and the pretrial practices associated with
24 possible arrest and detention. *Id.* at 102-08.

25 ///

26



1 (a) The Type of Offense

2 In *Brown*, the Court determined that, because the
3 legislature has the ability to determine how a particular
4 offense is regulated, looking at the "'gravity' or the 'nature'
5 of the offense as a criterion" was not very helpful. *Id.* at
6 102. See also, *In re Complaint as to the conduct of Harris*, 334
7 Or 353, 360 (2002). Therefore, in the present case, the fact
8 that the legislature has deemed that violations of ORS Chapter
9 59 may be adjudicated via the administrative process does not
10 necessarily result in a conclusion that the Respondents are not
11 entitled to the constitutional safeguards discussed above.
12 Other indicia or factors must be considered.

13 (b) The Penalty

14 The Court found that when the penalty involves imprisonment,
15 the penalty is "the single most important criterion." *Brown*, 280
16 Or 95, 103. The Court also found, however, that "the absence of
17 potential imprisonment does not conclusively prove [that] a
18 punishment [is] non-criminal." *Id.* The Court concluded that the
19 \$1,000.00 potential fine for a first offense DUII was "strong
20 evidence of the punitive significance that the legislature meant
21 to give th[e] fine." *Id.* at 105. The Court, however, was careful
22 to distinguish fines imposed on defendants for violations of the
23 traffic code and civil penalties imposed in administrative cases.
24 *Id.* at 104. The Court stated,

25 It proves little about a \$1,000.00 fine for driving
26 under the influence of intoxicants that much larger





1 civil penalties are levied against business
2 enterprises for violations of various regulations in
3 the course of business. We deal here with fines
4 payable by ordinary individuals for misconduct
5 unrelated to the pursuit of a profitable activity, not
6 by regulated truckers or cabdrivers, and indeed with
7 the rights of a petitioner who claims the right to
8 counsel as an indigent." *Id.*

6 In the case before me, the Division seeks to impose civil
7 penalties totaling \$40,000.00 against both Respondents payable
8 jointly and severally and civil penalties totaling \$20,000.00
9 against Mr. Blackwell alone. While these civil penalties are
10 significant (certainly more significant than the penalty imposed
11 in *Brown*), these are penalties imposed for alleged misconduct
12 related "to the pursuit of a profitable activity" by a regulated
13 business and business person. *Id.* *Brown* specifically limits
14 its applicability to instances involving "ordinary individuals *
15 * * unrelated to" such matters. *Id.* In *State ex rel Redden v.*
16 *Discount Fabrics, Inc.*, 289 Or 375 (1980), the Oregon Supreme
17 Court came to the same conclusion.

18 In *Discount Fabrics*, the State Attorney General brought
19 suit against the defendant for violations of Oregon's Unlawful
20 Trade Practices Act ("UTPA"). *Id.* at 377. The defendant
21 contended that because the Attorney General was seeking a
22 \$25,000.00 penalty for each of the 12 counts against it, it was
23 entitled to require the Attorney General to prove its case
24 beyond a reasonable doubt. *Id.* at 378, 386. To support its
25 position, the defendant relied upon *Brown*. Citing the same

1 block quote above, the Oregon Supreme Court held that the
2 "[d]efendant's reliance on *Brown* is misplaced * * * * *,
3 [because t]he civil penalty applicable in UTPA cases * * * only
4 applie[s] to activities committed 'in the course of the person's
5 business, vocation or occupation * * *.'" *Discount Fabrics*, 289
6 Or 289, 386-7. (Citations omitted.) Accordingly, even though
7 the civil penalty the Division is seeking is large, this factor
8 or criterion does not weigh in the Respondents' favor.

9 **(c) Collateral Consequences**

10 In *Brown*, the court determined that the loss or suspension of
11 the defendant's license to drive was not an example of collateral
12 consequences of the offense. *Id.* at 105. The court held that the
13 loss of the license was the result of a regulatory action as
14 opposed to a form of punishment. *Id.*

15 The Respondents contend that the loss of BDC's broker-dealer
16 license and the conditioning and suspension of Mr. Blackwell's
17 license are punitive measures as opposed to regulatory measures.
18 The Respondents, however, fail to distinguish the loss of the
19 defendant's license to drive in *Brown* with the facts of the
20 present case. Moreover, in *Harris*, the Oregon Supreme Court
21 citing *Brown*, held that "the personal and professional
22 consequences of disbarment are simply the direct results of
23 regulatory action taken by the court and do not impose a
24 collateral punishment of a criminal nature." *Harris*, 334 Or 353,
25 ///

26
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1 362. In *Megdal v. Board of Dental Examiners*, 288 Or 293, 299-300
2 (1980), the Oregon Supreme Court held,

3 If loss of the right to practice one's profession were
4 employed as a form of punishment for delinquencies
5 apart from safeguarding proper performance in the
6 professional role, the implications would go beyond
7 the adequacy of the standard to issues of criminal
8 procedure generally, see *Brown v. Multnomah county*
9 *Dist. Ct.*, 280 Or 95, 100, 105, 570 P.2d 52 (1977) * *
10 *. No doubt the disqualified person's loss is equally
grave whether it is inflicted as punishment for
wrongdoing or as enforcement of professional
discipline. But we have no reason to attribute the
former rather than the latter objective to laws that
allow disqualification for unprofessional conduct.
* * * * *

11 The same conclusions reached by the Court in *Harris* and *Megdal*
12 must follow in the case before me: Namely, that the actions the
13 Division seeks to take against the Respondents' licenses are not
14 a collateral consequences, because they are regulatory in nature
15 rather than punitive.

16 **(d) Punitive Significance**

17 The Court in *Brown* found that a judgment has punitive
18 significance if it "carries stigmatizing or condemnatory
19 significance." *Brown*, 280 Or 95, 106. The Court stated that "[a]
20 defendant who is asked to declare whether he is 'guilty' * * * or
21 who is 'convicted' as such, * * *, may reasonably conclude that
22 the judgment carries the stigma of condemnation. *Id.* at 107. In
23 applying the punitive significance test to the first time DUII
24 offense, the Court noted that although the legislature eliminated
25 the potential for imprisonment as a penalty, the legislature

26



1 intended that the offense still retain its serious nature. *Id.*
2 The Court further noted that the legislature "retained the
3 criminal classification" for subsequent DUII convictions, strongly
4 indicating that the legislature intended to "'decriminalize' the
5 procedure rather than the offense." *Id.* at 107-08.

6 There is no question that there is a stigma resulting from
7 the penalties and regulatory measures the Division seeks to
8 impose. The Respondents, however, have not established that the
9 stigma resulting from an administrative order in which there is
10 no conviction and no finding of guilt is equivalent to the
11 stigma resulting from an offense with criminal attributes such
12 as that considered in *Brown*.

13 **(e) Arrest and Detention**

14 The final factor considered by the Oregon Supreme Court in
15 *Brown* concerns whether there is a possibility of arrest and
16 detention. The Court concluded that because a person could
17 potentially be arrested for a first time DUII offense and could
18 face the "use of physical restraints, such as handcuffs, a
19 search of the person, booking (including the taking of
20 fingerprints or photographs), and detention in jail if not
21 released by police officers, or at a later time by a
22 magistrate," the offense "comport[ed] with criminal rather than
23 with civil procedure * * *."

24 Violations of the Oregon Securities Laws can be charged as
25 crimes; however, in the administrative proceeding before me, the

26



1 Respondents have not been charged criminally. Accordingly, the
2 Respondents face no possibility of arrest, no possibility of
3 being subjected to the use of physical restraints, no
4 possibility of being booked, and no possibility of being
5 detained in jail.

6 **(f) Conclusion**

7 The only factor even partially weighing in the Respondents'
8 favor is the punitive significance or stigma of the allegations
9 against them. However, the relative stigma of an administrative
10 order is not equivalent to that of a judgment of conviction for
11 an offense with criminal attributes such as the one considered
12 in *Brown*. Therefore, after weighing all of the relevant
13 factors, I must conclude that the administrative proceedings
14 initiated against the Respondents lack the character of a
15 criminal prosecution. Accordingly, the Division is not required
16 to prove its case beyond a reasonable doubt.

17 **3. Clear and Convincing Evidence**

18 The Division suggests that it may be required to prove by
19 clear and convincing evidence that the Respondents filed false
20 statements with the Director. (Agency's Response to
21 Respondents' Motions for Directed Verdict, p. 21.) The Division
22 may be correct; however, I decline to address this issue,
23 because, as discussed below, the Division failed to prove even
24 by a preponderance of the evidence, that the Respondents filed
25 false statements with the Director.

