

STATE OF NEBRASKA
Department of Banking & Finance

IN THE MATTER OF:

Securities America, Inc.
12325 Port Grace Boulevard
La Vista, Nebraska

CRD No. 10205

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FINDINGS OF FACT
CONCLUSIONS OF LAW
AND
CONSENT ORDER

THIS MATTER comes before the Nebraska Department of Banking and Finance (“Department”), by and through its Director, pursuant to its authority under the Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 to 8-1123 (Reissue 2012; Cum. Supp. 2014; Supp. 2015; LB 771, 2016) (“Act”). Pursuant to Neb. Rev. Stat. § 8-1115 (Reissue 2012), the Department has investigated the acts of Securities America, Inc., 12325 Port Grace Boulevard, La Vista, Nebraska (“SAI”). As a result of such investigation, and being fully advised and informed in the matter, the Director and SAI enter into the following Findings of Fact, Conclusions of Law and Consent Order (“Order”).

FINDINGS OF FACT

1. SAI is a broker-dealer registered with the Department since July 11, 1989. In addition, SAI is registered with the Financial Industry Regulatory Authority (“FINRA”) and several other states.

2. Thomas W. Mayo, CRD No. 2639261 (“Mayo”) was registered as a broker-dealer agent of SAI, from November 4, 1997 to October 7, 2011.

Non-traditional Exchange Traded Funds

3. “Exchange Traded Funds” (“ETF” or “ETFs”) are typically registered unit investment trusts or open-end investment companies whose shares represent an interest in a portfolio of securities that track an underlying benchmark or index. Shares of ETFs typically are listed on a national securities exchange and trade throughout the day at prices established by the market.

4. Leveraged ETFs seek to deliver multiples of the performance of the index or benchmark they track. Some ETFs are “inverse” or “short” funds, meaning that they seek to deliver the opposite of the performance of the index or benchmark they track (“Non-traditional ETFs”). Some funds are both inverse and leveraged, meaning that they seek to achieve a return that is a multiple of the inverse performance of the underlying index or benchmark. To accomplish their objectives, Non-traditional ETFs use swaps, futures contracts and other derivative instruments.

5. In June 2009, the Financial Industries Regulatory Authority (“FINRA”) issued FINRA Regulatory Notice 09-31 (“ETF Guidance”) concerning Non-traditional ETFs highlighting multiple concerns with such products. Specifically, the ETF Guidance noted that

Most leveraged and inverse ETFs “reset” daily, meaning that they are designed to achieve their stated objectives on a daily basis. Due to the effect of compounding, their performance over longer periods of time can differ significantly from the performance (or inverse of the performance) of their underlying index or benchmark during the same period of time. . . This effect can be magnified in volatile markets.

6. Because of these risks and the inherent complexity of the products, the ETF Guidance further advised broker-dealers that Non-traditional ETFs “are typically not suitable for retail investors who plan to hold them for more than one trading session, particularly in volatile markets.” The ETF Guidance further emphasized the broker-dealer’s obligation to determine the

suitability of the investment for a particular customer, and the firm's obligation to properly train and supervise its registered representatives related to the sale of Non-traditional ETFs.

Proshares Ultrashort S&P 500

7. Proshares Ultrashort S&P 500 ("Proshares") is a Non-traditional ETF which seeks daily investment results, before fees and expenses, that correspond to two times the inverse (-2x) of the daily performance of the S&P 500.

8. Prior to the ETF Guidance, Proshares' summary prospectus ("Prospectus") dated October 1, 2008, noted that "The Funds do not seek to achieve their stated investment objective over a period of time greater than one day."

9. By October 2009, Proshares had amended the Prospectus to track the issues noted in the ETF Guidance. The first page of Proshares' Prospectus dated October 1, 2009, and each summary prospectus issued thereafter, stated as follows:

ProShares UltraShort S&P500 (the "Fund") seeks investment results for a single day only, not for longer periods. . . The Fund is different from most exchange-traded funds in that it seeks inverse leveraged returns and only on a daily basis. The Fund also is riskier than similarly benchmarked exchange-traded funds that do not use leverage. Accordingly, the Fund may not be suitable for all investors and should be used only by knowledgeable investors who understand the potential consequences of seeking daily inverse leveraged investment results. Shareholders should actively monitor their investments. . . The Fund seeks daily investment results, before fees and expenses, that correspond to triple (300%) the inverse (opposite) of the daily performance of the Index. The Fund does not seek to achieve its stated investment objective over a period of time greater than one day. (emphasis in original)

HH's Purchase of Proshares

10. References in this Order to customers of SAI and Mayo shall be by way of initials in order to protect the privacy of such customers. SAI should know the identity of these customers.

