

Utah Division of Securities Commission

Meeting Minutes

December 3, 2015

Division of Securities Staff Present

LeeAnn Clark, Commission Secretary
Dave Hermansen, Enforcement Director
Kenneth Barton, Compliance Director
Benjamin Johnson, Licensing & Registration Director
Dee Johnson, Investor Education Director
Karen McMullin, Investor Education Coordinator
Charles Lyons, Securities Analyst
Brooke Winters, Securities Analyst
KristiLynn Wilkinson, Securities Investigator
Matt Edwards, Securities Investigator
Taylor Kauffman, Securities Investigator
Andreo Micic, Securities Examiner
Nathan Summers, Securities Examiner
Richard Jaramillo, Securities Examiner
Bryan Cowley, Securities Examiner
Nadene Adams, Administrative Assistant

Other State of Utah Employees:

Gregory Soderberg, Administrative Law Judge, Department of Commerce
Tom Melton, Assistant Attorney General

Commissioners Present

Erik Christiansen, Parsons Behle & Latimer
Lyle White, Fidelity Investments
Gary Cornia, Brigham Young University
David Russon, Investment Management Consultants
Brent Baker, Clyde, Snow & Sessions

Public Present:

Michael Petersen

Minutes: At 9:00 am the meeting was called to order by Commissioner **Erik Christiansen**. Commissioner **Brent Baker** made the motion to approve the minutes from the August 27, 2015 Commission meeting and Commissioner **Lyle White** seconded the motion and the motion was approved unanimously.

Director's Report:

Director Woodwell was not in attendance at the meeting due to illness. Director Woodwell asked Dave Hermansen and Chip Lyons to address the Commission regarding the director's report. Mr. Hermansen introduced Gregory Soderberg to the Commission. He will assume the position as the new Department of Commerce Administrative Law Judge, replacing Ms. Jennie Jonsson. Mr. Hermansen also briefed the Commission regarding personnel changes in the Division. Investigator Adam Sweet is no longer with the Division; he has obtained another

position at the Utah Legislature as a legislative policy analyst. The Division is currently in the process of hiring a new investigator to replace Mr. Sweet. Chip Lyons addressed the Commission regarding legislation that the Division hopes to pass during the 2016 General Session. Mr. Lyons reported that Representative Rich Cunningham has agreed to sponsor the Division's proposed bill. This legislation is in draft form and is currently with legislative research. Below is a summary.

- **1st item:** To recommend expanding the remedies the Commission may order in an administrative action to include disgorgement, restitution or rescission. These are remedies that the Division can currently obtain by filing a civil action in district court. The Division will often give offsets against a fine for individual respondents who make disgorgement or restitution payments in our cases. This legislation will explicitly give the Commission the power to order these remedies.
- **2nd item:** To create an administrative statute of limitation of ten years. The Commission members have had to rule on several motions over the last few years challenging the Division's current stance that there is no administrative statute of limitations. The draft language is based on a similar Department of Real Estate administrative statute of limitation.
- **3rd item:** To make securities fraud a continuing offense. This legislation was prompted by a criminal case that was filed by the Utah Attorney General's Office several years ago (State v. Taylor). The case involved a Ponzi scheme that went on for some time and where the defendant sent out false statements showing profits to investors. The Division and the Attorney General's office argued that the five-year criminal statute of limitations should run from the last act in furtherance of the scheme (such as the fabricated statements showing profits). The Utah Supreme Court essentially ruled that the statute of limitations begins to run from the time that the offer of sale of the security is complete, regardless of whether or not there is ongoing fraud after the offer or sale. The Division's proposed legislation is based on other states that have defined securities fraud as a continuing offense. The Utah Attorney General's office has also reviewed and approved the proposed legislation. Commissioner Christiansen expressed support for making securities fraud a continuing offense.
- **4th item:** The Division currently has a rule that provides for factors to be considered in determining the amount of and administrative fine. The Division plans to codify that rule and include it as statutory language in the Securities Act. The same factors would also be used for a judge in determining the amount of a fine in a civil case for securities violations. The proposed legislation also adds two new factors to be considered when determining the amount of a civil or administrative fine:
 - whether or not there was undue influence (affinity fraud) used by the person violating the Securities Act; and
 - whether or not the conduct involves a vulnerable adult.
- **5th item:** NASAA is currently working on model rule addressing continuing education requirements for investment advisor representatives. The Division's proposed legislation would give the Division rulemaking authority to establish a continuing education requirement for investment advisor representatives in Utah.