26



1 **Allegations**

2 **1. Violation of February 2000 Order - Failure to Pass NASD**
3 **Series 9 (or 24) Examination (ORS 59.205(3))**

4 The evidence is uncontroverted that Mr. Blackwell did not
5 pass the NASD Series 9 (or 24) examination. On October 3, 2000,
6 Mr. Blackwell took and passed the NASD Series 10 exam. On
7 October 4, 2000; November 9, 2000; and January 23, 2001, Mr.
8 Blackwell took and failed the NASD Series 9 exam. Mr. Blackwell
9 did not take the NASD Series 9 exam again and has never taken
10 the NASD Series 24 exam.

11 **(a) Does Mr. Blackwell's failure to pass the NASD Series 9**
12 **examination constitute a willful or repeated violation or**
13 **failure to comply with the February 2000 Order of the Director**
14 **in violation of ORS 59.205(3)?**

15 It is clear that at least initially, Mr. Blackwell did not
16 intend to violate the February 2000 Order of the Director. As
17 noted above, Mr. Blackwell attempted to take the Series 9
18 examination more than once but failed. There is no evidence to
19 conclude, and frankly no reason to believe, that Mr. Blackwell
20 intentionally or willfully failed the examination. To determine
21 Mr. Blackwell's intent as the years passed, however, requires a
22 little more analysis.

23 Mr. Blackwell last attempted to take the NASD Series 9
24 examination on January 23, 2001. Although he was given the
25 option to take and pass the NASD Series 24 examination in lieu
26



1 of the NASD Series 9 examination, Mr. Blackwell never attempted
2 to pass the NASD Series 24 examination. Despite knowing that he
3 was subject to the February 2000 Order of the Director and the
4 subsequent November 2000 Order, which required him to take and
5 pass one of the examinations, Mr. Blackwell made no further
6 attempts to pass either exam.

7 Mr. Blackwell more likely than not had the ability to take
8 either examination as demonstrated by the three times that he
9 managed to take the NASD Series 9 examination and the one time
10 he took and passed the NASD Series 10 exam. Moreover, he quite
11 clearly knew that he could not pass the NASD Series 9 (or 24)
12 examination without taking it. Considering the above together
13 with his failure to make any effort to take and pass either
14 examination after January 21, 2001, Mr. Blackwell's conduct
15 evidenced his intent not to pass the NASD Series 9 (or 24)
16 examination. As such, Mr. Blackwell willfully failed to pass
17 the exam by not attempting to take it. In doing so, Mr.
18 Blackwell willfully violated the February 2000 Order of the
19 Director through his willful non-compliance.

20 Although Mr. Blackwell's failure to take either examination
21 constituted a willful violation of the February 2000 Order, Mr.
22 Blackwell could have believed that as long as he was not BDC's
23 compliance officer, he did not have to take either exam. On
24 January 16, 2001, Ms. Smith sent a letter to Mr. Ketterling,
25 BDC's attorney, stating in part,

26

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1 Please confirm in writing that Ms. Joanne Kraft, or
2 another qualified principal, has replaced Mr.
3 Blackwell as compliance officer of Blackwell Donaldson
4 & Company, until Mr. Blackwell takes and passes either
5 the Series 9 or the Series 24 exam. As far as the
6 Director is concerned, if a suitable, qualified person
7 has replaced Mr. Blackwell as compliance officer of
8 Blackwell Donaldson & Company, then Mr. Blackwell may
9 take as much time as he needs to take and pass either
10 the Series 9 or the Series 24 exam.
11 (Ex. A28, p.1.)

12 Even if Mr. Blackwell believed that he was relieved of the
13 requirement of taking either exam as long as he was not BDC's
14 compliance officer, his subsequent decision to once again become
15 BDC's compliance officer in March 2003 would have constituted a
16 willful violation of the February 2000 Order of the Director.
17 If Mr. Blackwell held the assumption referred to above, he knew
18 that as long as he was not BDC's compliance officer, he could
19 take "as much time as he need[ed] to take and pass [the exam.]"
20 (Ex. A28, p.1.) Accordingly, he knew the converse, that in
21 order to become compliance officer again, he needed to pass one
22 of the two exams. Thus, even if Mr. Blackwell operated under
23 the assumption discussed above, his decision to become
24 compliance officer again constituted a willful violation of the
25 February 2000 Order of the Director, because Mr. Blackwell was
26 clearly capable of refraining from replacing Ms. Kraft as the
compliance officer and because he knew he had not passed either
exam.



1 On a related note, the Division argues that because Mr.
2 Blackwell continued to perform duties that are normally
3 performed by a compliance officer, he is in violation of the
4 February 2000 Order and/or the November 2000 Order of the
5 Director. Neither order prohibits Mr. Blackwell from being a
6 compliance officer or performing the duties of a compliance
7 officer. The Division's prohibitions against Mr. Blackwell
8 being BDC's compliance officer, however, are contained in Ms.
9 Smith's November 2000 and January 2001 correspondence with Mr.
10 Ketterling.

11 ORS 183.310 (2) defines a contested case as,
12 a proceeding before an agency:

13 (A) In which the individual rights, duties or
14 privileges of specific parties are required by statute
15 or Constitution to be determined only after an agency
16 hearing at which such specific parties are entitled to
17 appear and be heard; [or]

18 (B) Where the agency has discretion to suspend or
19 revoke a right or privilege of a person[.]
20 * * * * *

21 ⁴ ORS 183.310 states in relevant part, "As used in this chapter:

22 (1) 'Agency' means any state board, commission, department, or division thereof, or officer authorized by law
23 to make rules or to issue orders, except those in the legislative and judicial branches.

24 (2)(a) 'Contested case' means a proceeding before an agency:

25 (A) In which the individual legal rights, duties or privileges of specific parties are required by statute or
26 Constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and
be heard;

(B) Where the agency has discretion to suspend or revoke a right or privilege of a person;

(C) For the suspension, revocation or refusal to renew or issue a license where the licensee or applicant for a
license demands such hearing; or

(D) Where the agency by rule or order provides for hearings substantially of the character required by ORS
183.415, 183.425, 183.450, 183.460 and 183.470.

(b) 'Contested case' does not include proceedings in which an agency decision rests solely on the result of
a test. * * * * *

1 Pursuant to ORS 59.205(3), the Director has the authority
2 to

3 suspend or revoke, or impose conditions or
4 restrictions on, a license of a person as a broker-
5 dealer * * * or salesperson if the director finds that
6 the * * * licensee * * * * [h]as willfully or
7 repeatedly violated or failed to comply with any
provision of the Oregon Securities Law, any condition
or restriction imposed on a license or any rule or
order of the director.⁵

8
9 ⁵ ORS 59.205 states in its entirety, "Except as provided in ORS 59.215, the Director of the Department of Consumer
and Business Services may by order deny, suspend or revoke, or impose conditions or restrictions on, a license of a
10 person as a broker-dealer, state investment adviser, investment adviser representative or salesperson if the director
finds that the applicant or licensee:

11 (1) Is insolvent, either in the sense that the liabilities of the applicant or licensee exceed the assets of the
applicant or licensee or that the applicant or licensee cannot meet the obligations of the applicant or licensee as they
12 mature, or is in such financial condition that the applicant or licensee cannot continue in business with safety to the
customers of the applicant or licensee.

13 (2) Has engaged in dishonest, fraudulent or illegal practices or conduct in any business or profession or unfair
or unethical practices or conduct in connection with the purchase or sale of any security.

14 (3) Has willfully or repeatedly violated or failed to comply with any provision of the Oregon Securities Law,
any condition or restriction imposed on a license or any rule or order of the director.

15 (4) Has been convicted of a misdemeanor an essential element of which is fraud or of a felony.

16 (5) Is not qualified to conduct a securities business on the basis of such factors as training, experience and
knowledge of the securities business.

17 (6) Has filed an application for a license which as of the date the license was issued, or as of the date of an order
conditioning, restricting, denying, suspending or revoking a license, was incomplete in any material respect or
18 contained any statement which was, in light of the circumstances under which it was made, false or misleading with
respect to any material fact.

19 (7) Has failed to account to persons interested for all money or property received.

20 (8) Has not delivered after a reasonable time, to persons entitled thereto, securities held or to be delivered.

21 (9) Is permanently or temporarily enjoined by a court of competent jurisdiction from engaging in or continuing
any conduct or practice involving any aspect of the securities business.

22 (10) Is the subject of an order of the director conditioning, restricting, denying, suspending or revoking a license
as a broker-dealer, state investment adviser, investment adviser representative or salesperson.

