COMMONWEALTH OF PENNSYLVANIA
BANKING AND SECURITIES COMMISSION

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF BANKING AND SECURITIES, BUREAU OF SECURITIES COMPLIANCE AND EXAMINATIONS	:	**Docket No.: 180099 (SEC-OSC)**
v.	:	
TRICKLING SPRINGS CREAMERY, LLC **PHILIP ELVIN RIEHL** **GERALD A. BYERS** **ELVIN M. MARTIN** **DALE L. MARTIN**	:	

NOTICE OF RIGHT TO APPEAL

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

If you wish to appeal this Final 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 Final Order will result in it 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 may consult an attorney regarding your legal rights including your right to appeal the Final 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.

COMMONWEALTH OF PENNSYLVANIA
BANKING AND SECURITIES COMMISSION

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF BANKING AND SECURITIES, BUREAU OF SECURITIES COMPLIANCE AND EXAMINATIONS	:	**Docket No.: 180099 (SEC-OSC)**
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TRICKLING SPRINGS CREAMERY, LLC **PHILIP ELVIN RIEHL** **GERALD A. BYERS** **ELVIN M. MARTIN** **DALE L. MARTIN**	:	

FINAL ORDER

AND NOW, the Pennsylvania Banking and Securities Commission ("Commission") issues this Final Order in the matter of *Commonwealth of Pennsylvania, Department of Banking and Securities, Bureau of Securities Compliance and Examinations v. Trickling Springs Creamery, LLC, Philip Elvin Riehl, Gerald A. Byers, Elvin M. Martin and Dale L. Martin*, Docket No. 180099 (SEC-OSC).

The Commission reviewed documents of record in this matter, including the proposed report and proposed order of Hearing Officer Ruth D. Dunnewold, which are attached, and which were served upon the parties by letter dated December 6, 2019, pursuant to 1 Pa. Code § 35.207. The Bureau of Securities Compliance and Examinations ("Bureau") and three of the respondents--Gerald A. Byers, Elvin M. Martin, and Dale L. Martin—each filed separate exceptions to the proposed order. The Commission reviewed the exceptions and took them into account in directing the issuance of this Final Order at its meeting of January 30, 2020.

In this Final Order, the Commission adopts the proposed report as written, with one exception. The Commission deletes the hearing officer's proposed Finding of Fact No. 51 and replaces it with a new one to conform to the evidence. Finding of Fact No. 51 shall read as follows:

51. Although it was Respondent Riehl's idea to start selling the Notes, NT at 197, and he was the owner who primarily dealt with the investors about the Notes, NT at 170-175, Dale Martin would sign all of the Notes, NT at 134, and Riehl was in "constant communication with Dale Martin as far as decisions and so on for the ongoing operations." NT at 303-304.

Regarding the hearing officer's proposed order, the Commission amends it to acknowledge the Bureau's exceptions, which asked for the insertion of language to address the filing of a Chapter 7 bankruptcy petition by Trickling Springs Creamery, LLC. ("TSC") on December 6, 2019. Filing of such a petition will necessitate, during the pendency of TSC's bankruptcy proceedings, the stay of enforcement of any assessment imposed on TSC, but only with respect to TSC itself, not the individual owners.

With regard to the exceptions filed by Gerald A. Byers, Elvin M. Martin, and Dale L. Martin, the Commission has considered them and concludes that the assessment proposed by the hearing officer is supported by the evidence of record and the law, as explained in the hearing officer's proposed report. Her thorough analysis supports the conclusion that each of the three owners were "affiliates" of TSC and were liable, along with TSC and Riehl, for the violations of section 401 (c) of the Pennsylvania Securities Act of 1972 (the "1972 Act") for engaging in a course of business that operated as a fraud or deceit upon the Note investors. In addition, the Commission specifically finds as not credible the testimony of the three owners in which they

attempted to distance themselves from the actions of TSC and Riehl with respect to the offering and sale of the Notes.

Accordingly, the Commission replaces the hearing officer's proposed order with the following one:

ORDER

AND NOW, this 30th day of January, 2020, in accordance with the proposed report of the hearing officer, as amended, it is **ORDERED** that Tricking Springs Creamery, LLC, ("TSC"), Philip Elvin Riehl, Gerald A. Byers, Elvin M. Martin, and Dale L. Martin ("Respondents") shall pay an **ADMINISTRATIVE ASSESSMENT** of **$25,000** for each of the 175 violations of section 401 (c) of the 1972 Act, 10 P.S. § 1-401 (c), found in this matter, for a total of assessment in the amount of **$4,375,000**, pursuant to section 602.1 (c) of the 1972 Act, 10 P.S. § 1-602.1 (c). The Respondents shall be jointly and severally liable for payment of the assessment.

TSC shall make payment of the assessment in accordance with the Chapter 7 bankruptcy proceedings initiated in the United States Bankruptcy Court for the Middle District of Pennsylvania at docket number 1:19-bk-05202-HWV. If full payment is not made at the conclusion of the Chapter 7 bankruptcy proceeding at docket number 1:19-bk-05202-HMV, then Respondent TSC shall make payment within 30 days after the proceeding is closed, or within such other period agreed to by the Bureau, by certified check, attorney's check, or U.S. Postal Service money order, made payable to "Commonwealth of Pennsylvania," and shall deliver payment to the counsel for the Bureau set forth below unless otherwise directed by the Department of Banking and Securities.

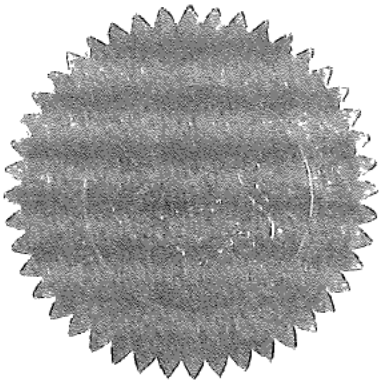
Respondents Philip Elvin Riehl, Gerald A. Byers, Elvin M. Martin and Dale L. Martin shall make payment within 30 days, or within such other period agreed to by the Bureau, by certified

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 Bureau set forth below unless otherwise directed by the Department.

IT IS FURTHER ORDERED, in accordance with section 512 (a) of the 1972 Act, 70 P.S. § 1-512 (a), that each of the Respondents is permanently barred from any of the following activities:

- Representing an issuer offering or selling securities in this Commonwealth;
- Acting as a promoter, officer, director or partner of an issuer (or an individual occupying a similar status or performing. similar functions) offering or selling securities in this state or of a person who controls or is controlled by such issuer;
- Being registered as a broker-dealer, agent, investment adviser or investment adviser representative under Section 301 of the 1972 Act;
- Being an affiliate of any person registered under Section 301 of the 1972 Act; or
- Relying upon an exemption from registration contained in Section 202, 203 or 302 of the 1972 Act.

The Commission approves the proposed report, as amended, and the Order set forth above and issues this Final Order pursuant to the final adjudication authority granted to the Commission under section 1122-A of the Department of Banking and Securities Code, 71 P.S. § 733-1122-A. The Final Order shall be effective 30 days after the Commission mails it.



