ADMINISTRATIVE PROCEEDING
BEFORE THE
SECURITIES COMMISSIONER OF MARYLAND

OFFICE OF THE ATTORNEY GENERAL, SECURITIES DIVISION	*	
	*	Securities Docket No. 2014-0119
v.	*	
EVEREST INVESTMENT ADVISORS, INC., ET AL	*	
Respondents.	*	

* * * * * * * * * * * * *

FINAL ORDER

WHEREAS, the Securities Division of the Office of the Maryland Attorney General (the "**Division**"), pursuant to the authority granted in Section 11-701 of the Maryland Securities Act, Corporations and Associations Article 11, Annotated Code of Maryland (2014 Repl. Vol.) (the "**Act**"), undertook an investigation into the securities activities of Everest Investment Advisors, Inc. ("**EIA**"), Everest Wealth Management, Inc. ("**EWM**"), and Philip Rousseaux ("**Rousseaux**") (collectively, "**Respondents**"); and

WHEREAS, on the basis of that investigation and on-site examinations of EIA, the Maryland Securities Commissioner (the "**Commissioner**") found grounds to conclude that Respondents may have engaged in acts or practices constituting violations of the investment adviser and antifraud provisions of the Act and the regulations thereunder; and

WHEREAS, on June 17, 2015, the Commissioner determined that it was in the public interest to issue an Order to Show Cause ("**Show Cause Order**") to each Respondent; and

WHEREAS, pursuant to sections 11-301(2) and (3), 11-302(a)(2), (a)(3), (c), and (e), 11-303, 11-401(b), 11-402(b), 11-411(a) and (d), 11-412(a)(2), and 11-412(a)(7) of the Act, it was ordered in the Show Cause Order that Respondents EIA and Rousseaux each show cause why each Respondent's registration as an investment adviser or investment adviser representative, respectively, should not be revoked; why Respondents EIA, EWM, and Rousseaux should not be barred permanently from engaging in the securities and investment advisory business in Maryland; and why a statutory penalty of up to $5,000 per violation should not be entered against each Respondent; and

WHEREAS, on July 2, 2015, each Respondent filed a separate Answer and Affirmative Defenses and requested a hearing; and

WHEREAS, on July 15, 2015, the Commissioner referred the matter to the Maryland Office of Administrative Hearings ("**OAH**") for a hearing and delegated authority to the OAH to issue a proposed decision (OAH Case No.: OAG-SD-50-15-24381); and

WHEREAS, on October 8, 2015, Administrative Law Judge Una M. Perez of the OAH held a telephonic prehearing conference with Assistant Attorneys General Kelvin M. Blake and Katharine Weiskittel, representing the Division, and Russell D. Duncan, Esq. and Jacob Frenkel, Esq., representing Respondents ("**Prehearing Conference**"); and

WHEREAS, on October 16, 2015, Administrative Law Judge Perez issued a Prehearing Conference Report and Scheduling Order ("**Report and Order**") and on November 4, 2015, issued a Corrected Report and Order; and

WHEREAS, a hearing on the merits was initially scheduled for January 19th through 29th, 2016; and

WHEREAS, on November 6, 2015, the Division filed a Motion for Partial Summary Decision and Memorandum in Support Thereof ("**Summary Decision Motion**"); and

WHEREAS, on December 8, 2015, Respondents filed a Memorandum in Opposition to the Division's Summary Decision Motion ("**Opposition to Summary Decision Motion**"); and

WHEREAS, on December 21, 2015, the Division filed a Memorandum in Reply to Respondents' Opposition to Summary Decision Motion; and

WHEREAS, no party requested a hearing on the Division's Summary Decision Motion; and

WHEREAS, on January 12, 2016, Respondents filed a Motion to Dismiss Proceedings and Argument ("**Motion to Dismiss**"); and

WHEREAS, on January 13, 2016, Administrative Law Judge Perez issued a Proposed Ruling on the Division's Summary Decision Motion, consisting of a Statement of the Case, Issue, Summary of Exhibits Pertinent to the Motion, Findings of Undisputed Fact, Discussion, Proposed Conclusions of Law, and Proposed Order ("**Proposed Ruling**"), a copy of which is attached to this Final Order as **Exhibit A**, in which she granted the Summary Decision Motion in part and denied it in part, reserving some factual issues and the issue of sanctions for hearing; and

WHEREAS, on January 15, 2016, the Division filed an Opposition to Respondents' Motion to Dismiss; and

WHEREAS, Administrative Law Judge Perez conducted a hearing on the merits on January 19 and 20, and February 4 and 5, 2016, with Assistant Attorneys General Kelvin M. Blake

and Katharine Weiskittel representing the Division and Russel D. Duncan, Esq. and Paul Huey-Burns, Esq., *pro hac vice*, representing Respondents; and

WHEREAS, on January 19, 2016, Administrative Law Judge Perez heard argument on and denied Respondents' Motion to Dismiss on the record, indicating it would be addressed in her proposed decision on the case; and

WHEREAS, on February 4, 2016, Respondents filed a Motion for Reconsideration of the Proposed Ruling, entitled "Motion for Reconsideration of the Administrative Law Judge's Proposed Ruling on the Securities Division's Motion for Summary Decision" ("**Motion for Reconsideration**"); and

WHEREAS, at the conclusion of the hearing on the merits, Administrative Law Judge Perez granted the parties permission to file post-hearing submissions; and

WHEREAS, on February 11, 2016, Respondents submitted copies of certain Orders of the Commissioner that Respondents had cited in their closing argument; and

WHEREAS, on February 18, 2016, the Division filed an Opposition to the Motion for Reconsideration; and

WHEREAS, on February 22, 2016, Respondents submitted a letter in lieu of a post-hearing brief; and

WHEREAS, on March 3, 2016, the Division submitted a Post Hearing Memorandum and Exhibits; and

WHEREAS, on March 18, 2016, Administrative Law Judge Perez issued an Order denying Respondents' Motion for Reconsideration ("**Order Denying Reconsideration**"); and

WHEREAS, on May 5, 2016, Administrative Law Judge Perez issued a Proposed Decision, consisting of a Statement of the Case, Issues, Summary of the Evidence, Findings of Fact, Discussion, Proposed Conclusions of Law, and Proposed Order (**"Proposed Decision"**), a copy of which is attached to this Final Order as **Exhibit B**; and

WHEREAS, on May 24, 2016, Respondents filed "Exceptions to the Proposed Decision," making reference to both the Proposed Decision of May 5, 2016, and the Proposed Ruling of January 13, 2016, and requested oral argument ("**Exceptions**"); and

WHEREAS, on June 2, 2016, the Division filed a Reply Memorandum to Respondents' Exceptions; and

WHEREAS, by letter dated October 27, 2016, a copy of which is attached to this Final Order as **Exhibit C**, Maryland Attorney General Brian E. Frosh appointed me, Sarah McCafferty, as Special Assistant Attorney General, effective October 27, 2016 ("**Appointment**"), and authorized me to act as final decision maker in this case; and

WHEREAS, on November 1, 2016, the Commissioner issued a Delegation of Authority ("**Delegation**"), a copy of which is attached to this Final Order as **Exhibit D**, whereby she delegated to me the powers and authority of the Maryland Securities Commissioner under the Maryland Securities Act with respect to this matter, to rule on exceptions, preside over any oral arguments, make any other necessary rulings, and render a final decision in this matter; and

WHEREAS, on January 3, 2017, I held a telephonic conference with Assistant Attorneys General Kelvin M. Blake and Katharine Weiskittel, representing the Division, and Russell D. Duncan, Esq., representing Respondents, to discuss issues relating to the scheduling of oral argument; and

WHEREAS, on January 5, 2017, I mailed the Scheduling Order for Oral Argument to counsel for the parties setting January 24, 2017, as the date of oral argument; and

WHEREAS, on January 24, 2017, oral argument was held before me with Assistant Attorneys General Kelvin M. Blake and Katharine Weiskittel representing the Division and Russell D. Duncan, Esq. representing Respondents; and

WHEREAS, on March 1, 2017, in response to my request at oral argument, Russell D. Duncan, Esq., representing Respondents, submitted a clarification of a specific section of Respondent Rousseaux's Answer to the Show Cause Order; and

WHEREAS, as required by COMAR 02.02.06.24B(4), I have reviewed the hearing record, the proposed rulings and proposed decision of the Administrative Law Judge, the exceptions and memoranda filed by the parties, oral argument by the parties, and the additional information submitted to me at my request by counsel for Respondent Rousseaux;

NOW, THEREFORE, PURSUANT TO THE AUTHORITY GRANTED TO ME BY THE APPOINTMENT BY MARYLAND ATTORNEY GENERAL BRIAN E. FROSH AND BY THE DELEGATION BY THE COMMISSIONER, I ISSUE THIS FINAL ORDER AND FIND, CONCLUDE, AND ORDER:

I. JURISDICTION

1. Jurisdiction in this proceeding is pursuant to Section 11-701.1 of the Act.

II. RESPONDENTS

2. EIA is a Florida corporation that, at all times relevant, has maintained a place of business in Towson, Maryland. EIA has been a registered investment adviser with the Division since July 21, 2011.

3. EWM is a Florida corporation that, at all times relevant, has maintained a place of business in Towson, Maryland. EWM is not now, nor has it ever been, registered as an investment adviser with the Division.

4. Rousseaux is the owner of EIA and EWM. Since July 26, 2011, Rousseaux has been registered with the Division as an investment adviser representative of EIA. Prior to that, Rousseaux was for several years registered with the Financial Industry Regulatory Authority, Inc. ("**FINRA**") as a representative through association with various broker-dealers, as more fully described in the Findings of Fact in the Proposed Ruling.

III. SUMMARY OF FINAL DECISIONS

5. I adopt the Proposed Ruling, including the grant of Partial Summary Decision to the Division, the Proposed Decision, and the rulings described below in Section IV, with the modifications, rejections, and additions stated in this Final Order. In doing so, I have carefully considered Respondents' Exceptions. To the extent that an exception raised by Respondents is not addressed in Section IV or otherwise in this Final Order (see paragraphs 21, 22, 23, 24, 25, 26, 27, 29, 30, 35, and 47), I have overruled it as being without merit.

IV. RULINGS ON RESPONDENTS' MOTIONS AND CONTINUING OBJECTION

6. In their Exceptions, in addition to challenging Findings of Fact and Conclusions of Law in the Proposed Ruling and the Proposed Decision, Respondents took exception to Administrative Law Judge Perez's rulings on their Motion to Dismiss and their Motion for Reconsideration and to her allowing certain evidence to be introduced over their continuing objection. I address these exceptions in this Section IV.

A. Ruling on Respondents' Motion to Dismiss

7. On January 12, 2016, Respondents filed a Motion to Dismiss with Administrative Law Judge Perez. This Motion to Dismiss arose out of related litigation filed by Respondents on August 4, 2015, in the form of a Complaint in the Circuit Court for Montgomery County, Maryland (Case No. 407544V) ("**Complaint**"). In the Complaint, Respondents raised certain constitutional claims relating to this administrative action. These claims included inadequate time to prepare; the unavailability of formal discovery procedures; that the Commissioner, who instituted this proceeding, retained final decision-making authority; the unavailability of right to a jury trial; and the inapplicability of the Maryland Rules of Evidence. The Respondents also asserted some of these claims as Affirmative Defenses in their respective Answers to the Show Cause Order.

8. The Division filed a Motion to Dismiss Respondents' Complaint in Montgomery County Circuit Court on September 17, 2015. As discussed in the Proposed Decision at p. 20, the Honorable Richard E. Jordan of that court held a hearing on the Division's Motion to Dismiss Respondents' Complaint on December 10, 2015, and granted the Division's Motion from the bench that day, indicating that Respondents should exhaust their administrative remedies and raise their constitutional claims in the administrative proceeding.

9. Although Administrative Law Judge Perez had set a deadline of November 6, 2015, for the filing of dispositive motions in this administrative action, Respondents did not indicate during the Prehearing Conference an intention to file such a motion, did not raise any of their due process or equal protection claims in their Opposition to Summary Decision Motion, and did not file a cross-motion for summary decision. *Id.* at p. 19. Instead, Respondents filed the above-referenced Motion to Dismiss, a week before the hearing on the merits began. In this Motion to Dismiss, Respondents claimed that their constitutional challenge to the Commissioner's adjudicatory proceedings was a "novel issue of first impression," and asked that the Show Cause Order be dismissed or that the case be transferred to a circuit court. *Id.* at p. 20.

10. The Division filed an Opposition to the Motion to Dismiss on January 15, 2016, and the parties presented oral argument on the motion on January 19, 2016. Administrative Law Judge Perez denied Respondents' Motion to Dismiss on the record at that time. In her discussion of this dismissal in the Proposed Decision at pp. 19-21, Administrative Law Judge Perez noted that she was unaware of any statute or regulation that would permit her to transfer this proceeding to a court of general jurisdiction. She also observed that this administrative proceeding "affords the Respondents exactly what the law requires – an opportunity to present their evidence, to cross-examine the Division's witnesses, and to argue their position – and the attendant rights to challenge the Commissioner's final decision." *Id.* at p. 21. Administrative Law Judge Perez also concluded "that the Respondents' argument that their Motion presents an issue of first impression is refuted by the legal authorities cited by the Division." *Id.* Respondents took exception to Administrative Law Judge Perez's denial of their Motion to Dismiss in their Exceptions, and reiterated this exception at oral argument before me on January 24, 2017.

11. I conclude that Administrative Law Judge Perez properly decided that Respondents' Motion to Dismiss should be denied for the reasons she stated in the Proposed Decision, and I adopt her decision on this issue. In addition, a key element of Respondents' argument before both the Circuit Court and Administrative Law Judge Perez - that the Commissioner both initiated this administrative proceeding and would act as the final decision maker for it - is no longer valid and was not valid at the time oral argument was held. My current association with the Office of the Attorney General of Maryland began on October 27, 2016, when Maryland Attorney General Brian E. Frosh appointed me as Special Assistant Attorney General with the authority to act as final decision maker in this proceeding (*see* Exhibit C); my association with this agency will end at the conclusion of this proceeding. The Commissioner is not the final decision maker in this proceeding, having delegated this authority to me. *See* Exhibit D.

12. For these reasons, Respondents' Motion to Dismiss is denied.

B. Ruling on Respondents' Continuing Objection

13. Because most of the factual issues in the Show Cause Order were decided in the Proposed Ruling, much of the four-day hearing on the merits focused on evidence relating to potential sanctions. To that end, Respondents introduced evidence intended to demonstrate improvements to their compliance program, while the Division presented evidence regarding what it viewed as ongoing or new violations of the Act and its related rules for purposes of rebuttal. Administrative Law Judge Perez granted Respondents a continuing objection to this evidence being introduced by the Division at the hearing. *See* Hearing Transcript of February 5, 2016, at pp. 13-14.

14. In their Exceptions, Respondents claim that, by allowing the Division's evidence, Administrative Law Judge Perez "based the proposed findings, conclusions of law, and recommended sanctions on material beyond the allegations in the Order to Show Cause, thereby presenting serious due process issues with the Proposed Decision." Exceptions at p. 20.

15. I adopt Administrative Law Judge Perez's ruling on this issue. Administrative Law Judge Perez properly allowed this rebuttal evidence presented by the Division and gave appropriate weight in the Proposed Decision to both Respondents' evidence of their current efforts to comply with the Act and its related rules and to the Division's rebuttal evidence.

C. Ruling on Respondents' Motion for Reconsideration

16. On February 4, 2016, Respondents filed a Motion for Reconsideration of Administrative Law Judge Perez's Proposed Ruling. This Motion for Reconsideration focused on specific findings regarding the "VIP" program and EIA's maintenance of required books and records. On February 18, 2016, the Division filed its Opposition to this motion. Administrative Law Judge Perez issued an Order Denying Reconsideration on March 18, 2016. Respondents have taken exception to this order in their Exceptions.

17. I adopt Administrative Law Judge Perez's ruling. COMAR 28.02.01.27, which Administrative Law Judge Perez read into the record during a discussion of this topic on January 19, 2016, the first day of the hearing on the merits, addresses revisions under the OAH's Rules of Procedure. By its terms, this rule applies only to a final decision. Administrative Law Judge Perez correctly concluded that the Commissioner had delegated only proposed decision-making authority to the OAH in this case and that, therefore, a motion for reconsideration is not allowed by law.

18. To the extent that Respondents' continued exception on this point might be construed as a motion for reconsideration addressed to me as the final decision maker, I find that the administrative rule that covers a final decision in a Securities Division administrative case heard by an administrative law judge, COMAR 02.02.06.24B, does not provide for a motion for reconsideration. This rule provides only the right to file exceptions and supporting memoranda to the proposed decision of the administrative law judge, to file a memorandum in opposition to exceptions, and to present argument, *see* COMAR 02.02.06.24B(2)-(4), as the parties have done in this case. All other rights to challenge a decision accrue after a final decision has been issued. COMAR 02.02.06.24C. A final decision may also be corrected in the limited instances of "fraud, mistake, or irregularity." COMAR 02.02.06.24F.

19. For the reasons stated in the Order Denying Reconsideration, Respondents' Motion for Reconsideration was properly denied by Administrative Law Judge Perez and, as noted in paragraph 17 of this Final Order, I adopt her ruling on this issue. In addition, this Motion is denied for this stage of the proceeding for the reasons stated in paragraph 18 of this Final Order.

V. FINDINGS OF FACT

20. I adopt the Findings of Fact of Administrative Law Judge Perez's **Proposed Ruling** of January 13, 2016, with the modifications, rejection, and addition noted herein. For purposes of clarity, all paragraphs in the Proposed Ruling retain their original numbering.

21. Finding of Fact #11 is modified to state: 11. On or about October 22, 2004, Rousseaux was permitted to resign from MetLife for "attempted replacement of a MetLife contract in violation of company policy." Within days thereafter, Rousseaux became registered with FINRA as a representative through an association with USALLIANZ Securities, Inc.

22. Finding of Fact #24 is rejected. Finding of Fact #24 relies solely on statements by Christopher Kirk, in his Affidavit filed as Exhibit C to the Summary Decision Motion, as to the reason for Rousseaux's unauthorized use of blank Authorization to Transfer Assets ("**ATA**") forms pre-stamped with a MetLife Medallion Signature Guarantee Stamp ("**Stamp**"). According to Mr. Kirk in his Affidavit, he was told by Rousseaux that Rousseaux obtained and used the MetLife Stamp to stamp a large number of blank Allianz and Conseco ATA forms to avoid the risk of losing a client to another financial institution, as had occurred in a previous instance. However, in paragraphs 3 and 16 of his Affidavit filed as Exhibit A to Respondents' Opposition to Summary Decision Motion, Rousseaux denied that he had made such a statement to Mr. Kirk, thus raising a genuine dispute of material fact on this point. Therefore, Finding of Fact #24 is not suitable for summary disposition and should not have been made in the Proposed Ruling.

23. Finding of Fact #40 is modified to state: 40. In March 2014, Division staff discovered that, contrary to the representations in the wrap fee brochure, investors were being charged transaction fees through their Charles Schwab accounts. Summary Decision Motion Exhibit A [hereinafter "Disney Affidavit"], paragraph 62 and Ex. 23.

24. Finding of Fact #42 is modified to state: 42. When EIA sold a program offered by third party adviser Curian to an EIA client, EIA was paid a fee equal to 1% of the assets placed with Curian; the investment adviser representative assigned to that client received 25% of that fee. When EIA sold its own investment program, EDGM, to a client, EIA received a fee equal to 2% of the assets placed with EIA; the investment adviser representative assigned to that client received 25% of that fee. Disney Affidavit, paragraph 65 and Ex. 7, Ex. 24. Thus, EIA and its investment adviser representatives earned twice as much in fees on assets placed in the EDGM Program than from assets placed in Curian programs sold by EIA. This circumstance was not disclosed in EIA's

wrap fee brochure. Ex. 28 to Rousseaux Transcript filed as Exhibit D to the Summary Decision Motion [hereinafter "Rousseaux Transcript"].

25. The heading between paragraph 43 and paragraph 44 is modified to read: EIA's Use of "Performance Figures" for the EDGM Program, including in an Investment Policy Statement (IPS)

26. Finding of Fact #44 is modified to state: 44. Clients solicited to invest in EIA's EDGM Program were given an Investment Policy Statement ("**IPS**") for that program. Answers, paragraph 115; Exhibit 34 to Rousseaux Transcript.

27. I find as additional Finding of Fact #44A: 44A. EIA created the IPS for the EDGM program. The IPS described the EDGM program and required the recipient to provide information such as his or her objectives, time horizon, and risk profile, and to review, approve, adopt, and sign "this Proposal and Investment Policy Statement" before investing. Ex. 34 to Rousseaux Transcript.

28. I adopt the Findings of Fact of Administrative Law Judge Perez's **Proposed Decision** of May 5, 2016, with the modifications and additions noted herein. For purposes of clarity, all paragraphs in the Proposed Decision retain their original numbering.

29. Under the heading found on page 5 entitled Rousseaux's Use of a MetLife Medallion Signature Guarantee Stamp in Forms Used to Transfer Client Assets and Purchase Insurance Products from Allianz and Conseco – October 2004 Through Summer 2007:

Finding of Fact #14 is modified to state: 14. While at MetLife, Rousseaux used the pre-stamped ATA forms to get around MetLife's policy prohibiting its representatives from selling competing products, specifically fixed income annuities, Hearing Transcript of January 19, 2016, at pp. 134-

37, for which he earned a higher commission. *Id.* at p. 164. Rousseaux was aware that MetLife would not approve of his activities in selling these products and using the MetLife Stamp to do so.

30. Under the heading found on page 8 entitled "Investment Committee" as a "Ploy" or "Client Manipulation Device," I find as additional Findings of Fact #10 and #11:

Finding of Fact 10. In his "Top of the Table" presentation, in answer to a question, Rousseaux discussed the process for not accepting a new client, saying, "...we say, 'We'll give you a call.' We just don't call. It doesn't hurt our reputation...They were told we're selective anyway." He also stated: "My salespeople have told people, 'Hey, I don't think you're a good fit. People don't really get mad....It's a polite way of saying we don't want to do business with you.'" 2013 Top of the Table Presentation at p. 18, Disney Affidavit, Ex. 4.

Finding of Fact 11. The Investment Committee had no set membership and the decision to take on a client could be made by an individual employee. There were no committee minutes that would establish that the Investment Committee conducted any activities, and no evidence was presented of a charter or other organizing document for the Investment Committee.

31. Under the heading Facts Relevant to Sanctions, under the subheading on page 11 entitled *The Wrap Fee Brochure*, I find as additional Finding of Fact 1A:

Finding of Fact 1A. On March 11, 2014, EIA and Rousseaux filed with the Division a Part 2A Disclosure Brochure and a Wrap Fee Program Brochure, each dated March 11, 2014, and each stating that EIA was offering a wrap fee program (Ex. 27 and Ex. 28 to Rousseaux Transcript; Division Hearing Ex. 114), which, according to the Disclosure Brochure, meant that "clients pay a single annualized fee of 200 basis points (2.00%) on the assets being managed under the Program, which covers both investment management fees and securities transaction charges." Ex. 27 at p.

5. The Wrap Fee Program Brochure contained a similar description of the wrap fee program offered, stating that it provided "clients with the ability to trade in certain investment products without incurring separate brokerage commissions or transactions charges." Ex. 28 at p. 3. These statements were false, because EDGM clients were, in fact, charged transaction fees. *See* Revised Proposed Ruling Finding of Fact 40, at paragraph 23 herein.

32. Under the heading Facts Relevant to Sanctions, under the subheading on page 13 entitled *EIA's Use of "Performance Figures" in an IPS for the EDGM Program*:

Finding of Fact #3 is modified to state: 3. After Rousseaux learned that the historical performance figures were incorrect, EIA sent a letter dated April 24, 2014, which Rousseaux signed, to EDGM investors. This letter stated in part that "[w]e have determined that the information we provided to you to market the model was not accurate and/or may have been misleading. Among other errors, the five and ten year performance data for the Everest Growth Model was incorrect." Division Hearing Ex. 46. The letter offered clients the opportunity to exit the model at no cost, provided the client notified EIA by 5:00 pm on May 5, 2014. *Id.* No clients accepted the offer to get out of the EDGM program. Hearing Transcript of January 20, 2016, at p. 218.

VI. CONCLUSIONS OF LAW

Count I

33. Respondents Rousseaux and EIA violated sections 11-301(2) and (3) of the Act in connection with the offer, sale, or purchase of securities, by making untrue statements of material fact or omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and by engaging in acts, practices or courses of business which operate or would operate as a fraud or deceit on any person. I conclude

that Finding of Fact #24 in the Proposed Ruling is not necessary to establish that Respondent Rousseaux violated sections 11-301(2) and (3) of the Act by obtaining and using, without authorization, blank ATA forms pre-stamped with the MetLife Medallion Signature Guarantee Stamp, signed by him or by persons whose identity is unknown, in connection with the sale of clients' securities to invest in non-MetLife insurance products, which thereby misrepresented that MetLife had verified the clients' identities.

