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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES

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PA DEPARTMENT OF
BANKING AND SECURITIES

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND
SECURITIES, BUREAU OF SECURITIES
COMPLIANCE AND EXAMINATIONS

Docket No.: 160062 (SEC-OSC)

v.

MARTINO AND MILES, INC.
d/b/a PEERLESS ADVISORS

DARYL S. MARTINO

NOTICE OF RIGHT TO APPEAL

You are hereby notified that you have the right to appeal the attached Final Report and Order ("Order") issued by the Commonwealth of Pennsylvania Banking and Securities Commission.

If you wish to appeal the attached Order you may file a petition for review with the Prothonotary of the Commonwealth Court of Pennsylvania that complies with the format and timing requirements of the applicable Pennsylvania Rules of Appellate Procedure. Pa. R.A.P. 1511-1561. Failure to file a petition for review within 30 days of the mailing date of this Order will result in the attached Order becoming final and unappealable. You may reach the Commonwealth Court at 717-255-1650.

Please be advised that this Notice of Right to Appeal is not intended to and does not constitute legal advice. You should consult an attorney regarding your legal rights including your right to appeal the attached Order or your right to file an application for rehearing or reconsideration under the General Rules of Administrative Practice and Procedure. 1 Pa. Code § 35.241.

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES

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PA DEPARTMENT OF
BANKING AND SECURITIES

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND
SECURITIES, BUREAU OF SECURITIES
COMPLIANCE AND EXAMINATIONS

Docket No.: 160062 (SEC-OSC)

v.

MARTINO AND MILES, INC.
d/b/a PEERLESS ADVISORS

DARYL S. MARTINO

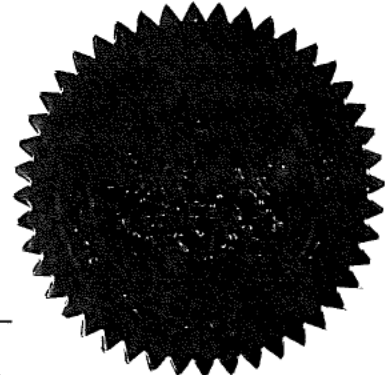
ORDER

AND NOW, this 7th day of February, 2018, the Proposed Report and Order of Hearing Officer Ruth Dunnewald attached hereto, and the findings and conclusions contained therein, are **ADOPTED** in its entirety, and is hereby **ORDERED** and **DECREED** that Martino and Miles, Inc. d/b/a Peerless Advisors, and Daryl S. Martino shall pay an Administrative Assessment of \$1,000 within 30 days or the date of this Order by certified check, attorney's check or U.S. Postal Service money order by delivering the same to counsel for the Department.

BY ORDER:

Redacted

James R. Biery, Chair
Executed on behalf of the
Banking and Securities Commission



Date of Mailing: 2/14/18

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES 2013 OCT 10 PM 1:14

PA DEPARTMENT OF
BANKING AND SECURITIES

Commonwealth of Pennsylvania, :
Department of Banking and Securities, :
Bureau of Securities Licensing, :
Compliance and Examinations, :
Petitioner :

v. :

Docket No. 160062 (SEC-OSC)

Martino and Miles, Inc. :
d/b/a Peerless Advisors, :
and :
Daryl S. Martino, :
Respondents :

PROPOSED REPORT

Ruth D. Dunnewold
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL
DEPARTMENT OF STATE
OFFICE OF HEARING EXAMINERS
P.O. Box 2649
Harrisburg, PA 17105-2649

HISTORY

This matter arose on the filing by the Department of Banking and Securities (“Department”) of an order to show cause charging Martino and Miles, Inc. d/b/a Peerless Advisors (“Respondent corporation”) and Daryl S. Martino (“Respondent Martino”) (collectively, “Respondents”) under the Pennsylvania Securities Act of 1972 (“1972 Act”), Act of December 5, 1972, P.L. 1280, No. 284, *as amended*, 70 P.S. § 1-101 *et seq.*, at section 305(a)(v), 70 P.S. § 1-305(a)(v). Specifically, the order to show cause charged that Respondents willfully violated the Department’s regulation at 10 Pa. Code § 303.012(d) by failing to take the steps necessary to ensure that material information in Respondent corporation’s Uniform Application for Investment Adviser Registration (“Form ADV”) and exhibits remains current and accurate, which, under the cited provision of the 1972 Act, would subject Respondents to the denial, suspension, revocation, or conditioning of their registrations, or censure as registrants.