BY ORDER OF THE COMMISSION:

Redacted

James R. Biery
Chair
Pennsylvania Banking and Securities Commission

So ORDERED this 30th day of January, 2020

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES

Commonwealth of Pennsylvania,	:	
Department of Banking and Securities,	:	
Bureau of Securities Compliance	:	
and Examinations,	:	**Docket No. 180099 (SEC-OSC)**
Petitioner	:	
	:	
v.	:	
	:	
Trickling Springs Creamery, LLC,	:	
Philip Elvin Riehl,	:	
Gerald A. Byers,	:	
Elvin M. Martin,	:	
Dale L. Martin,	:	
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 Trickling Springs Creamery, LLC ("Respondent TSC"), Philip Elvin Riehl ("Respondent Riehl"), Gerald A. Byers ("Respondent Byers"), Elvin M. Martin ("Respondent E Martin") and Dale L. Martin ("Respondent D Martin") (all five shall be referred to, collectively, as "Respondents;" Respondents Riehl, Byers, E Martin and D Martin shall be referred to, collectively and apart from Respondent TSC, as "Individual 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 sections 201, 401(b) and 401(c), 70 P.S. §§ 1-201, 1-401(b) and 1-401(c).

Specifically, the *Order to Show Cause* set forth 20 counts alleging that Respondents offered and sold Notes, which were securities within the meaning of the 1972 Act, in willful violation of section 201, 70 P.S. § 1-201, which makes it unlawful for any person to offer or sell any security in the Commonwealth unless the security is registered under the 1972 Act. Additionally, the order to show cause set forth 175 counts alleging that Respondents, in connection with the offer and sale of the Notes, omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, in willful violation of section 401(b), 70 P.S. § 1-401(b). And lastly, the order to show cause set forth 175 counts alleging that Respondents, in connection with the offer and sale of the Notes, engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon any person, in willful violation of section 401(c), 70 P.S. § 1-401(c).

The Department filed its *Order to Show Cause* on November 30, 2018. Through counsel, Respondents filed *Answers* to the *Order to Show Cause* on December 28, 2018, requesting a

hearing. Thereafter, by letter dated January 23, 2019, the case was delegated to the undersigned to act as hearing officer pursuant to the General Rules of Administrative Practice and Procedure ("General Rules"), 1 Pa. Code § 31.1 *et seq.*, and the Administrative Agency Law, 2 Pa.C.S. § 501 *et seq.*

The parties filed prehearing statements and participated in prehearing conferences on March 13, 2019 and June 19, 2019. On June 27, 2019, they filed *Joint Stipulations of the Parties.* Thereafter, the hearing in the matter occurred on July 17 and 18, 2019. At the hearing, the Department was represented by David B. Murren, Esquire, Seamus D. Dubbs, Esquire, and Stefanie Hamilton, Esquire, who presented the Department's case through testimonial and documentary evidence. Respondents appeared at the hearing, were represented by Norma E. Greenspan, Esquire, and presented their defense through testimonial and documentary evidence.

Following the hearing, an *Order Establishing Briefing Schedule* dated August 26, 2019, directed the parties to file simultaneous initial post-hearing briefs by close of business on September 25, 2019, and to file simultaneous reply briefs, if any, by close of business on October 15, 2019. Subsequently, Respondents filed a motion requesting additional time to file reply briefs on October 9, 2019, on which the Department took no position, and the motion was granted by Order dated October 10, 2019, which extended the deadline for the filing of reply briefs to the close of business on October 29, 2019. The parties filed their briefs in accordance with these deadlines, and the record was closed with the filing of the reply briefs on October 29, 2019.

FINDINGS OF FACT

1. Respondent TSC is a Pennsylvania limited liability company with an address at 2330 Molly Pitcher Highway, Chambersburg, PA 17202. Notes of Testimony ("NT") at 41, 131.

2. At all relevant and material times, Respondent TSC was engaged in the business of processing and selling dairy products. NT at 268 – 269, 334 – 335.

3. Respondent Byers, who became an original owner and member of Respondent TSC with its formation in 2000, owns approximately an 18% interest in Respondent TSC. NT at 164, 335 – 336, 341, 345.

4. Respondent Riehl, who became an owner of Respondent TSC in 2007 and has been in control of Respondent TSC's financial records since that time, owns a 58% interest in Respondent TSC and by reason of that interest, is the majority owner and member of Respondent TSC. NT at 164 – 165, 304.

5. Respondent D Martin, who became an owner and member of Respondent TSC in 2012, owns a 2.5% interest in Respondent TSC and at all relevant times, was Respondent TSC's Chief Operating Officer. NT at 130, 135, 164.

6. Respondent E Martin, who became an owner and member of Respondent TSC in approximately 2008, owns the balance of Respondent TSC, approximately 20%. NT at 164, 352.

7. All of the Individual Respondents are members of the Mennonite community, which may excommunicate members based on the existence of an "unequal yoke," defined as a partnership with those who do not hold the same beliefs as the Mennonites; the Mennonites do not believe it is acceptable to declare bankruptcy or sue someone. NT at 240, 265, 272, 301, 311 – 312, 315, 316, 317, 333, 337, 347, 364 – 365.

8. At all relevant times, the Individual Respondents served on Respondent TSC's

Board of Directors ("Board"). NT at 240, 303, 342, 357.

9. As the Chief Operating Officer, Respondent D Martin was involved with the finances of Respondent TSC, in that he had the chance to read through them, look at them, review them, and help analyze them, but Respondent Riehl and a combination of employees actually prepared Respondent TSC's yearly balance sheets. NT at 132 – 133.

10. At Respondent TSC's Board meetings, which occurred about three times a year, Respondent TSC's Board members discussed the need for additional capital and made major decisions about things like buying new equipment and buying property; any major decision was supposed to be discussed at a Board meeting. NT at 342, 358, 361.

11. Respondent Riehl is a tax accountant with 26 or 27 years of practice experience. NT at 302.

12. In 1994, when contemplating the purchase of additional land for his growing family, Respondent Riehl realized that he could borrow money from his acquaintances at a rate halfway between what the bank would charge him for a loan and what the bank would pay for money invested with the bank, and Respondent Riehl initiated a borrowing/lending program based on that idea. NT at 218, 219, 220.

13. From 1995 until July 2018, Respondent Riehl borrowed funds from investors ("Riehl Investors") and subsequently loaned these funds to other individuals and entities (the "Riehl Loan Program"). NT at 172, 215 – 216, 219 – 220.

14. At its peak, Respondent Riehl had borrowed approximately $79,000,000 from the Riehl Investors through the Riehl Loan Program. NT at 218.

15. At the time of the hearing, Respondent Riehl owed approximately $49,000,000 to the Riehl Investors, and he was the one who decided how the Riehl Investors got paid back, basing

his decisions on investors' requests for payment. NT at 313, 320.

16. Respondent Riehl commingled his personal assets with the funds he had borrowed from the Riehl Investors pursuant to the Riehl Loan Program. NT at 196.

17. In 2012 and 2013, members of the Mennonite community raised concerns to Respondent Riehl about the fact that, through the Riehl Loan Program, Respondent Riehl made himself the middle man for the loans involved in the Riehl Loan Program. NT at 210 – 211, 229.

18. Prior to becoming an owner of Respondent TSC, Respondent Riehl had loaned funds to Respondent TSC that he had borrowed from the Riehl Investors. NT at 165.

19. Respondent Riehl purchased his ownership interest in Respondent TSC in 2007 with funds Respondent Riehl had borrowed from the Riehl Investors, for investment in the Riehl Loan Program, thereby investing those borrowed funds in Respondent TSC and effectively increasing the number of Respondent TSC's debtors. NT at 165, 172 – 173.