23 (11) Is the subject of an order of the director under:

24 (a) ORS chapter 645 involving a violation of any provision of the Oregon Commodity Code or any rule or order
of the director adopted or entered under ORS chapter 645; or

25 (b) ORS 59.840 to 59.980 involving a violation of any provision of ORS 59.840 to 59.980 or any rule or order
of the director adopted or entered under ORS 59.840 to 59.980.

26 (12) Is the subject of any of the following orders that are currently effective and were issued within the last five
years:

(a) An order by the securities agency or administrator of another state or Canadian province or territory, or by
the Securities and Exchange Commission, entered after notice and opportunity for hearing, denying, suspending or
revoking the person's registration or license as a broker-dealer, federal covered investment adviser, state investment
adviser, investment adviser representative or salesperson, or the substantial equivalent of those terms as defined in
the Oregon Securities Law;

(b) A suspension or expulsion from membership in or association with a member of a self-regulatory
organization registered under the Securities Exchange Act of 1934, as amended, the Commodity Exchange Act or

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1 Under ORS 59.295(1), a licensee affected by an order issued
2 pursuant to ORS 59.205 shall receive notice from the Division
3 stating that a "hearing will be held on the order if a written
4 demand for hearing is filed with the director within 20 days
5 after the date of service of the order." ORS 59.295(2) provides
6 that when a party files a "timely demand for hearing," the
7 Division "shall hold a hearing on the order as provided by ORS
8 chapter 183." ⁶ Pursuant to ORS 183.415, parties in a contested
9 case are entitled to, among other things, a hearing after

10 ///

11

12

the Investment Advisers Act of 1940, as amended;

13

(c) A United States Postal Service fraud order;

14

(d) A cease and desist order entered after notice and opportunity for hearing by the director, the securities agency or administrator of another state or a Canadian province or territory, the Securities and Exchange Commission or the Commodity Futures Trading Commission; or

15

(e) An order by the Commodity Futures Trading Commission denying, suspending or revoking registration under the Commodity Exchange Act.

16

(13) Has failed, reasonably to supervise the salespersons or investment adviser representatives of the applicant or licensee.

17

(14) Has failed to comply with the requirements of ORS 59.195 to make and keep records prescribed by rule or order of the director, to produce such records required by the director or to file any financial reports or other information the director by rule or order may require."

18

⁶ ORS 59.295 states in its entirety, "(1) Except as provided in ORS 183.745, upon the entry of an order under the Oregon Securities Law, the Director of the Department of Consumer and Business Services shall promptly give appropriate notice of the order as provided in this subsection. The notice shall state that a hearing will be held on the order if a written demand for hearing is filed with the director within 20 days after the date of service of the order. The notice shall be given to:

19

(a) The issuer and applicant or registrant affected thereby with respect to orders entered pursuant to ORS 59.085 and 59.105;

20

(b) The applicant or licensee and any investment adviser representative or salesperson affected thereby with respect to orders entered pursuant to ORS 59.205; or

21

(c) All interested persons with respect to orders entered pursuant to any other provision of the Oregon Securities Law, except ORS 59.095.

22

(2) If timely demand for a hearing is filed by a person entitled to notice of the order, the director shall hold a hearing on the order as provided by ORS chapter 183. In the absence of a timely demand for a hearing, no person shall be entitled to judicial review of the order.

23

(3) After the hearing, the director shall enter a final order vacating, modifying or affirming the order.

24

(4) The director may enter a final order revoking a license or registration notwithstanding the fact that the license or registration has expired, if the initial order of revocation was issued prior to expiration of the license or registration."

25

26

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1 reasonable notice, representation by counsel, and explanation of
2 the issues by an Administrative Law Judge.⁷

3 The Division does not (and cannot) argue that BDC has no
4 right to choose its own compliance officer or that as the
5 majority owner of BDC, Mr. Blackwell has no right to serve as
6 BDC's compliance officer. Pursuant to ORS 59.205, the Division
7 has authority to suspend or revoke these rights. The November
8 2000 and January 2001 correspondence prohibiting Mr. Blackwell
9 from being BDC's compliance officer is an example of the
10 Division exercising that authority. This correspondence must
11 therefore be viewed as a final order subject to the contested
12 case procedures of ORS Chapter 183. See *Oregon Env. Council v.*
13 *Oregon State Bd. of Ed.*, 307 Or 30, 42 (1988) (when a person's
14 individual legal rights, duties, or privileges are at issue, the
15 person is a party to a contested case).

16 Because neither BDC nor Mr. Blackwell were afforded the right
17 to contest these prohibitions or given any of the other protections
18 mandated by ORS Chapter 183, I cannot hold either Respondent
19 accountable for not abiding by the prohibitions. See *Patton v.*

21 _____
22 ⁷ ORS 183.415 states in relevant part, "(1) In a contested case, all parties shall be afforded an opportunity for
hearing after reasonable notice, served personally or by registered or certified mail.

23 (2) The notice shall include:

24 (a) A statement of the party's right to hearing, or a statement of the time and place of the hearing;
25 (b) A statement of the authority and jurisdiction under which the hearing is to be held;
26 (c) A reference to the particular sections of the statutes and rules involved; and
(d) A short and plain statement of the matters asserted or charged.

(3) Parties may elect to be represented by counsel and to respond and present evidence and argument on all
issues involved. * * * * *

1 State Bd. of Higher Ed., 477 Or App481 (1982) (remanded to afford
2 petitioner a contested case hearing under ORS 183.413).

3 (b) Liability for Mr. Blackwell's Failure to Pass the NASD
4 Series 9 (or 24) Examination

5 The January 2005 Order seeks sanctions against both
6 Respondents individually and collectively for violating the
7 Division's February 2000 Order even though Mr. Blackwell was not
8 a named party of the February 2000 Order. Understandably, Mr.
9 Blackwell argues that since he was not a named party of the
10 February 2000 Order, he should not be subject to it. I agree
11 with Mr. Blackwell. Individually, Mr. Blackwell cannot violate
12 an order to which he was not subject. This is true even though
13 the February 2000 Order directed Mr. Blackwell to act, because
14 Mr. Blackwell consented to this order on behalf of BDC in his
15 capacity as president and agent of BDC, not in his capacity as
16 an individual. The Division has cited no authority to the
17 contrary.

18 Notwithstanding the above, the Division argues that because
19 Mr. Blackwell was BDC's President, CEO, CFO, CCO, COO, Control
20 Person, and owner of 75% or more of BDC, he was essentially BDC
21 and should be held accountable as such. This argument is far
22 from persuasive. As discussed below, although Mr. Blackwell
23 owned a significant percentage of BDC and held several offices
24 within the corporation, he and BDC were still distinct legal
25 entities.

26





1 (1) Liability as a Shareholder

2 Pursuant to ORS 60.151(2), "[a] shareholder of a
3 corporation is not personally liable for the acts or debts of
4 the corporation merely by reason of being a shareholder."
5 Because Mr. Blackwell was not subject to the February 2000 Order
6 and consented to the February 2000 Order only in his capacity as
7 BDC's president and agent and not in his personal capacity, he
8 is not liable for the acts of the corporation even when those
9 acts can be attributed to his conduct.

10 "Ownership of all the stock of the corporation by one
11 person, in and of itself, is insufficient to breach
12 the wall of immunity created by ORS [60.151(2)]. Nor
13 is the control of the corporation by a shareholder, in
and of itself, sufficient to support a claim for
recovery that the shareholder's immunity should be
disregarded."

14 *AMFAC Foods v. Int'l Systems*, 294 Or 94, 107 (1982).

15 Although the immunity granted pursuant to ORS 60.151 is not
16 absolute, the Division failed to establish that "piercing the
17 corporate veil" is appropriate in this case. The test outlined
18 in *AMFAC Foods*, 294 Or 94, 108-09 is not applicable here,
19 because it specifically concerns a situation where "a plaintiff
20 seeks to collect a corporate debt from a shareholder by virtue
21 of the shareholder's control over the debtor corporation * * *."

22 *Id.* at 108. In the case before me the issue is significantly
23 different than the one considered in *AMFAC Foods*. The issue
24 before me is whether a shareholder can be found in violation of

1 an administrative order to which only the corporation was a
2 party.