The Department filed its order to show cause on November 7, 2016. Respondents, through Respondent Martino, filed an answer to the order to show cause on December 8, 2016. In the answer, Respondents requested a hearing and Respondent Martino stated, among other things, “I admit the changes of address and the improper updating of form ADV for my virtual office.” Thereafter, by letter dated May 24, 2017, this case was delegated to the undersigned¹ to act as hearing officer pursuant to the General Rules of Administrative Practice and Procedure (“General Rules”), 1 Pa. Code § 31.1 *et seq.* A Notice of Hearing dated June 5, 2017, scheduled the matter for hearing on July 26, 2017, at 1:30 p.m.

The hearing occurred as scheduled. Because Respondents were not present at 1:30 p.m.,

¹Initially, by letter dated April 10, 2017, this case was delegated to Maria Battista to act as hearing officer, but was reassigned to the undersigned after Ms. Battista moved into a different job classification within the Office of General Counsel.

the convening of the hearing was delayed for approximately 15 minutes to allow Respondents additional time in which to arrive. However, when the hearing convened at approximately 1:45 p.m., Respondents still were not present, so the hearing proceeded on the assumption that Respondents did not intend to appear. The Department was represented by Thomas S. Lee, Esquire, who presented the Department's case through testimonial and documentary evidence. At the conclusion of the hearing, the Department declined to file a post-hearing brief. The hearing transcript was filed on August 21, 2017, closing the record.

FINDINGS OF FACT

1. Respondent corporation has been registered in the Commonwealth as an investment adviser from July 2008 to the present, under firm registration number #135461 in the Department's Central Registration Database ("CRD"). Exhibit DoBS-2; Notes of Testimony ("NT") at 13.

2. At all relevant times, Respondent Martino was the President of and Contact Employee for Respondent corporation, and as such, was an "affiliate" of Respondent corporation, as that term is defined in the 1972 Act, 1972 Act, section 102(b), 70 P.S. § 1-102(b); Exhibit DoBS-2; NT at 8 – 9.

3. Respondent Martino has been registered in the Commonwealth as an investment adviser representative of Respondent corporation since July 2008, under individual registration #2659386 in the Department's CRD. Exhibit DoBS-2; NT at 13 – 14.

4. The Department's Uniform Application for Investment Adviser Registration ("Form ADV") is a standard application for investment adviser ("IA") registration and is typically used by an IA applicant to apply for registration and provide the information required of registrants in the CRD. NT at 14.

5. The Department's regulations pertaining to registrants provide as follows with regard to IA registration:

An investment adviser registered under the act shall take steps necessary to ensure that material information contained in its Form ADV and exhibits remains current and accurate. If a material statement made in Form ADV and exhibits becomes incorrect or inaccurate the investment adviser shall file with the Commission an amendment on Form ADV within 30 days of the occurrence of the event which requires the filing of the amendment.

10 Pa. Code § 303.012(d); Exhibit DoBS-1, p. 4; NT at 15.

6. Federal and state regulators rely on the information on the Form ADV, which is submitted to and maintained in the CRD, to be able to obtain contact information for registrants

for purposes such as finding registrants in order to examine them. NT at 14 – 15, 29, 40 – 41.

7. The public relies on the information on the Form ADV, which is submitted to and maintained in the CRD, to be able to obtain contact information for their IAs, who have money that belongs to members of the public who are the IAs' clients. NT at 29 – 30, 40 – 41.

8. Because of the reliance by federal and state regulators and the public upon the contact information for the registrant/IA found on the Form ADV and in the CRD, the information on the Form ADV and in the CRD is material information. NT at 40 – 41.

9. The most recent Form ADV for Respondent corporation in the CRD is dated June 16, 2015 and bears filing i.d. #929189. Exhibit DoBS-2, pp. 7, 21 – 24; NT at 32.

10. The last updated addresses in the CRD from Respondents are the addresses set forth on the Form ADV dated June 16, 2015, filing i.d. #929189, which lists Respondent corporation's principal office and place of business address as 1060 First Avenue, King of Prussia, PA 19406 and Respondent corporation's mailing address as P.O. Box 613, Oaks, PA 19456. Exhibit DoBS-2, pp. 21, 22; NT at 33.