20. Respondent Riehl also used funds borrowed from the Riehl Investors, for investment in the Riehl Loan Program, to purchase interests in multiple companies and Pennsylvania real estate, including his personal residence. NT at 194 – 195, 195 – 186, 218 – 219.

21. From 2008 until 2014, Respondent TSC borrowed over $2,000,000 from the Riehl Loan Program and Respondent Riehl in order to meet Respondent TSC's payroll obligations. NT at 189.

22. Prior to September 2016, the federal Securities and Exchange Commission ("SEC") began an investigation of the Riehl Loan Program and Respondent Riehl. NT at 222, 223.

23. From the SEC's investigation, Respondent Riehl understood that there was a problem with his being the middle man in the Riehl Loan Program, borrowing money and then loaning it to other people. NT at 213, 225, 227, 234.

24. Respondent E Martin has eight years of formal schooling, completed a correspondence course in accounting from LaSalle Extension University in Chicago, and does tax preparation for a living. NT at 349.

25. Until 2018, Respondent E Martin borrowed funds from investors ("E Martin Investors") and loaned funds to individuals and entities ("E Martin Loan Program"). NT at 354 – 355, 355 – 356.

26. The E Martin Loan Program operated similarly to the Riehl Loan Program, and Respondent E Martin had no way of distinguishing his own money from his investors' money, which all went into the same account, with no clear separation and a lack of accounting for how much was his and how much belonged to his investors. NT at 354 – 355, 357.

27. Respondent E Martin commingled his personal assets with funds he borrowed from E Martin Investors for investment in the E Martin Loan Program. NT at 355.

28. Prior to becoming an owner of Respondent TSC, Respondent E Martin loaned funds to Respondent TSC that he had borrowed from E Martin Investors for investment in the E Martin Loan Program. NT at 353 – 354.

29. Respondent E Martin purchased his ownership interest in Respondent TSC using funds he had borrowed from the E Martin Investors for investment in the E Martin Loan Program. NT at 353 – 354.

30. At the time Respondent E Martin became an owner of Respondent TSC in 2008, Respondent TSC owed him money from loans, which Respondent E Martin converted into a capital interest, but he also made investor loans to Respondent TSC. NT at 353 – 354.

31. While Respondent E Martin invested in and loaned money to Respondent TSC, Respondent E Martin had nothing to do with the day-to-day operations of Respondent TSC. NT at

350.

32. Respondent E Martin sat on Respondent TSC's Board and participated at meetings, where there were discussions about the need for funds at times because the balance was low. NT at 357, 358, 359.

33. At the time of the hearing, Respondent TSC owed Respondent E Martin approximately $460,000 for reimbursement of private loans he had made to Respondent TSC, despite Respondent TSC's having made a payment to him of $40,000 in August 2016; he was unable to tell how much of that reimbursement was his and how much was owed to his investors. DoBS Exhibit 32, p. 567; E Martin Exhibit 1; NT at 351 – 352, 362 – 363.

34. Respondent Byers, who has 10 years of formal schooling, operates, and has operated for 30 years, a small trucking business through which he delivers, among other things, product for Respondent TSC. NT at 333, 336 – 337.

35. Respondent TSC made payments to Respondent Byers for reimbursements for the trucking side of things, because he would do maintenance, buying parts on his credit card, and submitting the credit card receipts to Respondent TSC for reimbursement because Respondent TSC did not have a credit card. NT at 337 – 338, 343 – 344.

36. Respondent Byers' expenses were handled in such a way that made his interest supersede the Note holders, in that he was reimbursed before Note holders were paid, because his expenses were incurred daily for payments related to trucking, for bills he paid to local vendors. NT at 347.

37. Respondent Byers never made any loans to Respondent TSC, but invested money in Respondent TSC as capital contributions, obtaining the money from his own savings as well as from a line of credit against the equity in his home. NT at 344.

38. Beginning in 2015, Respondent Byers was at Respondent TSC pretty much every day, running the processing plant, delivering product, making ice cream, and participating in all daily aspects of the business except what went on in the front office. NT at 336 – 337.

39. Respondent Byers has been a paid employee of Respondent TSC but was not a paid employee of Respondent TSC at the time of the hearing, although he continued to provide services to Respondent TSC because he wanted Respondent TSC to continue to operate and produce quality products. NT at 340 – 341.

40. Respondent Byers attended Board meetings, at which there were sometimes discussions about finances and the need to obtain additional capital, but he was not involved in the financial end of Respondent TSC, which he left up to Respondents Riehl and D Martin. NT at 342, 346.

41. At the time of the hearing, Respondent TSC owed Respondent Byers approximately $65,000 in remaining expenses. NT at 346.

42. Respondent D Martin, who has a high school diploma, has no formal education in the area of finance, but he has been an equipment supplier to Respondent TSC since 2001, and since January 1, 2015, Respondent D Martin has been the sole owner of Agri-Services, LLC, an agricultural-related business located in Hagerstown, MD, which is one of Respondent TSC's suppliers. DoBS Exhibit 33; NT at 80, 140, 240 – 241.

43. Respondents D Martin, E Martin, and Riehl borrowed from other individuals to fund their personal loans to Respondent TSC. NT at 171 – 172, 172 – 173, 285, 286, 354, 355 – 356, 356 – 357.

44. Respondents D Martin, E Martin, and Riehl did not document their loans to Respondent TSC through any promissory notes or any other written instruments. NT at 147, 168

– 169.

45. At some point in approximately 2015, Respondent Riehl came up with the idea of selling promissory notes in Respondent TSC to the Mennonite community in order to raise capital for Respondent TSC. NT at 135, 169 – 170, 197, 306.

46. At that time, Respondent D Martin had access to Respondent TSC's QuickBooks file, so he could be informed about Respondent TSC's financial condition. NT at 138.

47. From in or about February 2015 until October 2017, Respondent TSC offered and sold at least 175 promissory notes ("Notes") to at least 110 investors within the United States for an aggregate amount of at least $7,803,829. DoBS Exhibit 44 (*Joint Stipulations of the Parties*), paragraph 7; DoBS Exhibit 13; NT at 134 – 135.

48. From in or about November 2015 until October 2017, Respondent TSC offered and sold at least 20 Notes to at least 15 Pennsylvania residents for an aggregate amount of at least $963,104. DoBS Exhibit 44 (*Joint Stipulations of the Parties*), paragraph 8; DoBS Exhibit 13; NT at 134 – 135.

49. Respondent TSC represented to potential investors that it was issuing the Notes to obtain additional capital, and the proceeds from the Notes were to be used for whatever purpose in the business for which Respondent TSC required funds. DoBS Exhibit 14; NT at 135 – 136, 169 – 170.

50. All four of the Individual Respondents were owners of Respondent TSC when Respondent TSC offered and sold the Respondent TSC Notes. NT at 129 – 130, 131, 164, 240 – 241, 303 – 304, 341 – 342, 350, 352.

51. Respondent Riehl handled everything pertaining to the Notes. NT at 134.

52. Before issuing the Notes, Respondent TSC had borrowed a number of times from

Respondent Riehl. NT at 137 – 138.