3 Other tests used by the Oregon Supreme Court to determine
4 if the corporate veil should be pierced, whether the corporation
5 was used as a vehicle for fraud or whether failing to pierce the
6 corporate veil would result in injustice, are also not
7 applicable to the present case, because the relief imposed when
8 these tests are met is strictly equitable. "It is a general
9 principle that equity will disregard the corporate fiction for
10 the purpose of preventing the successful perpetration of a
11 fraud." *Security S. & T. Co. v. Portland F.M. Co.*, 124 Or 276,
12 288 (1928). See also, *Creditors Protective Ass'n v. Balcom*, 248
13 Or 38, 47 (1967) and *Bennett v. Mott*, 28 Or 339, 347 (1896).
14 The Division has failed to cite, and I have failed to find, any
15 authority to support the proposition that an administrative law
16 judge has the power to grant equitable relief under
17 circumstances such as these (or for that matter, under any
18 circumstances).

19 The only remaining test used by the Oregon Courts to
20 determine if the corporate entity should be disregarded is
21 whether the shareholder and the corporation have so confused or
22 intertwined their affairs that it is appropriate to treat the
23 two as one. See *Abbott v. Bob's U-Drive*, 222 Or 147, 161-62
24 (1960). The Division has presented no evidence to indicate that
25 Mr. Blackwell and BDC intertwined or confused their affairs.

26



1 Therefore, this test, if applied, would not support the
2 Division's position regardless of Mr. Blackwell's level of
3 ownership of BDC or the number of offices or positions he held.

4 (2) Liability as an Agent

5 Mr. Blackwell cannot be found to be in violation of the
6 February 2000 Order under principles of agency law. Clearly,
7 BDC, the corporation, is liable for the acts of Mr. Blackwell,
8 its officer, majority owner, and employee. However, the
9 Division has failed to establish that the reverse is true.
10 There is insufficient evidence to conclude that BDC was Mr.
11 Blackwell's agent for purposes of Mr. Blackwell's failure to
12 pass the NASD Series 9 (or 24) exam. Thus, simply because BDC
13 is in violation of the February 2000 Order, it does not follow
14 that Mr. Blackwell individually is also in violation of the
15 February 2000 Order. Although Mr. Blackwell's conduct is what
16 resulted in BDC's violation, his conduct does not constitute a
17 violation of the order in his individual capacity. As noted
18 above, because he was not a party to the February 2000 Order and
19 was not subject to it in his individual capacity, he cannot have
20 violated it. In other words, he, personally, was not bound by
21 the terms of the order. Rather, he, in his individual capacity,
22 could choose to ignore the requirement that he pass the NASD
23 Series 9 (or 24) exam. Doing so might make him liable to the
24 corporation, BDC, for the consequences of these actions;
25 however, personally, he would not be in violation of the order.

26





(3) Liability as an Aider and Abettor

In its closing arguments, the Division urges that even if Mr. Blackwell cannot be held individually responsible for violation of the February 2000 Order based upon the proposition that he and BDC are essentially one and the same, he should be held responsible for aiding and abetting BDC's violation of the February 2000 Order under ORS 59.995(1). ORS 59.995(1) provides,

In addition to all other penalties and enforcement provisions provided by law, any person who violates or who procures, aids or abets in the violation of ORS 59.005 to 59.451, 59.660 to 59.830, 59.991 and 59.995 or any rule or order of the Director of the Department of Consumer and Business Services shall be subject to a penalty of not more than \$20,000 for every violation, which shall be paid to the General Fund of the State Treasury.

This argument is more compelling; however, Mr. Blackwell counters that the Division is prohibited from pursuing this theory, because it failed to allege it in the January 2005 Order.

ORS 183.415(2) requires that all parties to a contested case hearing be afforded reasonable notice that includes: "(c) A reference to the particular sections of the statutes and rules involved; and (d) A short and plain statement of the matters asserted or charged." The January 2005 Order cites to ORS 59.995 in its entirety and does not cite to any of the four subsections specifically. The January 2005 Order also does not allege that Mr. Blackwell violated the February 2000 Order by aiding and abetting BDC to violate the order. Rather, the

1 January 2005 Order states that BDC and Mr. Blackwell "willfully
2 or repeatedly violated or failed to comply with [the February
3 2000 Order]."

4 In *Doherty v. Oregon Water Resources Director*, 92 Or App
5 22, 33 (1988), the Court of Appeals considered whether the
6 Oregon Water Resources Director complied with the notice
7 requirements of ORS 183.415(2)(c) even though it made reference
8 to ORS 537.730 in its entirety and ORS 537.730(1)(a) but failed
9 to make reference to ORS 537.730(1)(d). The petitioners argued
10 that under ORS 183.415(2)(c), the Oregon Water Resources
11 Director was barred from considering section (1)(d) of the
12 statute "as a basis for a critical ground water area
13 determination." *Doherty*, 92 Or App 22 at 33. The Court of
14 Appeals disagreed with the petitioners and found that there was
15 no evidence to conclude that the petitioners were prejudiced by
16 the omission, "the omission was not material, and * * * the
17 notice was adequate to advise petitioners fairly of the
18 provisions on which the [Oregon Water Resources] Director would
19 rely in making the critical ground water area determination."
20 *Id.* at 34.

21 The full text of ORS 59.995 is as follows:

22 (1) In addition to all other penalties and
23 enforcement provisions provided by law, any person who
24 violates or who procures, aids or abets in the
25 violation of ORS 59.005 to 59.451, 59.660 to 59.830,
26 59.991 and 59.995 or any rule or order of the Director
of the Department of Consumer and Business Services
shall be subject to a penalty of not more than \$20,000





1 for every violation, which shall be paid to the
2 General Fund of the State Treasury.

3 (2) Every violation is a separate offense and, in
4 the case of a continuing violation, each day's
5 continuance is a separate violation, but the maximum
6 penalty for any continuing violation shall not exceed
7 \$100,000.

8 (3) Civil penalties under this section shall be
9 imposed as provided in ORS 183.745.

10 (4) This section does not apply to a failure to
11 file a notice and pay a fee pursuant to ORS 59.049
12 (1), (2) or (3), nor to a failure to file a notice and
13 pay a fee pursuant to ORS 59.165 (7), nor to a failure
14 to pay a fee pursuant to ORS 59.175 (8), nor to a
15 violation of any rule adopted by the director under
16 ORS 59.049 (1), (2) or (3), 59.165 (7) or 59.175 (8).

17 Thus, in alleging liability and in imposing a civil penalty,
18 the Division's citation to ORS 59.995 can mean (1) the Division
19 intends to prove that Mr. Blackwell individually violated the
20 February 2000 Order, (2) he procured the violation of the order,
21 and/or (3) he aided or abetted another in the violation of the
22 order. A citation to ORS 59.995(1) would not have narrowed the
23 possibilities any further, and by the terms of the January 2005
24 Order and the language of ORS 59.995, Mr. Blackwell more likely
25 than not knew that the Division was seeking sanctions pursuant to
26 section (1) of ORS 59.995. Therefore, I cannot find that the
27 Division's failure to specifically cite section (1) of ORS 59.995
28 is material or that it resulted in prejudice to Mr. Blackwell.

29 Because the January 2005 Order states that BDC and Mr.
30 Blackwell "have willfully * * * violated * * * [the February
31 2000 Order]," it appears that the Division chose to prove that
32 Mr. Blackwell himself violated the order rather than proving



1 that he procured violation of the order or aided and abetted
2 another in the violation of the order. Failure to allege that
3 Mr. Blackwell aided and abetted in the violation of the order
4 could constitute a violation of ORS 183.415(2)(d)'s requirement
5 that the notice contain "[a] short and plain statement of the
6 matters asserted or charged." There are no Oregon cases that
7 discuss the necessity of alleging aiding and abetting violations
8 of the securities laws in an administrative context. There are,
9 however, several Oregon cases that discuss alleging aiding and
10 abetting violations of criminal law.

11 After extensive analysis of these cases, the Oregon Court
12 of Appeals found that in the criminal context, a defendant
13 indicted as a principal only, may be convicted on the theory
14 that he aided and abetted in the commission of a crime. *State*
15 *v. Burney*, 191 Or App 227, 236-37 (2003), rev den, 337 Or 182
16 (2004). The Court concluded that even though "a 'material
17 element' [of a crime is] 'one that the state must prove to
18 establish the crime charged' [and] that proof that varies from
19 an indictment is impermissible if it pertains to a material
20 element not pleaded," it is "nearly a universal rule * * * that
21 one who is indicted as a principal may be found guilty on
22 evidence that he or she aided and abetted the commission of the
23 crime." *Id.* at 237-38 (citations omitted). The Court noted
24 that it is a "well-settled * * * [principle] of accomplice
25 liability law [that] any defendant indicted as a principal is on
26



1 notice that he or she may be convicted on proof of being an
2 accomplice." *Id.* at 240 (citations omitted). The Court
3 rejected the defendant's argument that the state's failure to
4 provide notice "by way of specific pleading in a charging
5 instrument that he or she is at risk of criminal liability on an
6 aid and abet theory" constituted a violation of the Due Process
7 Clause of the United States Constitution. *Id.* at 239-40.