11. From June 2015 to the present, Respondent corporation has listed its principal office and place of business on its Form ADV as 1060 First Avenue, King of Prussia, PA 19406. Exhibit DoBS-2, p. 21; NT at 33.

12. From June 2015 to the present, Respondent corporation has listed its mailing address on its Form ADV as P.O. Box 613, Oaks, PA 19456. Exhibit DoBS-2, p. 22; NT at 33.

13. From 1999 to the present, Respondent Martino has listed his residential address on Respondent corporation's Form ADV as Redacted . Exhibit DoBS, pp. 7, 23; NT at 33.

14. Joseph Zibelman is employed by the Department as Chief of the Eastern Region.

NT at 8.

15. Mr. Zibelman acted as an examiner of Respondents, which entailed Mr. Zibelman's looking at books and records of Respondent corporation to determine if Respondents were in compliance with the 1972 Act and the regulations implementing it. *Id.*

16. Mr. Zibelman conducted an examination of Respondent corporation, which included visits to the principal office at 1060 First Avenue, King of Prussia, PA 19406, in April and May 2015 ("Spring 2015 examination"). Exhibit DoBS-4; NT at 20.

17. Based on the Spring 2015 examination, Mr. Zibelman sent a deficiency letter, dated August 5, 2015 ("August 2015 deficiency letter"), to Respondents at Respondent corporation's mailing address of record on the Form ADV in the CRD, which was P.O. Box 613, Oaks, PA 19456, as well as to Respondent Martino at his residential address of record on the Form ADV in the CRD, which was Redacted. Exhibit DoBS-4; NT at 20, 21, 22, 29.

18. The August 2015 deficiency letter sent to Respondent Martino at his residential address of record on the Form ADV in the CRD, Redacted, was received per a signed receipt from Respondent Martino. Exhibit DoBS-4, pp. 39, 53, 59; NT at 22, 29.

19. The August 2015 deficiency letter sent to Respondents at Respondent corporation's mailing address of record on the Form ADV in the CRD, which was P.O. Box 613, Oaks, PA 19456, was never picked up by the addressee and the United States Postal Service eventually returned it to the Department marked "Return to Sender Unclaimed Unable to Forward." Exhibit DoBS-4, pp. 39, 41, 42, 43; NT at 22 – 23, 29.

20. Respondents did not respond to the August 2015 deficiency letter, so based on the

Spring 2015 examination, Mr. Zibelman sent a second deficiency letter, dated May 9, 2016 (“May 2016 deficiency letter”), to Respondents at Respondent corporation’s principal office and place of business address of record on the Form ADV in the CRD, 1060 First Avenue, King of Prussia, PA 19406, as well as to Respondent corporation’s mailing address of record on the Form ADV in the CRD, P.O. Box 613, Oaks, PA 19456, and to Respondent Martino at his residential address of record on the Form ADV in the CRD, Redacted . Exhibit DoBS-5; NT at 23, 24, 25.

21. Respondent corporation’s principal office and place of business address of record on the Form ADV in the CRD, 1060 First Avenue, King of Prussia, PA 19406, was a “virtual” office where entities would rent office space, but at some point, the location at that address closed and relocated to Bala Cynwyd, Pennsylvania, so Respondents’ principal office and place of business had moved there as well, resulting in a change in Respondent corporation’s principal office and place of business address. NT at 25 – 26.

22. When the May 2016 deficiency letter was sent to the Respondent corporation’s principal office and place of business address of record on the Form ADV in the CRD, 1060 First Avenue, King of Prussia, PA 19406, the United States Postal Service forwarded it to the new location at Bala Cynwyd, where it was delivered. Exhibit DoBS-5, pp. 68, 69, 95; NT at 26 – 27.

23. The May 2016 deficiency letter sent to Respondents at Respondent corporation’s mailing address of record on the Form ADV in the CRD, P.O. Box 613, Oaks, PA 19456, was never picked up by the addressee, because the United States Postal Service eventually returned it to the Department marked “Return to Sender Unclaimed Unable to Forward.” Exhibit DoBS-5, pp. 67, 78, 96, 100.

24. Between May 2016 and November 7, 2016, the Department heard nothing from

Respondents, NT at 36.