53. Because no one at Respondent TSC knew the Notes should be registered with the Department, pursuant to section 201 of the 1972 Act, no one ever registered any of the Notes with the Department. 70 P.S. § 1-201; DoBS Exhibit 28; NT at 39, 209, 273.

54. No one at Respondent TSC prepared or used any offering materials to promote the sale of the Notes. DoBS Exhibit 44 (*Joint Stipulations of the Parties*), paragraph 9.

55. No one at Respondent TSC prepared or provided any formal disclosures to its investors, with the exception of some of Respondent TSC's tax returns and financial statements, in the form of a balance sheet and profit and loss statements, which Respondent Riehl provided to fewer than 20 potential investors, and he only did so when a potential investor actually requested financial information on Respondent TSC. DoBS Exhibit 44 (*Joint Stipulations of the Parties*), paragraph 10; DoBS Exhibit 22; NT at 197 – 198, 199 – 200, 201, 202.

56. Respondent D Martin was not directly aware of what financial information Respondent Riehl provided to potential Respondent TSC investors, but was aware that Respondent Riehl was providing some information. NT at 133.

57. When funds came in from the sale of Notes, Respondent Riehl would pass the funds along to Respondent D Martin, Respondent TSC's Chief Operating Officer, who would issue the Notes with his signature on them. DoBS Exhibit 13; NT at 134, 135, 139.

58. The Notes set forth the amount of the investment, the interest rate, the investors' names and addresses, and provisions for redemption of the Notes. DoBS Exhibit 13; NT at 40 – 41.

59. In general, the Notes were payable on demand, with 60 days' notice, and offered interest rates between 4% and 5%. DoBS Exhibit 13; NT at 40 – 41.

60. TSC Property Management, LLC ("TSC Property Management"), a separate entity from Respondent TSC, was created to hold a specific piece of real estate, a cooler or freezer building that TSC Property Management leased to Respondent TSC. DoBS Exhibit 35; NT at 132.

61. Respondent Riehl's signature is on TSC Property Management bank documents stating that Respondent Riehl was the majority owner of TSC Property Management. DoBS Exhibit 48; NT at 178 – 179.

62. In 2015 and 2016, Respondent TSC listed notes receivable from TSC Property Management, in the amounts of $19,344.18 and $37,298.42, as assets on Respondent TSC's balance sheets. DoBS Exhibits 20 and 21; NT at 52.

63. TSC Property Management never issued a note to Respondent TSC, so the notes receivable listed as assets on Respondent TSC's 2015 and 2016 balance sheets did not exist. DoBS Exhibit 35; NT at 53 – 54.

64. Respondent Riehl had not discussed the interest rates for the Notes with many investors, so on April 22, 2016, after the offer and sale of the majority of the Notes, Respondent TSC sent a letter to its investors to explain the possible interest rates available to them. DoBS Exhibit 14; NT at 204 – 205.

65. The letter of April 22, 2016 explained that Respondent TSC's investors could purchase either a simple demand Note which offered a 4.5% interest rate, or a Note with a one-year term which offered a 5% interest rate; it also solicited additional investment based on the statement that Respondent TSC was building additional cheese inventory to meet demand, and building that extra inventory required a lot of cash. DoBS Exhibit 14; NT at 204, 205.

66. Rather than raising additional capital, a majority of the Notes that Respondent TSC sold simply took the debt Respondent Riehl owed to the Riehl Investors and transferred that debt

to Respondent TSC, thereby eliminating Respondent Riehl's personal liability to the Riehl Investors without Respondent Riehl's making any of the Riehl Investors aware of it. NT at 170 – 171, 173, 206 – 207.

67. Respondent TSC received no additional capital when Respondent Riehl transferred his debt to Respondent TSC through the sales of the Respondent TSC Notes. NT at 171.

68. Respondent Riehl does not know how much of the money he loaned to Respondent TSC was his own funds and how much of it came from investors via the Riehl Loan Program. NT at 215.

69. Respondent Byers was in Tasmania from October 2015 through March 2016, supporting the church there, when the sale of the Notes began. NT at 337, 341.

70. While Respondent Byers knew there were some Notes being handled, he had no role in the sale of the Notes, but neither did he take any steps to find out what was going on. NT at 337, 343, 346.

71. Respondent E Martin did not attend all Board meetings, and at the Board meetings he attended, there were never any discussions about the sale of Notes for capital. NT at 359 – 360, 360 – 361.

72. Respondent E Martin had no involvement in the sale of the Notes, and no one informed him about the Notes. NT at 352, 361.

73. Despite the SEC's investigation in 2016 and Respondent Riehl's understanding of the problem with being the middle man in the Riehl Loan Program by borrowing money and then loaning it to other people, Respondent Riehl continued to loan money to Respondent TSC from 2015 to 2018, and Respondent TSC continued to offer and sell Notes into 2017. NT at 173 – 174, 230 – 231, 231 – 232.

74. From in or about July 2015 to March 2018, Agri-Service invoiced Respondent TSC $668,502.57 for various supplies and services provided to Respondent TSC. DoBS Exhibits 33 46; NT at 50.

75. From in or about July 2015 to March 2018, Respondent TSC paid Agri-Service $921,804.07, which was an unexplained difference of $253,301.50 more than the amount invoiced by Agri-Service during that period. DoBS Exhibit 46; NT at 51, 87.

76. Respondent TSC's payments to Agri-Service were inconsistent with Agri-Service's invoices to Respondent TSC. DoBS Exhibits 33, 43, 46; NT at 51, 87.

77. From in or about December 2015 until February 2018, Respondent Riehl received a total of $938,250 in checks from Respondent TSC's bank accounts for repayment of short term loans; Respondent Byers received a total of $31,688 in checks from Respondent TSC's bank accounts for reimbursement of monies that he expended on behalf of Respondent TSC; Respondent E Martin received $40,000 in checks from Respondent TSC's bank accounts, for the repayment of short term loans; and Respondent D Martin received a total of $379,390 in checks from Respondent TSC's bank accounts, primarily for the repayment of short term loans; Respondent TSC made these payments to the Individual Respondents before making any payments to Respondent TSC's investors. DoBS Exhibits 29, 30, 31, 32 and 45; NT at 57 – 58, 60, 250, 251, 252, 307, 308 – 309, 310, 337 – 338, 339 – 340, 351 – 352.

78. Respondent TSC continued to receive investor funds, intended for the purchase of Notes, after Respondent TSC stopped offering and selling Notes in October 2017, so Respondents Riehl and D Martin sent those funds to Agri-Service because they viewed the investors' sending the funds to Respondent TSC as a "mistake." NT at 153 – 154, 155 – 156, 157, 158, 159.

79. At the end of 2017 and beginning of 2018, when Respondent Riehl received money

from investors who wanted to invest in Respondent TSC, Respondent Riehl told some of those investors, but not all of them, that investing in Respondent TSC was no longer an option, and offered them the opportunity to invest their funds with Agri-Service instead; Respondent Riehl then diverted those funds to Agri-Service, and D Martin issued the investor a Note from Agri-Service. NT at 159, 212, 213, 222 – 223.

80. The regulations promulgated pursuant to the 1972 Act define "insolvent" or "insolvency" as follows:

> *Insolvent* or *insolvency*—Except in the case of entities required under law or regulation to submit an auditor's report if the auditor's report does not contain a going concern disclosure, the terms mean *either of the following*:
>
> > (i) The inability to pay debts as they fall due in the person's usual course of business.
> >
> > (ii) Liabilities in excess of the fair value of the person's assets.