8 Considering that in the criminal context, a defendant has
9 significantly more protections than a respondent in an
10 administrative proceeding, I can find no reason that the "nearly
11 universal rule" discussed in *Burney* should not be applied to the
12 case at hand. *Id.* at 237. Accordingly, the Division's failure
13 to specifically allege that Mr. Blackwell aided and abetted BDC
14 in violation of the February 2000 Order does not preclude a
15 finding that Mr. Blackwell is subject to the sanctions of ORS
16 59.995 based upon the theory that he aided and abetted BDC in
17 violating the order. By alleging that Mr. Blackwell violated
18 the February 2000 Order and referring to ORS 59.995, the
19 Division put Mr. Blackwell on notice that he was "at risk of * *
20 * liability on an aid and abet theory." *Burney*, 191 Or App 227,
21 240.

22 In conclusion, Mr. Blackwell was BDC's agent for purposes
23 of complying with the order. Therefore, because Mr. Blackwell
24 failed to pass the NASD Series 9 (or 24) exam in violation of
25 the order, BDC violated the order. Moreover, because Mr.

26

1 Blackwell was the one required by the terms of the order to pass
2 the exam, his failure to do so also constituted the aiding and
3 abetting of BDC to violate the order.

4 **(c) Statute of Limitations**

5 The Respondents argue that the Division is barred by the
6 two-year statute of limitations found in ORS 12.110(2) from
7 taking action against them for any conduct that occurred prior
8 to January 4, 2003, including Mr. Blackwell's failure to pass
9 the Series 9 (or 24) exam.⁸ Even if the statute of limitations
10 found in ORS 12.110(2) was applicable to administrative actions,
11 it would not prohibit the Division from proceeding against BDC
12 or Mr. Blackwell for Mr. Blackwell's failure to pass the NASD
13 Series 9 (or 24) exam. This particular violation of the
14 February 2000 Order of the Director was a continuing violation.
15 The violation continued well past January 4, 2003. Therefore,
16 the statute of limitations, even if applicable, would not bar
17 the Division from taking action against the Respondents for the
18 violation. See *State v. Harelson*, 147 Or App 556, 562 (1997)
19 (continuing offense is not barred by statute of limitations).

20 ///

21 ///

22 _____

23 ⁸ ORS 12.110 states in relevant part, "(1) An action for assault, battery, false imprisonment, or for any injury to the
24 person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be
deemed to commence only from the discovery of the fraud or deceit.

25 (2) An action upon a statute for a forfeiture or penalty to the state or county shall be commenced within two
years. * * * * *"

26



1 2. Violation of February 2000 Order - Failure to Reasonably or
2 Diligently Supervise All Associated Persons of BDC (ORS
3 59.205(3) and OAR 441-205-0210)

4 Pursuant to ORS 59.205(3), the Director may by order take
5 action against a licensee if the licensee "[h]as willfully or
6 repeatedly violated or failed to comply with any provision of
7 the Oregon Securities Law, any condition or restriction imposed
8 on a license or any rule or order of the director." The
9 February 2000 Order directed BDC to cease and desist from
10 "Failing to diligently supervise the securities activities of
11 all associated persons[] pursuant to OAR 441-205-0210." (Ex A2,
12 p.14.) OAR 441-205-0210 provides,

13 (1) Every broker-dealer shall exercise diligent
14 supervision over the securities activities of all of
his associated persons.

15 (2) Every associated person of the broker-dealer shall
16 be subject to the supervision of a supervisor
designated by such broker-dealer. The supervisor may
17 be the broker-dealer in the case of a sole proprietor,
18 or a partner, officer, office manager, or any other
qualified associated person.

19 (3) As part of his responsibility under this rule,
20 every broker-dealer shall establish, maintain, and
enforce written procedures, a copy of which shall be
21 kept in each business office, which shall set forth
the procedures adopted by the broker-dealer to comply
22 with the following duties imposed by this rule, and
shall state at which business office or offices the
23 broker-dealer keeps and maintains the records required
by OAR 441-195-0010:

Division of Finance and Corporate Securities
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387





1 (a) The review and written approval by the designated
2 supervisor of the opening of each new customer
account;

3 (b) The frequent examination of all customer accounts
4 to detect and prevent irregularities or abuses,
5 including a review for churning and switching of
6 securities in customers' accounts, as well as
unsuitable recommendations and sales of unregistered
securities;

7 (c) The prompt review and written approval by the
8 designated supervisor of all securities transactions
9 by associated persons and all correspondence
pertaining to the solicitation or execution of all
securities transactions by associated persons;

10 (d) The review of back office operations, i.e., all
11 systems and procedures, including the currency and
12 accuracy of books and records, the status and causes
of "Fails to Receive" and "Fails to Deliver," net
capital, credit extensions and financial reports;

13 (e) The review of form, content, and filing of all
14 correspondence related in any way to the purchase or
15 sale or solicitation for the purchase or sale of
securities;

16 (f) The review and written approval by the designated
17 supervisor of the delegation by any customer of
18 discretionary authority with respect to his account to
19 a stated associated person or persons of the broker-
20 dealer and the prompt written approval of each
discretionary order entered on behalf of that account;
and

21 (g) The prompt review and written approval of the
22 handling of all customer complaints. As used in these
23 rules, a "Complaint" is considered to be any written
statement by a customer, or by any person acting for a
customer, which complains about the activities of the
broker-dealer or any associated person in connection
with the solicitation or execution of a transaction or
the disposition of funds of that customer.

24 (4) Every broker-dealer who has designated more than
25 one supervisor pursuant to section (2) of this rule
26 shall designate from among his partners, officers, or



1 other qualified associated persons, a person or group
2 of persons who shall periodically inspect each
3 business office of the broker-dealer to insure that
4 the written procedures are enforced.

5 As required by OAR 441-205-0210(3), BDC established and
6 maintained procedures to comply with some of the duties imposed
7 by the rule. According to BDC's compliance manual in effect
8 from 2002 to 2004, Mr. Blackwell was to review, approve, and
9 initial all outgoing correspondence; he was to review and
10 initial all trade confirmations; and he was to sign off on all
11 trade blotters. Notwithstanding the requirements imposed by
12 BDC's compliance manual, neither Ms. Kraft nor Mr. Blackwell
13 signed the May 2003 trade blotters; several of the May and June
14 2003 trade confirmations; several of the May and June 2003 trade
15 tickets; and several pieces of incoming and outgoing
16 correspondence concerning the sale, purchase, and solicitation
17 of securities dated May and June 2003.

18 Pursuant to OAR 441-205-0210(3)(c) and (e), BDC was
19 required to enforce its written procedures concerning

20 [t]he prompt review and written approval * * * of all
21 securities transactions by associated person and all
22 correspondence pertaining to the solicitation or
23 execution of all securities transactions by associated
24 persons; * * * and [t]he review of form, content, and
25 filing of all correspondence related in any way to the
26 purchase or sale or solicitation for the purchase or
27 sale of securities * * * * *.

28 BDC's failure to comply with its own compliance manual in May
29 and June 2003 by not having the trade confirmations, trade
30 blotters, and correspondence initialed is a violation of 441-

1 205-0210(3) and is a clear indication that BDC was not
2 diligently supervising the activities of all of its associated
3 persons as required by OAR 441-205-0210(1), (3), and the
4 February 2000 Order. Accordingly, BDC violated 441-205-0210(3)
5 and the February 2000 Order by failing to cease and desist from
6 not diligently supervising all of its associated salespersons as
7 required by OAR 441-205-0210.

8 **(a) Liability of Mr. Blackwell**

9 Mr. Blackwell replaced Ms. Kraft as BDC's compliance officer
10 in March of 2003. Accordingly, it was Mr. Blackwell's duty
11 pursuant to the compliance manual to ensure that BDC enforced its
12 written procedures. His failure to sign trade tickets, trade
13 blotters, and correspondence was the direct result of BDC's
14 violation of the rule and the February 2000 Order. Thus, Mr.
15 Blackwell clearly aided and abetted BDC in violating both the rule
16 and the order.