25. On November 7, 2016, the Department filed the order to show cause in this matter against Respondents, setting forth the allegation that they had failed to take the steps necessary to ensure that material information in Respondent corporation's Form ADV and exhibits, meaning Respondents' addresses, remained current and accurate. Exhibit DoBS-3.

26. Respondent Martino filed an answer to the order to show cause on December 8, 2016, in which he stated, among other things, "I admit the changes of address and the improper updating of form ADV for my virtual office." Exhibit DoBS-3, p. 34.

27. In the answer to the order to show cause, Respondent Martino used the address of Redacted, his residential address of record on Respondent corporation's Form ADV in the CRD. *Id.*

28. After the issuance of the order to show cause, on January 26, 2017, Mr. Zibelman did an additional field examination at Respondent Martino's residence at Redacted Redacted, his residential address of record on Respondent corporation's Form ADV in the CRD, during which Mr. Zibelman reviewed every item in the August 2015 and May 2016 deficiency letters with Respondent Martino and explained Respondents' responsibility to update their addresses and phone numbers on Respondent corporation's Form ADV in the CRD within 30 days of any changes. NT at 29, 30, 31, 35 – 36, 37, 38.

29. On January 30, 2017, Respondent Martino agreed that by March 3, 2017, he would complete everything that had been requested of him at that January 26 examination. Exhibit DoBS-6, p. 116; NT at 37.

30. Mr. Zibelman sent Respondent Martino a confirmatory email dated January 31, 2017, enumerating the items which Respondent Martino had agreed to accomplish by March 3,

2017, including updating the Form ADV in the CRD to reflect, among other things, current contact information for Respondent corporation. Exhibit DoBS-6, p. 116; NT at 37.

31. On February 7, 2017, Mr. Zibelman sent Respondent Martino a follow-up email to confirm that Respondent Martino had received Mr. Zibelman's January 31, 2017 email. Exhibit DoBS-6, pp. 119 - 120; NT at 37.

32. Mr. Zibelman received no response from Respondent Martino via email, so on February 9, 2017, Mr. Zibelman called Respondent Martino and confirmed via phone that Respondent Martino had received the January 31, 2017 email; Respondent Martino stated that he would start sending the requested documents the following week. NT at 37 – 38.

33. On February 27, 2017, Mr. Zibelman received a voice message from Respondent Martino, indicating that he had been sick all month and requesting a one-week extension, until March 10, 2017, and in response, on March 3, 2017, Mr. Zibelman left Respondent Martino two voicemails, asking that Respondent Martino call him; additionally, Mr. Zibelman emailed Respondent Martino to let him know about the two voicemails Mr. Zibelman had left for him and asking Respondent Martino to call him. Exhibit DoBS-6, p. 119; NT at 38.

34. Mr. Zibelman never heard from Respondent Martino again; since March 3, 2017, Respondents have not provided any information, nor has Respondent Martino contacted Mr. Zibelman in any way. NT at 38, 40.

35. Respondents have done nothing to update their addresses in the Form ADV, in the CRD, since the last filing on June 16, 2015, filing i.d. #929189. NT at 35.

36. After Respondent Martino filed the answer to the order to show cause on December 8, 2016, a Notice of Hearing dated June 5, 2017 scheduled this matter for a hearing, to occur on

July 26, 2017. Official notice of Department records;² NT at 6 and *passim*.

37. The Notice of Hearing was sent to both Respondents at Respondent corporation's principal office and place of business address, 1060 First Avenue, King of Prussia, PA 19406, and Respondent corporation's mailing address, P.O. Box 613, Oaks, PA 19456, as well as to Respondent Martino at Redacted, his residential address on the Form ADV in the CRD. Department records; NT at 6.

38. The Notices of Hearing sent to Respondent corporation's principal office and place of business address, 1060 First Avenue, King of Prussia, PA 19406, and Respondent corporation's mailing address, P.O. Box 613, Oaks, PA 19456, were returned as undeliverable, but the notice of hearing sent to Redacted, was not returned. *Id.*

39. The hearing convened 15 minutes later than scheduled on July 26, 2017, giving Respondent additional time in which to arrive, but Respondent did not appear. NT at 5 – 6.