If SAI is unable to ascertain the identity of these customers, the Department will provide a list of the customers upon receipt of a written request.

11. On February 2, 2015, the Department received a complaint from HH regarding Mayo and SAI. HH's complaint involved the purchase and holding of shares of Proshares.

12. On September 16, 2008, HH and his then-spouse JH, opened a Financial Advisory Program Account ("FAP") with Securities America Advisors, Inc., an affiliated federal covered adviser, and SAI. The FAP granted Mayo limited discretionary trading authority with respect to the sale and purchase of securities in HH's and JH's account.

13. According to the FAP, HH and JH were seeking "aggressive" risk exposure, but not "speculative" risk exposure. In addition, HH and JH indicated in the FAP that their investment knowledge was "Limited."

14. Beginning in September 2008, Mayo began recommending that HH and JH purchase Non-traditional ETFs. From September 2008 through May 2009, HH and JH purchased and sold three Non-traditional ETFs.

15. On June 11, 2009, HH and JH purchased 1,000 shares of Proshares for \$54,498.00, based upon the recommendation of Mayo. Unlike the prior Non-traditional ETF's that HH had purchased, Proshares was not liquidated within a few weeks after purchase.

16. According to HH, he contacted Mayo in 2010 and expressed concerns about the losses associated with his Proshares holding. According to HH, Mayo recommended that he continue to hold Proshares because Mayo believed that the market was going to take another downturn. HH also claims that Mayo told him that he was holding Proshares in his personal accounts.

17. Upon receipt of HH's complaint, the Department contacted SAI for information concerning the account on February 4, 2015; March 27, 2015; May 19, 2015; September 8, 2015;

December 10, 2015; and January 27, 2016. SAI provided responses to each of the Department's inquiries.

Mayo's Proshares Holdings

18. As part of its investigation into HH's complaint, the Department obtained copies of Mayo's SAI personal account statements. According to the statements, Mayo had signatory authority for four different accounts with SAI ("personal accounts").

19. On June 11, 2009, the same day that HH purchased Proshares, Mayo purchased 2,500 shares of Proshares for \$129,039.50 for his personal accounts. After the purchase, the only securities held in his personal accounts were shares of Proshare.

20. Mayo eventually sold some of the Proshares holdings in his personal accounts. He sold 245 shares of Proshares on February 9, 2010; 350 shares on October 21, 2010; and 660 shares on March 11, 2011.

21. Mayo's affiliation with SAI ended on or about October 7, 2011, and these four SAI accounts were transferred to another broker-dealer shortly thereafter. At the time that the accounts were transferred, Mayo owned 1,245 shares of Proshares.

22. The only other security that Mayo held in his personal accounts was Proshares Trust II Ultrashort Silver ("Ultrashort Silver"). Ultrashort Silver is a Non-traditional ETF which "seeks daily investment results, before fees and expenses, that correspond to two times the inverse (-2x) of the daily performance of silver bullion as measured by the U.S. Dollar price for delivery in London." Thus, one hundred percent of Mayo's personal securities holdings at SAI were in Non-traditional ETFs. Mayo held Non-traditional ETF's continuously from June 11, 2009 through the transfer of the accounts in October 2011.

23. Seventeen other customers of Mayo purchased Proshares at the same time as Mayo and HH and JH. Thirteen of these customers still held Proshares at the time that Mayo left SAI.

SAI's Non-traditional ETF Policy

24. On September 21, 2009, SAI implemented a policy implementing a process to reject all solicited orders of leveraged products, including Non-traditional ETFs. Only transactions in leveraged funds occurring on an unsolicited basis would be accepted. In such instances, SAI required the client to execute a form titled "Leveraged ETF/Mutual Fund Disclosure and Acknowledgement of Non-Solicitation Form", ("Disclosure Form") which contained additional disclosures concerning the risks involved with Non-traditional ETFs.