17 **(b) Willfulness of Mr. Blackwell's Conduct**

18 Mr. Blackwell did review and initial some of the trade
19 confirmations and trade tickets from May and June 2003, and he
20 provided all of these records, the signed and the unsigned, to
21 the Division's securities examiners in July 2003. Therefore, he
22 more likely than not had the access and the ability to review
23 and initial all of the trade confirmations and trade tickets.
24 At the very least, he more likely than not had the ability to
25 arrange for another supervisor to review and initial them on his
26



1 behalf. Moreover, considering his experience and position at
2 BDC, Mr. Blackwell cannot argue that he was unaware that BDC's
3 compliance manual required him to review and initial these
4 documents. Accordingly, the preponderance of the evidence
5 compels a conclusion that Mr. Blackwell's failure to enforce the
6 written procedures in BDC's compliance manual and thus, his and
7 BDC's violation of OAR 441-205-0210 and the February 2000 Order
8 were willful acts.

9 **(c) Statute of Limitations**

10 Even if the statute of limitations found in ORS 12.110(2)
11 was applicable to administrative proceedings, it would not bar
12 the Division from taking action against the Respondents for the
13 violations of OAR 441-205-0210 and the February 2000 Order
14 discussed above. The violations mentioned above occurred in May
15 and June 2003, which is within two years of the issuance of the
16 January 2005 Order.

17 **3. Failure to Reasonably Supervise BDC's Salespersons (ORS**
18 **59.205(13))**

19 Pursuant to ORS 59.205(13), the Director may by order take
20 action against a licensee if the licensee "[h]as failed,
21 reasonably to supervise the salesperson or investment adviser
22 representatives of the applicant or licensee." The Oregon
23 Securities Law does not define reasonable supervision. As noted
24 above, however, OAR 441-205-0210 contains a list of requirements
25 that BDC must follow in order to exercise diligent supervision
26



1 over its associated persons. Moreover, it would seem that a
2 basic tenet of reasonable supervision would include the
3 requirement that one follow one's own rules, policies, and
4 procedures concerning supervision. Because BDC did not comply
5 with the legal requirements of OAR 441-205-0210 or its own
6 compliance manual, it cannot be said that it reasonably
7 supervised its salespersons. Accordingly, BDC failed to
8 reasonably supervise its salespeople in violation of ORS
9 59.205(13).

10 **(a) Liability of Mr. Blackwell**

11 Mr. Blackwell replaced Ms. Kraft as BDC's compliance
12 officer in March of 2003. Accordingly, it was Mr. Blackwell's
13 duty pursuant to the compliance manual to ensure that BDC
14 reasonably supervised BDC's salespersons. His failure to sign
15 trade tickets, trade blotters, and correspondence was the direct
16 result of BDC's failure to supervise. Thus, Mr. Blackwell
17 clearly aided and abetted BDC in violating ORS 59.205(13).

18 **(b) Willfulness of Mr. Blackwell's Conduct**

19 Mr. Blackwell did review and initial some of the trade
20 confirmations and trade tickets from May and June 2003, and he
21 provided all of these records, the signed and the unsigned, to
22 the Division's field examiners in July 2003. Therefore, he
23 clearly had the access and the ability to review and initial all
24 of the trade confirmations and trade tickets. At the very
25 least, he more likely than not had the ability to arrange for
26





1 another supervisor to review and initial them on his behalf.
2 Moreover, considering his experience and position at BDC, Mr.
3 Blackwell cannot argue that he was unaware that BDC's compliance
4 manual required him to review and initial these documents.
5 Accordingly, the preponderance of the evidence compels a
6 conclusion that Mr. Blackwell's failure to enforce the written
7 procedures in BDC's compliance manual and thus his and BDC's
8 violation of ORS 59.205(13) were willful acts.

9 **(c) Statute of Limitations**

10 Even if the statute of limitations found in ORS 12.110(2)
11 was applicable to administrative proceedings, it would not bar
12 the Division from taking action against the Respondents for the
13 violation of ORS 59.205(13) discussed above. The violations
14 mentioned above occurred in May and June 2003, which is within
15 two years of the issuance of the January 2005 Order.

16 **4. Filing of Materially False Statements (ORS 59.135(4) and ORS**
17 **59.451)**

18 **(a) ORS 59.135**

19 ORS 59.135 states,

20 It is unlawful for any person, directly or indirectly,
21 in connection with the purchase or sale of any
22 security or the conduct of a securities business or
23 for any person who receives any consideration from
24 another person primarily for advising the other person
25 as to the value of securities or their purchase or
26 sale, whether through the issuance of analyses or
reports or otherwise:

(1) To employ any device, scheme or artifice to
defraud;

(2) To make any untrue statement of a material



1 fact or to omit to state a material fact necessary in
2 order to make the statements made, in the light of the
3 circumstances under which they are made, not
4 misleading;

5 (3) To engage in any act, practice or course of
6 business which operates or would operate as a fraud or
7 deceit upon any person; or

8 (4) To make or file, or cause to be made or
9 filed, to or with the Director of the Department of
10 Consumer and Business Services any statement, report
11 or document which is known to be false in any material
12 respect or matter.

13 The Division alleges that Mr. Ketterling's January 29, 2001
14 letter to the Division contained a materially false statement.
15 Mr. Ketterling's letter stated that Ms. Kraft had become BDC's
16 acting compliance officer. Setting aside the issue of whether
17 Mr. Ketterling's letter can be attributed to BDC or Mr.
18 Blackwell, the Division has failed to present sufficient
19 evidence to demonstrate that at the time the letter was sent, it
20 contained a materially false statement, chiefly that Ms. Kraft
21 was not in fact BDC's compliance officer.

22 Ms. Kraft certainly assumed many of the duties normally
23 associated with a compliance officer, and Ms. Kraft's testimony
24 that she was BDC's compliance officer is essentially
25 uncontroverted.⁹ Mr. Blackwell also performed some of the duties
26 normally associated with a compliance officer and duplicated
27 some of the duties performed by Ms. Kraft; however, the position
28 of "compliance officer" is not defined by the Oregon Securities

1 Laws. Therefore, I am unable to conclude that more likely than
2 not Ms. Kraft's duties and title of "compliance officer" did
3 not, in fact, make her BDC's compliance officer as Mr.
4 Ketterling's letter stated.

5 (b) ORS 59.451

6 (1) NASD Letter

7 ORS 59.451 provides,

8 It is unlawful for any person who is the subject of an
9 investigation under ORS 59.245 or examination under
10 ORS 59.235, directly or indirectly, to make or file or
11 cause to be made or filed with the Director of the
12 Department of Consumer and Business Services any
statement, report or document which is false in any
material respect or manner.

13 The Division alleges that Mr. Blackwell's statement to
14 Mr. Kailey that Mr. Blackwell had not yet received the results
15 of the NASD's audit of BDC was false in a material respect. The
16 Division relies on the presumption contained in OAR 137-003-
17 0520(9), which states, "[d]ocuments sent through the U.S. Postal
18 Service by regular mail are presumed to have been received by
19 the addressee, subject to evidence to the contrary." The
20 Division also relies upon the presumption contained in ORS
40.135(q) (OED Rule 311), which states, "[a] letter duly
21 directed and mailed was received in the regular course of the
22 mail."

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23
24
25 ⁹ The ALJ found that the Division did submit some hearsay statements that would tend to indicate that Ms. Kraft
26 was not BDC's compliance office or that if she was, she was extremely ineffective. However, the ALJ found that
Ms. Kraft's direct testimony that she was BDC's compliance officer to be more credible.



1 In order for these presumptions to apply, however, the
2 Division must first establish that the letters were mailed.
3 There is little doubt that the letter was sent to Mr. Blackwell
4 and that at some point he received it, because he responded to
5 the letter on August 18, 2003. There is no evidence, however,
6 to indicate whether the NASD sent the letter through the mail or
7 used some other means such as a courier, or delivery agent, like
8 UPS or Federal Express. I have found no authority that would
9 allow me to presume that the letter was sent via the mail in
10 order to apply the presumptions found in OAR 137-003-0520(9) and
11 ORS 40.135(q).

12 Even if I could apply the presumptions found in OAR 137-
13 003-0520(9) and ORS 40.135(q), the Division failed to present
14 evidence that Mr. Blackwell had actually opened or read the
15 letter, that he had not misplaced it, or if he had opened it,
16 read it, and not misplaced it, that he had not simply forgotten
17 about it. I have difficulty making this jump when there appears
18 to be no reason or motive for Mr. Blackwell to have lied about
19 whether he received the letter. These NASD letters are quite
20 routine, and it is typical for the NASD to find some sort of
21 violation after an audit. Moreover, Mr. Blackwell more likely
22 than not knew that the Division could easily contact the NASD to
23 check on the results.