Crowdfunding Legislation. Director Benjamin Johnson briefly discussed the status of crowdfunding legislation. There is bill file opened on a proposed state-level crowdfunding law. The SEC has recently finalized its own crowdfunding rules. The Division's strategic position during the session is to allow the SEC crowdfunding rules to gain traction in the marketplace and then evaluate the need for a state-level crowdfunding law at a future time.

Enforcement Section Report: Director Dave Hermansen reported the number of incoming complaints is still very low. Mr. Hermansen mentioned to the Commission a case which is a joint investigation between Enforcement and the Utah FBI office. KristiLyn Wilkinson is the investigator. The case involves Lori Anderson who is a Logan, Utah resident. It has been uncovered that this respondent has misused 1.7 million dollars. Criminal charges have been filed. In the criminal arena, the Enforcement section has several trials scheduled in January 2016.

Compliance Section Report: Director Ken Barton updated the Commission regarding the following: Audit Statistics YTD 2015- Compliance has conducted a total 55 audits. Twenty-four audits are for-cause audits triggered by investor complaints, Thirty-one routine audits of both investment advisor firms and broker-dealer branch offices were conducted. A bright spot in these numbers was that routine audits doubled in 2015, mainly a function of operating with fully staffed Compliance and Licensing Sections. The Section has six administrative actions in progress. Two actions are on today's agenda for approval of Stipulation and Consent Orders, two actions have Orders to Show Cause documents ready to be filed with respondents, and two administrative actions (Dee Randall and Dean Hamilton) are stayed pending criminal actions. The Section has referred five cases to the Utah Attorney General's office for criminal prosecution. On September 21, 2015, in 2nd District Court, Dean Hamilton, an agent in the Dee Randall case, was charged with ten criminal counts, including securities fraud, unlicensed activity, and pattern of unlawful activity. No preliminary hearing date has been set. In 3rd District Court, Clark Gardner faces 26 felony counts of securities fraud, theft, selling unregistered securities, and pattern of unlawful activity. A preliminary hearing for Gardner is scheduled for December 22, 2015. In 2nd District Court, charges have been filed against George Marshall and Michael Aitken. Felony counts for both of these individuals include securities fraud, unregistered agent activity, selling unregistered securities and pattern of unlawful activity. A preliminary hearing for both Marshall and Aitken is scheduled for December 29, 2015. In 3rd District Court, the Scott Stewart case is set for trial in March 2016; Stewart is facing five felony counts, including securities fraud, selling unregistered securities, unregistered agent activity, and pattern of unlawful activity.

Registration and Licensing: Director Benjamin Johnson directed the Commission members to "Tab 3, Regulation A Notice Filing Rule proposal." The SEC has finalized the Regulation A+ rules that govern both the Tier 1 and Tier 2 Reg A offerings. The SEC is allowing states to collect notice filings and fees on the Tier 2 offerings, which are otherwise preempted from state regulation, similar to a Reg D, Rule 506 offering. NASAA has developed a uniform filing form for these types of offerings. The Division's goal in drafting these provisions is to make these filings as similar as possible to the Reg D, Rule 506 notice filings. Commissioner **Erik Christiansen** asked for a motion to approve Rule R164-15-3 as drafted. Commissioner **Gary Cornia** made the motion to approve and Commissioner **Dave Russon** seconded the motion and the motion was approved unanimously.

Investor Education: Karen McMullin provided an update on Investor Education.

Event Update - The Division's last IE event for 2015 was held on December 2 when Heidie George spoke to an undergraduate Family Finance class of about 500 students at Utah State University. This finishes our scheduled events for 2015 and brings our **total to 81 events with an estimated audience total of 17,793.**

Stock Market Game Update: The Fall Semester Stock Market Game participation includes 57 advisors + 934 teams = Total Participants 2,520. The 10 week game ends on Dec. 18, 2015.