25. SAI's policy did not apply to those customers who had purchased Non-traditional ETFs on a solicited basis prior to September 21, 2009. SAI initially did not provide such customers with the disclosures contained in the Disclosure Form.

26. On July 28, 2011, a SAI Regional Sales Supervision Principal emailed Mayo concerning Non-traditional ETFs. The email summarized the risks of Non-traditional ETFs. The email further noted:

We agreed that due to the longer period these securities have been held in client accounts obtaining some higher level of client acknowledgment regarding this ongoing investment philosophy and the risks associated with the products themselves was prudent. To this end the attached disclosure template was developed. This disclosure was only one client acknowledgement method considered, other actions such a client contract can, and would, be considered in the future, if it is deemed necessary.

I would like you to begin collecting these disclosure forms immediately from each client currently maintaining a leveraged position. I think that it would be reasonable to have collected a disclosure form from each client within the next 30-60 days.

27. On August 5, 2011, Mayo responded to this email and acknowledged that he would "begin using the form as I review with each client."

28. SAI has acknowledged to the Department that it had no documentation that the form was provided to any of Mayo's clients, including HH and JH.

29. SAI informed the Department that in the second half of 2012, SAI determined that it would require clients holding Non-traditional ETFs to sign "Leveraged Client Letters" which would disclose the concerns associated with Non-traditional ETFs. SAI noted that it "targeted clients who invested in leveraged positions prior to the implementation of our new controls being put in place, since we did not have an acknowledgement of understanding from these clients."

30. In response to an inquiry from the Department, SAI stated that its surveillance department had initiated a process on December 12, 2012, to review for risk-based hold recommendations, including Non-traditional ETFs.

HH's Account After Mayo's Departure From SAI

31. As set forth in Finding of Fact No. 21 above, Mayo's employment with SAI ended on or about October 7, 2011.

32. On or about October 8, 2011, SAI sent a letter to Mayo's clients to inform them of Mayo's departure. HH and JH did not receive that letter. SAI concedes that the letter intended for HH and JH was "suppressed in error" by its systems.

33. According to SAI, another representative was assigned to Mayo's account on December 8, 2011. However, the monthly account statements for HH continued to reflect Mayo as the account executive, and designated Mayo's telephone number as the telephone number to which questions were to be directed through April 2013. No other telephone number for SAI was contained on the account statements.

34. On June 17, 2013, HH contacted the office which first appeared on the May 2013 statement by telephone to complain about the handling of the Proshares. On June 18, 2013, the complaint was reported to SAI. The email noted as follows:

I received a call from [HH] yesterday afternoon. [HH] was a former client of Tom Mayo, who termed XXXXX. When Tom terminated, it appears that he did not move [HH]'s account, which was then coded as closed, and moved to [redacted]. Since the account was coded as closed and fees were no longer assessed to the account, we were blind to the account, and its existence.

35. Based on the foregoing, it appears that SAI failed to communicate with HH concerning Mayo's departure and the assignment of a new representative, continued to send statements to HH which inaccurately reflected the identity of his account representative, miscoded the account as closed, and failed to notify the successor representative of its existence. In essence, for a period of eighteen months, no one at SAI was aware that they were responsible for HH's account.

36. During the June 17, 2013 telephone call, SAI's representative asked HH if he wanted to liquidate the position. HH declined to do so at that time. He later explained to the Department that he did not do so because (a) he wanted a plan as to what to do with the money, (b) he was unsure whether he had authority to liquidate it since his now ex-wife's name was also on the account, and (c) he believed that SAI was simply trying to wash its hands of his account.

37. HH ultimately liquidated the position on or about May 28, 2015 for \$4,988.88. As a result, HH realized a loss of \$49,509.12. SAI has reimbursed HH for the loss.

CONCLUSIONS OF LAW

1. Neb. Rev. Stat. § 8-1103(9)(a)(vii) (Reissue 2012) provides, in part, that the Director may by order deny, suspend, or revoke the registration of any registrant, or bar, censure, or impose a fine pursuant to Neb. Rev. Stat. § 8-1108.01(4) (Cum. Supp. 2014) on a registrant if the Director

finds that (a) the order is in the public interest and (b) the registrant has engaged in dishonest or unethical practices in the securities business.