24 Finally, I have difficulty applying the presumptions because
25 of the way BDC's mail was received, routed, and distributed. In
26



1 2003 and 2004, mail addressed to BDC was received in the mailroom
2 of the building BDC occupied. A mailroom employee bundled BDC's
3 mail for pick up by a BDC employee. Usually Mr. Blackwell, Ms.
4 Kraft, or a secretary would pickup BDC's mail from the mailroom.
5 The mail was then usually placed in a conference room and Mr.
6 Blackwell or Ms. Kraft (assuming neither of them picked up the
7 mail) was alerted that the mail had arrived. Sometimes a
8 secretary would take the mail directly to Ms. Kraft or Mr.
9 Blackwell. Because the mail was not always delivered directly to
10 Mr. Blackwell and because he was not always even the second person
11 to handle the mail, I am reluctant to conclude that Mr. Blackwell,
12 personally, had in fact received the NASD's June 19, 2003 letter
13 when Mr. Kailey asked him about it.

14 (2) Branch Office Inspections

15 On July 8, 2003, Mr. Albrich had to ask Mr. Blackwell twice
16 to provide the branch audit reports. When Mr. Blackwell finally
17 provided the reports, it appeared to Messrs. McCulloch, Kailey,
18 and Albrich, that the documents were written in the same ink.
19 The three men believed that Mr. Blackwell drafted the documents
20 on July 8, 2003, in response to their request for branch audit
21 reports rather than on August 10, 2001 and September 18, 2002 as
22 the documents purport.

23 What Messrs. McCulloch, Kailey, and Albrich describe in
24 their testimony is certainly suspicious, and I have no doubt
25 that the three men believe that Mr. Blackwell hastily drafted

26



1 the reports on July 8, 2003 rather than on the dates listed on
2 the reports. However, I am unable to find that Mr. Blackwell in
3 fact did as Messrs. McCulloch, Kailey, and Albrich believe. The
4 Division failed to present the original copies of the reports so
5 that I could make my own determination as to whether they were
6 created on the same day. The copies are of little assistance in
7 this regard. As such, for me to find in the Division's favor on
8 this issue, I would essentially have to substitute my judgment
9 for that of Messrs. McCulloch, Kailey, and Albrich. Not only am
10 I not willing to do this, it is entirely inappropriate.
11 Therefore, I am compelled to conclude that the Division failed
12 to establish that more likely than not, Mr. Blackwell filed
13 false statements with the Director when he submitted the two
14 reports to Messrs. McCulloch, Kailey, and Albrich.

15 **Civil Penalties and Regulatory Measures**

16 **1. Civil Penalties**

17 The Division seeks to impose a civil penalty against BDC
18 and Mr. Blackwell jointly in the amount of \$20,000.00 for
19 violation of ORS 59.205(3), and a civil penalty in the amount of
20 \$20,000.00 for violations of ORS 59.205(13) and OAR 441-205-
21 0210. The Division also seeks to impose a civil penalty of
22 \$20,000.00 against Mr. Blackwell individually for violating ORS
23 59.135(4) and ORS 59.451.

24 As noted above, ORS 59.995 provides,

25 (1) In addition to all other penalties and enforcement
26 provisions provided by law, any person who violates or



1 who procures, aids or abets in the violation of ORS
2 59.005 to 59.451, 59.660 to 59.830, 59.991 and 59.995
3 or any rule or order of the Director of the Department
4 of Consumer and Business Services shall be subject to
5 a penalty of not more than \$20,000 for every
6 violation, which shall be paid to the General Fund of
7 the State Treasury.

8 (2) Every violation is a separate offense and, in
9 the case of a continuing violation, each day's
10 continuance is a separate violation, but the maximum
11 penalty for any continuing violation shall not exceed
12 \$100,000.

13 (3) Civil penalties under this section shall be
14 imposed as provided in ORS 183.745.

15 (4) This section does not apply to a failure to
16 file a notice and pay a fee pursuant to ORS 59.049
17 (1), (2) or (3), nor to a failure to file a notice and
18 pay a fee pursuant to ORS 59.165 (7), nor to a failure
19 to pay a fee pursuant to ORS 59.175 (8), nor to a
20 violation of any rule adopted by the director under
21 ORS 59.049 (1), (2) or (3), 59.165 (7) or 59.175 (8).

22 The Division has the authority to impose the civil
23 penalties it seeks to impose against Mr. Blackwell and BDC
24 jointly. There are no provisions in the statutes or rules to
25 consider mitigating factors and no mitigating factors have been
26 offered. Moreover, considering the seriousness of the
violations, the seriousness of BDC's previous violations as
noted in the February 2000 Order and the subsequent violation of
that order as determined by the November 2000 Order, significant
civil penalties are warranted. Accordingly, Mr. Blackwell and
BDC should be assessed civil penalties in the amount of
\$20,000.00 for violation of ORS 59.205(3) and \$20,000.00 for
violation of ORS 59.205(13) and OAR 441-205-0210. Because the
Division has the authority to assess a separate \$20,000.00 civil

1 penalty against each Respondent for each violation, the Division
2 inherently has the authority to issue one \$20,000.00 civil
3 penalty for each violation that is payable jointly and severally
4 by both Respondents.

5 The Division does not have the authority to impose the
6 \$20,000.00 civil penalty it is seeking against Mr. Blackwell
7 individually for violations of ORS 59.135(4) and ORS 59.451.
8 The Division failed to establish that more likely than not Mr.
9 Blackwell violated these statutes.

10 2. Regulatory Actions Against Licenses

11 (a) BDC

12 The Division seeks to revoke BDC's license. Pursuant to
13 ORS 59.205(3), the Director may by order revoke the license of a
14 broker-dealer if the broker dealer "[h]as willfully or
15 repeatedly violated or failed to comply with any provision of
16 the Oregon Securities Law, any condition or restriction imposed
17 on a license or any rule or order of the director." As the
18 extensive discussion above demonstrates, BDC willfully violated
19 the February 2000 Order of the Director by failing to reasonably
20 and diligently supervise its associated persons and salespersons
21 and by Mr. Blackwell's failure to pass the NASD Series 9 (or 24)
22 exam. Accordingly the Division has the authority to revoke
23 BDC's license.

24 Other than BDC's contention that it did not commit the
25 conduct that was alleged, BDC has presented no evidence that a
26



1 different regulatory action is more appropriate. Considering
2 the seriousness of the violations committed, the seriousness of
3 BDC's previous violations as noted in the February 2000 Order,
4 and the subsequent violation of that order as determined by the
5 November 2000 Order, revocation of BDC's license is an
6 appropriate regulatory measure.

7 (b) Mr. Blackwell

8 (1) Restriction from Acting as Supervisor

9 OAR 441-225-0030 provides,

10 (1) If the Director makes a finding as specified in
11 ORS 59.205 or 59.215 and determines, in the public
12 interest, that the license of an applicant should be
13 conditioned or restricted, the Director may issue the
14 license:

15 (a) Under the condition that the licensee be subject
16 to heightened supervision by the employing firm for a
17 specified period of time;

18 (b) Under the condition that the licensee retake and
19 pass a specified competency examination within a
20 specified period of time;

21 (c) Limiting the licensee to conducting business in a
22 specified area of the industry;

23 (d) Restricting the licensee from conducting business
24 in a specified area of the industry; or

25 (e) Restricting the licensee from acting as a
26 supervisor for salespersons or investment adviser
representatives conducting business in Oregon.

(2) If the Director makes a finding as specified in
ORS 59.205 or 59.215 and determines, in the public
interest, that the license of a licensee should be
conditioned or restricted, the Director may issue an
order modifying the license:

Division of Finance and Corporate Securities
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone: (503) 378-4387





1 (a) To impose a condition that the licensee is subject
2 to heightened supervision by the employing firm for a
specified period of time;

3 (b) To impose a condition that the licensee retake and
4 pass a specified competency examination within a
specified period of time;

5 (c) To limit the licensee to conducting business in a
6 specified area of the industry;

7 (d) To restrict the licensee from conducting business
in a specified area of the industry; or

8 (e) To restrict the licensee from acting as a
9 supervisor for salespersons or investment adviser
representatives conducting business in Oregon.

10 Mr. Blackwell was ineffective as a supervisor. He violated
11 the Oregon Securities Laws and the rules of his own company by
12 failing to adhere to BDC's compliance manual. Moreover, Mr.
13 Blackwell's failure to reasonably and diligently supervise BDC's
14 salespersons and his failure to comply with the February 2000
15 Order of the Director demonstrate that it is in the best
16 interests of the public that Mr. Blackwell not serve as a
17 supervisor of salespersons or investment advisor representatives
18 in the State of Oregon. Therefore, it is appropriate for the
19 Director to issue an order restricting Mr. Blackwell's license
20 so that he is prohibited from acting as a securities supervisor
for a period of five years.