Counts II and III

34. Except as discussed in paragraphs 36 through 40 of this Final Order, all Respondents violated section 11-302(a)(2) of the Act by engaging in acts, practices, or courses of business which operate or would operate as a fraud or deceit on another person, as described in section 11-302(a)(2), and also violated section 11-302(c) of the Act in the solicitation of or in dealings with advisory clients, by knowingly making untrue statements of material fact or omitting to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

35. I modify the first paragraph of page 26 of the Proposed Decision, in the Discussion section under the subheading "3. The 'Investment Committee' as a Ploy," as follows:

> The Division argued that whether there was actually an investment committee or not was not relevant; the important point was that the Respondents' use of this "manipulative marketing tool" to take away decision-making power from clients or prospective clients was not consistent with the Respondents' status as a fiduciary. It is not necessary, however, to accept such a broad argument, because there was no evidence presented that the Investment Committee actually operated as such.

For example, there is no evidence that the members of the Investment Committee collectively and consistently applied clear criteria for deciding to accept or reject potential clients. In fact, the Investment Committee did not keep minutes of any deliberations and had no set membership; decisions to accept or reject a potential client could even be made by a single employee. In addition, no evidence was presented of a committee charter or other organizing document. These circumstances fully support the conclusion that the Investment Committee was indeed a "ploy" or marketing device that the Respondents used to induce prospective clients to invest money with EWM, which has already been found to have "held out" as an investment adviser, or with EIA, a registered investment adviser.

36. I reject the proposed Conclusions of Law in Counts II and III related to certain of Rousseaux's activities in connection with his unauthorized use of a MetLife Medallion Signature Guarantee Stamp. Counts II and III allege that Rousseaux's unauthorized use of blank ATA forms pre-stamped with a MetLife Stamp in connection with his recommendations to clients that they liquidate existing investments, including securities products, to purchase annuities through him, violated sections 11-302(a)(2) and (c) of the Act.

37. Section 11-302(a)(2) provides in pertinent part:

It is unlawful for any person who *receives*, directly or indirectly, any *consideration from another person* for advising *the other person* as to the value of securities or their purchase or sale, or for acting as an investment adviser or representative under [section] 11-101(h) or (i) of this title, whether through the issuance of analyses, reports, or otherwise, to:... (2) [e]ngage in any act, practice, or course of business

which operates or would operate as a fraud or deceit on *the other person.* (emphasis added)

38. Rousseaux advised clients to sell their existing investments, including securities products, to fund the purchase of annuities through him. Rousseaux used, without authorization, blank ATA forms pre-stamped with a MetLife Stamp in connection with those transactions. However, there is no finding that the compensation that Rousseaux received, whether directly or indirectly, in connection with these activities came from the clients receiving those recommendations, rather than from the issuing insurance companies or some other source. There is also no finding that Rousseaux was acting as an investment adviser or investment adviser representative in connection with these activities. Therefore, I conclude that these activities do not fall within the scope of section 11-302(a)(2).

39. Section 11-302(c) provides in pertinent part:

> In the solicitation of or in dealings with *advisory* clients, it is unlawful for any person knowingly to make any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading. (emphasis added)

40. There is no finding that the individuals who sold investments to fund the purchase of annuities on Rousseaux's recommendation, as described in paragraph 38 of this Final Order, were advisory clients of Rousseaux's within the meaning of section 11-302(c) of the Act. Therefore, I conclude that Rousseaux's activities connected with his unauthorized use of blank ATA forms pre-stamped with the MetLife Stamp do not fall within the scope of section 11-302(c).

Count IV

41. Except as discussed in paragraphs 42 through 48 of this Final Order, Respondents EIA and Rousseaux violated section 11-302(a)(3) of the Act, COMAR 02.02.05.03B, and COMAR 02.02.05.03B(8) by misrepresenting to clients the nature of advisory services offered and the fee to be charged for that service and by omitting to state material facts necessary to make statements regarding services and fees, in light of the circumstances under which they were made, not misleading, and also violated section 11-302(a)(3) of the Act, COMAR 02.02.05.03B, and COMAR 02.02.05.03B(13) by publishing, circulating or distributing advertisements that did not comply with SEC Rule 206(4)-1.

42. I reject the proposed Conclusions of Law in Count IV related to certain of Rousseaux's activities in connection with his unauthorized use of a MetLife Stamp. Count IV alleges that Rousseaux's unauthorized use of blank ATA forms pre-stamped with a MetLife Stamp in connection with his recommendations to clients that they liquidate existing investments, including securities products, to purchase annuities through him, violated section 11-302(a)(3) of the Act and COMAR 02.02.05.03B.

43. Section 11-302(a)(3) provides in pertinent part:

> It is unlawful for any person who *receives*, directly or indirectly, any *consideration from another person* for advising *the other person* as to the value of securities or their purchase or sale, or for acting as an investment adviser or representative under [section] 11-101(h) or (i) of this title, whether through the issuance of analyses, reports, or otherwise, to:... (3) [e]ngage in dishonest or unethical practices as the Commissioner may define by rule. (emphasis added)

44. COMAR 02.02.05.03B addresses dishonest or unethical practices in this context, including the prohibited practices described in subsections (1) through (16) of COMAR 02.02.05.03B.

45. As noted in the discussion of Counts II and III at paragraphs 36 through 40 of this Final Order, there are no findings that Rousseaux either received compensation, whether directly or indirectly, from the individuals who received these recommendations, or that he was acting as an investment adviser or investment adviser representative in this context. Therefore, I conclude that this conduct does not violate section 11-302(a)(3) or, consequently, COMAR 02.02.05.03B, the rule that defines dishonest and unethical practices by investment advisers.

46. COMAR 02.02.05.03B, which is entitled "Prohibited Practices," provides generally that:

> An investment adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser and its clients and the circumstances of each case, an investment adviser may not engage in unethical business practices, including the following:

The "following" referenced are the prohibited practices described in subsections (1) through (16) of COMAR 02.02.05.03B. I conclude, independent of my conclusion that section 11-302(a)(3) does not apply to this aspect of Rousseaux's conduct, that Rousseaux's unauthorized use of the Stamp as described in Count IV does not fall within this general section of COMAR 02.02.05.03B, which by its terms applies to investment advisers acting as such. There is no finding that Rousseaux

was functioning as an investment adviser within the intended scope of COMAR 02.02.05.03B in connection with this conduct.

47. I conclude that the allegation in Count IV that Rousseaux "falsified investment documents in order to benefit himself financially by reducing the risk of clients changing their minds and keeping their assets with another broker," is not supported by the facts, given my rejection of Finding of Fact #24 in the Proposed Ruling.

48. I reject the proposed Conclusions of Law in Count IV related to the allegations that Respondents used ploys, such as making clients believe they were chosen by an Investment Committee to become part of an exclusive club to convince them to invest their funds with Respondents, and that by implementing ploys that were not in the best interest of their clients, Respondents breached their fiduciary duty to clients. I conclude that these activities do not fall within the specific unethical business practice cited, COMAR 02.02.05.03B(13), which prohibits "[p]ublishing, circulating, or distributing an advertisement that does not comply with… SEC Rule 206(4)-1." These activities cannot reasonably be viewed as advertisements within the meaning of COMAR 02.02.05.03B(13).

Count V

49. Respondents EIA and EWM violated section 11-302(e) of the Act by entering into investment advisory contracts that did not provide that assignment of the contract may not be made by the investment adviser without the consent of the other party to the contract, and also violated COMAR 02.02.05.03B(16) by entering into investment advisory contracts that failed to disclose whether the contract granted discretionary authority to the investment adviser and that an

assignment of the contract may not be made by the investment adviser without the consent of the other party to the contract.

Count VI

50. Respondents EIA and Rousseaux violated section 11-303 of the Act by making or causing to be made, in documents filed with the Commissioner, statements that were at the time and in the light of the circumstances under which they were made, materially false and misleading.

Count VII

51. Respondents EWM and Rousseaux violated section 11-401(b) of the Act by EWM transacting business in this State as an investment adviser without registration as such pursuant to the Act.

Count VIII

52. Respondents EIA and Rousseaux violated section 11-402(b) of the Act by EIA employing or associating with investment adviser representatives, as defined in section 11-101(i) of the Act, who were not registered as investment adviser representatives pursuant to the Act.

Count IX

53. Respondents EIA and Rousseaux violated section 11-411(d) of the Act by EIA's failure to promptly file with the Commissioner correcting amendments for information contained in documents filed with the Commissioner that was or became materially inaccurate or incomplete.

Count X

54. Respondents EIA and Rousseaux violated section 11-411(a) of the Act and COMAR 02.02.05.16 by failing to maintain and preserve certain records required to be maintained and preserved by an investment adviser.

Count XI

55. Respondents Rousseaux and EIA violated section 11-411 of the Act and COMAR 02.02.05.12 and COMAR 02.02.05.11, respectively, by failing promptly to file correcting amendments when information contained in documents filed with the Commissioner became materially inaccurate or incomplete.

Count XII

56. Respondent EIA violated COMAR 02.02.05.13 by failing to enforce certain provisions of EIA's written supervisory guidelines.

Count XIII

57. Respondents Rousseaux and EIA violated section 11-412(a)(2) of the Act by willfully violating and willfully failing to comply with certain provisions of the Act, and also violated section 11-412(a)(7) of the Act by engaging in dishonest and unethical practices as provided in that subsection.

VII. SANCTIONS

58. I adopt the sanctions proposed in Administrative Law Judge Perez's Proposed Decision dated May 5, 2016, with the additions and modifications stated below. In adopting the

sanctions with additions and modifications, I have considered the following violations found in the Proposed Ruling and the Proposed Decision:

(A) Respondent Rousseaux obtained and used, without authorization, blank Authorization to Transfer Assets forms pre-stamped with the MetLife Medallion Signature Guarantee Stamp, signed by him or by persons whose identity is unknown, in connection with the sale of clients' securities to invest in non-MetLife insurance products, thereby representing that MetLife had verified the clients' identities. This occurred in **58** instances in connection with investments in Allianz annuities and in **33** instances in connection with investments in Conseco annuities after Rousseaux had left MetLife. Proposed Ruling, Findings of Fact 25, 30.

(B) Respondents EIA and Rousseaux misrepresented the nature of the EDGM program as a wrap fee program to EDGM's **85** investors. Proposed Ruling, Findings of Fact 40, 43.

(C) Respondents EIA and Rousseaux issued false and misleading performance figures in the IPS for the EDGM program to EDGM's **85** investors. Proposed Ruling, Findings Fact 43, 44, 45.

(D) EDGM's performance was misrepresented by an agent of EIA to **2** prospective investors. Proposed Ruling, Finding of Fact 46.

(E) Respondents EIA and Rousseaux failed to disclose to EIA's clients that EIA offered financial planning services and that it charged a $500 fee per account not funded, in EIA's Form ADV Part 2A brochure delivered by email

to **173** EIA clients in February 2013 and to **234** EIA clients in February 2014. Proposed Decision, pages 10-11, Findings of Fact 3, 4; Proposed Ruling, Finding of Fact 57.

(F) Respondents EWM and Rousseaux required at least **67** clients and Respondents EIA and Rousseaux required at least **98** clients to sign a Financial Planning Agreement with EWM or EIA, respectively, containing a contingent $500 fee, the sole purpose of which was to penalize clients who chose not to fund their accounts with EWM or EIA within 60 days, or who chose not to continue their advisory relationship with EWM or EIA. Proposed Ruling, Findings of Fact 50, 56.

(G) All Respondents used an "Investment Committee" and an "exclusive club" as ploys to manipulate advisory clients or to convince them to open advisory accounts. There is evidence regarding communications to **2** clients or prospective clients in which the Investment Committee was specifically mentioned. Proposed Decision, page 8, Findings of Fact 3, 4.

(H) Respondents EIA and Rousseaux caused the amendment of EIA's Form ADV Part 2A brochure to inflate the stated minimum investment amount needed to open an account, and caused this amended brochure to be sent to **234** email accounts in February 2014. Proposed Ruling, Findings of Fact 74, 75. Approximately half of the clients who entered the EDGM Program invested less than the $100,000 stated minimum. Proposed Decision at p. 15, Findings of Fact 1, 2, 3.

(I) Respondent EWM failed to include required provisions in the Financial Planning Agreement in **67** instances and Respondent EIA failed to include required provisions in the Financial Planning Agreement in **98** instances. Proposed Ruling, Findings of Fact 50, 58.

(J) Respondents EIA and Rousseaux filed with the Division in March 2014, a Part 2A Disclosure Brochure and a Wrap Fee Program Brochure, **both** of which falsely represented to the Division that EIA was offering a wrap fee program under which clients would pay a single fee that covered both investment management fees and securities transaction charges. Proposed Decision, Facts Relevant to Sanctions, *The Wrap Fee Brochure*, Finding of Fact IA, at paragraph 31 herein.

(K) Respondent EIA filed with the Division on **4** separate occasions EIA's Form ADV that falsely represented to the Division the amount of EIA's regulatory assets under management. Show Cause Order, paragraph 64; Answers, paragraph 64; Proposed Ruling, Finding of Fact 68.

(L) Respondents EWM and Rousseaux held EWM out as an investment adviser by requiring **67** of EWM's clients to sign a Financial Planning Agreement. Proposed Ruling, Findings of Fact 50, 84.

(M) Respondents Rousseaux and EIA implemented the VIP Program, offering benefits accepted by **72** clients for soliciting clients for Respondents. These soliciting clients were not registered as investment adviser representatives. Proposed Ruling, Findings of Fact 85, 88, 89.

(N) Respondents EIA and Rousseaux failed to file new and updated or different versions of contracts previously filed with the Division in **3** specified instances. Proposed Ruling, Finding of Fact 58; Proposed Decision, page 11, Findings of Fact 1, 2, 3.

(O) Respondents EIA and Rousseaux failed to maintain and/or produce required books and records in **3** specified instances. Proposed Ruling, Findings of Fact 92, 93, 94.

(P) Respondent Rousseaux failed to amend his Form U4 as required in **1** specified instance. Proposed Ruling, Finding of Fact 104.

(Q) Respondents EIA and Rousseaux failed to amend EIA's Form ADV in **1** specified instance. Proposed Ruling, Finding of Fact 106.

(R) Respondent EIA failed to enforce its Written Supervisory Guidelines in **7** specified areas. Proposed Ruling, Findings of Fact 95, 96, 97, 98, 99, 100, 101, 102.

59. The violation tallies in paragraph 58 of this Final Order provide only a partial picture of the potential number of Respondents' violations of the Act and its related rules, because they do not capture violations for which specific incidents are not enumerated. Among other examples, the evidence does not allow a determination of how many prospective EDGM investors, who ultimately did not invest in EDGM, received false and misleading performance information for EDGM and/or received false representations that EDGM was a wrap fee program in which an investor would pay a single annualized fee of 2% on the assets under management that covered both investment management fees and securities transaction charges when, in fact, the investors

were charged transaction fees. Similarly, the evidence does not allow the identification of every prospective client of EIA and/or EWM who was told that the Investment Committee would decide whether that person would be accepted as a client.

60. The violation tallies in paragraph 58 of this Final Order also do not reflect the fact that several of the violations described there form a basis for more than one Count of the Show Cause Order.

61. Taking into account only the violations described in paragraph 58 of this Final Order, the following summarizes the violations for each Respondent:

- Rousseaux's violations total **1,218**, of which **92** are individual violations, **990** are violations in which EIA was also a participant, **134** are violations in which EWM was also a participant, and **2** are violations in which all three Respondents were participants.
- EIA's violations total **1,103**, of which **111** are best characterized as individual violations, **990** are violations in which Rousseaux was also a participant, and **2** are violations in which all three Respondents were participants.
- EWM's violations total **203**, of which **67** are best characterized as individual violations, **134** are violations in which Rousseaux was also a participant, and **2** are violations in which all three Respondents were participants.

62. For purposes of determining appropriate civil monetary sanctions, I have considered the 2 violations in which all three Respondents were participants in connection with assessing fines against each Respondent individually.

63. If the maximum statutory penalty of $5,000 per violation were assessed, the violations described in paragraph 58 of this Final Order would yield a monetary penalty of $6,090,000 for Respondent Rousseaux, $5,515,000 for Respondent EIA, and $1,015,000 for Respondent EWM, or a total of $12,620,000 for all Respondents, without giving effect to the multiplier created when the same set of facts forms a basis for more than one Count.

64. I adopt some and modify and add to the other penalties proposed by Administrative Law Judge Perez. In doing so, I have acted pursuant to the discretion granted in assessing penalties under section 11-701.1(b) of the Act, and after careful consideration of the hearing record, the proposed rulings and proposed decision of Administrative Law Judge Perez, the exceptions and memoranda filed by the parties, the arguments presented in oral argument by the parties, and the additional information submitted to me at my request by counsel for Respondents regarding the Answer filed by Respondent Rousseaux. In particular, I have taken into consideration the steps that Respondents have taken to improve their compliance with the Act and its related rules, especially since the engagement of Oyster Consulting, LLC ("**Oyster**").

65. I adopt Administrative Law Judge Perez's analysis that sanctions may be imposed for past conduct. Specifically, section 11-701.1(b) of the Act provides in pertinent part:

> Whenever the Commissioner determines ... that a person *has engaged* in any act or practice constituting a violation of any provision of this title or any rule or order under this title, the Commissioner may in his discretion and in addition to taking any other action authorized under this title: ...
>
> (3) Bar such person from engaging in the securities business or investment advisory business in this State;

(4) Issue a penalty order against such person imposing a civil penalty up to the maximum amount of $5,000 for any single violation of this title; or

(5) Take any combination of the actions specified in this subsection. (emphasis added)

66. Regarding the proposed monetary sanctions, although the violations in this case are both pervasive and significant, I conclude that it would be punitive to assess the maximum $5,000 penalty per violation. Administrative Law Judge Perez proposed assessing a total monetary fine of $265,000, of which $15,000 would be assessed against Respondent EWM and $250,000 would be assessed against Respondents EIA and Rousseaux, jointly and severally. I conclude that this total proposed monetary penalty, although based on a larger number of violations, is in the appropriate range. I also conclude, however, that the monetary penalties should be assessed in a way that is more proportionate to the violations attributable to each Respondent.

67. As to the non-monetary sanctions, I adopt Administrative Law Judge Perez's proposed sanction suspending Respondent EIA's registration as an investment adviser for one year, rather than revoking that registration and/or permanently barring Respondent EIA from the securities and investment advisory businesses. Administrative Law Judge Perez based this suspension "on the amount of time Oyster ... required ... to review and redraft the documents necessary to bring EIA into full compliance with the Securities Act and applicable regulations." Proposed Decision at p. 35. Although I conclude that Respondent EIA has not achieved full compliance with the Act and its related rules, I also conclude that this sanction properly balances the large number and serious nature of Respondent EIA's violations with its efforts to improve its compliance program.

68. I also adopt Administrative Law Judge Perez's proposed sanction to bar permanently Respondent EWM from engaging in the securities and investment advisory businesses in this State. Respondent EWM is not now and has never been registered as an investment adviser with the Division. Despite the concerns that the Division expressed as early as January 2012 about the lack of separation between Respondent EIA and Respondent EWM and that Respondent EWM appeared to be acting as an unregistered investment adviser (Proposed Ruling, Findings of Fact 79, 81), Respondent EWM persisted in acting as an investment adviser. For example, although not registered as an investment adviser with the Division, Respondent EWM required 67 of its clients to sign a Financial Planning Agreement, even though the activities connected with financial planning fall within the definition of investment adviser, *see* section 11-101(h)(1)(ii) of the Act, and the clients were required to sign the Financial Planning Agreement contrary to the advice of Respondent EWM's compliance consultant. Proposed Ruling, Finding of Fact 84. I conclude that Respondent EWM's activities of this type, which are described in the Proposed Ruling, Finding of Fact 84, fully support the imposition of the permanent bar.

69. Although I adopt Administrative Law Judge Perez's proposed revocation of Respondent Rousseaux's investment adviser representative registration, I conclude that it is also appropriate to impose the permanent bar on Respondent Rousseaux requested by the Division.

70. Respondent Rousseaux is the key person at both Respondent EIA and Respondent EWM and set the tone from the top at both of these entities. In addition to his individual violations, Respondent Rousseaux participated in a very significant portion of Respondent EIA's and Respondent EWM's violations, as well. The record amply documents that Respondent Rousseaux has engaged in a pattern and practice over many years of both violating the Act and its related rules and demonstrating a striking lack of concern about compliance. The evidence begins with

his purposeful, unauthorized use of blank ATA forms pre-stamped with the MetLife Stamp in over 90 separate instances and continues through the many violations that occurred over the time period covered by the Show Cause Order in connection with his operation of Respondents EIA and EWM. In some instances, Respondent Rousseaux and the entities he controlled took actions, despite information, cautions, and advice received from their own compliance consultants, that violated the Act and its related rules. *See* Proposed Ruling, Findings of Fact 63, 64, 66, 72, 73, 74, 84; Proposed Decision at p. 10, Finding of Fact 2, and at p. 13, Finding of Fact 2.

71. I have also considered that, as Administrative Law Judge Perez noted in the Proposed Decision at page 34, "[r]espondents have consistently taken the position that they have not committed violations of law, or if they have, the violations were 'de minimis.'"

72. In addition to characterizing violations, to the extent they are acknowledged at all, as minimal, some violations are simply described with words such as "oversight," "error," or "mistake." For example, the discussion of the wrap fee issue in Respondents' Opposition to Summary Decision Motion begins at page 12 with a definition of wrap fee program from a publicly available SEC website. Yet, the argument continues, EDGM was "mistakenly marketed ... as a wrap program because [EIA] and Rousseaux did not understand that wrap was a specific term used to describe how the fees would be deducted from investor accounts." *Id.* at p. 14.

73. Respondent Rousseaux worked for many years in the financial industry as a registered representative and has been registered as an investment adviser representative since 2011, yet he contends that he did not know what a wrap fee program was. Respondent Rousseaux nevertheless caused to be filed with the Division, and provided to EDGM investors, both a Disclosure Brochure and a Wrap Fee Program Brochure that contained unambiguous and accurate definitions of a wrap fee program. These definitions flatly contradicted how transaction fees in the

EDGM Program were actually charged, which had also been clearly explained to him by a Charles Schwab representative in an email exchange when the Program was being set up. Respondent Rousseaux knew or should have known how this critical aspect of the EDGM Program functioned. He was aware of how the Program was being marketed to EDGM investors and how it was being represented in regulatory filings. His knowing or reckless disregard of the discrepancy between the wrap fee disclosure language and the actual operation of the EDGM Program caused investors in the EDGM Program to be misled and led to false and misleading filings with the Commissioner. His actions in this instance are emblematic of his ongoing disregard for both his compliance responsibilities and his obligation to provide full and accurate disclosure to his clients.

74. I therefore conclude that the imposition of a permanent bar on Respondent Rousseaux, in addition to the revocation of his investment adviser representative registration, is warranted.

75. **NOW THEREFORE**, pursuant to section 701.1 of the Act, it is hereby **ORDERED THAT**:

76. Respondent Philip Rousseaux's registration as an investment adviser representative is revoked.

77. Respondent Philip Rousseaux is permanently barred from engaging in the securities and investment advisory businesses in Maryland, including for or on behalf of any others, and from acting as a principal of or consultant to or in any entity so engaged.

78. Respondent Everest Investment Advisors, Inc.'s registration as an investment adviser is suspended for a period of one year.

79. Respondent Everest Wealth Management, Inc. is permanently barred from engaging in the securities and investment advisory businesses in Maryland, including for or on behalf of any others, and from acting as a consultant to or in any entity so engaged.

80. Respondent Philip Rousseaux is assessed an individual monetary penalty of $20,000.00.

81. Respondent Everest Investment Advisors, Inc. is assessed an individual monetary penalty of $20,000.00.

82. Respondent Everest Wealth Management, Inc. is assessed an individual monetary penalty of $15,000.00.

83. Respondents Everest Investment Advisors, Inc. and Philip Rousseaux, jointly and severally, are assessed an additional monetary penalty of $175,000.00.

84. Respondents Everest Wealth Management, Inc. and Philip Rousseaux, jointly and severally, are assessed an additional monetary penalty of $25,000.00.

VIII. JURISDICTION RETAINED

85. Jurisdiction is retained by the Commissioner or her designee for the purposes of enabling any party to this Final Order to apply for such further orders and directions as may be necessary or appropriate for the construction or enforcement of this Final Order.

IX. APPEAL RIGHTS

86. Pursuant to the Code of Maryland Regulations, COMAR 02.02.06.24, each Respondent has the right to file an appeal of this Final Order to the appropriate Circuit Court of

the State of Maryland. Any appeal must be filed with 30 days from the date this Final Order is mailed by the Division.