40. Respondent Martino, and through him as president and contact employee, Respondent corporation, received the order to show cause and all other pleadings and notices filed in this matter, and filed a response to the order to show cause, but neither Respondent Martino nor anyone on his behalf or on behalf of Respondent corporation appeared at the hearing in this matter. Department records; NT at 5 – 6 and *passim*.

²Official notice is taken of docket entries in this matter in accordance with the rule that an administrative agency may take official notice of its own records. General Rules of Administrative Practice and Procedure, 1 Pa Code § 31.1 *et seq*, at § 35.173, *see also Falasco v Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A.2d 991 (Pa. Cmwlth 1987) (The doctrine of official notice allows an agency to take official notice of facts which are obvious and notorious to an expert in the agency's field and those facts contained in reports and records in the agency's files), *Gleeson v State Bd of Medicine*, 900 A 2d 430, 440 (Pa. Cmwlth 2006), *appeal denied*, 917 A 2d 316 (Pa. 2007) (licensing board may take official notice of its own records) All subsequent such references will be cited as "Department records."

CONCLUSIONS OF LAW

1. The Department has jurisdiction in this matter. 1972 Act, sections 304(a) and 601(a), 70 P.S. §§ 1-304(a) and 1-601(a); Department of Banking and Securities Code, Act of May 15, 1933, P.L. 565, *as amended*, sections 1122-A and 1141-A, 71 P.S. §§ 733-1122-A and 733-1141-A; Findings of Fact 1 – 3.

2. Respondents received notice of this proceeding and were afforded an opportunity to be heard in accordance with section 4 of the Administrative Agency Law, 2 Pa. C.S. § 504. Findings of Fact 25 – 27, 36 – 40.

3. Because Respondent corporation's principal office and place of business address of record, and mailing address of record, on Respondents' Form ADV in the Department's CRD, which constitute material information, have changed since Respondents' last filing on June 16, 2015, and Respondents have done nothing to update those addresses since that filing, despite being given notice to do so on several occasions, Respondents have willfully violated the Department's regulation at 10 Pa. Code § 303.012(d), subjecting Respondents to the denial, suspension, revocation of, or imposition of conditions upon, their registrations, or censure of them as registrants, pursuant to the 1972 Act at section 305(a)(v), 70 P.S. § 1-305(a)(v), or the imposition of an administrative assessment of up to \$100,000 for each act or omission that constitutes a violation of the 1972 Act or any rule issued under it, pursuant to the 1972 Act at section 602.1(c)(1)(i), 70 P.S. § 1-602.1(c)(1)(i). Findings of Fact 1 – 35.

DISCUSSION

Violation

Respondents are registrants of the Department under section 301 of the 1972 Act, 70 P.S. § 1-301,³ Respondent corporation as an investment adviser (“IA”), and Respondent Martino as an investment adviser representative of Respondent corporation. Respondent Martino is also the president and contact employee for Respondent corporation. As president of Respondent corporation, Respondent Martino is an “affiliate” of Respondent corporation, within the meaning of the 1972 Act, which defines an “affiliate” as “a person that directly. . . controls. . . the person specified.” 1972 Act, section 102(b), 70 P.S. § 1-102(b). In other words, Respondent Martino directly controls Respondent corporation, and Respondent corporation acts through Respondent Martino. *See, for example, Walacavage v. Excell 2000*, 480 A.2d 281, 284 (Pa. Super. 1984) (a corporation can do no act except through its agents).

Under the 1972 Act, every registered IA is required to “make and keep all accounts, correspondence, memoranda, papers, books and other records which the department by regulation prescribes. . .” Section 304(a), 70 P.S. § 1-304(a). Furthermore, “[i]f the information contained in any document filed with the [D]epartment. . . becomes inaccurate or incomplete in any material respect,” section 304(c), 70 P.S. § 1-304(c), the registrant is required to “promptly file a correcting

³In pertinent part, this section provides as follows:
§ 1-301. Registration requirement

Unless exempted under section 302 hereof

* * *

(c) It is unlawful for any person to transact business in this State as an investment adviser unless he is so registered or registered as a broker-dealer under this act or unless he is exempted from registration. It is unlawful for any person to transact business in this State as an investment adviser representative unless he is so registered or exempted from registration.