21 **(2) Heightened Supervision**

22 OAR 441-225-0030 states in relevant part,

23 (2) If the Director makes a finding as specified in
24 ORS 59.205 or 59.215 and determines, in the public
25 interest, that the license of a licensee should be
26 conditioned or restricted, the Director may issue an
order modifying the license:



1 (a) To impose a condition that the licensee is subject
2 to heightened supervision by the employing firm for a
3 specified period of time;
4 *****

5 Although Mr. Blackwell willfully violated provisions of ORS
6 59.205, Mr. Blackwell committed these violations in his capacity
7 as a supervisor not as a salesperson. Moreover, the violations
8 pertained specifically to his duties as a supervisor.
9 Therefore, I do not believe that the Division has established
10 that it is in the public's interest to require that Mr.
11 Blackwell be subjected to heightened supervision in addition to
12 prohibiting him from supervising salespersons and investment
13 advisors.

14 If Mr. Blackwell's eventual employer follows the Oregon
15 Securities Laws' requirements regarding supervision (and it must
16 be presumed that they will; see ORS 40.135(m) and (x)), Mr.
17 Blackwell should be adequately supervised.¹⁰ This type of
18 supervision and the restriction of Mr. Blackwell's ability to
19 supervise should be sufficient to ensure future compliance with
20 the Oregon Securities Laws. Accordingly, it is not appropriate
21 for the Division to condition Mr. Blackwell's salesperson's
22 license to require heightened supervision.

23 (3) Suspension of Mr. Blackwell's Salesperson's License

24 Pursuant to ORS 59.205(3), the Director may by order
25 suspend the license of a salesperson if the salesperson "[h]as
26



1 willfully or repeatedly violated or failed to comply with any
2 provision of the Oregon Securities Law, any condition or
3 restriction imposed on a license or any rule or order of the
4 director." As the extensive discussion above demonstrates, Mr.
5 Blackwell willfully violated the February 2000 Order of the
6 Director by failing to reasonably and diligently supervise BDC's
7 associated persons and salespersons and by failing to pass the
8 NASD Series 9 (or 24) exam. Accordingly the Division has the
9 authority to suspend Mr. Blackwell's salesperson's license.

10 As noted above, Mr. Blackwell violated the Oregon
11 Securities Laws in his capacity as a supervisor. Therefore, it
12 would be appropriate to take action against Mr. Blackwell's
13 "supervisor's" license. The State of Oregon, however, does not
14 specifically license supervisors. Supervisors are licensed only
15 as general securities salespersons. Therefore, a suspension of
16 Mr. Blackwell's salesperson's license is appropriate even though
17 his violations occurred as a result of his supervisory
18 activities.

19 At first glance, this might appear contradictory to my
20 conclusion that Mr. Blackwell's salesperson's license should not
21 be subject to heightened scrutiny. However, this is not the
22 case. As discussed above, the prohibition against Mr. Blackwell

23

24

25 ¹⁰ ORS 40.135 states in relevant part, "(1) The following are presumptions: ***** (m) The ordinary course of
26 business has been followed. ***** (x) The law has been obeyed. *****"

1 supervising others appropriately addresses the violation and
2 adequately protects the public.

3 Suspending Mr. Blackwell's salesperson license, also
4 addresses the violation, because Mr. Blackwell was a supervisor
5 only by virtue of his salesperson's license. Accordingly,
6 suspending that license is an appropriate response to violations
7 committed as a supervisor. Subjecting that license to
8 heightened scrutiny after Mr. Blackwell has been prohibited from
9 being a supervisor, however, does nothing to further address the
10 violation or protect the public from acts Mr. Blackwell
11 committed or might commit as a supervisor.

12 Other than Mr. Blackwell's contention that he did not
13 commit the conduct that was alleged, Mr. Blackwell has failed to
14 present mitigating evidence to support the imposition of a
15 lesser action. Accordingly, considering the seriousness of the
16 violation, it is appropriate for the Division to issue an order
17 suspending Mr. Blackwell's license for 90 days.

18 **3. Cease and Desist**

19 Pursuant to ORS 59.245(4), the Director has the
20 authority to order BDC and Mr. Blackwell to cease and
21 desist from violations of the Oregon Securities Laws if the
22 Director has reason to believe that they have violated the
23 same.¹¹ Therefore, it is appropriate for the Director to

24 _____

25 ¹¹ ORS 59.245 states in its entirety: "The Director of the Department of Consumer and Business Services: (1) May
26 make such public or private investigations within or outside this state as the director deems necessary to determine



1 order both Mr. Blackwell and BDC to cease and desist from
2 (1) willfully or repeatedly violating or failing to comply
3 with an order of the Director; (2) failing to reasonably
4 and diligently supervise the salespersons and all
5 associated persons of BDC; (3) violating any provision of
6 the Oregon Securities Law, including ORS Chapter 59 and OAR
7 Chapter 441; and (4) filing or causing to be made or filed
8 with the Director any statement, report, or document which
9 is false in any material respect or manner.¹²

10 ORDER

11 BASED ON THE FINDINGS OF FACT AND CONCLUSIONS OF LAW STATED

12 ABOVE, THE DIRECTOR ORDERS:

13 (1) A civil penalty of \$20,000.00 is hereby **ASSESSED**
14 against the Respondents payable jointly and severally for
15 violations of ORS 59.205(3);

16 ///

17 ///

18 _____
19 whether a person has violated or is about to violate any provision of the Oregon Securities Law or any rule or order
20 of the director, or to aid in the enforcement of the Oregon Securities Law or in the formulation of rules and forms
thereunder;

21 (2) May require or permit a person to file a statement in writing, under oath or otherwise as the director
determines, as to all the facts and circumstances concerning the matter to be investigated;

22 (3) May publish information concerning any violation of the Oregon Securities Law or any rule or order of the
director; and

23 (4) If the director has reason to believe that any person has engaged, is engaging or is about to engage in any
violation of the Oregon Securities Law, the director may issue an order, subject to ORS 59.295, directed to the
person to cease and desist from the violation or threatened violation."

24 ¹² The ALJ found that although the Division failed to establish by a preponderance of the evidence that Mr.
25 Blackwell and BDC filed or made a false statement with the Director, the statute requires only that the Director have
reason to believe that such a false statement was filed or made. Having reason to believe is a far lower standard than
by a preponderance of the evidence. The suspicious nature of the two branch inspection reports provided during the



1 (2) A civil penalty of \$20,000.00 is hereby **ASSESSED**
2 against the Respondents payable jointly and severally for
3 violations of ORS 59.205(13) and OAR 441-225-0210;

4 (3) The broker-dealer license of BDC is hereby **REVOKED**,
5 effective the date of service of this Final Order;

6 (4) For a period of five years, the license of Mr.
7 Blackwell is hereby **RESTRICTED**, effective the date of service of
8 this Final Order such that Mr. Blackwell is prohibited from
9 acting as a supervisor for salespersons or investment adviser
10 representatives conducting business in Oregon;

11 (5) The salesperson's license of Mr. Blackwell is hereby
12 **SUSPENDED** for 90 days, effective the date of service of this
13 Final Order; and

14 (6) The Respondents are hereby **ORDERED** to cease and desist
15 from: (a) Willfully or repeatedly violating or failing to
16 comply with an order of the Director; (b) Failing to reasonably
17 and diligently supervise the salespersons and all associated
18 persons of the broker-dealer; (c) Filing or causing to be made
19 or filed with the Director any statement, report or document
20 which is false in any material respect or manner; and (d)

21 ///

22 ///

23 ///

24


25 Division's field audit of BDC clearly gives the Director reason to believe that Mr. Blackwell and BDC made or filed
26 a false statement with the Director.

In the Matter of Blackwell Donaldson & Co. and Joseph M. Blackwell
FINAL ORDER - PAGE 65 of 66



1 Violating any provision of the Oregon Securities Law, including
2 ORS Chapter 59 and OAR Chapter 441.

3
4 Dated this 29th day of November, 2005.

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6 
7 CORY STREISINGER, Director
8 Department of Consumer and Business Services

9 Date of Service: 11/30/05

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NOTICE OF REVIEW AND APPEAL RIGHTS

NOTICE: You are entitled to judicial review of this Order by the Oregon Court of Appeals pursuant to the provisions of ORS 183.480 and 183.482. Judicial review may be obtained by filing with the court a petition for review within 60 days from the service of this Order. If you file a petition, you are requested to also send a copy of the Division of Finance and Corporate Securities, Enforcement Section.

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