SO ORDERED:

Dated: March 28, 2017

Sarah McCafferty
Special Assistant Attorney General

OFFICE OF THE ATTORNEY	*	**BEFORE UNA M. PEREZ,**
GENERAL, SECURITIES DIVISION	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE**
EVEREST INVESTMENT ADVISORS,	*	**OF ADMINISTRATIVE HEARINGS**
INC., et al.,	*	**OAH Case No.: OAG-SD-50-15-24381**
RESPONDENTS	*	**SD Case No.: 2014-0119**

* * * * * * * * * * * * *

PROPOSED RULING ON THE SECURITIES DIVISION'S MOTION FOR SUMMARY DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF EXHIBITS PERTINENT TO THE MOTION
FINDINGS OF UNDISPUTED FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On June 17, 2015, the Maryland Securities Commissioner (Commissioner), in the Office of the Attorney General, Securities Division (Division), issued an Order to Show Cause (OSC) against Everest Investment Advisors, Inc. (EIA), Everest Wealth Management, Inc. (EWM), and Phillippe Rousseaux[1] (Rousseaux) (collectively Respondents) for alleged violations of the Maryland Securities Act[2] and related regulations. On July 2, 2015, each Respondent filed an Answer and requested a hearing.

On July 15, 2015, the Commissioner referred the matter to the Office of Administrative Hearings (OAH) for a hearing, and delegated to the OAH the authority to issue a proposed

[1] On the Respondents' Pre-Hearing Statement, and on other documents in the record, this Respondent's first name is spelled "Philip."
[2] Md. Code Ann., Corps. & Assoc. §§ 11-101 to 11-805 (2014) (hereinafter, the Securities Act).

Exhibit A

decision. The parties filed Prehearing Conference Statements: on September 24, 2015 (the Division) and October 6, 2015 (Respondents), respectively.

I held a telephone prehearing conference on October 8, 2015. Assistant Attorneys General Kelvin M. Blake and Katharine Weiskittel represented the Division. Russell D. Duncan, Esquire, and Jacob Frenkel, Esquire, represented all Respondents. I issued a Prehearing Conference Report and Scheduling Order (Report and Order) on October 16, 2015.

On October 26, 2015, the Respondents filed a Motion to Correct the Report and Order. I held a telephone conference on Monday, November 2, 2015, to discuss the motion on the record. Mr. Blake and Ms. Weiskittel represented the Division, and Mr. Duncan, Mr. Frenkel, and Vincent Hsia, Esquire, represented the Respondents. On November 4, 2015, I issued a Corrected Prehearing Conference Report and Scheduling Order.

On November 6, 2015, the Division filed a Motion for Partial Summary Decision (Motion) and Memorandum in Support thereof (Memorandum). A settlement conference was held on November 10, 2015, before another Administrative Law Judge. On November 17, 2015, the Division filed a Motion to Seal certain of the exhibits attached to its Memorandum; the Respondents did not oppose this motion. By letter of November 18, 2015, the parties requested a telephone conference to "propose a modification of the current schedule." On November 24, 2015, I held a teleconference with counsel, and on November 25, 2015, issued a letter granting each party an additional seven days to file their opposition and reply memoranda, respectively. On December 1, 2015, I issued an Order granting the Motion to Seal.

The Respondents filed a Memorandum in Opposition (Opposition) to the Division's Motion on December 8, 2015. The Division filed a Memorandum in Reply (Reply) on December 21, 2015. Neither party requested a hearing on the Motion.

The contested case provisions of the Administrative Procedure Act, the Procedures for Administrative Hearings of the Office of the Attorney General, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); Code of Maryland Regulations (COMAR) 02.02.06; and COMAR 28.02.01.

ISSUE

Should the Division's Motion be granted, in whole or in part, because there are no genuine disputes of material fact and the Division is entitled to judgment as a matter of law that the Respondents violated certain provisions of the Securities Act and related regulations?

SUMMARY OF EXHIBITS PERTINENT TO THE MOTION

The Division attached the following exhibits[3] to its Motion:

Motion Ex. A Affidavit of Martin Disney, Securities Fraud Investigator, November 4, 2015, with 45 numbered exhibits, separated by tabs, and an Exhibit List

Motion Ex. B Affidavit of Marcia Gilliam, September 11, 2015

Motion Ex. C Affidavit of Christopher Joseph Kirk, July 9, 2015, with 10 numbered exhibits, separated by tabs

Motion Ex. D Transcript of Statement under Oath of Philip Rousseaux, November 25, 2014, with 36 numbered exhibits, separated by tabs

Motion Ex. E Transcript of Deposition of Julie P. Long (nee Quinn), December 4, 2014, with 19 numbered exhibits, separated by tabs

Motion Ex. F Affidavit of Patrick Tormey, Senior Broker-Dealer Examiner, October 27, 2015, with 12 numbered exhibits, separated by tabs

Motion Ex. G Transcript of Deposition of Michael DiPaula, September 10, 2015, with 15 numbered exhibits, separated by tabs

The Respondents attached the following exhibits to their Opposition:

Opp. Ex. A Affidavit of Philip Rousseaux, December 8, 2015

[3] The lettered exhibits are affidavits, transcripts of testimony under oath, or depositions. All but Exhibit B have numbered exhibits attached. The only exhibit that has a list of the numbered exhibits is Exhibit A. For the remaining exhibits attached to the Division's Motion and Reply, I have not prepared lists of the numbered exhibits. The numbered exhibits are separated by tabs or divider sheets, and the transcripts of testimony prepared by court reporters contain lists of the numbered exhibits that were used in the sworn statements or depositions.

Opp. Ex. B Affidavit of John Anthony, December 8, 2015

Opp. Ex. C Letter from Daniel J. McCartin, Esq., Conti, Fenn & Lawrence LLC, to Assistant Attorneys General Blake and Weiskittel, June 6, 2014

Opp. Ex. D E-mail thread between John Anthony and Charles Schwab & Co., Inc., April 8-10, 2014

Opp. Ex. E FINRA Chart, Guidelines Sanctions for Violations re: Filing of Forms U4/U5

Opp. Ex. F Affidavit of Evan Rosser, December 8, 2015

The Division attached the following exhibits to its Reply:

Reply Ex. A Affidavit of Mary Stanczyk, December 15, 2015, with attached Exhibits 1- 3

Reply Ex. B Affidavit of L. Scott Phillips, December 17, 2015, with attached Exhibits 1- 3

Reply Ex. C Supplemental Affidavit of Martin Disney, December 16, 2015, with 11 numbered exhibits, separated by tabs

Reply Ex. D Supplemental Transcript of Testimony of Philip Rousseaux, November 23, 2015, with 17 numbered exhibits, separated by tabs

Reply Ex. E Client Affidavits, attached as Exhibits 1 through 6, December 15, 16, or 17, 2015

FINDINGS OF UNDISPUTED FACT

Undisputed Background Facts[4]

1. EWM is a Florida corporation. It maintains a place of business in Towson, Maryland. The principal business of EWM, an insurance producer, is the sale of insurance products, including but not limited to fixed annuities.
2. EIA is a Florida corporation. It maintains a place of business in Towson, Maryland. The principal business of EIA is the provision of investment advisory services. Since July 21, 2011, EIA has been a registered investment adviser (IA) with the Division.
3. EWM is not now, nor has it ever been, registered as an IA with the Division.

[4] These are facts alleged in the OSC that the Respondents have admitted or identified as undisputed in their Answers to the OSC, their Prehearing Conference Statement, or their Opposition.

4. Rousseaux is the owner of EWM and EIA. Both entities operate out of the same business premises in Towson. Since July 26, 2011, Rousseaux has been a registered investment adviser representative (IAR) for EIA with the Division.

5. In January 2012, the Division conducted an on-site examination of EIA's advisory practice.

6. On March 13, 2014, March 31, 2014, and April 2, 2014, the Division conducted a follow-up on-site examination of EIA's advisory practice.

7. The Money Guys radio show was broadcast on several radio stations in the Baltimore Metropolitan area. Rousseaux expanded The Money Guys radio show into the television market by running weekly television infomercials on several Baltimore Metropolitan and surrounding area television stations. The television infomercials reached as far as Ocean City, Maryland.

8. From January 2003 to November 2004, through an affiliation with MetLife Securities (MetLife), Rousseaux was registered as a "registered representative" with the Financial Industry Regulatory Authority (FINRA).

9. From November 2004 to March 2005, through an affiliation with USAllianz Securities (Allianz), Rousseaux was registered as a "registered representative" with FINRA.

10. From 2005 to 2011, through an affiliation with H. Beck, Inc. (H. Beck), Rousseaux was registered as a "registered representative" with FINRA.

11. On or about October 22, 2004, Rousseaux was permitted to resign from MetLife for "attempted replacement of a MetLife contract in violation of company policy." Within days thereafter, Rousseaux went to work for Allianz.

12. During the February 2005 to October 2007 time frame, Rousseaux conducted insurance business through Conseco Insurance (Conseco), now known as Washington National Insurance Company.

I find the following additional facts to be undisputed:

Rousseaux's Use of a MetLife Medallion Signature Guarantee Stamp in Forms Used to Transfer Client Assets and Purchase Insurance Products from Allianz and Conseco—October 2004 through Summer 2007

13. Rousseaux worked for MetLife Securities, Inc. and Metropolitan Life Insurance Company, Inc. (collectively MetLife) from January 2003 to October 2004, in MetLife's Linthicum, Maryland branch office. Motion Ex. B, Affidavit of Marcia Gilliam, ¶¶ 3, 4, and 5.

14. In order for Rousseaux to sell an investment and transfer an investor's funds to effectuate the purchase of an annuity, the investor was required to complete and sign an Authorization to Transfer Assets (ATA) form. Motion Ex. A, Affidavit of Martin Disney, ¶ 4. Ordinarily a transfer agent will not accept an ATA form or process the transaction unless the investor's signature is "guaranteed." *Id.*

15. A signature guarantee can be provided by a financial institution that participates in a Medallion Signature Guarantee program. Respondents' Answers, ¶ 8.

16. From 2004 to 2007, there were two Medallion Signature Guarantee stamps in MetLife's Linthicum office. They were numbered #9005518 **317** and #9005518 **246**.[5] Gilliam Aff., ¶ 7; *see also* Reply Ex. B, Affidavit of L. Scott Phillips, ¶ 11. Rousseaux was not one of the individuals in that office authorized to use the stamps. Gilliam Aff., ¶ 8.

17. When not in use, the stamps were required to be secured in a locked place in the offices of persons authorized to use the stamps. Gilliam Aff., ¶ 9, Phillips Aff., ¶ 12. The

[5] I have used boldface type on the last three digits for clarity only.

stamps could only be used for MetLife business. Gilliam Aff., ¶ 12. A registered representative (such as Rousseaux) was prohibited from guaranteeing his or her own signature or the signature of his or her clients. *Id.*, ¶ 11.

18. Each MetLife branch was required to maintain a Signature Guarantee File, containing a Signature Guarantee Log, copies of documents stamped with the Medallion Stamp, and the Signature Guarantee Medallion Acceptance Forms. Gilliam Aff., ¶ 10.

19. It was against MetLife company policy to pre-stamp ATA forms with MetLife's Guarantee stamp before a client signed the forms. Phillips Aff., ¶ 13. During the time that Rousseaux worked in the Linthicum branch of MetLife, his supervisor, L. Scott Phillips, did not authorize the use of pre-stamped ATA forms by registered representatives. *Id.*, ¶ 14.

20. All registered representatives should have been aware that it was against MetLife policy to use ATA forms pre-stamped with MetLife's Guarantee stamp to effect the transfer of clients' assets or to use the forms for non-MetLife business. Phillips Aff., ¶ 15.

21. When he left MetLife in October 2004, Rousseaux took with him a box including a lot of blank ATA forms that were pre-stamped with MetLife's Medallion Signature Guarantee Stamp. Disney Aff., ¶ 7 and Ex. 3. Rousseaux's then-supervisor, Mr. Phillips, did not authorize Rousseaux to take pre-stamped ATA forms with him after Rousseaux's separation from MetLife. Phillips Aff., ¶ 16.

22. Allianz's ATA form, Form S2056, consisted of four pages. The third page was the page containing the client/investor's authorization of the transaction with his or her signature, a witness's signature, and the Signature Guarantee Stamp with the authorized signator's signature (client authorization page). Answers, ¶ 23.

23. Allianz periodically updated its Form S2056, with new revision dates displayed at the bottom left hand corner of each of the four pages. The form was updated on at least the following dates—October 2003; August 2004; February 2006, and September 2006. Disney Aff., ¶ 6 and Ex. 1.

24. Rousseaux told Christopher Kirk, an employee of EWM, that to avoid the risk of losing a client to another financial institution, he had gained access to one of the MetLife Signature Guarantee stamps from the office of one of the individuals responsible for storing the stamps, and had used the MetLife Signature Guarantee stamp to stamp the client authorization page of a large number of blank ATA forms for Allianz and Conseco. Motion Ex. C, Affidavit of Christopher Joseph Kirk, ¶ 8.

25. After he left MetLife, Rousseaux used at least 69 client authorization pages of the Form S2056, stamped with the MetLife Medallion Signature Guarantee stamp # 9005518 **317**. The majority of these pages (58) were used to sell clients' securities to invest in Allianz annuities. The client authorization pages showed revision dates of October 2003 and August 2004. Disney Aff., ¶ 9 and Ex. 1.

26. Although the Allianz Form S2056 was updated in February 2006, between March 2006 and June 2007, Rousseaux continued to use Allianz client authorization pages with revision dates of October 2003 or August 2004. Disney Aff., ¶ 11 and Ex. 1.

27. Beginning around March 2006 through the summer of 2007, the MetLife Medallion Signature Guarantee stamps were consistently purportedly signed by a person with the initials "K.M." Disney Aff., ¶ 13 and Ex. 1.

28. MetLife's records do not reveal any person with the initials "K.M." who was authorized to use, or act as a signatory on, the signature guarantee stamps during the period 2004 to 2007. Gilliam Aff., ¶ 13.

29. Conseco's ATA Form was Form 13495. Between about February 2005 and October 2007, Rousseaux acted as the selling agent on approximately 42 client transactions involving the transfer of client assets from another financial institution to Conseco, using Form 13495. Disney Aff., ¶ 15 and Ex. 1.

30. Of the 42 transactions, at least 35 of the Forms 13495 contained MetLife's Signature Guarantee Medallion Stamp # 9005518 **317**. Thirty-three of the client authorization forms were used to sell clients' securities to invest in Conseco annuities. Disney Aff., ¶ 16 and Ex. 1. As in the Allianz transactions, beginning around March 2006, the person purportedly signing the stamps used the initials "K.M." *Id.*, ¶ 17 and Ex. 1.

31. The MetLife stamp used by Rousseaux after his departure from MetLife represented that Met Life had verified the identity of the clients. *See* Disney Aff., Ex. 2.

32. The vast majority of the Forms S2056 and 13495 used to transfer assets using the MetLife stamp involved the transfer of non-MetLife products to Allianz or Conseco products, respectively. Disney Aff., ¶18 and Ex. 1.

33. In the summer of 2007, while at H. Beck, Rousseaux began processing Forms S2056 through H. Beck, using H. Beck's Medallion Signature Guarantee stamp. The revision dates on all four pages were consistent. Disney Aff., ¶ 19, and Disney Suppl. Aff., ¶ 7 and Ex. 11.

EIA's Marketing of a New Investment Program as a "Wrap Fee Program"[6] when the Program Was Not a Wrap Fee Program

34. In or about October 2013, EIA began to develop a new investment program or model, known at various times as the Everest Dynamic Growth Portfolio, the Everest Dynamic Growth Model Portfolio, and the Everest Dynamic Growth Model (EDGM).

[6] A "wrap fee program" is one in which an investment advisory client pays a flat fee for investment advisory services and is not charged separate brokerage commissions or transaction charges. The Securities and Exchange Commission (SEC) requires a special disclosure document, the Wrap Fee Program Brochure. *See* Memorandum at 50-51.

35. On October 15, 2013, Julie Quinn (now Long) was EIA's Chief Compliance Officer (CCO). As such, she e-mailed EIA's then-outside compliance consulting firm to introduce herself and to say that she wanted to discuss a new investment model that EIA wanted to "roll out" on January 1, 2014, the Everest Dynamic Growth Portfolio. Disney Aff., ¶¶ 58 and 59 and Ex. 20.

36. Also on October 15, 2013, Rousseaux engaged in an e-mail conversation with a Charles Schwab representative concerning EIA's new investment program. During that exchange, Rousseaux expressed his intention that the clients should pay transaction charges. Motion Ex. D, Transcript of Statement under Oath of Philip Rousseaux, at 181-82 and Ex. 24.

37. On November 14, 2013, Quinn e-mailed to a new compliance consultant a draft of EIA's updated Part 2A firm brochure that described the new investment program as a "wrap program . . . where the investor pays one stated fee that includes management fees, transaction costs, fund expenses, and any other administrative fees." Motion Ex. E, Transcript of Deposition of Julie P. Long (nee Quinn), at 25 and Ex. 2.

38. Rousseaux and EIA approved the use of the new Part 2A brochure and a separate new brochure advertising the wrap fee program. Answers, ¶ 103.

39. Beginning in January 2014, EIA solicited existing and potential clients to invest in the new program, representing it as a wrap fee program. Disney Aff., ¶¶ 59-61 and Exs. 21 and 22.

40. In March 2014, Division staff discovered that, contrary to the representations in the wrap fee brochure, investors were being charged transaction fees through their Charles Schwab accounts, and EIA was not paying those fees as promised. Disney Aff., ¶ 62 and Ex. 23.

41. The transaction fees exceeded $8,000.00. After the Division brought the matter to EIA's attention, EIA caused those fees to be refunded to the clients. Opp. Ex. A, Affidavit of Philip Rousseaux, at ¶ 12 and Ex. D.

42. EIA and its investment adviser representatives earned twice as much in fees from the EDGM program than from other programs EIA sold to clients. Disney Aff., ¶ 65 and Ex. 24. This circumstance was not disclosed in EIA's wrap fee brochure. Motion Ex. D, Rousseaux Transcript, Ex. 28.

43. At least 85 of EIA's clients invested in the EDGM program. Disney Aff., ¶ 61 and Ex. 6.

EIA's Use of "Performance Figures" in an Investment Policy Statement (IPS) for the EDGM Program

44. Clients who invested in the EDGM program were provided with an Investment Policy Statement (IPS). Answers, ¶ 115; Rousseaux Tr., Ex. 34.

45. Among other things, the IPS provided backtested performance data for the EDGM, and represented that the "5 and 10 years long term performance/growth of the [EDGM] as of 1/1/2014" would have been 8.92% and 8.64%, respectively. Rousseaux Tr., Ex. 34, at 7. These performance figures were false.

46. In addition, in soliciting investors for the wrap fee program, Quinn told at least two clients that Rousseaux had backtested the program for the period 2000 to 2013 and that the model "would have outperformed the S & P [Standard & Poor's] 500 [index] by 37%." Disney Aff., ¶ 69; Quinn Tr. at 60-61, 63, and 65, and Ex. 11, at 2, and Ex. 12. This representation was false.

47. In a letter to clients dated April 24, 2014, Rousseaux and EIA admitted that "information we provided to you to market the model was not accurate and/or may have been misleading. Among other errors, the five and ten year performance data for the [EDGM]

was incorrect." Disney Aff., ¶ 68 and Ex. 28. The letter also stated that the errors had been discovered by the Division in the course of an audit of EIA. Disney Aff., Ex. 28.

48. The 2014 IPS did not contain the material disclosures concerning the advertisement of model performance figures required by a certain SEC no-action letter, *Clover Capital Management, Inc.*, 1986 WL 67379 (Oct. 28, 1986).

49. When the Division asked EIA to produce documentation to support the statement that the EDGM would have outperformed the S & P 500 by 37% over the 2000 to 2013 time period, EIA was unable to do so. Disney Aff., ¶ 70.

Financial Planning Agreements

50. Between November 2012 and March 2014, EIA and EWM required more than 165 clients to sign a Financial Planning Agreement (FPA) describing financial planning services EIA and EWM offered to clients. Disney Aff., ¶ 48 and Ex. 15. In consideration for the financial planning services, the clients were required to acknowledge "that if the accounts we signed up for today are not opened and funded within 60 days, we are to pay a fee of $500 per account." Rousseaux Tr., Ex. 30; *see also* Kirk Aff., Ex. 7.

51. If the clients funded the accounts, they would not be assessed a fee and the contract (FPA) would terminate. Kirk Aff., ¶28.

52. In filings with the Division as amended in December 2012, EIA represented that it did not offer or provide financial planning services to clients, or charge a fee for such services. Disney Aff., ¶ 46 and Exs. 10, 13, and 14.

53. In at least one instance, EIA sought to enforce the FPA against a client who decided to terminate her relationship with EIA and EWM. Answers at 82. The client sought to cancel the purchase of annuities and to end her advisory relationship two days after the purchase and the inception of the relationship. Disney Aff., ¶ 49 and Ex. 16.

54. Shortly thereafter, the Respondents sent the client an invoice for $1,000.00, representing $500.00 per account that she failed to fund within 60 days. Answers, ¶ 83.

55. Ultimately, the Respondents did not require the client to pay the $1,000.00 fee, but only to return a new client signing gift. Answers, ¶ 85.

56. The $500.00 fee was intended to deter clients from choosing not to transfer their accounts to, or not to continue their advisory relationship with, EIA or EWM. Rousseaux Tr., at 205; Kirk Aff., ¶ 29; Disney Aff., ¶ 51 and Ex. 16.

57. In February 2013 and again in February 2014, EIA and EWM, respectively, e-mailed to EIA clients the annual delivery of EIA's Part 2A Brochure. Disney Aff., ¶ 47 and Ex. 7 and 8. Neither of these brochures disclosed that EIA provided financial planning services or charged a $500.00 fee per account not funded. *Id.*

58. The Respondents did not file the FPA with the Division. Answers, ¶ 88. None of the FPAs contained a non-assignment clause or disclosed whether they granted discretion to the adviser. Rousseaux Tr., Ex. 30; *see also* Disney Aff., Ex. 15.

EIA's Representations as to Regulatory Assets under Management (RAUM)

59. EIA periodically provided to its outside compliance consultants the amount of EIA's regulatory assets under management (RAUM). EIA's RAUM was reported in Item 5 of Part 1A of its Form ADV.[7] Kirk Aff., ¶ 14.

60. According to EIA's Form ADV, Part 2A, from January 31, 2012 through 2013, EIA's sole advisory service consisted of referring clients to Curian Capital LLC (Curian), a third party adviser who managed the clients' assets through its investment programs. Disney Aff., ¶ 45 and Ex.10; Kirk Aff., ¶ 16.

[7] Form ADV is a FINRA form, Application for Investment Adviser Registration and Report by Exempt Reporting Advisers.

61. EIA did not have discretionary authority to hire and fire investment advisers under the Curian programs; did not select or recommend specific securities to clients under the Curian programs; and did not effect securities transactions for those clients. Disney Aff., ¶ 39 and Ex. 10; Kirk Aff., ¶ 16; Rousseaux Tr. at 162-63.

62. In its Form ADV Part 2A, EIA disclosed at least nine times that it did not actively manage client assets under the Curian program. Disney Aff., ¶ 40 and Ex. 10.

63. On September 11, 2012, EIA's compliance consultants provided EIA with the SEC guidelines for calculating RAUM. Kirk Aff., ¶ 20 and Ex. 3.

64. On March 27, 2013, EIA's compliance consultants informed EIA and its then Chief Compliance Officer (CCO), Christopher Kirk, that EIA could not count assets as assets under management unless EIA provided continuous and regular supervision of the money. Kirk Aff., ¶ 17, and Ex 2.

65. A representative of Curian, Ray Kelly, also told Kirk that EIA could not count the Curian assets as EIA's assets under management. Kirk Aff., ¶ 19.

66. Kirk relayed the advice concerning the counting of RAUM to Rousseaux. Kirk Aff., ¶ 19. Rousseaux nevertheless directed that the Curian assets be listed on EIA's Form ADV. *Id.*

67. In an e-mail to Kirk dated March 20, 2013, Rousseaux expressed his belief that "the more [assets under management] we state the stronger we look for marketing campaigns." Kirk Aff., ¶ 22 and Ex. 2.

68. In January 2012, EIA's RAUM were reported as approximately $11 million. In subsequent filings, reported RAUM increased steadily; by April 2014, EIA's RAUM were reported as approximately $37 million. Answers, ¶ 64; Disney Aff., ¶ 42.

69. In or about late April 2014, Ray Kelly, of Curian, told Rousseaux verbally that EIA could not include the Curian-managed assets in EIA's RAUM. Rousseau Tr. at 171-73 and Ex. 22. On April 30, 2014, Mr. Kelly followed up with an e-mail, setting forth the SEC's definition of RAUM. Rousseaux Tr., Ex. 22.

70. In March 2014 and June 2014, the Division sent letters to EIA, questioning the inclusion of Curian assets under RAUM and asking for an explanation. Disney Aff., ¶ 43 and Exs. 11 and 12.

71. On February 24, 2015, Respondents EIA and Rousseaux responded to the Division's questions and amended their Form ADV to remove the Curian-managed assets from their RAUM. Answers, ¶ 72.

EIA's Representations as to the Account Minimum for the EDGM Program

72. In an e-mail to EIA's compliance consultant dated December 10, 2013, Rousseaux requested that, for purposes of amending EIA's Part 2A brochure disclosure, "the only material change I would like to make is to part 7, account minimums. Let's bump our minimum up to $100,000 and keep everything else the same. We will leverage that to our advantage to make exceptions for clients." Disney Aff., ¶ 36 and Ex. 5; Rousseaux Tr., Ex. 29.