Website Update - Online activity for the Retirement Toolbox and Stock Market Game shows a consistent number of over 200 hits per month on each page.

Exact Number of Hits –

- Retirement Toolbox - Apr-Nov -1,308
- Stock Market Game - Jan-Nov - 1,899

In October, the Division partnered with the Commodity Futures Trading Commission on two very successful events.

- **Event One** – For two weeks (Oct. 3-15) the Division and the CFTC co-sponsored a booth at the Huntsman World Senior Games Athlete Expo held at the Dixie Center. During this time, approximately 1,700 expo bags were distributed to senior athletes. The bags contained a variety of brochures promoting the CFTC “SmartCheck” program along with Division brochures to help protect seniors and their money. With the Division’s iPad kiosk, we were able to provide BrokerCheck reports to senior athletes and discuss the other aspects of the SmartCheck initiative. The athletes came from all over the world, but the majority who visited our booth were from the United States and Canada. In addition, AARP supplied 1,000 copies of the “Real Possibilities” DVD for distribution to athletes from our booth. The DVD features Keith Woodwell, Director of Utah Division of Securities, speaking about avoiding investment fraud and Dr. Kevin Duff, Associate Professor, U of U Dept. of Neurology, encouraging activities which promote brain health in seniors.
- **Event Two** – During this same time, through a CFTC media campaign, a mailed invitation to AARP members, and a Division email blast, approximately 152 seniors responded to the invitation to a “Scam Jam” held at Thanksgiving Point’s Museum of Ancient Life on Oct. 15. Those in attendance received a customized bag containing fraud prevention material and a light meal was provided. Speakers at the event included the Division’s investor protection message, and consumer fraud warnings from the Division of Consumer Protection. Also included on the speaking agenda were AARP, CFTC and Securities and Exchange Commission. Web traffic information received after the event from CFTC as a result of placing online ads with the Herald, showed a sharp uptick on Oct. 13th of 1,164 sessions (times people clicked on the ad over to the SmartCheck.gov event post). The bulk of the expenses for these two events were covered by CFTC.

Success Story – A retired accountant attended the “Scam Jam” in October. During the event, she recognized some of the red flags in her own recent retirement decisions. She contacted the Division to schedule an individual meeting regarding her recent annuity purchase. During the meeting at the Division offices, she provided more information about the annuity sales tactics, the free lunch invitation and gave the name of an agent, who is well known to the Division. Division staff provided her with the 27-page broker check report on this adviser and explained the specifics of her annuity purchase, which encumbered the bulk of her savings. A review of her annuity contract allowed the Division to show her how to calculate her future monthly income payments based on the total value of the annuity. She stated that this fell far short of what her income needs would be and what she had been told by the agent. In addition, the growth had, in the two years since the annuity purchase, used approximately ½ of her earnings for rider charges. She shared that during the “free lunch”, the adviser included the word “guarantee” often, and in the accountant’s mind, the sale was made final when the adviser mentioned he was a bishop in an LDS ward. Toward the end of our meeting at the Division, the accountant became more disheartened about her purchase as we shared additional Investor Education material with her, particularly about annuity sales. We suggested she file a complaint, not just with the Division, but also with the Department of Insurance, which she did immediately. We hope to be able to help her through her filing this complaint.

Education and Training Fund Report: Director Benjamin Johnson reported to the Commission regarding the current Education and Training Fund. The expenditures listed are from the end of July through the end of October, 2015. We do not have any grant requests in today's meeting. However, there are a couple of items that need to be reviewed. Mr. Johnson specifically referenced column three, the investigation and litigation expenses. A couple of complex cases (Dee Randall and Shane Baldwin) have caused a considerable drain on the first four categories due to the expense of hiring expert forensic accountants and securities expert witnesses. Upon further discussion with Director Woodwell and Executive Director Giani it was determined that the core Education and Training Fund needs to be protected. This will allow us to continue our investigative activities. Therefore, it was decided that expenses which are non-investigation/litigation (such as office administration expenses) will be paid from the General Commerce Service Fund rather than the Education and Training Fund. Director Woodwell will have a report at the next Commission meeting. Commissioner Christiansen recommended that the Division explore, with the legislature, a separate funding mechanism for complex case litigation costs.