2. 48 NAC 12.002.15 provides that it is a dishonest and unethical business practice, under Section 8-1103(9)(a)(vii) of the Act, for a broker-dealer to allow a customer to invest inappropriately.

3. SAI's recommendation to HH to purchase and to continue to hold Proshares was not suitable because, as stated in the ETF Guidance, such products are not suitable for individual, non-sophisticated investors, and are not intended to be held for a long term.

4. Neb. Rev. Stat. § 8-1103(9)(a)(xi) (Reissue 2012) provides, in part, that the Director may by order deny, suspend, or revoke the registration of any broker-dealer, or bar, censure, or impose a fine pursuant to Neb. Rev. Stat. § 8-1108.01(4) (Cum. Supp. 2014) on a broker-dealer if the Director finds that (a) the order is in the public interest and (b) the broker-dealer has failed to reasonably supervise its agents to assure their compliance with the Act.

5. SAI failed to supervise Mayo in connection with his recommendation to purchase and hold Non-traditional ETFs. Further, while SAI implemented a policy barring its agents from soliciting investments in Non-traditional ETFs, it implemented no policies concerning those clients who had previously purchased Non-traditional ETFs and were continuing to hold them. In June 2011, more than eighteen months after implementing its policy, SAI instructed Mayo to obtain client signatures on disclosures specifically related to Non-traditional ETFs. SAI failed to obtain any of those signed disclosures before Mayo left SAI. SAI did not implement a company-wide policy to obtain disclosure forms from all customers holding Non-traditional ETFs until the second half of 2012, more than two and one half years after issuing its policy. SAI failed to take any efforts to collect such a disclosure form from HH. Furthermore, SAI failed to have

proper supervision and procedures to ensure that an employee or agent was responsible for HH's account after Mayo left SAI.

6. Neb. Rev. Stat. § 8-1108.01(4) (Reissue 2012) provides that the Director may, after giving reasonable notice and an opportunity for a hearing under this section, impose a fine not to exceed twenty-five thousand dollars per violation, in addition to costs of the investigation, upon a person found to have engaged in any act or practice which would constitute a violation of the Act or any rule, regulation, or order issued under the Act.

7. Under the Act's statutory framework, the Director has legal and equitable authority to fashion significant protective remedies.

8. It is in the best interest of SAI, and it is in the public's best interest, for SAI and the Director to resolve the issues included herein.

STIPULATIONS

In connection with this Order, SAI and the Director stipulate to the following:

1. The Department has jurisdiction as to all matters herein.
2. An Order should be entered in this matter, which shall be in lieu of other proceedings by the Department against SAI, except as specifically referenced in this Order.

SAI further represents as follows:

1. SAI is aware of its right to a hearing on this Order at which it may be represented by counsel, present evidence, and cross-examine witnesses. The right to such a hearing and any related appeal on all matters covered by this Order, is irrevocably waived.
2. SAI is acting free from any duress or coercion of any kind or nature.
3. This Order is executed to avoid further proceedings and constitutes an admission of violations of the Act solely for the purposes of this Order and for no other purposes.

CONSENT ORDER

IT IS THEREFORE ORDERED as follows:

1. SAI shall pay a fine in the amount of Thirty Thousand Dollars (\$30,000.00) for its violations of the Act.
2. SAI shall reimburse the Department for the costs of the investigation in the amount of Ten Thousand Dollars (\$10,000.00).
3. SAI shall pay the total of the fine and costs assessed pursuant to this Order in the amount of Forty Thousand Dollars (\$40,000.00) by check or money order, payable to the Nebraska Department of Banking and Finance, within fifteen days of the effective date of this Order.
4. In the event that SAI fails to comply with the provisions of this Order, the Department may commence such action as it deems necessary and appropriate in the public interest.
5. If, at any time, the Department determines that SAI has committed any violations of the Act, the Department may take any action available to it under the Act.
6. The effective date of this Order will be the date of the Director's signature.

DATED this 23 day of August, 2016.

SECURITIES AMERICA, INC.

By: 
Mark Lasswell,
Senior Vice President and
Chief Compliance Officer

12325 Port Grace Boulevard
La Vista, Nebraska 68128

DATED this 25 day of August, 2016.



**STATE OF NEBRASKA
DEPARTMENT OF BANKING AND FINANCE**

By: *Mark Quandahl*
Mark Quandahl, Director

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