73. On December 13, 2013, the compliance consultant responded that the minimums could be increased "so long as you adhere to that threshold for the most part (the rule more than the exception)." Disney Aff., Ex. 5.

74. Many of the investors accepted into EIA's wrap program did not meet the required $100,000.00 account minimum. Disney Aff., ¶37 and Ex. 6. The account minimum was actually $10,000.00. Motion Ex. F., Transcript of Deposition of Michael DiPaula, at 93-94; Quinn Tr. at 67.

75. On February 5, 2014, as part of the annual delivery of EIA's Form ADV Part 2 Brochure, Respondent EWM sent to 234 e-mail accounts, belonging to EIA's clients, an e-mail containing EIA's Form ADV, Part 2A disclosure brochure, which listed the account minimum for EIA's wrap fee program as $100,000.00. Disney Aff., ¶ 28 and Ex. 7.

EIA's Failure to File Updated Advisory Contracts with the Division

76. As part of its initial application for investment adviser registration, EIA filed an initial investment advisory contract with the Division. Disney Aff., ¶ 52. The Division reviewed that advisory agreement. *Id.*, ¶ 53.

77. Since the time of its initial registration, EIA has amended and used several versions of advisory contracts that were materially different from the advisory agreement initially filed with the Division. Disney Aff., ¶ 54 and Exs. 15, 17, 18 and 19.

78. EIA never filed any of these amended or updated agreements with the Division. Disney Aff., ¶ 55.

EWM Acting as or Holding Itself Out as an Investment Adviser when Not Registered with the Division

79. During its January 2012 examination of EIA and in subsequent written communications with Respondents' counsel, the Division expressed concerns about the lack of separation between EWM and EIA. Answers, ¶ 150.

80. Rousseaux was aware of the Division's concerns and relayed them to EIA's compliance consultant by e-mail on January 12, 2012. Rousseaux Tr., Ex. 3.

81. In a letter of January 23, 2012, the Division informed the Respondents that it appeared that EWM was acting as an unregistered IA, including by holding itself out as a "small boutique local investment advisory firm" on a Money Guys radio broadcast, and advertising on its website that it provides "Personalized Strategies. . . Financial planning for individuals and families." Disney Aff., ¶ 72 and Ex. 29.

82. In a letter of January 27, 2012, Respondents' then-counsel represented to the Division that EWM had added disclosures both to its website and to the Money Guys radio show. Disney Aff., ¶ 73 and Ex. 30.

83. In a letter of August 12, 2012, Respondents' new counsel represented to the Division that "EWM has not and does not intend to act or hold itself out as an investment adviser." Disney Aff., ¶ 74 and Ex. 31.

84. Notwithstanding the Division's concerns and the representations of counsel, EWM has continued to act as in investment advisor by, among other things:

- executing at least 67 Financial Planning Agreements (FPAs) with clients, contrary to the advice of EWM's compliance consultant, Rousseaux Tr., Ex. 31 at 5, Disney Aff., ¶ 75A and Ex. 15;
- using EWM letterhead in discussing securities related matters with advisory clients, Disney Aff., ¶ 75B and Ex. 32;
- holding out EWM's logo in comprehensive financial plans and on client intake forms and other documents asking about brokerage accounts, Rousseaux Tr., Exs. 1 and 7, Disney Aff., ¶75C and Ex. 33;
- offering financial planning services and security portfolio management on its Facebook page, Rousseaux Tr., Ex. 4; and
- holding out as an investment advisory or financial advisory firm on different social media websites, such as Linked In, Angie's List, Yelp, and the Better Business Bureau, Disney Aff., ¶ 75D and Ex. 34.

Respondents' Employment of Unregistered Investment Adviser Representatives

85. In early 2012, Rousseaux set up and introduced the VIP program to his insurance and advisory clients. Answers, ¶ 157. Under this program, a client could become a VIP client by soliciting a potential client for Rousseaux's insurance and advisory businesses. Rousseaux Tr. at 134; Kirk Aff., ¶ 36 and Ex. 9.

86. In exchange for the referral, and as a member of the VIP program for the year, a client would be eligible for trips, dinners, or other benefits provided by Rousseaux and his businesses. Answers, ¶ 159; Kirk Aff., ¶ 37 and Ex. 9.

87. The Respondents heavily marketed the VIP program to their clients, including during client appreciation events and after signing clients. Kirk Aff., ¶ 38. In or about November 2013, Julie Quinn began including advertising for the VIP program in her e-mail signature. Quinn Tr., Exs. 1, 2, 3, 4, 7, 11, 12, 13, 14, and 16.

88. Seventy-two clients took advantage of the benefits offered by the VIP program, by soliciting clients for the Respondents. Disney Aff., ¶ 76 and Ex. 35; *see also* Kirk Aff., ¶ 39.

89. EIA compensated clients for soliciting new advisory clients for EIA, but did not register the soliciting clients as investment adviser representatives. Disney Aff., ¶ 77 and Ex. 36.

EIA's' Failure to Maintain and/or Timely Produce Books and Records

90. In a November 7, 2011 e-mail from EIA's former compliance consultant to EIA's former CCO, the consultant advised that "any time you send a letter or get a letter from a client, keep a copy. All documentation on behalf of a client must be kept." Kirk Aff., ¶ 40 and Ex. 10.

91. EIA's former CCO responded, "We keep all of these copies in an outgoing and incoming correspondence file for the entire company instead of putting the letters in the individual client files." Kirk Aff., ¶ 41 and Ex. 10.

92. On April 2, 2014, Division staff requested that the then-CCO, Quinn, provide copies of all written correspondence with advisory clients. Motion Ex. G, Affidavit of Patrick Tormey, ¶ 13. Quinn told Division staff that EIA does not preserve written communications with clients sent by mail. *Id.*, ¶ 14.

93. On March 13, 2014, Division staff also requested copies of all documentation supporting the performance advertised in EIA's [2014] IPS. The only documents produced were two hypothetical reports dated October 18, 2013 and January 1, 2014. Tormey Aff., ¶ 21.

94. EIA has not produced any documentation supporting its claims that its investment program (i.e., the EDGM) would have outperformed the S & P 500 by 37% for the period 2000 to 2013. Disney Aff., ¶¶ 69-70.

EIA's Failure to Enforce Compliance Procedures

95. On or about October 30, 2013, EIA amended its Form ADV to disclose that Quinn was now the CCO for EIA. Answers, ¶ 174.

96. Quinn had no prior experience in compliance and asked Rousseaux if she would receive training. Answers, ¶ 176.

97. Rousseaux told Quinn that she would receive compliance training, but that training never took place. Quinn Tr. at 14 and 36-37.

98. Quinn did not have the authority to overrule Rousseaux's actions. Quinn Tr. at 18, 33.

99. The EIA Compliance Manual in effect when Quinn became CCO stated that the CCO was "competent and knowledgeable" regarding applicable statutes and regulations, and was empowered with "full responsibility and authority to develop and enforce appropriate policies and procedures for the firm" and to "compel others to adhere to the compliance policies and procedures." Tormey Aff., ¶ 23 and Ex. 2.

100. The Compliance Manual prohibited supervised persons from offering clients gifts or other things of value, except for gifts of "de minimis" value if pre-approved in writing by the CCO. Tormey Aff., ¶ 24 and Ex. 2.

101. The Compliance Manual required the CCO to perform numerous specified responsibilities, including but not limited to:

- recording all gifts given to or received by a "supervised person" in a log;
- reviewing all client account activities, correspondence, and transactions, and ensuring the maintenance of a correspondence file;
- approving all company advertising to ensure its compliance with applicable regulations; and
- monitoring and approving the use of social media websites by the company and its supervised persons.

Tormey Aff., ¶ 24-27 and Exs. 2 and 3.

102. Quinn never carried out many of the CCO functions required of her. Quinn Tr. at 101-105.

EIA's and Rousseaux's Failure to Disclose the Division's Investigation and an Administrative Proceeding by the State of Delaware

103. By e-mail to Respondents' then counsel on April 24, 2014, the Division provided the Respondents with written notice, including an Interim Order, that the Division was conducting an investigation of the Respondents' investment advisory activities. Tormey Aff., ¶ 33 and Ex. 6.

104. Rousseaux did not amend his Form U4 [Uniform Application for Securities Industry Registration or Transfer] to disclose the Division's investigation against him within 30 days. Tormey Aff., ¶ 34. On June 29, 2015, Rousseaux amended his Form U4 to disclose the Division's proceeding against him. *Id.*, ¶ 35 and Ex. 8.

105. On September 25, 2014, the Investor Protection Unit of the Delaware Department of Justice (Delaware IPU) issued a Complaint initiating an administrative proceeding against EIA. Tormey Aff., ¶ 40 and Ex. 11.

106. EIA did not amend its Form ADV, Part 1A to disclose the Delaware IPU's Complaint within 30 days of its issuance. Tormey Aff., ¶ 42.

107. On November 13, 2014, the Delaware IPU and EIA entered into a Consent Order settling the administrative proceeding, including the payment of a $12,500.00 fine. Tormey Aff., ¶ 41 and Ex. 12.

108. EIA amended its Form ADV on November 25, 2014, after the entry of the Consent Order. Tormey Aff., ¶ 42 and Ex. 4.

DISCUSSION

Summary Decision Standard

The Rules of Procedure applicable to the Office of Administrative Hearings permit an administrative law judge to grant summary decision if the judge finds that "there is no genuine dispute as to any material fact and that the [moving] party is entitled to judgment as a matter of law." COMAR 28.02.01.12D (1). This regulation is substantially similar to both Maryland Rule 2-501 and Rule 56 of the Federal Rules of Civil Procedure. Thus, it is appropriate to refer to interpretations of each for guidance in the application of the proper standard.

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Commodity Futures Trading Comm. v. Noble Wealth Data Information Services, Inc.*, 90 F. Supp. 2d 676, 684 (D. Md. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). The nonmoving party "may not rest upon the mere allegations or denials of the adverse party's pleading," Fed. R. Civ. P. 56(e), but must come forward with "specific facts showing that there is a genuine issue for trial." *Commodity Futures Trading*, 90 F. Supp. 2d at 684 *(citing Matsushita Electronic Indus. v. Zenith Radio Co.,* 475 U. S. 574, 586 (1986)). "Mere unsupported speculation . . . is not enough to defeat a summary judgment motion." *Ennis v. Nat' l Ass'n of Bus. & Educ. Radio, Inc.,* 53 F. 3d. 55, 62 (4th Cir. 1995).

Facts are material if they would affect the outcome of a case; there is a genuine issue of fact if the evidence would allow a "reasonable [fact finder] . . . to return a verdict for the nonmoving party." *Anderson*, 477 U. S. at 248. A mere scintilla of evidence in favor of a nonmoving party is insufficient to defeat a summary judgment motion. *Id.* at 251. In deciding a motion for summary judgment, or summary decision, the evidence, including all inferences therefrom, is viewed in the light most favorable to the non-moving party. *Natural Design, Inc. v. Rouse Co.*, 302 Md. 47, 62 (1984).

In considering a motion for summary decision, it is not my responsibility to decide any issue of fact or credibility but only to determine whether such issues exist. *See Engineering Mgt. Serv., Inc. v. Maryland,* 375 Md. 211, 226 (2003); *see also Berkey v. Delia*, 287 Md. 302, 304 (1980). Only where the material facts are conceded, undisputed, or uncontroverted and the inferences to be drawn from those facts are plain, definite and undisputed does their legal significance become a matter of law for summary determination. *Fenwick Motor Co. v. Fenwick,* 258 Md. 134, 139 (1970).

When a party has demonstrated grounds for summary judgment, the opposing party may defeat the motion by producing affidavits or admissible documents, which establish that material facts are in dispute. *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 737 (1993). In such an effort, an opposing party is aided by the principle that all inferences which can be drawn from the pleadings, affidavits, and admissions must be resolved against the moving party on the question of whether there is a dispute as to material facts. *Honaker v. W.C. & A.N. Miller*, 285 Md. 216, 231 (1979).

Structure of Analysis

The OSC contains twelve counts (Counts I through XII) alleging violations of the Securities Act and/or applicable regulations by one or more of the Respondents. These counts

seek sanctions, including the revocation of EIA's and Rousseaux's IA and IAR registrations, respectively; the permanent bar of EIA and/or EWM from the investment advisory and/or securities business, respectively, in Maryland; and a statutory penalty of up to $5,000.00 per violation against each Respondent, as applicable. Count XIII also seeks revocation of EIA's and Rousseaux's IA and IAR registrations, respectively.

Some of the factual allegations pertain to more than one count; others are limited to one count. For ease of reference, I will discuss the counts of the OSC in numerical order.

Count I: Fraud in Connection with the Offer, Sale, or Purchase of Securities—Sections 11-301(2) and (3) of the Securities Act

Applicable Law

Section 11-301 of the Securities Act provides, in pertinent part:

> It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly to:
>
> (2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
>
> (3) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person.

The Division alleges that Respondents Rousseaux and EIA violated these provisions in several ways. *See* OSC at 39-40.

Whether Any Material Facts are in Dispute

Rousseaux does not dispute the majority of the Division's assertions, supported by the Affidavits of Martin Disney, Marcia Gilliam, and L. Scott Phillips, regarding his use, after his departure from MetLife in October 2004, of certain ATA forms displaying the MetLife Medallion Signature Guarantee stamp. He does, however, deny that he ever used the Medallion

Signature Guarantee to stamp blank ATA forms, Allianz client authorization forms, or Conseco ATA forms. Opp. at 3 and Ex. A, Rousseaux Aff., ¶¶ 4, 5, and 6.[8]

The Division's position is that these denials do not create a dispute of material fact, because the Division need only show that Rousseaux was not authorized to take pre-stamped ATA forms with him upon his separation from MetLife, or to use them to transfer clients' assets. *See* Memorandum at 50, and Reply at 2. The Division contends that Rousseaux's use of these forms operated or would operate as a fraud or deceit upon MetLife, Allianz, Conseco and the transferring financial institutions, by falsely representing that MetLife had verified the client's identity. *Id.*

Because I must consider the evidence in the light most favorable to the non-moving party, and because I may not make credibility determinations at this stage, I conclude that Rousseaux has generated a genuine dispute of material fact on the *limited factual issue* of whether he did, or did not, pre-stamp some 100 ATA forms with the MetLife Medallion Signature Guarantee stamp prior to his departure from MetLife.

In this connection, I note that the Division has extensively briefed several legal principles applicable to the construction of the Securities Act and analogous provisions of federal law. Memorandum at 43-49; Reply at 6-10. Initially, the Division provides authority for the proposition that federal and state securities laws should be interpreted flexibly, so as to effectuate their remedial purpose (protection of investors) and to achieve uniformity. Memorandum at 43. The Respondents do not take issue with these principles or the cited authorities.

Next, the Division asserts that under sections 11-301(2) and (3) (as well as section 11-302(a)(2), involved in Count IV) it is not required to prove *scienter* (intent to defraud or deceive), detrimental reliance, or actual harm to investors. Memorandum at 43-48; Reply at 6-

[8] He does not deny Kirk's sworn statement to the effect that Rousseaux had admitted gaining access to the stamp and using it to stamp the client authorization pages of a large number of blank ATA forms. *See* Kirk Aff., ¶8.

11. The Respondents contend, on the other hand, that the Division must prove *scienter*, and that in any event, no investors were misled or defrauded by the Respondents' actions or representations. Opp. at 6-7.

The Division's thorough exposition of longstanding federal and state authority, particularly *Aaron v. SEC*, 446 U.S. 680 (1980), and *SEC v. Capital Gains Research Bureau,*, 375 U.S. 180 (1963), persuades me that its position is the correct one. In *Aaron*, the Supreme Court construed the language of section 17(a)(1) of the Securities Act of 1933, which expressly requires a "device, scheme, or artifice," as requiring *scienter*. By contrast, the Court held that section 17(a)(2), which is the model or progenitor of section 11-301(2), is "devoid of any suggestion whatsoever of a scienter requirement," and that section 17(a)(3), which is the model or progenitor of section 11-301(3), "quite plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than on the culpability of the person responsible." *Aaron*, 446 U.S. at 695-97 (emphasis in original); Memorandum at 45. Similarly, in *Capital Gains,* the Court held that section 206(2) of the Investment Advisers Act of 1940, which is the model or progenitor of section 11-302 of the Securities Act (involved in Counts II and III of the OSC), does not require a showing of intent to defraud. *Capital Gains*, 371 U.S. at 191-92.

The Respondents do not even attempt to distinguish *Aaron* or *Capital Gains,* or to explain why those cases are not controlling authority on these points. As authority, they cite only a 2005 unreported decision of a Maryland circuit court, *Lubin v. Beneficial Assurance, Ltd.*, 2006 WL 5781983. Opp. at 6. This decision has no precedential value. Moreover, the Respondents have cited no authority for their argument that the Division must prove harm to investors to establish a violation of sections 11-301(a)(2) or (3). Thus, with regard to Rousseaux's use of the pre-stamped ATA forms, his claim that he used them "as a matter of convenience when away from the office," his subjective beliefs about the purposes of the

signature guarantee, and his assertions that the clients had always requested the transfers, *see* Opp. at 8 and Rousseaux Aff., ¶¶ 13 and 14, are irrelevant.

The Respondents do not dispute the Division's evidence that EIA marketed its new investment program, the EDGM, as a "wrap fee program," i.e., a program in which one fee covers all services and separate transaction fees are not charged, when clients were in fact charged transaction fees through their Charles Schwab accounts. Rousseaux claims, however, that he "mistakenly" identified the fee requirements for the EDGM as a wrap program, when his intention always was for the clients to pay transaction costs. Rousseaux Aff., ¶ 11. He also says that when he "realized the mistake [he] had caused," he arranged for the clients to be reimbursed the approximately $8,400.00 in fees they had been charged. *Id.* at ¶ 12.

Throughout their argument, the Respondents repeatedly emphasize that Rousseaux did not understand the nature of a wrap fee program, and that the characterization of the EDGM as a wrap fee program in EIA's brochure was a "simple mistake, a "misnomer," a "fee mishap," or a "misprint." *See* Opp. at 12-17. They also do not acknowledge that the reimbursement of clients occurred only after the Division discovered that the clients were being charged transaction fees. Further, they claim, without any evidentiary support whatsoever, that EIA made *oral* representations to clients in person about the actual fee structure, and that the clients relied on these representations. *See* Opp. at 16 and 17. This is not the type of admissible evidence that can create a dispute of material fact. The Division is correct that the Respondents have not generated a genuine dispute of material fact as to the marketing of the EDGM program as a wrap fee program.

As to false and misleading performance figures in the 2014 IPS, and a representation by Julie Quinn that Rousseaux had backtested the wrap fee program for the period 2000 to 2013 and that the model "would have outperformed the S & P 500 by 37%," the Respondents have not

identified any disputes of material fact. *See* Opp. at 3-5. The record reflects that, by a letter from counsel, EIA advised its clients that "Among other errors, the five and ten year performance data for the [EDGM] was incorrect." Disney Aff., ¶ 68 and Ex. 28. It is undisputed that the Respondents have never produced documentation to support the "37%" performance figure in the 2014 IPS.

The Respondents assert that performance figures in a new IPS, prepared by National Economic Research Associates (NERA) in 2015, Disney Aff., Ex. 37, are quite similar to, albeit slightly higher than, the performance figures in the 2014 IPS and in an e-mail sent by Quinn to certain investors comparing the performance of the EDGM to the Curian Moderate Growth program, Quinn Tr., Ex. 13. They argue that the earlier information was therefore "not incorrect to a material degree." Opp. at 18. They further contend that a chart comparing the EDGM's backtested performance from 2000 to 2013 to the S & P 500's performance over the same period, Quinn Tr., Ex 10, shows that the EDGM outperformed the S & P 500 by 36.7%, and that the difference between that number and 37% is "negligible." Opp. at 19-20.

The Division counters that a comparison between the 2014 IPS and the 2015 IPS is not valid, for a number of reasons. Reply at 27-29. The Division further points out that although the Respondent rely on "data from the chart" to support their argument on the 37% figure, *see* Opp. at 19, the Respondents do not provide an affidavit or other admissible evidence to explain how the "data" were calculated or what they represent. Reply at 29-30. I conclude that the Respondents have failed to generate a genuine dispute of material fact as to whether the performance figures and the "37%" representation were false and misleading.

Counts II and III: Fraud in Connection with the Offer and Sale of Investment Advice—Sections 11-302(a)(2) and (c)

Applicable Law

Section 11-302 of the Securities Act provides, in pertinent part:

> (a) It is unlawful for any person who receives, directly or indirectly, any consideration from another person for advising the other person as to the value of securities or their purchase or sale, or for acting as an investment adviser or representative under § 11-101(h) and (i) of this title, whether through the issuance of analyses, reports, or otherwise, to:
>
> (2) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on the other person [.]
>
> (c) In the solicitation of or in dealings with advisory clients, it is unlawful for any person knowingly to make any untrue statement of a material fact, or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading.

The Division alleges that Respondents Rousseaux and EIA violated these provisions in several ways. *See* OSC at 41-42.

Whether Any Material Facts are in Dispute

As is the case under Count I, Rousseaux denies that he gained unauthorized access to one of MetLife's Medallion Signature Guarantee stamps and used it to stamp approximately 100 ATA forms. I have concluded above that he has raised a genuine dispute of material fact on this point.

As to the EDGM wrap fee program and the performance figures, I have concluded above that the Respondents have not raised a genuine dispute of material fact.

The Division alleges that the FPAs that were signed by clients investing in the EDGM program, providing for a $500.00 fee if the accounts were not funded, were designed to penalize clients who chose not to transfer their accounts to, or continue their advisory relationship with, the Respondents. *See* OSC at 42. On this point, the Respondents assert first that the signers were not "clients" of EIA, but were merely "prospective clients." Opp. at 4, and Rousseaux Aff.,

¶ 10. They also assert that the $500.00 fee was "intended to compensate EIA for its meeting time and administrative costs." Opp. at 4, and Anthony Aff., ¶ 3.

As to the first assertion, the Division counters that the FPAs themselves refer to the signers as "Client," Disney Aff., Ex. 15, ¶1, and the question of whether the person is a client is one of law, not fact. Reply at 3-4 and 33. As to the second assertion, the Division points out that the FPAs themselves do not mention compensation for "meeting time and administrative costs." *Id.* at 4. Again, because I must consider the evidence in the light most favorable to the non-moving party, and because I may not make credibility determinations at this stage, I conclude that EIA, through the Affidavit of John Anthony, has generated a dispute of material fact on the *limited factual issue* of the purpose of the $500.00 fee in the FPAs.

The Division also alleges that EIA amended its disclosures to state that the account minimum for the EDGM program was $100,000.00, for the purposes of discounting the minimum to induce clients to invest. As to this allegation, the Respondents have not identified any dispute of material fact. *See* Opp. at 3-5.[9]

The Respondents point out that, as stated in the wrap fee program brochure, EIA had the discretion to accept investments below $100,000.00 in the EDGM program. Opp. at 22. They then assert that "EIA waived the minimum account contingent on individual circumstances and in situations where it would be in the best interest of the clients based on their investment profile" and that EIA also permitted clients to invest "who may have not had the financial means to meet the minimum requirement, to the clients' benefit." *Id.* at 23. They also suggest that Rousseaux's use of the word "leverage" meant that EIA had increased the minimum investment

[9] In their Opposition, under the heading "Alleged Manipulation of Clients," the Respondents dispute that EIA used an "Investment Committee" as a ploy to convince clients to invest. Opp. at 4; Rousseaux Aff., ¶ 9. This allegation is mentioned in Counts II and III. OSC at 42; *see also* Memorandum at 11-12 (factual assertions). However, in its Reply, the Division states that manipulation of clients is not one of the violations which is the subject of the Motion. Reply at 2. The Memorandum does not contain legal argument concerning EIA's use of an "Investment Committee" ploy.

amount to "leverage raising more capital for [the] product." *Id.*; *but see* Disney Aff., Ex. 5. All these factual assertions are unsupported by any sworn testimony or documents in the record. They do not serve to create a genuine dispute of material fact.

Count IV: Dishonest and Unethical Practices—Section 11-302(a)(3) and COMAR 02.02.05.03B(8) and (13)

Section 11-302(a)(3) of the Securities Act provides:

> (a) It is unlawful for any person who receives, directly or indirectly, any consideration from another person for advising the other person as to the value of securities or their purchase or sale, or for acting as an investment adviser or representative under § 11-101(h) and (i) of this title, whether through the issuance of analyses, reports, or otherwise, to . . . (3) Engage in dishonest or unethical practices as the Commissioner may define by rule [.]

COMAR 02.02.05.03B provides, in pertinent part:

> B. Prohibited Practices. An investment adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser and its clients and the circumstances of each case, an investment adviser may not engage in unethical business practices, including the following:
>
> (8) Misrepresenting to an advisory client or prospective advisory client the qualifications of the investment adviser, or an investment adviser representative employed by or associated with the investment adviser or an employee of the investment adviser, or misrepresenting the nature of the advisory services being offered or fees to be charged for that service, or omitting to state a material fact necessary to make the statements made regarding qualifications, services, or fees, in light of the circumstances under which they are made, not misleading.
>
> (13) Publishing, circulating, or distributing an advertisement that does not comply with 17 CFR §275.206(4)-1 (SEC Rule 206(4)-1, Advertisements by Investment Advisers).