Commissioner **Lyle White** made the motion to approve the changes to the Education and Training Fund and Commissioner **Dave Russon** seconded the motion and the motion was approved unanimously.

Update from Asst. Attorney General Tom Melton: There have been some recent personnel changes in the Attorney General's Office. Asst. Attorney General Melton informed the Commission that he has been promoted to a section manager position and will oversee the Civil Enforcement Attorneys for the Department of Commerce. Two assistant attorney general positions dedicated to representing the Division of Securities have been posted and are now closed. The A.G.'s Office hopes to have these two positions filled by the end of the year. Mr. Melton also provided a brief update on the criminal case against Shane Baldwin. December 18, 2015 is the preliminary trial for the Shane Baldwin case. The Attorney General's Office investigation and forensic teams have determined that Mr. Baldwin has embezzled from investors around \$51.4 million dollars. A settlement is pending.

Consideration and Approval of Proposed Orders:

David S. Scott; William Clayton Cox; and Corporate Funding & Investments, LLC: SD 15-0038; SD -15-0040: Recommended Order on Motion for Default as to David S. Scott and Corporate Funding & Investments, LLC

Tom Melton reported that on September 9, 2015, Respondent William Clayton Cox moved for a stay of the proceeding against him, pending the outcome of a criminal proceeding. However, the stay did not stay the proceedings as to Respondents David S. Scott and Corporate Funding & Investments, LLC. On October 7, 2015 an initial hearing was held, and Scott and Corporate Funding failed to appear. Because they failed to file a Response it is recommended that a default judgement against the Respondents be entered. In the recommended default order, Respondents are ordered to pay fine of \$83,500 to the Division, subject to offset during the first 30 days following the date of this Order on a dollar-to-dollar basis for any restitution paid to investors. If Respondents fail to provide proof of restitution payments to investors within the 30-day period following the date of this Order, the full \$83,500 becomes due immediately and is subject to collection. The recommended order also includes a cease and desist order and a permanently securities bar against the Respondents.

Commissioner **Dave Russon** made the motion to approve the proposed Order on Default. Commissioner **Gary Cornia** seconded the motion and the motion was approved unanimously.

Veronica M. Valenzuela and Wealth Makers of Utah, LLC: SD-15-0028, SD-15-0030: Stipulation and Consent Order

KristiLyn Wilkinson, Enforcement Investigator, reported that on or about May 28, 2015, the Division initiated an administrative action against Respondents, by issuing an Order to Show Cause and Notice of Agency Action. Respondents agreed to admit the Division's findings of the fact and conclusions of the law and enter into a Stipulation and Consent Order in settlement of the Division's action. The Stipulation imposes a joint and several fine of \$2,500 against Respondents that shall be paid directly to the Division at the time of entry of this Order and imposes a permanent securities bar against the Respondents. Commissioner White asked about restitution for the investors. Asst. Attorney General Melton said that the Respondent is indigent and cannot make restitution payments to the investors.

Commissioner **Dave Russon** made the motion to approve the proposed Order on Default. Commissioner **Lyle White** seconded the motion and the motion was approved unanimously.