* * *

amendment.” *Id.* The Uniform Application for Investment Adviser Registration (“Form ADV”) is a document which registrants file with the Department in and through the Department’s Central Registration Database (“CRD”), so under this statutory provision, the registrant is required to keep its Form ADV accurate and complete, and must promptly correct it if at any point it becomes inaccurate or incomplete.

The Department’s regulations reiterate the statutorily-imposed responsibility of registered IAs to make sure the information about them on file with the Department (for example, the information in the Form ADV), is accurate. Additionally, the regulations, from a practical standpoint, amplify that requirement, essentially defining “promptly” as being within a 30-day period:

(d) An investment adviser registered under the act shall take steps necessary to ensure that material information contained in its Form ADV and exhibits remains current and accurate. If a material statement made in Form ADV and exhibits becomes incorrect or inaccurate the investment adviser shall file with the Commission an amendment on Form ADV within 30 days of the occurrence of the event which requires the filing of the amendment.

10 Pa. Code § 303.012(d) (emphasis added). The order to show cause charged Respondents with violating this regulation.

The record adduced at the hearing indicates the following. Respondents had a change of address sometime after August 2015 and failed to update their Form ADV in the Department’s CRD. Respondent Martino admitted as much in the answer to the order to show cause, which was admitted into evidence. Moreover, Mr. Zibelman’s testimony demonstrated quite clearly that Respondent Martino was aware of the problem by, at the latest, May 2016, when Mr. Zibelman sent Respondent Martino the May 2016 deficiency letter. Respondent Martino subsequently admitted to Mr. Zibelman that Respondent Martino had received that May 2016 deficiency letter, which, among other things, referenced the need for updated addresses for Respondents in the

Department's records.

Yet Respondent Martino did nothing about that need after May 2016. Finally, in January 2017, Mr. Zibelman examined Respondents again at Respondent Martino's residence. During that examination, Mr. Zibelman pointed out deficiencies to Respondent Martino, including the need for a change of address on Respondent corporation's Form ADV on file with the Department. At that time, Respondent Martino agreed to correct that problem and others by March 3, 2017, but despite several subsequent instances of prompting from Mr. Zibelman, Respondent Martino failed to do so. And as of the date of the hearing, Respondent Martino still had not taken the simple action of updating Respondents' addresses on the Form ADV in the Department's CRD.

Respondents' failure to maintain current addresses in the records on file with the Department in the CRD was material. The Form ADVs in the CRD constitute the records on which federal and state regulators rely in order to locate registrants for purposes of regulation and examination. Besides that, those same records are the records on which the public relies to be able to contact and locate the IA registrants who handle money belonging to members of the public who are the IAs' clients. Certainly it is material information when it enables these functions of regulation and accountability.

Additionally, Respondents' continued failure to take the simple step of updating their addresses with the Department was willful. "Willful" has been defined to mean an act done voluntarily or intentionally, as distinguished from accidental conduct. *C.f. Rosa v. United States of America*, 613 F.Supp. 469, 476 (M.D.Pa. 1985); *see also People 2.0 Global v. Com., Dept. of Labor & Industry*, 105 A.3d 824 (Pa. Cmwlth. 2014) (construing "willfully" to mean "knowingly"). In this case, even after Mr. Zibelman specifically notified Respondent Martino of the problem and established with Respondent Martino a specific date by which Respondent

Martino would complete the necessary changes, Respondent Martino did not do so. There is no evidence in the record to suggest that the failure to do so was accidental, and based on Mr. Zibelman's testimony, as well as Respondents' answer to the order to show cause, Respondent Martino clearly knew he needed to make the changes. Under these circumstances, Respondent Martino's lack of action can only be characterized as voluntary and intentional – and, therefore, as willful.

The Department had the burden of proving⁴ the violation alleged in the order to show cause. To do that, the Department put testimonial and documentary evidence into the record at the hearing. Respondents did not appear, and consequently put no evidence into the record, either to contradict the Department's evidence or to explain or offer mitigation regarding Respondents' actions. Accordingly, the Department has met its burden of proving that Respondents violated the the Department's regulation at 10 Pa. Code § 303.012(d).