The Division alleges that Respondents Rousseaux and EIA violated these provisions in several ways. *See* OSC at 43-45.

Whether Any Material Facts are in Dispute

As to this count, the Respondents incorporate their previous assertions and arguments concerning Rousseaux's use of the MetLife Medallion Signature Guarantee stamp; the creation

and marketing of the EDGM wrap fee program; and the FPAs including the $500.00 fee. *See* Opp. at 24. To that extent, I reach the same conclusions I reached under Count I and Counts II and III, *supra.*

The Respondents appear to misunderstand the Division's allegation that EIA's Part 2A brochure did not disclose that EIA provided financial planning services or charged a fee for such services (the $500.00), when EIA did not, in fact, provide financial planning services. *See* OSC at 44, and Memorandum at 63-64, alleging a violation of COMAR 02.02.05.03B(8). They incorporate by reference their argument under Count III that the $500.00 fee is disclosed in the FPA itself, a point not in dispute. *See* Opp. at 24, and 20-21.

The Division contends that EIA violated COMAR 02.02.05.03B(13) by advertising false performance figures in the 2014 IPS for the EDGM program, and by failing to include in the IPS certain disclosures that are required by a SEC no-action letter, *Clover Capital Management, Inc.*, 1986 WL 67379 (Oct. 28, 1986) (*Clover*), to render performance results not false and misleading. *See* Memorandum at 29, 57-58, 65-66; Reply at 32-33. The Respondents do not dispute that these disclosures were absent; instead, relying on their comparison of the 2014 IPS and the 2015 IPS, they contend that because the difference in the performance figures was "negligible," the advertising was not false or misleading for purposes of the advertising rule referenced in COMAR 02.02.05.03B(13). This legal argument does not create a genuine dispute of material fact.

Count V: Omission of Required Contractual Provisions—Section 11-302(e) and COMAR 02.02.05.03B(16)

Section 11-302(e) of the Securities Act provides, in pertinent part:

> (1) Except as permitted by rule or order of the Commissioner, it is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract, unless it provides in writing that:

(i) The investment adviser shall not be compensated on the basis of a share of capital gains on or capital appreciation of the funds or any portion of the funds of the client;

(ii) An assignment of the contract may not be made by the investment adviser without the consent of the other party to the contract; and

(iii) The investment adviser, if a partnership, shall notify the other party to the contract of any change in the membership of the partnership within a reasonable time after the change.

COMAR 02.02.05.03B provides, in pertinent part:

B. Prohibited Practices. An investment adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser and its clients and the circumstances of each case, an investment adviser may not engage in unethical business practices, including the following:

(16) Entering into, extending, or renewing an investment advisory contract unless the contract is in writing and discloses, in substance:

(a) The services to be provided;

(b) The term of the contract;

(c) The advisory fee or the formula for computing the fee;

(d) The amount of prepaid fee to be returned in the event of contract termination or nonperformance;

(e) Whether the contract grants discretionary power to the investment adviser; and

(f) That an assignment of the contract may not be made by the investment adviser without the consent of the other party to the contract.

Whether Any Material Facts are in Dispute

The Respondents do not identify any dispute of fact regarding whether the approximately 165 FPAs signed by investors in the EDGM program contained the required provisions. Instead, they argue that the FPAs were not "investment advisory contracts" for purposes of the statute and regulation, but some other sort of contract entered into at the initial meeting, which would terminate upon the execution of an investment advisory contract. Opp. at 25-26. The Division

counters that the Respondents cite no evidence to support this argument, and points out that the investment advisory contracts and the FPAs were signed by clients on the same day. Reply at 4, at note 3, and Disney Aff., Ex. 17. This evidence refutes the argument that no advisory relationship had been established at the time the FPAs were signed. There is no genuine dispute of material fact.

Count VI: Misleading Filings—Section 11-303

Section 11-303 of the Securities Act provides as follows:

> It is unlawful for any person to make or cause to be made, in any document filed with the Commissioner or in any proceeding under this title, any statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect.

The Division alleges that EIA and Rousseaux violated this provision by filing with the Division brochures that falsely described the wrap fee program as one where clients paid a single annualized fee of 2%, which covered both investment management fees and securities transaction charges. OSC at 48. The Division alleges that EIA committed a separate violation by falsely represented the amount of its RAUM, when the assets were actually managed by Curian, and even though EIA's compliance consultant had advised EIA not to include such assets as RAUM in filings with the Division. *Id.*

Whether Any Material Facts are in Dispute

The Division cites the instructions for Item 5F of Form ADV, Part 1A, which provide that assets may only be counted as RAUM if the adviser provides "continuous and regular supervisory or management services with respect to the account." Memorandum at 69. There is no dispute that EIA's disclosures stated that it did not "actively manage" client assets under the Curian program, and that account reviews would be performed "at least annually." *Id.* at 70.

There is also no dispute that EIA's reported RAUM increased every year, up to $37 million in 2014. This involved seven separate filings with the Division. *Id.*.

In the Opposition, Respondents assert that there is a dispute of fact because in 2014, Rousseaux believed "in good faith" that EIA could count Curian assets as RAUM. Opp. at 4. The Division counters that section 11-303 is a "strict liability" statute, and that Rousseaux's subjective belief is irrelevant. Reply at 3. Moreover, Rousseaux admitted that a Curian representative, Ray Kelly, told him that EIA could not include Curian assets as RAUM. Rousseaux Tr., at 171-72. Finally, the Respondents do not provide any admissible evidence to refute the assertions in Kirk's Affidavit that as early as 2012, and again in 2013, EIA's compliance consultants had told EIA and Rousseaux that Curian-managed assets did not qualify as EIA's RAUM. *See* Kirk Aff., ¶ 17-21. The Respondents have not generated a genuine dispute of material fact.

Count VII: Unregistered Investment Adviser—Section 11-401(b)

Section 11-401(b) of the Securities Act provides, in pertinent part:

> (b) A person may not transact business in this State as an investment adviser or as an investment adviser representative unless:
>
> (1) The person is registered as an investment adviser or an investment adviser representative under this subtitle [.]

"Investment adviser" is defined very broadly in section 11-101(h)(1) of the Securities Act, and includes any person who "holds out as investment adviser in any way, including indicating by advertisement, card, or letterhead, or in any other manner indicates that the person is a financial or investment 'planner', 'counselor','consultant', or any other similar type adviser or consultant."

In Count VII, the Division alleges that from 2011 and continuing to 2014, Respondent EWM, which is owned and controlled by Rousseaux, has held itself out to the public as an

investment adviser in numerous ways. OSC at 49; *see also* Memorandum at 71 and Disney Aff., ¶ 71. The Division further alleges that EWM has acted, and Rousseaux has caused EWM to act, as an investment adviser by, among other things, entering into FPAs with clients, and discussing advisory and securities-related matters using EWM's letterhead. OSC at 50; *see also* Memorandum at 71 and Disney Aff., ¶¶ 71 and 75. These activities continued despite representations by EWM's counsel that EWM had added disclosures to its website and did not intend to act or hold itself out as an investment adviser. *Id.;* Disney Aff., ¶¶ 73-74.

Whether Any Material Facts are in Dispute

There is no dispute that EWM is not, and has never been, registered as an investment adviser. In the Opposition, the Respondents nevertheless assert that there is a dispute of fact. They concede that EIA personnel used FPA forms that referred to EWM instead of EIA. Opp. at 5. They rely on the Affidavit of John Anthony, who states that he discovered the error and corrected and updated the forms as of April 1, 2013. Opp. at 28 and Anthony Aff., ¶ 4.

As with the arguments pertaining to the wrap fee program, the Respondents minimize the Division's evidence, calling EWM's actions "paperwork errors" or "simple oversights." Opp. at 28. Among other arguments, the Respondents quote selectively from the social media websites reviewed by Martin Disney, emphasizing the insurance-related content on these websites, and suggesting that no reasonable investor would conclude that EWM provided investment advisory services. *Id.* at 29-30. They seek to bring EWM within the "insurance producer" exception to the definition of investment adviser. *See* Md. Code Ann., Corps & Assocs., § 11-101(h)(2)(iii).

The Division provides additional quotations from EWM's and Rousseaux's social media sites, in support of its "holding out" argument. Reply at 37-38. It also explains that the "insurance producer" exemption from the definition does not apply if the insurance provider "holds out" as an investment adviser. *Id.*; Md. Code Ann., Corps & Assocs., § 11-

101(h)(2)(iii)(3). The Respondents have not generated a genuine dispute of material fact as to EWM's holding out and acting as an investment adviser when not registered.

Count VIII: Employment of an Unregistered Investment Adviser Representative—Section 11-402(b)

Section 11-402(b) of the Securities Act provides, in pertinent part:

> (b) (1) An investment adviser required to be registered may not employ or associate with an investment adviser representative unless the representative is registered under this subtitle. [.]

An "investment adviser representative" is an individual who is employed by or associated with an investment adviser and "solicits on behalf of the investment adviser for the sale of investment advisory services." Md. Code Ann., Corps & Assocs., § 11-101(h)(i). There is no dispute that EIA is a registered IA, or that clients in the VIP program were not registered IARs.

In Count VIII, the Division alleges that by compensating clients in the VIP program with benefits such as trips, dinners, and concerts for soliciting new insurance and advisory clients for EWM and EIA, EIA and Rousseaux were employing or associating with unregistered IARs, thereby violating section 11-402(b). OSC at 51. At least 72 clients participated in the VIP program. Memorandum at 73.

Whether Any Material Facts are in Dispute

In their Opposition, the Respondents did not identify any disputes of fact. Opp. at 3-5. They argue, without any evidentiary support, that the VIP program did not share the attributes of a typical solicitor program. Opp. at 31. They reference Rousseaux's statement that it never occurred to him that the VIP program could be construed as a solicitation program, Rousseaux Aff., ¶ 24. They suggest that Rousseaux and/or EIA misunderstood the breadth of the term "solicitor" in a regulatory context. Opp. at 31.

The Division points to evidence showing that the Respondents marketed the VIP program aggressively, and routinely reminded clients that referrals would qualify them for "perks" or benefits. Reply at 39. Whether or not it occurred to Rousseaux that the VIP program could be seen as a solicitation program, the Respondents have not generated a genuine dispute of material fact.

Count IX: Failure to File Updated Advisory Contracts with the Division—Section 11-411(d)

Section 11-411(d) of the Securities Act provides:

> (d) A registrant shall promptly file a correcting amendment, if:
> (1) The information contained in any document filed with the Commissioner is or becomes inaccurate or incomplete in any material respect; and
>
> (2) The registrant has not provided notification of the correction under § 11-402 of this subtitle.

Whether Any Material Facts are in Dispute

In Count IX, the Division alleges that Rousseaux and EIA have developed and used several versions of the investment advisory contract initially filed with the Division, and/or new contracts, but have not filed those contracts with the Division. OSC at 52. Respondent EIA admits this, but asserts that under EIA's compliance program, any and all such contracts are now filed with the Division. Opp. at 32. The Division disputes this as to a contract described in an August 2015 EIA Part 2 brochure. Reply at 40. For purposes of the Motion, however, there is no genuine dispute of material fact.

Count X: Failure to Maintain and Timely Produce Books and Records—Section 11-411(a) and COMAR 02.02.05.16A and E

Section 11-411(a) of the Securities Act provides, in pertinent part:

> (3) A registered investment adviser shall make, keep, and preserve accounts, correspondence, memoranda, papers, books, and other records that the Commissioner requires by rule.

COMAR 02.02.05.16 provides, in pertinent part:

A. An investment adviser registered or required to be registered in this State shall maintain and preserve the following books, ledgers, and records:

(7) Originals of all written communications received, and copies of all written communications sent, by the investment adviser relating to a recommendation made or proposed to be made and advice given or proposed to be given, a receipt, disbursement, or delivery of funds, securities, or assets, or the placing or execution of an order to purchase or sell a security or asset [.]

(15) All accounts, books, internal working papers, and other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of all managed accounts or securities or assets recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication that the investment adviser circulates or distributes, directly or indirectly, to 10 or more persons, other than persons connected with the investment adviser. With respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits, and other transactions in a client's account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts, shall be considered to satisfy the requirements of this subsection.

E. Time Period.

(1) Books and records required to be made under the provisions of §§A—C(1), inclusive, of this regulation, except for books and records required to be made under the provisions of §A(11) and (15) of this regulation, shall be maintained and preserved in an easily accessible place for a period of not less than 5 years from the end of the fiscal year during which the last entry was made on the record, and for the first 2 years shall be maintained in an appropriate office of the investment adviser.

(3) Books and records required to be made under the provisions of §A(11) and (15) of this regulation shall be maintained and preserved in an easily accessible place for a period of not less than 5 years, the first 2 years in an appropriate office of the investment adviser, from the end of the fiscal year during which the investment adviser last published or otherwise disseminated, directly or indirectly, the notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication.

In this Count, the Division alleges that the Respondents violated the statute and regulation because they were unable to produce copies of written correspondence to clients, or documentation sufficient to support the performance figures issued to clients or potential clients.

OSC at 53. These allegations refer specifically to copies of correspondence sent by regular mail, and documentation related to Quinn's "37%" representation. Memorandum at 74, and Disney Aff., ¶ 70-71.

Whether Any Material Facts are in Dispute

In their Opposition, Respondents merely assert that EIA currently maintains copies of written correspondence to clients, without addressing the "regular mail" aspect. Opp. at 32, and Anthony Aff., ¶ 5. The Respondents do not address the alleged violation related to documents concerning the performance or rate of return of managed accounts. There is no genuine dispute of material fact.

Count XI: Failure to Amend Form U4 and Form ADV to Disclose Regulatory Investigations or Actions—Section 11-411[(d)][10] and COMAR 02.02.05.11 and .12

Section 11-411 (d) of the Securities Act provides, in pertinent part,

> (d) A registrant shall promptly file a correcting amendment, if:
>
> (1) The information contained in any document filed with the Commissioner is or becomes inaccurate or incomplete in any material respect [.]

COMAR 02.02.05.11 provides, in pertinent part:

> (3) Updates and Amendments.
> (a) An investment adviser shall file with the IARD, in accordance with the instructions in the Form ADV, any amendments to the investment adviser's Form ADV;
> (b) An amendment shall be considered to be filed promptly if the amendment is filed within 30 days of the event that requires the filing of the amendment; and
> (c) Within 90 days of the end of the investment adviser's fiscal year, an investment adviser shall file with the IARD an updated Form ADV.

COMAR 02.02.05.12 provides, in pertinent part:

> (3) Updates and Amendments.
> (a) The investment adviser representative is under a continuing obligation to update information required by Form U-4 as changes occur.
> (b) An investment adviser representative and the investment adviser shall file promptly with the IARD any amendments to the representative's Form U-4.

[10] It appears that the correct section is 11-411(d), not (c). *See* Md. Code Ann., Corps. & Assocs. § 11-411.

(c) An amendment shall be considered to be filed promptly if the amendment is filed within 30 days of the event that requires the filing of the amendment.

In this Count, the Division alleges that Rousseaux did not file amendments to his Form U4, which pertains to him as an investment adviser representative, to disclose the Division's investigation and the Delaware IPU's administrative proceeding against him, within 30 days as required by section 11-411 (d), COMAR 02.02.05.12, and the instructions on the form. OSC at 54-55; Memorandum at 39-41. The Division further alleges that EIA did not file amendments to its Form ADV, which pertains to it as an investment adviser, to disclose the Division's investigation and the Delaware IPU's administrative proceeding against it, within 30 days as required by section 11-411 (d), COMAR 02.02.05.11, and the instructions on the form. *Id.* at 55-56; Memorandum at 41-42.

Whether Any Material Facts are in Dispute

There is no dispute that both EIA and Rousseaux had actual knowledge of the Division's investigation by the end of April 2014 at the latest. The dates of the Delaware IPU's actions (September 25 and November 13, 2014) are also not in dispute. EIA did timely update its Form ADV within 30 days of the Delaware Consent Order, but not within 30 days of the inception of the Delaware proceedings.

In the Opposition, both Rousseaux and EIA concede that they did not timely update their respective filings as required. Opp. at 33, and Rousseaux Aff., ¶ 21 and 22. There is no dispute of material fact as to these Respondents' failure to comply with their continuing legal obligations.[11]

[11] They nevertheless argue that these reporting violations are "not significant" and "technical in nature," and that the sanctions should be "minimal." Opp. at 33.

Count XII: Failure to Enforce Written Supervisory Guidelines—COMAR 02.02.05.13

COMAR 02.02.05.13 provides:

> A. An investment adviser registered or required to be registered in this State shall establish, maintain, and enforce written supervisory guidelines that are reasonably designed to:
>
> (1) Supervise the activities of an investment adviser representative and associated person to achieve compliance with the Maryland Securities Act, Corporations and Associations Article, Title 11, Annotated Code of Maryland, and the regulations promulgated under it; and
>
> (2) Achieve compliance by the investment adviser with the Maryland Securities Act, Corporations and Associations Article, Title 11, Annotated Code of Maryland, and the regulations promulgated under it.
>
> B. An investment adviser registered or required to be registered in this State shall designate on the Form ADV one principal responsible for compliance with §A of this regulation.

In this Count, the Division alleges that in October 2013, notwithstanding the provisions of EIA's supervisory guidelines, EIA designated Quinn, an individual lacking the necessary training and experience, as CCO, and that during her tenure, Quinn failed to perform many of the compliance tasks required by the firm's supervisory guidelines and applicable law. OSC at 56-58; Memorandum at 36-39. The Division also points to EIA's lack of compliance with section 11-411(a)(3) of the Securities Act, which requires an investment adviser to "make, keep, and preserve accounts, correspondence, memoranda, papers, books, and other records that the Commissioner requires by rule." Md. Code Ann., Corps. & Assocs. § 11-411(a)(3).

Whether Any Material Facts are in Dispute

The Respondents do not identify any dispute of material fact related to these allegations. Opp. at 3-5. They effectively concede that the violations occurred (albeit obliquely) by saying that "during the year that Ms. Quinn worked in this [CCO] position, it became apparent that EIA needed more experienced compliance advice." Opp. at 33. They argue that EIA has since hired a competent and knowledgeable senior manager, Mr. Anthony, and a new outside compliance

consultant, Oyster Consulting, Inc. Opp. at 33-34. These circumstances do not create a material dispute of fact as to whether the violations occurred during the relevant time period.

Count XIII: Revocation of Registration—Section 11-412

Section 11-412 of the Securities Act provides, in pertinent part:

> (a) The Commissioner by order may deny, suspend, or revoke any registration if the Commissioner finds that the order is in the public interest and that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser:
>
> (2) Has willfully violated or willfully failed to comply with any provisions of this title, a predecessor act, or any rule or order under this title or a predecessor act; [or]
>
> (7) Has engaged in dishonest or unethical practices in the securities or investment advisory or any other financial services business [.]

In this Count, the Division alleges that EIA and Rousseaux have willfully violated or willfully failed to comply with numerous provisions of the Securities Act and applicable regulations, and have engaged in dishonest and unethical practices in the investment advisory business. OSC at 58-59. The Division alleges that these Respondents' IA and IAR registrations, respectively, are subject to revocation in the public interest. *Id.*; *see also* Memorandum at 78-81, Reply at 40.

As I have concluded above, there remain material disputes of fact as to whether Rousseaux used the MetLife Medallion Signature Guarantee stamp to pre-stamp ATA forms, and the purpose of the $500.00 fee in the FPAs signed by investors in the EDGM program. For this reason, I conclude that EIA and Rousseaux are not subject to revocation of their respective registrations as a matter of law.

Sanctions

The Division has itemized all of the violations it alleges to have been committed by each of the Respondents, categorized under the applicable statutory and/or regulatory provisions. Memorandum at 81-85. It argues that under the discretionary standards set forth in COMAR 02.02.01.04, the Commissioner should impose a fine of at least $425,000.00. *Id.* at 89. It further argues that Rousseaux's and EIA's registrations as an IA and IAR, respectively, should be revoked, and that Rousseaux and EIA should be barred from the securities and investment advisory business. *Id.*

The Division asserts that the sanctions should be decided as part of the ruling on its Motion, and would promote judicial economy. Reply at 40. The Division acknowledges that the Respondents have adduced evidence pertaining to their past and ongoing attempts to correct their violations and to comply with the Securities Act, and that such evidence may be relevant to the appropriate sanctions. *Id.* The Respondents request an opportunity to be heard on the sanctions to be imposed. Opp. at 34.

The number and magnitude of the violations that I have concluded to be established by the Division's Motion and the evidence submitted therewith are compelling. Nevertheless, I am inclined to agree with the Respondents, and believe that fairness requires me to consider any mitigating factors that may be relevant to the appropriate sanctions. I also believe that intangible factors, such as the credibility of witnesses, will inform the Commissioner's exercise of discretion, and should not be decided on the basis of papers alone. Therefore, the hearing will proceed on the question of sanctions, as well as the limited factual issues that I have concluded are in genuine dispute.

PROPOSED CONCLUSIONS OF LAW

Based on the foregoing Facts and Discussion, I conclude as a matter of law that the Division is entitled to partial summary decision as to **Count I** of the Order to Show Cause, with the exception of those portions of Count I alleging violations of sections 11-301(2) and (3 of the Securities Act by Rousseaux in connection with the use of the MetLife Medallion Signature Guarantee stamp. As to the remainder of Count I, there are no genuine disputes of material fact and the Division is entitled to judgment as a matter of law that all Respondents violated sections 11-301(2) and (3) of the Securities Act.

I further conclude as a matter of law that the Division is entitled to partial summary decision on **Counts II and III** of the Order to Show Cause, with the exception of those portions of Counts II and III alleging violations of sections 11-302(a) and (c) of the Securities Act by Rousseaux in connection with the use of the MetLife Medallion Signature Guarantee stamp, and those portions of Count II and III alleging a violation of section 11-302(a)(2 and (c) of the Securities Act by EIA and EWM in connection with the purpose of the $500.00 fee included in the FPAs signed by investors in the EDGM program. As to the remainder of Counts I and III, there are no genuine disputes of material fact and the Division is entitled to judgment as a matter of law that all Respondents violated sections 11-302(a)(2) and (c) of the Securities Act.

I further conclude as a matter of law that the Division is entitled to partial summary decision on **Count IV** of the Order to Show Cause, with the exception of those portions of Counts IV alleging violations of sections 11-302(a)(3) of the Securities Act and COMAR 02.02.05.03B by Rousseaux in connection with the use of the MetLife Medallion Signature Guarantee stamp, and those portions of Count IV alleging a violation of section 11-302(a)(3) of the Securities Act and COMAR 02.02.05.03B by EIA and EWM in connection with the purpose of the $500.00 fee included in the FPAs signed by investors in the EDGM program. As to the

remainder of Count IV, there are no genuine disputes of material fact and the Division is entitled to judgment as a matter of law that all Respondents violated sections 11-302(a)(3) of the Securities Act.

I further conclude as a matter of law that the Division is entitled to summary decision as to **Count V** of the Order to Show Cause, as there are no genuine disputes of material fact and the Division is entitled to judgment as a matter of law that Respondents EIA and EWM violated section 11-302(e) of the Securities Act and COMAR 02.02.05.03B.

I further conclude as a matter of law that the Division is entitled to summary decision as to **Count VI** of the Order to Show Cause, as there are no genuine disputes of material fact and the Division is entitled to judgment as a matter of law that Respondents EIA and Rousseaux violated section 11-303 of the Securities Act.

I further conclude as a matter of law that the Division is entitled to summary decision as to **Count VII** of the Order to Show Cause, as there are no genuine disputes of material fact and the Division is entitled to judgment as a matter of law that Respondents EWM and Rousseaux violated section 11-401(b) of the Securities Act.

I further conclude as a matter of law that the Division is entitled to summary decision as to **Count VIII** of the Order to Show Cause, as there are no genuine disputes of material fact and the Division is entitled to judgment as a matter of law that Respondent EIA violated section 11-402(b) of the Securities Act.

I further conclude as a matter of law that the Division is entitled to summary decision as to **Count IX** of the Order to Show Cause, as there are no genuine disputes of material fact and the Division is entitled to judgment as a matter of law that Respondents EIA and Rousseaux violated section 11-411(d) of the Securities Act.

I further conclude as a matter of law that the Division is entitled to summary decision as to **Count X** of the Order to Show Cause, as there are no genuine disputes of material fact and the Division is entitled to judgment as a matter of law that Respondents EIA and Rousseaux violated section 11-411(a) of the Securities Act and COMAR 02.02.05.16.

I further conclude as a matter of law that the Division is entitled to summary decision as to **Count XI** of the Order to Show Cause, as there are no genuine disputes of material fact and the Division is entitled to judgment as a matter of law that Respondents EIA and Rousseaux violated sections 11-411(c) of the Securities Act and COMAR 02.02.05.11 and COMAR 02.02.05.12, respectively.