10 Pa. Code § 102.021(a) (emphasis added).

81. Respondent TSC's net worth as of December 31, 2015 was a loss of $525,957.71, and its net worth as of December 2016 was a loss of $6,064,264.02. DoBS Exhibit 42; NT at 113.

82. As of December 31, 2015, Respondent TSC had liabilities in excess of the fair value of its assets, so Respondent TSC met the second definition of "insolvency" and was "insolvent" by the end of 2015. DoBS Exhibit 42; NT at 113.

83. As of December 31, 2016, Respondent TSC was unable to pay its debts as they came due in the usual course of its business and also had liabilities in excess of the fair value of its assets, so Respondent TSC met both definitions of "insolvency" and was "insolvent" at the end of 2016. DoBS Exhibit 42; NT at 114.

84. At all relevant times, Respondent TSC was insolvent and unable to fulfill its financial obligations stemming from the sale of the Notes. DoBS Exhibit 42; NT at 113, 114.

85. Respondents failed to disclose the following information concerning Respondent TSC to some or all of its investors:

a. An accurate description of Respondent TSC's financial condition;

b. The financial risk of investing in Respondent TSC's Notes;

c. The identity and relevant background of Respondent TSC's corporate officers;

d. Respondent TSC's operating history;

e. Respondent Riehl's purchase of his ownership interest in Respondent TSC using funds loaned to Respondent Riehl by Riehl Investors through the Riehl Loan Program;

f. Respondent E Martin's purchase of his ownership interest in Respondent TSC using funds loaned to Respondent E Martin by E Martin Investors through the E Martin Loan Program;

g. Respondents D Martin, E Martin, and Riehl had borrowed money from other individuals to fund personal loans to Respondent TSC;

h. The lack of documentation of personal loans to Respondent TSC from Respondents D Martin, E Martin and Riehl;

i. Respondent Riehl's receipt of a total of at least $954,250 in checks from Respondent TSC's bank accounts from in or about December 2015 until February 2018;

j. Respondent Byers' receipt of a total of at least $31,688 in checks from Respondent TSC's bank accounts from in or about September 2015 until February 2018;

k. Respondent E Martin's receipt of a total of at least $40,000 in checks from Respondent TSC's bank accounts in or about August 2016;

l. Respondent D Martin's receipt of a total of at least $379,930 in checks from Respondent TSC's bank accounts from in or about December 2015 until January 2018;

m. Respondent TSC made payments to Respondents D Martin, E Martin, Byers, and Riehl before making any payments to Respondent TSC's investors;

n. At all relevant times, Respondent TSC was insolvent and unable to fulfill its financial obligations stemming from the sale of its Notes;

o. From in or about July 2015 to March 2018, Respondent TSC paid Agri-Service $921,804.07, resulting in an overpayment $253,301.50 more than the amount invoiced by Agri-Services;

p. Respondent TSC's payments to Agri-Service were inconsistent with Agri-Service's invoices to Respondent TSC;

q. In 2016, the SEC began an investigation of Respondent Riehl and the Riehl Loan Program;

r. Respondent TSC received no additional capital when Respondent Riehl transferred his debt to Respondent TSC through Respondent TSC's sales of Notes; and

s. The notes receivable from TSC Property Management, listed as assets on Respondent TSC's 2015 and 2016 balance sheets, which Respondent provided to potential investors as evidence of Respondent TSC's financial condition, did not exist.

DoBS Exhibit 22; DoBS Exhibit 44 (*Joint Stipulations of the Parties*), paragraphs 9 and 10; NT at 170 – 171, 173, 197 – 198, 199 – 200, 201, 202, 206 – 207.

86. Redacted is the chairman of two Mennonite church committees that advise Respondent TSC and Respondent Riehl in light of their insolvency and inability to make payments to Respondent TSC's investors and the Riehl Investors. NT at 364 – 365.

87. Redacted joined the committees in the beginning of 2018. NT at 370.

88. As of March 31, 2018, Respondent TSC had issued Investment Account Statements indicating the following balances on the investment accounts of 18 Pennsylvania residents who had invested with Respondent TSC, for an aggregate total of $1,414,099.89:

Investor name/Location	Balance on investment account with Respondent TSC	Citation to page within DoBS Exhibit 17

Redacted	Myerstown, PA	$ 0.00	000272
Redacted	Myerstown, PA	$ 40,138.03	000273
Redacted	Ephrata, PA	$ 44,261.91	000277
Redacted	Myerstown, PA	$ 7,360.93	000305
Redacted	Fredericksburg, PA	$ 69,559.72	000310
Redacted	Myerstown, PA	$ 121,482.57	000342
Redacted	Fredericksburg, PA	$ 56,073.56	000348
Redacted	Greencastle, PA	$ 27,503.81	000349
Redacted	Waynesboro, PA	$ 0.00	000353
Redacted	New Holland, PA	$ 555.51	000373
Redacted	Bethel, PA	$ 496,427.56	000374
Redacted	Hanover, PA	$ 0.00	000388
Redacted	Carlisle, PA	$ 278,931.22	000389
Redacted	Liverpool, PA	$ 27,846.48	000397
Redacted	Quarryville, PA	$ 109,327.83	000399
Redacted	Chambersburg, PA	$ 0.00	000405
Redacted	Chambersburg, PA	$ 33,429.60	000406
Redacted	Myerstown, PA	$ 101,201.16	000408
Total		**$1,414,099.89**	

DoBS Exhibit 17.

89. The committee that advises Respondent TSC was created in August or September 2018, comprises multi-million dollar business owners, none of whom has any experience in bankruptcy restructuring, and can only offer advice to Respondents, which is not binding on Respondents. NT at 365, 371, 372, 374.

90. As of the date of the hearing, the committee that advises Respondent TSC had advised Respondent TSC to freeze all payments to Note holders, but the committee did not have a plan by which Respondent TSC would begin to repay Respondent TSC's investors. NT at 377, 378 – 379.

91. As of the date of the hearing, Respondent TSC did not have the cash flow sufficient to pay its debts, and was struggling to continue its operations, so the chance of Respondent TSC's being able to pay its investors back was very small. NT at 367, 375 – 376.

92. Respondents received the *Orders to Show Cause* and all other pleadings and notices filed in this matter, filed *Answers* to the *Orders to Show Cause*, appeared at the hearing, were

represented by counsel, presented evidence on their own behalf, and filed post-hearing briefs. Department records;[1] NT at 13 – 14 and *passim*.

[1]Official notice is taken of the filings made 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). While, in accordance with 1 Pa. Code § 35.125(d)(1), those filings constitute "formal documents upon which hearings are fixed" which "shall, without further action, be considered as parts of the record as pleadings" so that official notice of their filing may be taken, those pleadings cannot "be considered as evidence of fact other than that of the filing thereof unless offered and received in evidence in under this part." 1 Pa. Code § 35.125(d)(2). Accordingly, no findings of fact have been based on the content of any pleadings unless those pleadings have been admitted into the record.

CONCLUSIONS OF LAW

1. The Department has jurisdiction in this matter. 1972 Act, sections 601(a) and 702, 70 P.S. §§ 1-601(a) and 1-702.

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. Finding of Fact 92.