LPL Financial LLC, CRD#6413: SD-15-0064: Stipulation and Consent Order

Director Ken Barton reported to the Commission that the North American Securities Administrators Association (NASAA) and LPL Financial, LLC entered into a settlement in connection with a multi-state investigation. The investigation uncovered sales practice violations and subsequent LPL firm supervision violations related to the marketing of non-traded Real Estate Investment Trusts ("REITs") investment. During the investigation period from January 1, 2008 and December 31, 2013, LPL processed over 2,000 non-traded REIT transactions in various jurisdictions where the sale amount violated one or more of the following standards: 1) The prospectus for the non-traded REITs concentration amounts, 2) state concentration limit regulations for alternative investments (Note: The Utah Securities Act does not have a defined concentration limit), and/or 3) LPL's firm policies concerning "Alternative Investment Guidelines". Following a Massachusetts Division of Securities investigation and administrative action which uncovered the issue, LPL began an internal review of non-traded REIT transactions in other states. In calendar year 2013, LPL began contacting states to notify regulators of non-traded REIT transactions that exceeded defined concentration standards. This prompted NASAA's multi-state exam and investigation. The investigation determined LPL violated FINRA Rules 3010(a) and 3010 with regard to LPL implementing and enforcing the firm's working supervisory procedures related to non-traded REIT sales. As a result LPL violated section 61-1-6 (2)(a)(ii)(J) of Utah Uniform Securities Act. The sanctions negotiated in the Order include: LPL will cease and desist from further violations, LPL shall offer to remediate losses to Utah non-traded REIT investors per a NASAA agreed upon process with ongoing NASAA and Division oversight, LPL will made adjustments to its supervisory and surveillance systems to prevent future violations, and LPL will pay the Division an \$18,293.16 fine which is Utah's portion of the NASAA global settlement amount. LPL's total fine to NASAA and the States is \$1,425,000. Stipulation and Consent Orders under NASAA Global settlements use agreed upon settlement language. There were 18 Utah investors impacted. Investments in Non-Traded REITS ranged from \$10,000 to \$350,000; Concentration percentages for the Utah investors of non-traded RIETs ranged from \$2.8% to 25%, with an average of 13.5%. Nine of the 18 investors met the definition of an accredited investor. Only two investors with a concentration percentage above 13.5% average were non-accredited. Fortunately, impact to Utah investors was small; hence, Utah received a small percentage of the overall fine amount. Looking at the LPL agents, there was only one LPL agent that had multiple clients impacted in Utah. The Division has conducted an audit of that agent's office looking at the non-traded REIT issues and other office operations. That audit is closed with no action to be taken against the agent.

Commissioner **Gary Cornia** made the motion to approve the proposed Order on Default. Commissioner **Dave Russon** seconded the motion and the motion was approved unanimously.

Jesse S. Heaton, CRD#5347122; Peak Financial Group, LLC; & Mark Bench SD-15-0042, SD-15-0043, SD-15-0045: Stipulation and Consent Order

Richard Jaramillo, Securities Examiner, reported that the Division had taken a previous administrative action against the Respondents in 2010. Based upon the Respondents' representations to the Division that corporation assets could be liquidated and generate sufficient funds to repay investors, the Division agreed to resolve the 2010 case through a Stipulation and Consent Order (2010 Order) without a fine against Respondents. Because Respondents were ultimately unable to liquidate enough of the assets to repay investors, the Division initiated a new administrative action against Respondents on August 31, 2015. The Division and Respondents have now agreed to a proposed Stipulation and Consent Order (2015 Order). As part of the Stipulation, Respondents admit to the Division Findings of Fact and Conclusions of the Law and to pay fines as follows: Heaton/Peak, jointly and severally: \$2,500; Bench/Peak, jointly and severally: \$2,500. If Respondents materially violate any term of this order, after notice and an opportunity to be heard before administrative judge as to assure sole violation, Respondents' fines shall be \$20,000 each and become due immediately. Respondents also agree to a cease and desist order and to a permanent securities bar. Commissioner **Dave Russon** made the motion to approve the proposed Order on Default. Commissioner **Brent Baker** seconded the motion and the motion was approved unanimously.

Evidentiary Hearing: Charles Scot Roundtree; High Fly'n Zip Lines, LLC; SD-15-0026, SD-15-0027

Respondent Charles Scot Roundtree/High Fly'n Zip Lines failed to appear for the scheduled hearing; therefore, the ALJ will prepare a recommended default order for the January 2016 Commission Meeting.

Commissioner **Gary Cornia** made the motion to adjourn the meeting. Commissioner **Dave Russon** seconded the motion and the meeting was adjourned at 10:15 am.

Approved:  _____
Erik Christiansen, Chairman

Date: 4/28/16