Sanction

The remaining question is the appropriate sanction. For their willful violation of the Department's regulation at 10 Pa. Code § 303.012(d), Respondents are subject to the imposition of sanctions under the 1972 Act at section 305(a)(v). That provision authorizes the Department to deny, suspend, revoke or condition any registration, or censure any registrant or affiliate of an IA, if the registrant or affiliate has willfully violated any provision of the 1972 Act or the regulations promulgated under it. 70 P.S. § 1-305(a)(v).⁵

⁴The degree of proof required to establish a case before an administrative tribunal in an action of this nature is a preponderance of the evidence *Lansberry v Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). A preponderance of the evidence is generally understood to mean that the evidence demonstrates a fact is more likely to be true than not to be true, or if the burden were viewed as a balance scale, the evidence in support of the proponent's case must weigh slightly more than the opposing evidence *Se-Ling Hosiery, Inc. v. Margulies*, 70 A 2d 854, 856 (Pa. 1950)

⁵In pertinent part, this section provides as follows
§ 1-305. Denial, suspension, revocation and conditioning of registration

(Footnote continued on next page)

However, rather than recommending the suspension, revocation, or imposition of conditions on the registrations, or censure of Respondents, the Department, at the hearing, requested that Respondents be sanctioned by the imposition of a civil penalty of \$1,000.00 for their actions in this matter. Such a sanction is authorized under the 1972 Act, which provides that the Department may impose an administrative assessment (another term for "civil penalty") for each violation of the 1972 Act or any rule issued under it. 70 P.S. § 1-602.1(c)(1)(i).⁶

While Respondents' offense is, as discussed above, a material one, because keeping accurate information on file facilitates oversight of registrants and also enables clients of IAs to monitor their IAs' activities vis-à-vis the clients' funds, the offense is, at the same time, one of the

(a) The department may, by order, deny, suspend, revoke or condition any registration or may censure any registrant if it finds . . . that such registrant . . . or in the case of any . . . investment adviser, any affiliate thereof

* * *

(v) Has wilfully violated any provision of . . . this act, or of any rule, regulation or order under any of such statutes within the previous ten years,

* * *

70 P S § 1-305(a)(v)

⁶In pertinent part, this section provides as follows
§ 1-602.1. Assessments

* * *

(c) After giving notice and opportunity for a hearing, the department may issue an order accompanied by written findings of fact and conclusions of law which imposes an administrative assessment in the amounts provided in paragraph (1) against a[n]. . . investment adviser or investment adviser representative registered under section 301 or an affiliate of any . . . investment adviser where the department determines that the person within the previous ten years willfully has violated this act or a rule or order of the department under this act. . .

(1) The department, in issuing an order under this subsection, may impose the administrative assessments set forth below Each act or omission that provides a basis for issuing an order under this subsection shall constitute a separate violation

(i) In issuing an order against any. . . investment adviser or investment adviser representative registered under section 301 or an affiliate of any. . . investment adviser, the department may impose a maximum administrative assessment of up to one hundred thousand dollars (\$100,000) for each act or omission that constitutes a violation of the act or rule or order issued under this act. .

* * *

lesser offenses in the overall regulatory framework. The Department's recommendation recognizes this, refraining as it does from putting Respondents out of business, even temporarily, via a suspension or revocation. Nonetheless, an administrative assessment of \$1,000.00 is significant enough to emphasize to Respondents (as well as to other registrants similarly situated, and to therefore serve as a deterrent to similar behavior), the importance of keeping their registration records with the Department up to date. Accordingly, based upon the foregoing discussion, the following proposed order shall issue:

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES**

Commonwealth of Pennsylvania,	:	
Department of Banking and Securities,	:	
Bureau of Securities Licensing,	:	
Compliance and Examinations,	:	
Petitioner	:	
	:	
v.	:	Docket No. 160062 (SEC-OSC)
	:	
Martino and Miles, Inc.	:	
d/b/a Peerless Advisors,	:	
and	:	
Daryl S. Martino,	:	
Respondents	:	

PROPOSED ORDER

AND NOW, this 4th day of **October, 2017**, in accordance with the foregoing findings of fact, conclusions of law and discussion, it is **ORDERED** that Martino and Miles, Inc. d/b/a Peerless Advisors, and Daryl S. Martino (“Respondents”) shall pay an **ADMINISTRATIVE ASSESSMENT** of \$1,000.00 within **30 DAYS** of the date of the Final Order issued in this matter.