I further conclude as a matter of law that the Division is entitled to summary decision as to **Count XII** of the Order to Show Cause, as there are no genuine disputes of material fact and the Division is entitled to judgment as a matter of law that Respondent EIA violated section 11-411(a)(3) of the Securities Act and COMAR 02.02.05.13.

I further conclude as a matter of law that the Division is not entitled to summary decision on Count **XIII** of the Order to Show Cause, as there are genuine disputes of material fact, for purposes of sections 11-412(a)(2) and (a)(7) of the Securities Act, as to whether Rousseaux and/or EIA engaged in dishonest or unethical practices in connection with Rousseaux's use of the MetLife Medallion Signature Guarantee stamp, and in connection with the purpose of the $500.00 fee included in the FPAs signed by investors in the EDGM program.

PROPOSED ORDER

I therefore **PROPOSE** that the Commissioner Division **GRANT** the Motion for Partial Summary Decision as to Counts **V, VI, VII, VIII, IX, X, XI** and **XII** of the Order to Show Cause, but defer any sanctions on the charges in those counts pending the already scheduled hearing;

It is further **PROPOSED** that the Commissioner **GRANT in part** the Motion for Summary Decision against the Respondents as to Counts **I, II** and **III, and IV** of the Order to Show Cause, and affirm that the Respondents, as applicable, violated the Securities Act and any applicable regulations, as set forth in the Proposed Conclusions of Law above, but defer any sanctions on the charges in those counts pending the already scheduled hearing; and

It is further **PROPOSED** that the Commissioner **DENY in part** the Motion for Summary Decision against the Respondents, as applicable, as to Counts **I, II** and **III, and IV** of the Order to Show Cause, and allow the hearing on the merits, as to the disputed factual issues, to proceed as currently scheduled;

It is further **PROPOSED** that the Commissioner **DENY in part** the Motion for Summary Decision against all Respondents, as to Count **XIII** of the Order to Show Cause, and allow the hearing on the proposed sanctions and monetary penalties to proceed as currently scheduled.

January 13, 2016
Date Decision Mailed

Una M. Perez
Administrative Law Judge

#160152
UMP/kc

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OFFICE OF THE ATTORNEY	*	**BEFORE UNA M. PEREZ,**
GENERAL, SECURITIES DIVISION	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE**
EVEREST INVESTMENT ADVISORS,	*	**OF ADMINISTRATIVE HEARINGS**
INC., et al.,	*	**OAH Case No.: OAG-SD-50-15-24381**
RESPONDENTS	*	**SD Case No.: 2014-0119**

* * * * * * * * * * * * *

FILE EXHIBIT LIST

The Division attached the following exhibits to its Motion:

Motion Ex. A Affidavit of Martin Disney, Securities Fraud Investigator, November 4, 2015, with 45 numbered exhibits, separated by tabs, and an Exhibit List

Motion Ex. B Affidavit of Marcia Gilliam, September 11, 2015

Motion Ex. C Affidavit of Christopher Joseph Kirk, July 9, 2015, with 10 numbered exhibits, separated by tabs

Motion Ex. D Transcript of Statement under Oath of Philip Rousseaux, November 25, 2014, with 36 numbered exhibits, separated by tabs

Motion Ex. E Transcript of Deposition of Julie P. Long (nee Quinn), December 4, 2014, with 19 numbered exhibits, separated by tabs

Motion Ex. F Affidavit of Patrick Tormey, Senior Broker-Dealer Examiner, October 27, 2015, with 12 numbered exhibits, separated by tabs

Motion Ex. G Transcript of Deposition of Michael DiPaula, September 10, 2015, with 15 numbered exhibits, separated by tabs

The Respondents attached the following exhibits to their Opposition:

Opp. Ex. A Affidavit of Philip Rousseaux, December 8, 2015

Opp. Ex. B Affidavit of John Anthony, December 8, 2015

Opp. Ex. C Letter from Daniel J. McCartin, Esq., Conti, Fenn & Lawrence LLC, to Assistant Attorneys General Blake and Weiskittel, June 6, 2014

Opp. Ex. D E-mail thread between John Anthony and Charles Schwab & Co., Inc., April 8-10, 2014

Opp. Ex. E FINRA Chart, Guidelines Sanctions for Violations re: Filing of Forms U4/U5

Opp. Ex. F Affidavit of Evan Rosser, December 8, 2015

The Division attached the following exhibits to its Reply:

Reply Ex. A Affidavit of Mary Stanczyk, December 15, 2015, with attached Exhibits 1- 3

Reply Ex. B Affidavit of L. Scott Phillips, December 17, 2015, with attached Exhibits 1- 3

Reply Ex. C Supplemental Affidavit of Martin Disney, December 16, 2015, with 11 numbered exhibits, separated by tabs

Reply Ex. D Supplemental Transcript of Testimony of Philip Rousseaux, November 23, 2015, with 17 numbered exhibits, separated by tabs

Reply Ex. E Client Affidavits, attached as Exhibits 1 through 6, December 15, 16, or 17, 2015

OFFICE OF THE ATTORNEY	*	**BEFORE UNA M. PEREZ,**
GENERAL, SECURITIES DIVISION	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE OF**
EVEREST INVESTMENT ADVISORS,	*	**ADMINISTRATIVE HEARINGS**
INC., et al.,	*	**OAH CASE No.: OAG-SD-50-15-24381**
RESPONDENTS	*	**SD Case No.: 2014-0119**

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE

On June 17, 2015, the Maryland Securities Commissioner (Commissioner), in the Office of the Attorney General, Securities Division (Division), issued an Order to Show Cause (OSC) against Everest Investment Advisors, Inc. (EIA), Everest Wealth Management, Inc. (EWM), and Phillippe[1] Rousseaux (Rousseaux) (collectively Respondents) for alleged violations of the Maryland Securities Act[2] and related regulations. On July 2, 2015, each Respondent filed an Answer and requested a hearing.

On July 15, 2015, the Commissioner referred the matter to the Office of Administrative Hearings (OAH) for a hearing, and delegated to the OAH the authority to issue a proposed decision.

[1] On other documents, this Respondent's first name is spelled "Phillip" or "Philip." Mr. Rousseaux indicated that "Philip" is acceptable to him and is the version he uses. Transcript (Tr.) Vol. I, at 126.
[2] Md. Code Ann., Corps. & Assoc. §§ 11-101 to 11-805 (2014) (hereinafter, the Securities Act).

I held a telephone prehearing conference on October 8, 2015. Assistant Attorneys General Kelvin M. Blake and Katharine Weiskittel represented the Division. Russell D. Duncan, Esquire, and Jacob Frenkel, Esquire, represented the Respondents. I issued a Prehearing Conference Report and Scheduling Order (Report and Order) on October 16, 2015, and a Corrected Report and Order on November 4, 2015. The hearing on the merits was scheduled for January 19 through 29, 2016.

On November 6, 2015, the Division filed a Motion for Partial Summary Decision and Memorandum in Support thereof. The Respondents filed a Memorandum in Opposition to the Division's motion on December 8, 2015. The Division filed a Memorandum in Reply on December 21, 2015. Neither party requested a hearing on the motion.

On November 16, 2015, the Division filed a Motion to Seal Certain Exhibits to its Memorandum in Support of its Motion for Partial Summary Decision (Motion to Seal). The Respondents did not oppose that motion. On December 1, 2015, I issued an Order granting the Motion to Seal.

On January 12, 2016, one week before the hearing, the Respondents filed a Motion to Dismiss Proceedings and Argument (Motion to Dismiss). On January 15, 2016, the Division filed an Opposition to that motion.

On January 13, 2016, I issued a Proposed Ruling granting the Division's Motion for Partial Summary Decision in part and denying it in part, reserving some factual issues and the issue of sanctions for a hearing (Proposed Ruling).

I conducted a merits hearing on January 19 and 20, and February 4 and 5, 2016, at the OAH, 11101 Gilroy Road, Hunt Valley, Maryland. Assistant Attorneys General Kelvin M. Blake and Katharine Weiskittel represented the Division. Russell D. Duncan, Esquire, and Paul Huey-Burns, Esquire, *pro hac vice,* represented the Respondents. On the afternoon of January 19, 2016, I heard

argument on the Respondents' Motion to Dismiss. I denied the motion on the record, indicating that I would address it in my Proposed Decision.

On February 4, 2016, the Respondents hand-delivered a Motion for Reconsideration of the Administrative Law Judge's Proposed Ruling on the Securities Division's Motion for Summary Decision (Motion for Reconsideration). On February 18, 2016, the Division filed an Opposition to that motion. On March 18, 2016, I issued an Order Denying the Motion for Reconsideration.

At the conclusion of the hearing, I granted the parties permission to file brief post-hearing submissions. On February 11, 2016, the Respondents submitted copies of certain Orders of the Commissioner that the Respondents had cited in their closing argument. On February 22, 2016, the Respondents submitted a letter in lieu of a post-hearing brief. On March 3, 2016, the Division submitted a Post Hearing Memorandum and Exhibits.

The contested case provisions of the Administrative Procedure Act, the Procedures for Administrative Hearings of the Office of the Attorney General, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014); Code of Maryland Regulations (COMAR) 02.02.06; and COMAR 28.02.01.

ISSUES

A. Factual Issues Reserved in the January 13, 2016 Proposed Ruling

1. Whether Respondent Rousseaux pre-stamped, or caused to be pre-stamped, approximately 100 Authorization to Transfer Assets forms with the MetLife Medallion Signature Guarantee Stamp prior to his departure from MetLife in October 2004;

2. Whether a contingent $500.00 fee in a Financial Planning Agreement entered into between clients and EWM, or clients and EIA, was intended to compensate the firm(s) for "meeting time and

administrative costs," or was intended to penalize clients who did not open and fund their accounts within 60 days, or clients who terminated their relationship with EWM or EIA;

B. Factual Issue Not Included in the Division's Motion for Partial Summary Decision

1. Whether EIA and EWM used the concept of an "Investment Committee" as a ploy to manipulate clients or to convince them to open accounts with the firm(s); and

C. Sanctions

1. What sanctions against each Respondent are appropriate for any proven violations?

SUMMARY OF THE EVIDENCE

Exhibits

I have attached a complete list of exhibits as an Appendix. For exhibits that were submitted before the hearing, I used the titles provided by the parties in their respective exhibit lists. For any additional exhibits, I used the title of the exhibit on its face (if there is one) or a description provided by a witness who identified the exhibit. If an exhibit title referred to a client of EWM or EIA by name, I omitted the name and substituted an initial, in this format: [Client X.]

Testimony

Several witnesses were called more than once, at different stages of the case. I have listed each witness only once, but the Transcript, in each volume (I refer to these as I through IV), indicates which witnesses testified on each day of the hearing.

The following witnesses testified on behalf of the Division:

- L. Scott Phillips, former Managing Director of a MetLife branch in Linthicum, Maryland;
- Martin Disney, Investigator with the Division; and
- Philip Rousseaux, President of EIA and EWM (as an adverse witness).

The following witnesses testified on behalf of the Respondents:

- Michael DiPaula, an employee of EWM and EIA;
- John Anthony, Chief Compliance Officer, EIA, and Branch Manager, EWM;
- Philip Rousseaux;
- Reginald Montoya, Donna Rober, and Richard Martelo (clients of EWM and/or EIA);
- Evan Rosser, Associate Director, Oyster Consulting, LLC; and
- Louis Dempsey, President and CEO, Renaissance Regulatory Services, who was accepted as an expert in investment advisor compliance.

FINDINGS OF FACT

Introduction

Except as otherwise specifically provided herein (where I am finding additional facts), I incorporate by reference all Findings of Undisputed Fact set forth at pages 4 through 21 of the January 13, 2016 Proposed Ruling.

Rousseaux's Use of a MetLife Medallion Signature Guarantee Stamp in Forms Used to Transfer Client Assets and Purchase Insurance Products from Allianz and Conseco—October 2004 through Summer 2007

I incorporate herein by reference Findings of Undisputed Fact 13 through 33 set forth in the January 13, 2016 Proposed Ruling. Upon consideration of the evidence presented at the hearing, I find the following additional facts by a preponderance of the evidence:

1. While Rousseaux was a registered representative at MetLife, MetLife policy did not permit its representatives to sell fixed index annuities, offered by other companies, to its clients.
2. Fixed index annuities are an insurance product.
3. Allianz and Conseco offered fixed index annuities for sale. MetLife did not.

4. Rousseaux earned a higher commission on Allianz products[3] he sold that were not approved by MetLife.
5. At some point Rousseaux asked a colleague at MetLife, Thomas Yost (Yost), for pre-stamped Authorization to Transfer Assets (ATA) forms for Allianz and Conseco (*not* MetLife) so he could effectuate sales of other insurance carriers' fixed index annuities without MetLife's knowledge or approval.
6. During Rousseaux's tenure at MetLife, Yost was not one of the two individuals at the MetLife Linthicum branch who were authorized to guarantee client signatures on ATA forms using the MetLife Medallion Signature Guarantee Stamp (Stamp).
7. Rousseaux asked Yost to pre-stamp the Allianz and Conseco forms with the MetLife Stamp.
8. Yost provided Rousseaux with at least 100 ATA forms,(some for Allianz and some for Conseco). These forms had the MetLife Stamp on them.
9. On at least one occasion, Rousseaux signed the MetLife Stamp, purporting to guarantee the client's signature.
10. The identity of "K. W.," who purportedly guaranteed the signatures of MetLife clients who liquidated other assets to purchase Allianz or Conseco products that were not approved by MetLife (such as fixed index annuities), is unknown.
11. While he was employed at MetLife, Rousseaux kept the pre-stamped Allianz and Conseco ATA forms in the trunk of his car.
12. At the time of his resignation in lieu of termination, Rousseaux still had a large supply of the pre-stamped ATA forms. He did not return them to MetLife, but continued to use them.

[3] The question asked of Mr. Rousseaux specifically mentioned Allianz products. Tr. I, at 164. It is reasonable to infer that he earned a higher commission on Conseco fixed index annuity products also.

13. No one at MetLife gave Rousseaux permission to take the pre-stamped Allianz or Conseco ATA forms with him, or to continue to use them, after his separation from MetLife.

14. Rousseaux used the pre-stamped ATA forms to get around MetLife's policy prohibiting its representatives from selling competing products, specifically fixed index annuities, for which he earned a higher commission. Rousseaux was aware that MetLife would not approve of his activities in selling these products and using the MetLife Stamp to do so.

Financial Planning Agreements

I incorporate herein by reference Findings of Undisputed Fact 50 through 58 set forth in the January 13, 2016 Proposed Ruling. Upon consideration of the evidence presented at the hearing, I find the following additional facts by a preponderance of the evidence:

1. From November 2012 to March 2014, there were some costs to EIA or EWM, in time or administrative expenses, associated with opening a client's account.
2. Sometime after March 2014, with the help of compliance consultant Evan Rosser, of Oyster Consulting, LLC, EIA developed a Processing Services Agreement (PSA) that provided for a one-time fixed fee of $500.00 (Fee) "in consideration of [EIA] performing the "Processing Tasks," which were defined as the "tasks associated with opening your account." Resp. Ex. 169.
3. The PSA provided that the Fee was "due and payable within sixty (60) days of your execution of this Agreement. The Fee will be waived if you become an Everest client and fund your Account with Everest." EIA reserved the right to waive the Fee on a "case-by case basis." Resp. Ex. 169.
4. This PSA was submitted to the Division on January 19, 2016.

"Investment Committee" as a "Ploy" or "Client Manipulation" Device

Upon consideration of the evidence presented at the hearing, I find the following facts by a preponderance of the evidence:[4]

1. In a presentation entitled "Top of the Table," delivered to the 2013 annual meeting of the Million Dollar Roundtable, a group of successful insurance professionals, Rousseaux described a marketing strategy whereby the Respondents took away the decision-making power from prospects by engaging in "psychological warfare" and "freaking mind games."
2. These techniques or tactics included the use of an "Investment Committee" to suggest that acceptance as an Everest client was not automatic, and that the Respondents' clients would be members of an "exclusive club." Rousseaux told his audience that "The investment committee is really powerful." *See* SD Ex. 19, at 000014-000016.
3. On May 21, 2013 and May 23, 2013, Everest employees Michael (Mike) DiPaula and John Anthony exchanged e-mails concerning a prospective client, whom they were trying to get in to the office for a second meeting. The e-mails were sent from EWM e-mail addresses. John Anthony's e-mail said, "Left message about us having an investment committee meeting next week yesterday. I will follow up again Friday, if not then he [the prospect] is ignoring us." SD Ex. 20.
4. On August 6, 2013, Rousseaux sent an e-mail to a client,[5] saying:

   > Please call John so he can sit down with you and we can talk and you can complete the transfer process. I am sure Chris explained the investment committee to you and the fact that we only put on 100 new relationships a year, so if for some reason you

[4] In the OSC, the Division alleged that Respondents EIA and EWM used the idea of an "Investment Committee" to manipulate clients or induce them to open accounts. *See* OSC, at ¶¶ 49-56. At the hearing, the Division pointed out several times that this allegation was not encompassed within its Motion for Partial Summary Decision, and that the factual issue was before me to decide. The parties agreed on this point at the end of the hearing. Tr. IV, at 308-09.

[5] Mr. Anthony identified the recipient as a "client." Tr. II, at 140. The entire e-mail suggests that the recipient may have been a prospective client, at least with respect to the purchase of an annuity. *See* SD Ex. 90.

are not interested in working with us or had a change in heart, please let us know so we can give your spot to someone else.

SD Ex. 90.

5. On April 17, 2014, Mike DiPaula sent an e-mail to Rousseaux and other staff members, captioned "Suggestion." The e-mail said:

When we call people to tell them about the Investment Committee, I don't think we should leave that news on a voice mail. I think if we get a voice mail, we should say who we are and either for them to call us back and that's it or we would like to speak with you about the Investment Committee. I think a VM [voice mail] lessens the impact. Let them wonder what we're going to say when they call back, and then go right to the close to bump the second.

SD Ex. 85.

6. On April 22, 2014, John Anthony replied as follows, from his EWM e-mail address, with copies to the same recipients:

I would concur as well. Maybe just a VM message that says we have the results from the Investment Committee Meeting and to call us back.

SD Ex. 85.

7. In his "Top of the Table" presentation, in answer to a question, Rousseaux alluded to his investment advisory business [EIA], as follows:

So it appears on the surface that all we're doing [is] selling annuities, but most of the people who come in we're selling annuities and managed money. Sixty cents of every dollar goes into the annuity. Of every dollar that comes in our door, forty cents goes on the money management platform that we have, which does require you to give them a call every quarter, even if there's nothing to say.

SD Ex. 19, at 000017.

8. According to Mike DiPaula, the decision whether to take a client was "basically subjective," sometimes "my decision," sometimes a "group decision." Tr. II, at 40. "It was done through me subjectively or we would meet with other team members." "We called it an investment committee meeting." *Id.* at 41.

9. When Louis Dempsey, of Renaissance Regulatory Services, requested minutes of EIA's investment and wealth portfolio management committees, he was told there was no such document. Tr. III, at 318.

Facts Relevant to Sanctions[6]

Upon consideration of the evidence presented at the hearing, I find the following facts by a preponderance of the evidence:

Financial Planning Agreements and the $500.00 Fee

1. On December 10, 2012, EWM submitted a draft of a tri-fold brochure for new clients to EWM's compliance consultant, Currin Compliance. Under the caption "What to EXPECT [sic]," the brochure contained the following bulleted paragraph: "As previously stated, if the accounts that you signed up for are not opened and funded within 60 days, you will be charged $500 per account as *compensation for the financial advice received.*" Resp. Ex. 24 (emphasis added).
2. On December 12, 2012, Currin Compliance commented: "This is not consistent with a fee based service or a commission based service and should be removed." Resp. Ex. 24.
3. On February 28, 2013, John Anthony (using the EIA e-mail address), sent 173 EIA clients the annual delivery of EIA's Form ADV Part 2A Firm Brochure. This brochure, dated February 26, 2013, did not disclose that EIA provided financial planning services or charged a $500.00 fee per account not funded. SD Ex. 31.
4. On February 5, 2014, John Anthony (using the EWM e-mail address), sent 234 EIA clients the annual delivery of EIA's Form ADV Part 2A Firm Brochure. This brochure, dated

[6] To the extent practicable and appropriate, I have organized these findings under the same topic headings I used in the Proposed Ruling.

December 12, 2013, did not disclose that EIA provided financial planning services or charged a $500.00 fee per account not funded. SD Ex. 24.

5. The intention of the $500.00 fee was to "conserve," or keep, EIA or EWM clients in the event that the client was "trying to move money away." Tr. II, at 160-61.

Failure to File Updated Advisory Contracts with the Division

1. The Financial Planning Agreement entered into by numerous EIA and EWM clients was not filed with the Division before April 2014. SD Ex. 24 (exemplar), signed February 19, 2014.
2. An EIA Investment Advisory Contract, updated August 15, 2012, was not filed with the Division before April 2014. SD Ex. 35 (exemplar), signed February 19, 2014.
3. An earlier version of the EIA Investment Advisory Contract was filed with the Division before April 2014. SD Ex. 36 (exemplar), signed October 21, 2011.
4. A Discretionary Wrap Investment Management Agreement, between EIA and its clients, was not filed with the Division before April 2014. SD Ex. 37 (exemplar), signed March 25, 2014.

The Wrap Fee Brochure

1. In December 2013, EIA's outside compliance consultant, Market Counsel/Hamburger Law Firm, prepared a draft brochure for purposes of the initial launch of the EDGM Program (Program). This document, entitled Wrap Fee Program Brochure and dated December 12, 2013, introduced the Program, describing it as a "wrap fee program, which provides clients with the ability to trade in certain investment products without incurring separate brokerage commissions or transaction charges." Resp. Ex. 67, at 3. The document identified the Program fee as "a single annualized fee of two percent (2.00%) of the assets being managed through the Program." *Id.* The document also provided that clients might incur certain

other additional charges imposed by third parties, but did not mention "commissions or transaction charges" among the "other charges." *Id.*, at 4.

2. Division staff, not EIA or any compliance consultant, discovered in or about March 2014 that clients who had invested in the Program were paying brokerage fees and/or transaction charges through their Charles Schwab accounts.
3. In February 2015, EIA filed an amendment to its Form ADV, Part A. Among other "Material Changes," this document disclosed that the Program was "no longer a Wrap Program;" that effective March 1, 2015, EIA clients would pay an annualized fee of 1.5% (reduced from 2.0%) on the assets being managed; and that the fees do not include "third party custodial or execution charges." Resp. Ex. 42, at 2. The document indicated that EIA would "no longer file or distribute the Wrap Fee Program Brochure." *Id.* This document was transmitted to clients by e-mail on March 9, 2015. Resp. Ex. 127.
4. On March 27, 2015, EIA sent its clients a letter, advising them of the reduction of the fee for the EDGM from 2% to 1.5% of the assets invested, effective March 1, 2015. Resp. Ex. 178.
5. EIA subsequently mailed a letter to EDGM Program clients, requesting them to sign new documents in light of "updates" to a number of items, including a lowering of the fee; the discontinuance of the wrap fee program; and the "passing on" of trading fees to the client. Resp. Ex. 54. The letter enclosed an Investment Policy Statement (IPS) for the EDGM Program, and a Discretionary Asset Management Agreement, for signature. *Id.*
6. In an "other than annual amendment" to its Form ADV, filed with the Division on August 26, 2015, EIA disclosed that because Charles Schwab, & Co., Inc. (Schwab) was terminating its relationship with EIA on November 4, 2015, EIA "no longer is accepting new clients or additional assets for its Everest Growth Model and will not be offering

discretionary asset management services as of September 30, 2015." EIA provided three options for EIA clients with accounts at Schwab to consider before November 4, 2015. *See* SD Ex. 114; SD Ex. 106, at attached pages 234-35; and SD Ex. 117.

EIA's Use of "Performance Figures" in an IPS for the EDGM Program

1. Rousseaux and previous compliance experts [Market Counsel] developed the IPS for the EDGM. Tr. II, 203; *see* SD Ex. 39. The IPS advised investors that the five- and ten-year long term performance/growth of the EDGM as of January 1, 2014 was 8.92% and 8.64%, respectively. *Id.* These figures were incorrect because they did not take into account "buys and sells" that would occur over a five or ten-year term, but instead reflected a "buy and hold" strategy. Rousseaux made this mistake, which he attributed to "inexperience." Tr. II, at 209-10.
2. Rousseaux showed this document to Market Counsel, who "cautioned us on using historical performance data, and that we needed to be careful with it." Tr. II, at 216.
3. After Rousseaux learned that the historical performance figures were incorrect, on April 24, 2014, EIA sent a letter to clients, admitting that the five- and ten-year performance figures were incorrect, and offering clients the opportunity to exit the model at no cost, provided the clients notified EIA by 5:00 p.m. on May 5, 2014. SD Ex. 46. No clients accepted the offer to get out of the EDGM program. Tr. II, at 218.
4. At the recommendation of Oyster Consulting, LLC (Oyster), EIA engaged National Economic Research Associates (NERA) to prepare a new IPS for the EDGM. Rousseaux wanted the IPS to incorporate the "buys and sells" that would have occurred over the five- and ten-year periods; EIA did not have the necessary software, which would have cost hundreds of thousands of dollars to develop. Tr. II, at 219-22.