3. As the majority owner and a member of Respondent TSC with control over Respondent TSC, Respondent Riehl was an "affiliate" of Respondent TSC, as that term is defined by section 102(b) of the 1972 Act, 70 P.S. § 1-102(b), and as such, caused Respondent TSC to commit acts which violated the 1972 Act. Findings of Fact 1 – 2, 4, 8, 9, 10, 50, 51.

4. As an owner and member of Respondent TSC with control over Respondent TSC, Respondent Byers was an "affiliate" of Respondent TSC, as that term is defined by section 102(b) of the 1972 Act, 70 P.S. § 1-102(b), and as such, caused Respondent TSC to commit acts which violated the 1972 Act. Findings of Fact 1 – 2, 3, 8, 10, 40, 50.

5. As an owner and member of Respondent TSC with control over Respondent TSC, Respondent E Martin was an "affiliate" of Respondent TSC, as that term is defined by section 102(b) of the 1972 Act, 70 P.S. § 1-102(b), and as such, caused Respondent TSC to commit acts which violated the 1972 Act. Findings of Fact 1 – 2, 6, 8, 10, 32, 50.

6. As an owner and member of Respondent TSC with control over Respondent TSC, Respondent D Martin was an "affiliate" of Respondent TSC, as that term is defined by section 102(b) of the 1972 Act, 70 P.S. § 1-102(b), and as such, caused Respondent TSC to commit acts which violated the 1972 Act. Findings of Fact 1 – 2, 5, 8, 9, 10, 46, 50, 56, 57.

7. Under the 1972 Act, "any note" is a "security," so the Notes that Respondent TSC

issued were "securities" within the meaning of section 102(t) of the 1972 Act. 70 P.S. § 1-102(t); Findings of Fact 45, 47, 48, 49, 57, 58, 59.

8. The Notes sold by Respondents were not exempt from registration under section 202 of the 1972 Act, were not federally covered securities, and Respondents' offer and sale of the Notes was not an exempt transaction under section 203 of the 1972 Act. 70 P.S. §§ 1-102(f.2), 1-202, 1-203; Findings of Fact 45 – 67.

9. Respondent TSC was the "issuer" of the Notes within the meaning of section 102(i) of the 1972 Act. 70 P.S. § 102(i); Findings of Fact 45, 47, 48.

10. The Respondents offered and sold 20 Notes to 15 Pennsylvania residents without first registering under the 1972 Act and without being exempt from the 1972 Act, in willful violation of section 201 of the 1972 Act, 70 P.S. § 1-201. Findings of Fact 47, 48, 50, 53.

11. Respondents failed to disclose, to some or all of Respondent TSC's investors, information concerning Respondent TSC that was material, in that it was information that a reasonable investor would want to know in order to accurately evaluate the risk of investing in Respondent TSC. *TSC Industries, Inc., et al. v. Northway, Inc.*, 426 U.S. 438 (1976); Findings of Fact 54, 55, 62, 63, 66, 67, 80, 81, 82, 83, 84, 85.

12. In light of the circumstances under which Respondent's omissions of material information occurred, i.e. the offering or sale of securities for the purpose of investment, the omissions were misleading, so Respondents omitted, in connection with the offer and sale of the Notes, to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, in willful violation of section 401(b) of the 1972 Act, 70 P.S. § 1-401(b). *Com. v. Stockard*, 413 A.2d 1088 (Pa. 1980); Findings of Fact 54, 55, 62, 63, 66, 67, 80, 81, 82, 83, 84, 85.

13. Respondents' failure to disclose material information concerning Respondent TSC to some or all of Respondent TSC's investors, as well as Respondents' providing of false information, in the form of listing nonexistent notes receivable as assets on Respondent TSC's 2015 and 2016 balance sheets, constituted acts, practices or a course of business by Respondent TSC, Respondent Riehl, Respondent Byers, Respondent D Martin, and Respondent E Martin, in connection with the offer and sale of the Notes, which operated or would operate as a fraud or deceit upon any person, in willful violation of section 401(c) of the 1972 Act, 70 P.S. § 1-401(c). *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963); Findings of Fact 54, 55, 62, 63, 66, 67, 80, 81, 82, 83, 84, 85.

DISCUSSION

Burden of proof

This is an administrative action. The degree of proof required to establish a case before an administrative tribunal in an administrative action is a preponderance of the evidence. *Lansberry v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). The preponderance of the evidence standard, which is

> the lowest evidentiary standard, is tantamount to "a more likely than not" inquiry. *Carey v. Dep't of Corr.*, 61 A.3d 367, 374 (Pa. Cmwlth. 2013). Courts describe a preponderance of the evidence as evidence that has sufficient weight to "tip the scales on the side of the plaintiff," *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854, 856 (Pa. 1950), and as "such proof as leads the fact-finder . . . to find that the existence of a contested fact is more probable than its nonexistence," *Sigafoos v. Pa. Bd. of Prob. & Parole*, 94 Pa. Commw. 454, 503 A.2d 1076, 1079 (Pa. Cmwlth. 1986).

Pa. State Police v. Slaughter, 138 A.3d 65, 73 – 74 (Pa. Cmwlth. 2016).

In the *Post-Hearing Brief of Respondents*, citing *Lansberry, supra*, Respondents agreed that the burden of proof before administrative tribunals is a preponderance of the evidence. *Post-Hearing Brief of Respondents*, page 6. However, in the *Post-Hearing* ***Reply*** *Brief of Respondents* (emphasis added), without explanation, Respondents changed their stance, asserting that the Department had misstated the burden of proof, and further, Respondents maintained that the burden to prove fraud in a civil matter, clear and convincing evidence, applies in this administrative action. *Post-Hearing Reply Brief of Respondents*, page 2.

But Respondents cite no authority for their position, citing only cases that address the burden of proof for common law fraud in the civil courts. *Id.* In citing those cases, Respondents overlook the distinctions between this administrative enforcement matter, under the 1972 Act, and common law fraud matters. One such distinction is that this case has been initiated before the agency, rather than in civil court, so it is an administrative action, before an administrative tribunal.

Also, the Department here proceeds under a statute, rather than pursuant to the common law, and seeks a very specific administrative remedy, authorized in the statute, for a very specific administrative violation, defined in the statute, rather than a civil remedy for common law fraud.

Another distinction is found in the fact that the 1972 Act specifically defines "fraud" and "deceit" as follows:

* * *

> **(h)** "FRAUD," "DECEIT" and "DEFRAUD" *are not limited to common law fraud or deceit.*

* * *

70 P.S. § 1-102(h) (emphasis added). This definition clearly broadens the terms "fraud" and "deceit" beyond the confines of common law definitions of fraud or deceit.

When the broadened definition from the 1972 Act is added to the facts that the offenses charged in this case are statutorily-defined administrative offenses, which are not the equivalent of common law fraud, and the remedies sought here are statutorily-prescribed remedies that an administrative agency, rather than a civil or criminal court, is authorized to impose, it follows, logically, that the statutory administrative offenses charged should be subject to the administrative action burden of proof, rather than to the burden of proof that applies to common law fraud or deceit. All of these factors, then, support the determination that the appropriate burden of proof in this matter is proof by a preponderance of the evidence, the typical burden which applies in an administrative action.

Violations

Section 201, 70 P.S. § 1-201

The order to show cause charged Respondents with 20 willful violations of section 201 of the 1972 Act, which provides as follows:

Section 201. Registration requirement

It is unlawful for any person to offer or sell any security in this State unless the security is registered under this act, the security or transaction is exempted under section 202 or 203 hereof or the security is a federally covered security.