Respondents shall make said payment by certified check, attorney’s check or U.S. Postal Service money order, made payable to “Commonwealth of Pennsylvania,” and shall deliver the payment to the counsel for the Department set forth below unless otherwise directed by the Department.

BY ORDER:

Redacted

Ruth D. Dunnewold
Hearing Examiner

For the Department: Thomas S. Lee, Esquire
Stefanie Z. Hamilton, Deputy Chief Counsel for Securities
GOVERNOR’S OFFICE OF GENERAL COUNSEL

DEPARTMENT OF BANKING AND SECURITIES
Market Square Plaza
17 N. 2nd St., Suite 1300
Harrisburg, PA 17101

For Respondents:

Daryl S. Martino
Martino & Miles, Inc. d/b/a Peerless Advisors
Redacted

Daryl S. Martino
Martino & Miles, Inc. d/b/a Peerless Advisors
1060 First Avenue, Suite 400
King of Prussia, PA 19406

Daryl S. Martino
Martino & Miles, Inc. d/b/a Peerless Advisors
P.O. Box 613
Oaks, PA 19456

Docket Clerk.

Linnea Freeberg
DEPARTMENT OF BANKING AND SECURITIES
17 North 2nd Street, Suite 1300
Harrisburg, PA 17101

Date of mailing:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES

FILED

2017 OCT 12 PM 1:16

COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF BANKING AND	:	
SECURITIES, COMPLIANCE OFFICE	:	PA DEPARTMENT OF
	:	BANKING AND SECURITIES
	:	
PETITIONER,	:	
v.	:	Docket No. : 160062 (SEC-OSC)
	:	
MARTINO AND MILES, INC.	:	
D/B/A PEERLESS ADVISORS	:	
DARYL S. MARTINO	:	
	:	
RESPONDENT.	:	

CERTIFICATE OF SERVICE

I hereby certify that on October 12th, 2017, I served a true and correct copy of the attached Letter and Proposed Report in accordance with the requirements of 1 Pa. Code § 33.31 (relating to service by agency), in the manner indicated below:

Via Email & Hand Delivery:

Stefanie Z. Hamilton, Deputy Chief Counsel for Securities
Tom S. Lee, Esquire
PA Department of Banking and Securities
17 N. Second Street, Suite 1300
Harrisburg, PA 17101

By United States First Class Mail:

Daryl S. Martino
Martino and Miles, Inc. d/b/a Peerless Advisors
Redacted

Daryl S. Martino
Martino and Miles, Inc. d/b/a Peerless Advisors
1060 First Avenue, Suite 400
King of Prussia, PA 19406

Daryl S. Martino
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P.O. Box 613
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By:

Redacted

Linda Carroll
Deputy Chief Counsel
PA Department of Banking and Securities
17 North Second Street, Suite 1300
Harrisburg, Pennsylvania 17101

FILED

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES

2018 FEB 14 AM 9:07

PA DEPARTMENT OF
BANKING AND SECURITIES

COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF BANKING AND	:	
SECURITIES, BUREAU OF SECURITIES	:	
COMPLIANCE AND EXAMINATIONS	:	Docket No.: 160062 (SEC-OSC)
	:	
v.	:	
MARTINO AND MILES, INC.	:	
d/b/a PEERLESS ADVISORS	:	
	:	
DARYL S. MARTINO	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing *Final Order* upon counsel for the parties who constitute the only parties of record in this proceeding, in accordance with the requirements of 1 Pa. Code §§ 33.35 and 33.36:

BY CERTIFIED AND
FIRST CLASS MAIL:

BY HAND-DELIVERY AND
ELECTRONIC MAIL:

Daryl S. Martino
Martino and Miles, Inc.
d/b/a Peerless Advisors
1060 First Avenue, Suite 400
King of Prussia, PA 19406

Thomas Lee
Commonwealth of Pennsylvania
Department of Banking and Securities
Market Square Plaza
17 N. Second Street, Suite 1300
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717.787.1471
tholee@pa.gov

Daryl S. Martino
Redacted

Daryl S. Martino
Martino and Miles, Inc.
d/b/a Peerless Advisors
P.O. Box 613
Oaks, PA 19456

Dated this 14th day of February 2018

Redacted

Linnea Freeberg, Docket Clerk
Pennsylvania Department of Banking and Securities
17 N. 2nd Street, Suite 1300
Harrisburg, PA 17101