5. The new IPS was a one-page document. The figures were represented to be "As of March 31, 2015." The "Model/Backtested Performance (net of fees)" was shown graphically as 12.35% for three years; 9.59% for five years, and 9.53% for ten years. Annual rates were shown in a list. This information was followed by two paragraphs of disclosures, in smaller print. Resp. Ex. 45.

Regulatory Assets Under Management

1. Rousseaux wanted his companies to be listed in financial trade magazines, such as *Barron's* and *Worth*, which were available to high-income persons and financial professionals.
2. One of the criteria for acceptance into these magazines' programs (such as *Barron's* top 1,000 state-by-state rankings of advisors) is the amount of an advisor's Assets Under Management (AUM).
3. Some magazines, such as *Barron's*, recognize annuities as AUM, and some, such as *Worth*, do not. Tr. IV, at 170-73.
4. In addition, such magazines have a minimum asset requirement for an advisor to be listed. In 2012, the minimum for Barron's was $275 million. SD Ex. 89.
5. Rousseaux found it disappointing and upsetting that *Worth* magazine did not recognize annuities as AUM. SD Ex. 88.
6. Rousseaux made an application to *Worth* on behalf of EWM. Tr. IV, at 170. In his November 8, 2012 e-mail to Chris Kirk, then EIA's Chief Compliance Officer, Rousseaux said: "We need to grow our AUM, assets under management, with Curian to $100 million." SD Ex. 88. Curian assets were those advised through EIA. Tr. IV., at 193.
7. On September 25, 2012, Rousseaux sent an e-mail to four staff members, from his EWM e-mail address, saying: "We are close to $120 million [in assets] now. They [*Barron's*] count

annuity business as well. This would be a huge credibility factor in our lobby, on the website, and on radio." SD Ex. 89; Tr. IV, at 139.

8. On March 20, 2013, from his EWM e-mail address, Rousseaux sent an e-mail to Chris Kirk, asking for "clarification on what we can include on the ADV for AUM." . . . "I believe the more [AUM] we state the stronger we look for marketing campaigns and info we can use to discuss on website, radio shows, and ads." . . . "I would like to state something like EWM and EIA have combined assets of $130 million (close) in our [Form ADV Part 2]." SD Ex. 86; Tr. IV, at 136-37.

EIA's Representations as to the Account Minimum for the EDGM Program

1. Rousseaux wanted clients who had $100,000.00 or more to invest in the EDGM Program. Tr. II, at 228.
2. In a brochure pertaining to the Wrap Fee Program, EIA reserved to itself the discretion to accept smaller accounts based on certain criteria. Tr. II, at 228-29.[7] EIA also did not want to exclude existing clients who had money being managed by Curian, which had a $25,000.00 minimum. Tr. II, at 229-30.
3. Approximately half of the clients who entered the EDGM program invested less than $100,000.00. No client asked EIA to make an exception to the $100,000.00 minimum investment requirement. Tr. II, at 231.

EWM Acting as or Holding Itself Out as an Investment Adviser when Not Registered with the Division

1. In October or November 2015, Division staff obtained a copy of Rousseaux's Chartered Financial Consultant (ChFC) brochure from a booth at a "Senior Expo" in Timonium, Maryland. Tr. IV, at 7, 127, and SD Ex. 113. Division staff also obtained a DVD copy of

[7] Mr. Rousseaux read the criteria from the brochure, which was marked for identification only as SD Ex. 75.

EWM's infomercial, The Money Guys: How to Have a Hassle-Free Retirement, from the Senior Expo booth. Tr. IV, at 10, and SD Ex. 123.[8] Multiple copies of the video were available for the asking at the booth. Tr. IV, at 119.

2. The infomercial recorded on SD Ex. 123 is currently broadcast on television on Sundays. Tr. IV, at 127.

3. The infomercial is hosted by EWM President Philip Rousseaux, and employees Mike DiPaula and Sarah Flora. There is no live audience.

4. At the beginning, a voice says clearly, "The following program is a paid advertisement for Everest Wealth Management." Tr. IV, at 100.

5. A written disclaimer, shown on the screen in the initial moments of the infomercial, contains a number of statements describing the relationship between EIA and EWM, the services and products offered by each, and the role of insurance products, specifically fixed index annuities, in financial plans. Tr. IV, at 14, 101-04; SD Ex. 122.

6. The program's hosts mention a "comprehensive financial plan" three times during the infomercial. Tr. IV, at 50. Rousseaux's several professional designations, including the ChFC, are mentioned twice. *Id.* Di Paula says "We are investment advisors and this show is about fixed index annuities." *Id.*, at 21. Rousseaux says "We are investment advisors and financial planners as well as insurance agents." *Id.*, at 22-23.

7. Between two segments of the infomercial, DiPaula addresses the television viewers, describing his personal experience with EWM. He begins with his background in law enforcement, and says that after hearing the Money Guys radio show, he was "very skeptical . . . like many of you right now. What I found out was these plans were just as described. *I own one myself.*" Tr. IV, at 43-44 (emphasis added).

[8] The DVD was played in its entirety at the hearing. The Court Reporter transcribed the audio portion. Tr. IV, at 21-50.

8. At different times in the infomercial, the hosts (especially Rousseaux) mention investments and concepts other than insurance, such as the stock market; the "buy and hold" theory; certificates of deposit; bonds; reverse dollar cost averaging; portfolio diversification; equity and bond portfolios; the stock market's "single digit success rate;" and "hidden fees" and commissions in equity and stock market investments. Tr. IV, at 24-30.
9. The infomercial recorded on SD Ex. 123 was prepared with the advice and input of Respondents' insurance and securities counsel, and securities and insurance compliance advisors. The disclaimer was written by Paul Huey-Burns, Esquire, who was present when the video was made. Tr. IV, at 186-87.

EIA's Failure to Maintain and/or Timely Produce Books and Records

1. Currently, outgoing client correspondence is kept on a secure server, to which only John Anthony has access. Such correspondence cannot be printed without being archived to a client. Incoming client correspondence is kept in the client file itself. Tr. II, at 85.

Compliance History Generally

1. Since EIA's inception as a registered investment adviser (IA) in July 2011, several individuals served as Chief Compliance Officer for that entity. In chronological order, they were Christopher Kirk; Julie Quinn (now Long); Evan Rosser; and currently John Anthony.
2. Since EIA's inception as an IA in July 2011, it has retained the services of several outside compliance consultants, related law firms, and other experts, at considerable expense. These include but are not limited to RIA in a Box/Lexington Compliance; Market Counsel/Hamburger Law Firm; Ober Kaler; Oyster Consulting, LLC; NERA; and most recently Shulman Rogers Gandal Pordy & Ecker, P.A. (Shulman Rogers).

3. In late 2013, Rousseaux imposed very short deadlines on then-compliance consultant Market Counsel for the preparation of necessary documents and filings relating to the new EDGM Program. SD Ex. 71; Tr. IV, at 132.
4. After the Division's audit and the issuance of an Interim Order against EIA, it took Oyster Consulting 8 to 12 months to review and revise the documents and filings relating to the EDGM Program. Tr. III, 199.
5. On April 6, 2015, EIA promulgated a new Compliance Manual. Resp. Ex. 121. The principal author was Evan Rosser, of Oyster Consulting.
6. EIA filed a "material amendment" to its Form ADV, Part 2A, on June 29, 2015. SD Ex. 114. EIA did not send this amendment to its clients until August 11, 2015, more than 30 days after the filing.
7. As of January 2016, Oyster Consulting is being retained directly by EIA to provide compliance assistance, not by Shulman Rogers.

Current Business Model

1. EIA has not compensated its employees for approximately one year. Tr. II, at 139; Tr. IV, 164-65.
2. EIA is currently a solicitor for EQIS, an "asset manager" or "third party money manager." Tr. III, at 232. EIA receives a fee for its services as a solicitor. Tr. IV, at 172.
3. EQIS is itself a registered IA, and must provide required disclosures to any client referred to it by EIA or any other solicitor. Tr. III, at 229.
4. There is no advisory contract or agreement between EIA and the clients it refers to EQIS. Tr. IV, at 289, 344.

DISCUSSION

Respondents' Motion to Dismiss[9]

Respondents' Motion to Dismiss Proceedings and Argument (Motion to Dismiss), filed January 12, 2016, arose out of related litigation the Respondents filed on August 4, 2015, in the Circuit Court for Montgomery County, Case No. 407544V. That case raised certain due process and constitutional claims related to this administrative proceeding, including inadequate time to prepare; the unavailability of formal discovery procedures, such as interrogatories, requests for admission, and depositions; limitations on evidence and the ability to issue subpoenas; the fact that the Securities Commissioner, who instituted this proceeding, retains final decision-making authority; the unavailability of a right to a jury trial; and the inapplicability of the Maryland Rules of Evidence.

On or about July 2, 2015, the Respondents had asserted these claims as Affirmative Defenses in their respective Answers to the Order to Show Cause issued herein.

On or about September 17, 2015, the Division filed a Motion to Dismiss the Respondents' Complaint in Case No. 407544V. During the Pre-hearing Conference that I held on October 8, 2015, counsel for the Respondents mentioned that a related case was pending in the Circuit Court, and that the Division had filed a Motion to Dismiss the Complaint therein. Although I set a deadline for the filing of dispositive motions in this proceeding (November 6, 2015), the Respondents did not indicate that they intended to file any such motion. They did not file a cross-motion for summary decision, or raise any of their due process or equal protection claims in their Opposition to the Division's Motion for Partial Summary Decision.

[9] This background is drawn from the Respondents' Motion to Dismiss and the record in this proceeding.

On December 10, 2015, the Circuit Court (the Hon. Richard E. Jordan) held a hearing on the Division's Motion to Dismiss the Complaint. The Court granted the Division's Motion from the bench, indicating that the Respondents should exhaust their administrative remedies and should raise their due process and equal protection claims in this proceeding.

The Respondents' Motion to Dismiss followed. The Respondents did not allude to any legal authority to support their arguments, suggesting that their constitutional challenge to the Commissioner's adjudicatory proceedings is a "novel issue of first impression." As relief, they requested that I dismiss this proceeding (*i.e.*, dismiss the Order to Show Cause, the agency's notice of action), or, in the alternative, transfer it to a circuit court where venue would be proper.

In its Opposition, the Division made factual arguments in response to the Respondents' contentions that they lacked adequate time to prepare, or were unable to obtain documents from the Division. The Division cited legal authority for the proposition that the combination of prosecutorial and adjudicatory functions does not violate due process, *Consumer Protection Div. v. Consumer Publishing Co.*, 304 Md. 731, 763 (1985). The Division cited further authority for the proposition that full discovery or a trial by jury are not required for an administrative proceeding to comport with due process. *Maryland Dept. of Human Resources v. Bo Peep Nursery*, 317 Md. 573, 596-67 (1989); *Curtis v. Loether*, 415 U.S. 189, 194-05 (1974). Instead, all that is required is "an effective opportunity to defend," meaning an opportunity for a party to present its own evidence and to confront and cross-examine adverse witnesses. *Goldberg v. Kelly,* 397 U.S. 254, 268 (1974).

On January 20, 2016, the parties presented argument on the Motion to Dismiss, arguing essentially what was contained in their written submissions. Tr. II, at 176-183. I denied the Motion on the record, for basically two reasons. First, even if I were inclined to dismiss this proceeding, I am aware of no statute or regulation that would permit me to transfer it to a court of general

jurisdiction. Second, this proceeding affords the Respondents exactly what the law requires—an opportunity to present their evidence, to cross-examine the Division's witnesses, and to argue their position—and the attendant rights to challenge the Commissioner's final decision. Tr. II, at 186. In addition, I conclude that the Respondents' argument that their Motion presents an issue of first impression is refuted by the legal authorities cited by the Division.

Reserved Factual Issues

1. Rousseaux's Unauthorized Use of the MetLife Signature Guarantee Stamp

I conclude that the Division has met its burden to prove that Rousseaux stamped, or caused to be stamped, numerous Allianz and Conseco ATA forms with the MetLife Stamp, and used these forms to sell insurance products offered by other carriers, for which he earned a higher sales commission. As I have previously found, he did so until sometime in 2007, long after he left MetLife. *See* Proposed Ruling, at 8-9.

Rousseaux testified as an adverse witness in the Division's case. Initially, he admitted asking his colleague Yost for "forms that were signature-guaranteed for outside companies [*i.e.*, not MetLife]," and using them to transfer client assets after his resignation from MetLife. Tr. I, at 126. He denied any knowledge of how Yost got the forms, or how the MetLife Stamp got on the forms, and expressly denied stamping them himself. *Id.*, at 127. Nevertheless, when shown a document,[10] he admitted that he signed at least one of the signature guarantee stamps. Tr. I, at 126-28. He admitted that no one at MetLife gave him permission to take the ATA forms away, or to use them after he left. Tr. I, at 129.

In an Affidavit attached to the Respondents' Opposition to the Division's Motion for Partial Summary Decision, Rousseaux asserted that he used the pre-stamped forms "as a matter of

[10] This was SD Ex. 17, page 00090. The Division did not offer this exhibit.

convenience when away from the office and meeting with potential clients who wanted to transfer their accounts from their existing custodian." Affidavit of Philip Rousseaux, at ¶ 14. He reiterated this rationale at the hearing. Tr. I, at 148-49.

On cross-examination by his own counsel, however, Rousseaux admitted that he used the pre-stamped forms to get around MetLife's policies against selling certain products, specifically fixed index annuities. When he sold a client such a product, the business was placed directly with the other carrier (Allianz or Conseco). Tr. I, at 135-38.

Also on cross-examination by his own counsel, Rousseaux testified that by engaging in this conduct, he "put my client's interest before MetLife's interest." Tr. I, at 136. He further claimed that many of the representatives at MetLife followed the same process in using the signature guarantee stamp. *Id.*, at 141. He claimed that he received no training about the signature guarantee form, and that he had only a "vague idea" of its purpose—to make sure the clients who signed the paper [the ATA form] wanted their funds moved. *Id.*, at 151-52.

Eventually, in response to one of my questions, Rousseaux admitted that he asked Yost to stamp the forms, Tr. I, at 161; *see generally id.,* at 153-162. Upon further questioning by his counsel, he explained that he used the pre-stamped forms to prevent MetLife from ever seeing the ATA forms effecting sales of Allianz fixed index annuities. *Id.*, at 162-64. In response to a question by the Division, he admitted that he earned a higher commission on the non-approved Allianz products. *Id.*, at 164. He claimed that this fact did not influence his recommendation to the client, which he based on "suitability." *Id.*, at 165.

I give Rousseaux some credit for admitting to a course of conduct that reflects badly on his character. Nevertheless, his testimony as to the reasons for his behavior is self-serving, and his testimony that "everybody else was doing it" is simply not credible. It is perfectly clear that

Rousseaux knew MetLife would not approve of his conduct, but he used the pre-stamped ATA forms anyway, and gained financially thereby. Either he did not understand the purpose of the signature guarantee, which is hard to believe, or he did not care that he was falsely representing to the transferee firms that MetLife had verified the clients' signatures. Regardless, he used the forms many times to sell products that his employer, for whom he was a registered agent, did not sell.

I find that, upon these facts, the Division has established that Rousseaux individually violated the following sections of the Securities Act, as alleged in several Counts of the OSC: section 11-301(2) and (3) (Fraud in Connection with the Offer, Sale or Purchase of Securities, Count I); section 11-302(a)(2) (Fraud in Connection with the Offer and Sale of Investment Advice, Counts II and III); and section 11-302(a)(3) (Dishonest and Unethical Practices, Count IV).

2. The Purpose of the $500.00 Fee in the Financial Planning Agreements

I conclude that the Division has met its burden to prove that a contingent $500.00 fee in a Financial Planning Agreement entered into between clients and EWM, or clients and EIA, was not intended to compensate the firm(s) for "meeting time and administrative costs," but was intended to penalize clients who did not open and fund their accounts within 60 days, or clients who terminated their relationship with EWM or EIA.

In an Affidavit attached to the Respondents' Opposition to the Division's Motion for Partial Summary Decision, John Anthony asserted that the $500.00 fee in the FPAs was "intended to compensate EIA for its meeting time and administrative costs." Affidavit of John Anthony, at ¶ 4.

This is not what the FPA says; the fee was "in consideration of the financial advice received [from] EIA" but would be payable only if the client did not open and fund the account within 60 days. *See* SD Ex. 34, Resp. Ex. 94. Evan Rosser, of Oyster Consulting, who served for a time as EIA's CCO, testified that he didn't care for this FPA, saying it "doesn't accurately reflect the

service EIA was providing" or EIA's "costs in the process." He testified that there are "fixed costs" in setting up an account, such as an advisor's time, administrative costs, and operational issues. Tr. III, at 96-97. Mr. Rosser created a new "Processing Services Agreement" (Resp. Ex. 169), which is much more explicit on this point. Mr. Anthony testified that the PSA "might be a little more clear" [than the previous FPA] "but the purpose works the same." Tr. II, at 98.

When asked if he had seen agreements like Resp. Ex. 169 for other companies, Mr. Rosser hesitated at first, then admitted that he had not seen a document similar to it, but said that other companies have "other methods of collecting those fixed fees [costs] somehow." In response to a leading question, he agreed that "it's not uncommon in the industry." Tr. III, at 97-98.

I do not doubt that, as a practical matter, there may be administrative or processing costs associated with opening a financial account for a client. With due respect to both Mr. Anthony and Mr. Rosser, however, their "post hoc" attempts to change the meaning of the language in the FPA are unavailing. Maryland follows the objective law of contract interpretation. *Maryland Casualty Co. v. Blackstone International, Ltd.*, 442 Md. 685, 694 (2015). This means that "When the clear language of a contract is unambiguous, the court will give effect to its plain, ordinary, and usual meaning, taking into account the context in which it is used." *Id.* at 695, *quoting Sy-Lene of Wash., Inc. v. Starwood Urban Retail II, LLC*, 376 Md. 157, 166 (2003); *see also Spacesaver Systems, Inc. v. Carla Adam*, 440 Md. 1, 8 (2014), *citing Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261 (1985).

In reaching the conclusion that the FPA meant what it said, I note that the completely different language of the PSA, which ties the $500.00 fee to "Processing Tasks," is evidence that the language in the FPA did *not* refer to processing tasks, administrative costs, or the like. Mr. Anthony conceded as much, when he testified that the intention was to "conserve," or keep, EIA or

EWM clients in the event that the client was "trying to move money away." Tr. II, at 160-61. Also, when asked if he charged a certain client a fee when she decided not to complete her transactions with EIA and EWM, he responded, "[You] mean did I send her an *invoice for canceling*? Yes." Tr. II, at 162-63 (emphasis added). This provides valuable insight into the true purpose of the contingent $500.00 fee. There is no dispute that the Respondents did not actually collect the fee from this client; but the attempt speaks for itself. *See* SD Ex. 33.

I find that, upon these facts, the Division has established that EIA and EWM violated the following sections of the Securities Act, as alleged in these Counts of the OSC: section 11-302(a)(2) and (c) (Fraud in Connection with the Offer and Sale of Investment Advice, Counts II and III); and section 11-302(a)(3) (Dishonest and Unethical Practices, Count IV).

3. The "Investment Committee" as a Ploy

I conclude that the Division has met its burden to show that, as alleged in the OSC at ¶¶ 50-56, the so-called "Investment Committee" was indeed a "ploy" or marketing device, which the Respondents used to induce prospective clients to invest money with EWM or EIA. This is evident from contemporaneous e-mails, and from Rousseaux's "Top of the Table" presentation. The idea, as expressed by Rousseaux, was to make clients believe they were members of an "exclusive club." *See* SD Ex. 19, at 000016.

In addition, I found Mr. DiPaula's testimony on this point enlightening. He essentially described either a subjective decision by himself, or perhaps a group decision with other team members. It is important to recall that in the 2012 time frame, EIA had only four employees. Mr. DiPaula acknowledged that the firm was small, and that the investment committee meetings were not something formal, with members sitting around a board room "like LA Law." Tr. II, at 43-44. I found him a credible witness, who did not exaggerate and was not prone to self-aggrandizement.

The Division argued that whether there was actually an investment committee or not was not relevant; the important point was that the Respondents' use of this "manipulative marketing tool" to take away decision-making power from clients or prospective clients was not consistent with the Respondents' status as a fiduciary. The Division further argued that this rationale applied to both EWM and EIA, as I had already found that EWM "held out" as an investment adviser. *See* Tr. IV, at 240-42. I agree with the Division.

I find that, upon these facts, the Division has established that the Respondents violated the following sections of the Securities Act and applicable regulations, as alleged in these Counts of the OSC: section 11-302(a)(2) and (c) (Fraud in Connection with the Offer and Sale of Investment Advice, Counts II and III); and section 11-302(a)(3) (Dishonest and Unethical Practices, Count IV) and COMAR 02.02.05.03B(8) (Prohibited Practices).

Sanctions

Necessarily, because I granted the bulk of the Division's Motion for Partial Summary Decision as to the alleged violations, the bulk of the hearing was directed to the issue of sanctions. In addition to presenting evidence as to the Respondents' past violations as alleged in the OSC, the Division sought to show both ongoing violations of the same nature, and some new violations.[11] The Respondents focused primarily on their past efforts to obtain compliance advice and counsel, and especially their current efforts at compliance with the Securities Act and applicable regulations going forward.[12]

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[11] I gave the Respondents a continuing objection as to the evidence of ongoing and new violations. *See, e.g.,* Tr. IV, at 13.

[12] As pointed out by the Division in closing argument, the Respondents attempted to re-visit some of the adverse findings made in the Proposed Ruling, by adducing evidence concerning their intent, or the asserted lack of complaints by, or actual harm to, clients. Tr. IV, at 246-47.

The Division's Position

With regard to ongoing violations, the Division's argument is that Respondents EIA and Rousseaux continue to advertise financial planning services that they do not disclose in EIA's Form ADV, Part 2 brochure; that EIA and Rousseaux do not have a financial planning agreement with clients, or if they do, they have not submitted it to the Division for review; that EIA and Rousseaux continue to violate the new Compliance Manual (Resp. Ex. 121) and the SEC's *Clover* no-action letter by failing to make required disclosures, with particular reference to the use of back-tested or hypothetical performance returns; that EWM continues to hold itself out as an investment adviser, and blurs the distinction between EWM and EIA, in the infomercial that is currently broadcast regularly on television; and that Respondent include a testimonial by Mike DiPaula in the infomercial, contrary to applicable federal and state regulations and the Compliance Manual. *See* the Division's Post Hearing Memorandum, at 3-4; Tr. IV., at 55, 255-56.

With regard to new violations, the Division alleges that EIA's delivery of the June 29, 2015 amendment to its Form ADV, Part 2 brochure, which disclosed the pendency of the OSC, was not delivered "promptly," that is, within 30 days of the triggering event, as defined by COMAR 02.02.05.11A(3)(b). Post Hearing Memorandum, at 4; Tr. III, at 154-58; Tr. IV, at 259. The Division further alleges, in substance, that EIA still does not disclose its basic fee schedule, as required by Instruction 5A to the Form ADV, Part 2 brochure. Post Hearing Memorandum, at 4-5. Finally, the Division points out that Rousseaux's personal LinkedIn page continues to claim that he was an "investment advisor" while employed at Fidelity Investments, and an "investment consultant" while employed at MetLife, claims that are refuted by the Central Registrations Depository Registration Summary for Rousseaux. Post Hearing Memorandum at 5, and Ex. 3; SD

Ex. 105. The LinkedIn page formerly stated that Rousseaux was an "investment advisor" at both Fidelity and MetLife. SD Ex. 112.

The Division also pointed to Rousseaux's refusal to answer certain questions at his November 23, 2015 deposition, suggesting that this conduct showed contempt for the Division's legal authority. Post Hearing Memorandum at 5-6; Tr. IV, at 258, 267. The Division's ultimate position is that the Respondents, and each of them, should be subject to sanctions as urged by the Division in its Motion for Partial Summary Decision, at pages 81-90.

The Respondents' Position

The Respondents minimized the seriousness of their violations; blamed others, such as prior compliance consultants and legal counsel; urged that the Division had not shown any evidence that the Respondents acted with scienter, *i.e.*, an intent to deceive or defraud; emphasized the testimony of several clients indicating satisfaction with the service they received; emphasized the commitment to compliance on the part of EIA, Rousseaux, and EIA's employees; and highlighted the qualifications and experience of EIA's compliance consultant, Evan Rosser, and its expert witness, Louis Dempsey. *See* Respondents' letter of February 19, 2016; Tr. IV, at 268-300.

The Respondents requested "no sanctions or minimal sanctions together with retention of a compliance monitor." Respondents' letter of February 19, 2016, at 4. They referred to the remedies sought by the Division as the corporate "death penalty." *Id.*, at 1.

Analysis

A threshold question is whether sanctions are designed to punish past conduct, as argued by the Division, or should simply be forward-looking, to protect the investing public, as argued by the Respondents. As to the Commissioner's permissible actions, the plain language of the Securities Act indicates that she may take certain actions, or a combination of them, upon a final finding that a

person "*has engaged* in any act or practice constituting a violation of any provision of [the Act] or any rule or order under [the Act]." Md. Code Ann., Corps. & Assocs. § 11-701.1 (2014) (emphasis added).