70 P.S. § 1-201. The following definitions from the 1972 Act are pertinent to a charge under section 201:

Section 102. Definitions

* * *

(l) "ISSUER" means any person who issues or proposes to issue any security, . . . Members of unincorporated associations, which members have limited liability, and any trustee or member of a trust, committee or other legal entity shall not be deemed to be an "issuer" for the purposes of this act.

* * *

(n) "PERSON" means an ***individual, corporation***, partnership, association, joint stock company, syndicate, trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, government, political subdivision of a government, ***or any other entity***.

* * *

(r)(i) "SALE" or "SELL" includes every sale, disposition or exchange, and every contract of sale of, or contract to sell, a security or interest in a security for value or any issuance of securities pursuant to any merger, consolidation, sale of assets or other corporate reorganization, involving the exchange of securities, in whole or in part, for the securities of any other person.

(ii) "OFFER" or "OFFER TO SELL" includes every direct or indirect attempt or offer to sell or dispose of, or solicitation of an offer to purchase, a security or interest in a security for value.

* * *

(t) "SECURITY" means ***any note***; . . . All of the foregoing are securities whether or not evidenced by written document.

* * *

(w) "WILFUL AND WILFULLY" mean the following:

> (1) As used in all sections of the act except section 511 with respect to a wilful violation of section 401(a) of the act, and notwithstanding any law or statute to the contrary, wilful means that the person acted intentionally in the sense that ***the person intended to do the act and was aware of what the person was doing. Proof of*** evil motive or intent to violate the act or ***knowledge that the person's conduct violated the act is not required.***
>
> * * *

70 P.S. § 1-102(n), (r), (t), (w) (emphasis added). Based on this last definition, no proof of intent to violate the Act, or knowledge that the person's conduct violates the Act, is required for a violation of the Act to exist. Therefore, even a "wilful" violation of the Act, under these definitions, is a strict liability offense, which is one that permits the finding of a violation and imposition of a sanction regardless of whether the person knew or should have known that their conduct was violative of the law. *See, for example, Pa. Liquor Control Bd. v. Tlk*, 544 A.2d 931, 932 (Pa. 1988).

Based on these definitions, all five Respondents meet the definition of "person," and Respondent TSC's Notes were "securities" that were the subject of an "offer to sell," and "sale," by Respondent TSC, the "issuer," to its investors. Indeed, Respondent TSC has admitted that it sold its Notes to investors, and that it did so without having registered as required by section 201. *Post-Hearing Brief of Respondents*, page 2, last full paragraph. Moreover, based on the above definition of "wilful," the sale of the Notes was "wilful" if the person (1) intended to sell the Notes and (2) was aware that they were selling the Notes; the person did not need to know that the selling of the Notes violated the 1972 Act. On this point, Respondent TSC also has admitted that its conduct in selling the Notes was "wilful," as the 1972 Act defines the term. *Post-Hearing Brief of Respondents*, page 2, last full paragraph.

Additionally, the evidence at the hearing indicates that at least 20 of those Notes were sold to at least 15 Pennsylvania residents. DoBS Exhibit 44 (*Joint Stipulations of the Parties*),

paragraph 8; DoBS Exhibit 13, pp. 81, 82, 90, 91, 100, 101, 132, 158, 161, 186, 187, 188, 189, 210, 213, 223, 226, 234, 235, 236. (For purposes of section 201, the Department has no jurisdiction over offers to sell which are not directed to, or received by, an offeree in Pennsylvania,[2] so only the 20 Notes sold to Pennsylvania residents are in question under section 201.) Therefore, the Department has proved by a preponderance of the evidence that Respondent TSC willfully violated section 201 of the 1972 Act, 70 P.S. § 1-201, with regard to the 20 Notes sold to Pennsylvania residents.

The next question is whether the Individual Respondents violated section 201 with regard to the 20 Notes sold to Pennsylvania residents, or are responsible for Respondent TSC's violation of section 201. As to the Individual Respondents, the evidence indicates the following. At all relevant times, including during the time Respondent TSC offered and sold the Notes, all four of them were owners of Respondent TSC and served on Respondent TSC's Board. At the Respondent TSC Board meetings, which occurred about three times a year, the Board members discussed the need for additional capital and made major decisions; indeed, any major decision was supposed to be discussed at a Board meeting.

Respondent Riehl, who was the majority owner of Respondent TSC with a 58% interest, came up with the idea of selling notes in Respondent TSC to the Mennonite community in order

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[2]The scope of the 1972 Act is limited by section 702, which provides, in pertinent part, as follows:

§ 1-702. Scope of act

* * *

(b) For the purpose of this section, an offer to sell or to purchase is made in this State, whether or not either party is then present in this State, when the offer originates from this State or is directed by the offeror to this State and received by the offeree in this State; provided, however, ***for the purpose of section 201 an offer to sell which is not directed to or received by the offeree in this State is not made in this State.***

* * *

70 P.S. § 1-702(b)(emphasis added).

to raise capital for Respondent TSC. Also, Respondent Riehl handled anything pertaining to the Notes. When capital came in from the sale of Notes, Respondent Riehl would pass the capital along to Respondent D Martin. Respondent D Martin, who was Respondent TSC's Chief Operating Officer and had a 2.5% ownership interest in Respondent TSC, would issue the Notes with his signature on them. Clearly, both Respondent Riehl and Respondent D Martin (1) intended to sell the Notes and (2) were aware that they were selling the Notes.

Respondent Byers had an ownership interest in Respondent TSC that dated to Respondent TSC's founding in 2000, and owned approximately 18% of Respondent TSC at all relevant times. Beginning in 2015, he was at Respondent TSC pretty much every day, participating in all daily aspects of the business except what went on in the front office. He attended Board meetings, at which there were discussions about finances and the need to obtain additional capital. Respondent Byers was in Tasmania from October 2015 through March 2016, when the sale of the Notes began, but he nonetheless knew there were some Notes being handled. This evidence indicates that Respondent Byers (1) intended to sell the Notes and (2) was aware that they were selling the Notes.

Respondent E Martin is an owner/member of Respondent TSC with approximately a 20% interest, and while he had nothing to do with its day-to-day operations, he sat on Respondent TSC's Board and participated at meetings, where there were discussions about the need for funds because the balance was low. However, he did not attend all Board meetings, and at the Board meetings he attended, there were never any discussions about the sale of Notes for capital. He had no involvement in the sale of the Notes, and although no one informed him about the Notes, neither did he take any steps to find out what was going on.

Overall, this evidence indicates that Respondent Riehl, a "person" as defined in the 1972 Act, handled anything pertaining to the Notes. A corporate person can only act through its member

persons who are individuals, *c.f. Walacavage v. Excell 2000*, 480 A.2d 281, 284 (Pa. Super. 1984) (a corporation can do no act except through its agents), so this evidence supports the determination that Respondent Riehl was the individual person who actually sold the Notes to Respondent TSC's investors on behalf of Respondent TSC. This evidence also indicates that Respondent Riehl intended to sell, and was aware that he was selling, the Notes. Given the definition of "wilful," it doesn't matter whether Respondent Riehl knew the Notes should be registered with the Department or not. Therefore, the evidence supports the finding that Respondent Riehl willfully violated section 201 as an individual.