Preliminarily, the Respondents argued that Rousseaux's conduct while employed at MetLife was irrelevant in this proceeding, because it occurred in the insurance regime. *See* Tr. I, at 9-10. However, section 11-412(a) of the Act empowers the Commissioner to suspend or revoke an investment adviser's registration if the order is in the public interest and the registrant "has engaged in dishonest or unethical practices in the securities or investment advisory or *any other financial services business*." Md. Code Ann., Corps. & Assocs. § 11-412(a)(7) (2014) (emphasis added). The Respondents cannot seriously contend that while employed as a broker-dealer agent with MetLife, Rousseaux was not working in a financial services business.

Indeed, with regard to Rousseaux individually, his conduct involving the acquisition of pre-stamped ATA forms while employed as a broker-dealer agent at MetLife, and his unauthorized use of those forms for several years thereafter, is in some ways the most shocking aspect of this case. There can be no doubt that this conduct was intentional, and was motivated not by considerations of "convenience" but by Rousseaux's desire to avoid or frustrate MetLife's policies regarding the sale of non-MetLife products, specifically fixed index annuities.

Whether fixed index annuities sold by Allianz or Conseco were in his clients' best interest, as claimed by Rousseaux, is completely beside the point. For purposes of this proceeding, the point is that Rousseaux used ATA forms pre-stamped with the MetLife stamp and signed by him, or by persons unknown, falsely representing that *MetLife* had guaranteed the signature of the client, during time periods when he was no longer even associated with MetLife. He did not do this once or twice, or by inadvertence. He did it purposefully, approximately 100 times, until mid-2007. At

that time, while employed at H. Beck, he presumably ran out of his supply of out-of-date transfer forms and began using current forms. No special expertise is required to conclude that this course of conduct was dishonest and unethical. Rousseaux's attempts now to put a positive "spin" on this behavior, or to portray it simply as a matter of convenience, are unavailing.

With regard to EIA's and Rousseaux's current efforts at becoming a compliant investment advisory firm, I do not doubt the sincerity or professionalism of John Anthony, the current CCO. Apart from his role in perpetuating the idea of the "investment committee" as part of a marketing strategy, Mr. Anthony impressed me as a "good soldier," who follows the direction of Rousseaux, the President and CEO of both EWM and EIA. In addition, Mr. Anthony has received recent training and guidance regarding compliance, and spends a significant portion of his time on compliance functions. He was not, however, particularly knowledgeable about some aspects of EIA's filing of amendments to its Form ADV, or the required time frame for doing so. Tr. II, at 117-18, 124-28, 130, 135-36.

I note, moreover, that Rousseaux testified that EIA had not been paying its employees for approximately a year, because it could not afford to. Mr. Anthony also testified that he was not currently being compensated by EIA. Given the substantial challenges of being a Chief Compliance Officer in the highly regulated investment advisory business, I find it hard to believe that anyone would continue to perform this difficult job indefinitely without any salary.

Evan Rosser, who served as the CCO for a short time between the end of 2014 and early 2015, who is the principal author of the current Compliance Manual, and who is still a compliance consultant for EIA, also impressed me as a sincere witness. Although not tendered as an expert, he expressed the opinion that the current state of EIA's compliance program was "very reasonably designed for the business they do now." Tr. III, at 88. He acknowledged that the program was "not

perfect," and that he could probably find gaps in it, but it was "adequate, reasonably designed to do what it's meant to do for the firm as it's currently constructed." *Id.* He conceded that he was not an expert in Maryland law or regulations. Tr. III, at 104-108.

Louis Dempsey, who was accepted as an expert in investment advisor compliance, was retained at the end of October 2015 to review EIA's written compliance program and to perform a limited review of the firm's activities, within a "tight" or "very compressed" time frame. Tr. III, at 269-70. Mr. Dempsey reviewed pertinent documents, met with CCO John Anthony, and spoke with Rousseaux by telephone for about a half hour. *Id.*, at 270-73. Mr. Dempsey concluded that EIA's documents were "generally in line with what I've seen in an advisor of this size." He characterized EIA as a "small advisor." *Id.*, at 274.

Nevertheless, Mr. Dempsey noted that there were "things that needed to be probably cleaned up or modified within certain documents," including the need to clarify on the ADV receipt "which entity the customer was signing off on" and to provide disclosure as to the "relationship between the advisor and its affiliated entity." There were some marketing materials that he thought could be deemed "a little bit confusing." Tr. III, at 275. He spoke to John Anthony and counsel about these points, and was told this was "all being reworked." *Id.*

Both Mr. Rosser and Mr. Dempsey testified in detail about EIA's current business model, which effectively replaces the EDGM Program. Suffice it to say that these two professionals both seemed somewhat uncertain as to the exact relationship between EIA and EQIS, the new "third party asset manager," and between EIA and the clients it refers to EQIS. In this connection, it is important to recall that under Maryland law, a "solicitor" is encompassed within the definition of an "investment adviser." Md. Code Ann., Corps. & Assocs. § 11-101(i)(v) (2014).

The lack of clarity about the current business model is significant because the nature of these relationships dictates the types of disclosure documents that must be given, by whom and to whom they must be given, and what contracts must exist between EIA and its clients. With particular reference to this case, the nature of these relationships determines who is responsible for disclosing certain items that the Division still contends are not compliant, particularly the fees that advisory clients will pay and the limitations of back-tested performance figures.

While the Division expressed agreement with many of the statements or opinions of Mr. Rosser and Mr. Dempsey, Post Hearing Memorandum at 7-9, it suggested that this evidence was entitled to little weight in assessing the Respondents' current compliance program, especially with regard to Mr. Dempsey, whose review was limited in scope. Without any disrespect to either witness, I am inclined to agree. After listening to their testimony concerning the EIA-EQIS relationship and the disclosures in documents prepared by EIA and EQIS, it was still not clear to me how a client would be able to find out the amount of the fee that the client would have to pay, and whether the IPS prepared by EQIS contained the disclosures regarding back-tested performance figures required by the SEC's no-action letter, *Clover Capital Management, Inc.*, 1986 WL 67379 (Oct. 28, 1986).

There are other aspects of the Respondents' ongoing compliance efforts that are worth mentioning. I found completely unconvincing the Respondents' attempts to say that the personal statement made by Mike DiPaula on the "Money Guys" infomercial was not a "testimonial," because Mr. DiPaula, as an employee of EWM, was "selling his services," and because he was not paid anything for making the statements. I saw the video. To a person of ordinary intelligence, Mr. DiPaula's comments that "these plans are just as described" and "I own one myself," cannot be viewed as anything other than a testimonial, especially in light of Mr. DiPaula's emphasis on his

long career in law enforcement. It does not require special expertise to conclude that at least some potential investors would give special credence to statements by a person with such a background.

Such advertisements by investment advisers are prohibited by federal law, and are incorporated by Maryland regulations under the Securities Act. *See* 17 C.F.R § 275.206(4)-1 (a)(1) and COMAR 02.02.05.03B(13). While the infomercial purports to be only on behalf of EWM, I have previously concluded that EWM has held itself out as an investment adviser, without being registered as such. As noted in the Findings of Fact herein, despite the fine-print disclosures and the statement that the infomercial is a paid advertisement for EWM, the infomercial continues to blur the distinction between EIA and EWM, thereby continuing EWM's holding out as an investment adviser.

Much of the testimony offered by the Respondents is self-serving and internally inconsistent. For example, Rousseaux testified that the performance data, graphs, and other information in the 2014 IPS for the EDGM was educational, not for marketing purposes, and that it was not shown to clients until they had decided to invest in the EDGM. Tr. 214-15. But he also said that the purpose of the data and illustrations was to educate potential investors on the risks, and to measure risk tolerance. Tr. II, at 205-07. Since the point of the IPS was to educate the client on risk, it does not make sense that the IPS would not be shown to them before they committed to investing in the EDGM Program.

In another example, on the topic of RAUM, Mr. Dempsey testified that sometimes investment advisers inflate the amount of such assets, based on a "misunderstanding" of how they are calculated. Tr. III, at 337. But he later said that regulatory assets are "typically assets that the advisor is managing directly versus assets that are farmed out to a third party advisor or referred out

in a solicitor arrangement." *Id.*, at 352. This is a concept that Rousseaux refused to accept until, in his words, EIA "decided to stop counting those assets." Tr. II, at 238.

Finally, as pointed out by the Division in its Post Hearing Memorandum, most if not all of the cases cited by the Respondents in support of their argument that the Commissioner should impose minimal sanctions in conjunction with a "compliance monitor" were resolved as part of a negotiated Consent Order. Obviously, that is not the case here; the Respondents have consistently taken the position that they have not committed violations of law, or if they have, the violations were "de minimis" and not deserving of the harsh sanctions sought by the Division.

In making a recommendation as to sanctions, I have considered all the evidence, the Division's arguments as to the Respondents' past and continuing violations of applicable law and Rousseaux's conduct during the Division's investigation and after the institution of these proceedings, the Respondents' arguments as to mitigating factors under *Steadman v. S.E.C.*, 603 F.2d 1126 (5th Cir. 1979), *aff'd* 450 U.S. 91 (1981), and the factors pertinent to fines and civil penalties set forth in COMAR 02.02.01.04.

In its Motion for Partial Summary Decision, the Division set forth the multiple violations, as pertinent to each count in the Order to Show Cause, totaling approximately 6,800 violations. The Division did not suggest a specific amount, except to argue that Respondents EIA and Rousseaux should pay a penalty of $425,000.00 for their violations related to the use of false and misleading performance figures. *See* Motion for Partial Summary Decision, at 81-90. I note that the Division used essentially the same violations under each Count of the Order to Show Cause, thereby producing a multiplier effect; that is, the same facts underlie the allegations in multiple counts. The Respondents did not suggest an alternative amount, arguing that the Respondents should be subject to only minimal or no sanctions.

My recommendations are as follows:

1. Respondent EWM should be permanently barred from engaging in the securities and investment advisory business in this state, pursuant to section 11-701.1(b)(3) of the Securities Act;
2. Respondent Rousseaux's registration as an investment adviser representative should be revoked, pursuant to section 11-412(a)(7) of the Securities Act;
3. Respondent EIA's registration as an investment advisor should be suspended, for a period of one year, pursuant to section 11-412(a)(2) and (a)(7) of the Securities Act;
4. Respondents EIA and Rousseaux, jointly and severally, should be assessed a fine of $250,000.00, pursuant to section 11-701.1(b)(4) of the Securities Act, based upon the number of violations computed at page 86 of the Motion for Partial Summary Decision; and
5. Respondent EWM should be assessed a fine of $15,000.00, pursuant to section 11-701.1(b)(4) of the Securities Act, based upon the number of violations computed at page 86 of the Motion for Partial Summary Decision.

I have declined to recommend that Respondent EIA be permanently barred from engaging in the securities and investment advisory business in this state. I have recommended a one-year period of suspension of its registration; I base this on the amount of time Oyster Consultants, LLC required, in 2014 and 2015, to review and redraft the documents necessary bring EIA into full compliance with the Securities Act and applicable regulations.

PROPOSED CONCLUSIONS OF LAW

Except as otherwise set forth below, I incorporate herein by reference the Proposed Conclusions of Law contained in the Proposed Ruling on the Securities Division's Motion for

Partial Summary Decision, issued January 13, 2016, including the analysis upon which those conclusions are based, at pages 22-42 of that ruling.

Based on the foregoing Facts and Discussion, I conclude as a matter of law that Respondent Rousseaux violated sections 11-301(2) and (3) of the Securities Act, as alleged in **Count I** of the Order to Show Cause, by obtaining and using, without authorization, approximately 100 Authorization to Transfer Assets forms pre-stamped with the MetLife Medallion Signature Guarantee Stamp, signed by him or by persons whose identity is unknown, to sell clients' securities to invest in non-MetLife insurance products, thereby representing that MetLife had verified the clients' identity.

I further conclude as a matter of law that Respondent Rousseaux violated sections 11-302(a) and (c) of the Securities Act, as alleged in **Counts II and III** of the Order to Show Cause, by obtaining and using, without authorization, approximately 100 Authorization to Transfer Assets forms pre-stamped with the MetLife Medallion Signature Guarantee Stamp, signed by him or by persons whose identity is unknown, to sell clients' securities to invest in non-MetLife insurance products, thereby representing that MetLife had verified the clients' identity.

I further conclude as a matter of law that all Respondents violated sections 11-302(a)(2) and (c) of the Securities Act, as alleged in **Counts II and III** of the Order to Show Cause, by requiring clients to sign a Financial Planning Agreement containing a contingent $500.00 fee, the sole purpose of which was to penalize clients who chose not to fund their accounts with the Respondents within 60 days, or who chose not to continue their advisory relationship with the Respondents.

I further conclude as a matter of law that all Respondents violated sections 11-302(a)(2 and (c) of the Securities Act, as alleged in **Counts II and III** of the Order to Show Cause, by using the

concepts of an "Investment Committee" and an "exclusive club" as ploys or devices to manipulate advisory clients or to convince them to open advisory accounts.

I further conclude as a matter of law that Respondent Rousseaux violated section 11-302(a)(3) of the Securities Act and COMAR 02.02.05.03B , as alleged in **Count IV** of the Order to Show Cause, by obtaining and using, without authorization, approximately 100 Authorization to Transfer Assets forms pre-stamped with the MetLife Medallion Signature Guarantee Stamp, signed by him or by persons whose identity is unknown, to sell clients' securities to invest in non-MetLife insurance products, thereby representing that MetLife had verified the clients' identity.

I further conclude as a matter of law that all Respondents violated section 11-302(a)(3) of the Securities Act and COMAR 02.02.05.03B , as alleged in **Count IV** of the Order to Show Cause, by requiring clients to sign a Financial Planning Agreement containing a contingent $500.00 fee, the sole purpose of which was to penalize clients who chose not to fund their accounts with the Respondents within 60 days, or who chose not to continue their advisory relationship with the Respondents.

I further conclude as a matter of law that all Respondents violated section 11-302(a)(3) of the Securities Act and COMAR 02.02.05.03B , as alleged in **Count IV** of the Order to Show Cause, by using the concepts of an "Investment Committee" and an "exclusive club" as ploys or devices to manipulate clients or to convince them to open accounts with the firm(s).

I further conclude as a matter of law that Respondent Rousseaux engaged in dishonest or unethical practices, for purposes of sections 11-412(a)(2) and (a)(7) of the Securities Act and as alleged in **Count XIII** of the Order to Show Cause, by obtaining and using, without authorization, approximately 100 Authorization to Transfer Assets forms pre-stamped with the MetLife Medallion Signature Guarantee Stamp, signed by him or by persons whose identity is unknown, to sell

clients' securities to invest in non-MetLife insurance products, thereby representing that MetLife had verified the clients' identity.

I further conclude as a matter of law that Respondents EIA and Rousseaux engaged in dishonest or unethical practices, for purposes of sections 11-412(a)(2) and (a)(7) of the Securities Act and as alleged in **Count XIII** of the Order to Show Cause, by, among other things, requiring clients to sign a Financial Planning Agreement containing a contingent $500.00 fee, the sole purpose of which was to penalize clients who chose not to fund their accounts with the Respondents within 60 days, or who chose not to continue their advisory relationship with the Respondents; by misrepresenting the nature of an investment program offered by them; by issuing false and misleading performance figures, and by filing misleading documents with the Commissioner.

PROPOSED ORDER

I **PROPOSE** that the Securities Commissioner **ORDER** that the Respondents be found in violation of Maryland Code Annotated, Corporations and Associations §§ 11-301, 11-302 and 11-401, 11-402, and 11-411, and Code of Maryland Regulations 02.02.05.03B, all as set forth in the January13, 2016 Proposed Ruling and this Proposed Decision; and further

ORDER that Respondent Everest Wealth Management, Inc. be permanently barred from engaging in the securities and investment advisory business in this state; and further

ORDER that Respondent Philip Rousseaux's registration as an investment adviser representative should be revoked; and further

ORDER that Respondent Everest Investment Advisors, Inc.'s registration as an investment adviser should be suspended, for a period of one year; and further

ORDER that Respondents Everest Investment Advisors, Inc. and Philip Rousseaux, jointly and severally, be ordered to pay a fine of $250,000.00; and further

ORDER that Respondent Everest Wealth Management, Inc. should be ordered to pay a fine of $15,000.00; and further

ORDER that the Security Division's records reflect this Decision.

May 5, 2016
Date Decision Mailed

Una M. Perez
Administrative Law Judge

UMP/da
#161684

RIGHT TO FILE EXCEPTIONS

Written exceptions to this Proposed Decision may be filed with the Securities Commissioner, Securities Division, Office of the Attorney General, 200 Saint Paul Place, 20th Floor, Baltimore, Maryland, 21202, within fifteen (15) calendar days of receipt of this Proposed Decision. Code of Maryland Regulations 02.02.06.24B(2). In addition, you must also state in writing whether you wish to present oral argument. After consideration of the exceptions and oral argument, if any, the Commissioner shall issue the final written decision in this case.

Copies Mailed To:

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OFFICE OF THE ATTORNEY	*	**BEFORE UNA M. PEREZ,**
GENERAL, SECURITIES DIVISION	*	**AN ADMINISTRATIVE LAW JUDGE**
v.	*	**OF THE MARYLAND OFFICE OF**
EVEREST INVESTMENT ADVISORS,	*	**ADMINISTRATIVE HEARINGS**
INC., et al.,	*	**OAH CASE NO.: OAG-SD-50-15-24381**
RESPONDENTS	*	**SD Case No. 2014-0119**

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APPENDIX—LIST OF EXHIBITS[13]

January 19, 2016

SD Ex. 19	Top of the Table 2013—Transcript
SD Ex. 20	May 23, 2013 - Email—investment committee
SD Ex. 85	April 22, 2014 - Email—investment committee
SD Ex. 24	February 5, 2014 - Email to client—annual delivery of Form ADV with ADV
SD Ex. 31	February 28, 2013 - Email to EIA clients—annual delivery of Form ADV with ADV
SD Ex. 34	[Client B.'s] financial planning agreement date February 19, 2014[14]
SD Ex. 35	[Client B.'s] investment advisory agreement date February 19, 2014 (with updated 8/15/2012)
SD Ex. 36	EIA client agreement without updated date
SD Ex. 37	EIA discretionary wrap investment management agreement
SD Ex. 62	August 10, 2015 - Email—EIA to clients—"exclusive benefits"
SD Ex. 63	August 31, 2015 - Email from Schwab
SD Ex. 64	November 24, 2015 - Email from AssetMark

[13] The exhibits are listed by date, in the order of admission. In the Transcript, the Court Reporter grouped the exhibits each day by party, designating the Division as "Claimant" and the Respondents as "Respondent." I have identified any discrepancy that I discovered when comparing my notes to the Transcript.

[14] This exhibit is not on the Court Reporter's list. It was offered and admitted on January 19, 2016. Tr. I, at 195.

SD Ex. 106 Deposition of Phillip Rousseaux, November 23, 2015, pages 7-8 and Bates-stamped pages 00132-00133; pages 118-121; page 93 and Exhibit 14, Bates-stamped pages 00250-00251

January 20, 2016

Resp. Ex. 1 Email exchange between John Anthony and Charles Schwab Rep. regarding "Trading Fees"

Resp. Ex. 42 February 2015 ADV

Resp. Ex. 54 May 21, 2015 letter to [Clients L.] attaching IPS [Investment Policy Statement] of EDGM [Everest Dynamic Growth Model]

Resp. Ex. 121 Compliance manual dated April 6, 2015

Resp. Ex. 127 3-09-2015 Email regarding annual ADV disclosure

Resp. Ex. 9 4-30-15 John Anthony Letter to Weiskittel regarding amended docs provided to the Division

Resp. Ex. 169 Processing Services Agreement

Resp. Ex. 94 EIA Financial Planning Agreement

Resp. Ex. 178 3-27-2015 Letter to Clients about EDGM Reduced Fees

SD Ex. 92 Two VIP brochures

Resp. Ex. 87 Introducing the VIP Program

SD Ex. 106 Deposition of Phillip Rousseaux, November 23, 2015, pages 80-84 and Exhibit 11, Bates-stamped page 00212; and Exhibits 12 and 13, Bates-stamped pages 00214-00249

SD Ex. 108 Instructions for Part 2A of Form ADV: Preparing Your Firm *Brochure* [sic]

SD Ex. 90 August 6, 2013 - Email Investment Committee

SD Ex. 33 March 10, 2014 and March 12, 2014 - Emails—$1,000 invoice for financial planning fee

SD Ex. 67 October 15, 2013 - Emails between Rousseaux and Schwab—Wrap fee program

Resp. Ex. 67 Wrap fee program brochure Dec. 12, 2013

SD Ex. 39 EDGM 2014 IPS

SD Ex. 46 April 24, 2014 - EIA and Rousseaux letter to clients—misrepresentations in marketing EDGM

Resp. Ex. 45 Everest Dynamic Growth Model Tear Sheet as of March 31, 2015

Resp. Ex. 24 12/10/2012 Email from Chris Kirk to Phil [Rousseaux]

SD Ex. 73 December 17-12, 2013 - Emails—rush to get EDGM brochure done

February 4, 2016

Resp. Ex. 34 [Client M.] – EIA

Resp. Ex. 43 2-26-2015 Evan Rosser Brochure Supplement

SD Ex. 112 Philip Rousseaux LinkedIn page, printed February 2, 2016

SD Ex. 105 CRD [Central Registrations Depository] Registrations Summary for Philippe Rousseaux

SD Ex. 114 EIA Brochure Filing History Detail, printed January 21, 2016

SD Ex.117 EIA December 2015 Amendment to Form ADV-2

SD Ex. 106 Attached Bates-stamped pages 00250-00251

Resp. Ex. 32 [Client M.] – EWM documents

SD Ex. 99 September 11, 2014 - Item 5(F) of Part 1A—RAUM [Regulatory Assets Under Management] still includes Curian assets

February 5, 2016

SD Ex. 113 ChFC [Chartered Financial Consultant] Brochure

SD Ex. 122 Screen shot of disclaimer from The Money Guys infomercial

SD Ex. 123 Video of The Money Guys TV show/infomercial

SD Ex. 124 Letter to Philip Rousseaux/EIA attaching the Division's Subpoena for Documents, October 8, 2015

SD Ex. 126 EIA Update to 2015 Form ADV 2, re: Material Changes, with handwritten date 8-14-2015 at top

SD Ex. 121	"The Everest Advantage," from EIA website, printed January 27, 2016
SD Ex. 118	EQIS Capital Management, Inc. Part 2A Appendix 1 of Form ADV: *Wrap Fee Program Brochure* [sic], April 6, 2015
SD Ex. 71	November 14, 2013 - Email—to compliance consultant with ADV for EDGM that describes it as a wrap fee
SD Ex. 88	November 8, 2012 - Email Worth leading wealth advisors program
SD Ex. 86	March 27, 2013 - Email with compliance consultant about RAUM
SD Ex. 89	September 25, 2012 - Email Top Advisors in Barron's Magazine
SD Ex. 100	October 18, 2013 - MorningStar performance figures
SD Ex. 101	January 1, 2014 - MorningStar performance figures
SD Ex. 116	Letter to [Clients M.] from John Anthony, transmitting "recently amended ADV and Privacy Policy," August 11, 2015
SD Ex. 120	Email from John Anthony to [Clients F.] re: Proposals for Curian Replacement, August 25, 2015
SD Ex. 131	Email from John Anthony to [Client B.] re: Information on Eqis model, August 21, 2015

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OFFICE OF THE ATTORNEY GENERAL

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October 27, 2016

Sarah McCafferty, Esquire
905 Pemberton Road
Baltimore, MD 21212

Re: Appointment as Special Assistant Attorney General

Dear Ms. McCafferty:

By this letter, I am appointing you as Special Assistant Attorney General, effective October 27, 2016. Working under the supervision of Carolyn Quattrocki, Deputy Attorney General, you are authorized to act as final decision maker in the proceeding *In the Matter of Everest Investment Advisors, Inc. et al.*, Securities Division No. 2014-0119. You will receive compensation for this appointment at the rate of $125 per hour. Expenses will be reimbursed at the prevailing state rate. Administrative support will be provided by the Securities Division.

Thank you for your assistance to the Office of the Attorney General.

Sincerely,

Brian E. Frosh

Attorney General

Exhibit C

BRIAN E. FROSH
Attorney General

ELIZABETH HARRIS
Chief Deputy Attorney General

DONNA HILL STATON
Deputy Attorney General

CAROLYN QUATTROCKI
Deputy Attorney General

FACSIMILE NO.

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

WRITER'S DIRECT DIAL NO.

November 1, 2016

Delegation of Authority

I hereby delegate to Sarah McCafferty, Special Assistant Attorney General, the powers and authority of the Securities Commissioner under the Maryland Securities Act with respect to File No. 2014-0119, Everest Investment Advisors, Inc., Everest Wealth Management, Inc., and Philip Rousseaux, to rule on exceptions, preside over any oral argument, make any other necessary rulings and render a final decision in this matter.

Melanie Senter Lubin
Securities Commissioner

Exhibit D