But besides Respondent Riehl's violation of section 201 as an individual, this evidence supports the determination that, as owners/members of Respondent TSC, who sat on Respondent TSC's Board of Directors, which discussed and made any major decisions through and at Board meetings, each of the Individual Respondents possessed, directly or indirectly, the power to direct or cause the direction of the management and policies of Respondent TSC. In short, the Individual Respondents had "control" of Respondent TSC, as defined in the 1972 Act. That definition is as follows:

* * *

> (g) "CONTROL" (including the terms "controlling," "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

* * *

70 P.S. § 1-102(g). Based on the evidence adduced at the hearing and this definition, then, each of the Individual Respondents had some element of control of Respondent TSC.

From the fact of the Individual Respondents' control of Respondent TSC flows the additional conclusion that each of the Individual Respondents was an "affiliate" of Respondent

TSC, as that term is defined in the 1972 Act:

* * *

> **(b)** An "AFFILIATE" of, or a person "AFFILIATED" with, a specified person, means a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the person specified.

* * *

70 P.S. § 1-102(b). Here, the "specified person" is Respondent TSC, and the evidence indicates that the Individual Respondents are the persons that directly controlled Respondent TSC, so they are "affiliates" of Respondent TSC. As affiliates possessing that control, the Individual Respondents, therefore, were responsible for the actions of Respondent TSC. Conversely, due to their control over Respondent TSC, Respondent TSC's conduct, for purposes of the 1972 Act, is attributable to the Individual Respondents as affiliates. Accordingly, the evidence tips in favor of the conclusion that all of the Individual Respondents willfully violated section 201 as individuals.

Respondents argue that there is insufficient evidence that the Individual Respondents had control over Respondent TSC because there is no operating agreement, providing the percentage interest of the voting members needed for Respondent TSC to take any action, in the record. *Post-Hearing Brief of Respondents*, page 9. However, the evidence adduced the hearing, discussed above, constitutes *prima facie* evidence that the Individual Respondents exercised "control" and were "affiliates" of Respondent TSC, as those terms are defined in the 1972 Act. To the extent that Respondents desired to rebut that *prima facie* evidence, it was Respondents' responsibility to produce evidence showing something different, in terms of each Individual Respondent's control over Respondent TSC. Indeed, any operating agreement that exists would be a document within Respondents' control, but they did not produce it to rebut the actual evidence in the record. Accordingly, the unrebutted evidence is sufficient to tip the evidentiary scale in favor of the

determination that the Individual Respondents had "control" over and were "affiliates" of Respondent TSC, as those terms are defined in the 1972 Act.

Respondents also argue that principles of agency law make Respondent TSC solely liable for its actions under the common law. *Post-Hearing Brief of Respondents*, page 6. However, as already discussed, this is not a common law proceeding. Rather, it is an administrative enforcement action that proceeds under the very specific statutory provisions of the 1972 Act. Accordingly, it is those provisions, rather than the common law, which govern in this administrative enforcement proceeding.

Section 401(b), 70 P.S. § 1-401(b)

The order to show cause also charged Respondents, based on the sale of a total of 175 Notes, with 175 willful violations of section 401(b) of the 1972 Act, which provides as follows:

> **Section 401. Sales and purchases**
> It is unlawful for any person, in connection with the offer, sale or purchase of any security in this State, directly or indirectly:
>
> * * *
>
> **(b)** To make any untrue statement of a material fact or to 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
>
> * * *

70 P.S. § 1-401(b).

Based on this language, an offense under section 401(b) comprises the following elements:

1. Any person
2. In connection with the offer sale or purchase of
3. Any security
4. Directly or indirectly
5. a. Makes an untrue statement of material fact

or

5. b. Omits to state a material fact
6. Necessary to make the statements or omissions not misleading

7. In light of the circumstances under which the statements or omissions are made

As already discussed, all five Respondents met the definition of "person," the Notes were "securities" that were the subject of an "offer to sell" and "sale" by Respondents, and all of the Individual Respondents were "affiliates" of Respondent TSC, making them responsible for the actions of Respondent TSC and making Respondent TSC's conduct attributable to them. Accordingly, any statements or omissions by Respondent TSC, who in the sale of the Notes acted through Respondent Riehl directly, are indirectly attributable to the other Individual Respondents. Therefore, the first four elements above are present.

As for element 5, Respondents made untrue statements of material fact about Respondent TSC's assets on the 2015 and 2016 balance sheets provided to a small number of investors. Those balance sheets, for 2015 and 2016, contained false information, because they listed notes receivable from TSC Property Management as assets, in the amounts of $19,344.18 and $37,298.42, when those notes receivable did not exist. Misrepresenting the corporation's assets is material, because it impacts on the apparent viability of the corporation because increased assets make it a better investment. A reasonable investor would want accurate information about the assets of the corporation in which they are considering investing. *See TSC Industries, Inc., et al. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Therefore, such information is material.

Additionally, by providing the written Notes to Respondent TSC's investors, which specifically indicated that the Notes were payable on demand, with 60 days' notice, at interest rates between 4% and 5%, Respondents represented that Respondent TSC would return the investors' funds under those conditions. Moreover, by sending the letter of April 22, 2016 to Respondent TSC's investors, which explained that Respondent TSC's investors could purchase either a simple demand Note which offered a 4.5% interest rate, or a Note with a one-year term which offered a

5% interest rate, and that the proceeds from the Notes would be used to help build a cheese inventory, Respondents made similar representations. A reasonable investor would want information about the corporation which would enable it to know if the corporation would be able to deliver on these promises.

But in fact, at the very time Respondents made all of these representations to Respondent TSC's investors, both potential and actual, Respondent TSC was incapable of delivering on what had been promised, because it was so deep in debt to those investors that it was actually insolvent. And yet, Respondent TSC did not provide any information to potential investors to allow them to make this determination and, accordingly, to judge the risk of their investment in Respondent TSC. A reasonable investor would want to be able to do that. Therefore, a preponderance of the evidence demonstrates element 5, in that Respondents made untrue statements of material fact to investors, both about Respondent TSC's assets and about Respondent TSC's ability to adhere to the terms it had offered to investors for their investments. It follows that all five elements of the first type of violation of section 1-401(b) have been demonstrated by a preponderance of the evidence.

In addition to that, elements 5, 6 and 7 of the *second* type of violation of section 1-401(b) are also present. This is apparent from the evidence indicating that, in making the offer to sell the Notes, Respondents failed to provide any offering materials which would have disclosed any pertinent facts to potential investors about Respondent TSC. Similarly, no one at Respondent TSC prepared or provided any formal disclosures to its investors, aside from a balance sheet and profit and loss statements, which Respondent Riehl provided to fewer than 20 potential investors *only* when the potential investor actually requested financial information about Respondent TSC. A reasonable investor would want all of this information in order to make an informed decision about whether it was wise to invest in Respondent TSC or not.

Because of these failures, Respondents omitted to provide Respondent TSC's investors with any of the following information:

a. An accurate description of Respondent TSC's financial condition;

b. The financial risk of investing in Respondent TSC's Notes;

c. The identity and relevant background of Respondent TSC's corporate officers;

d. Respondent TSC's operating history;

e. Respondent Riehl's purchase of his ownership interest in Respondent TSC using funds loaned to Respondent Riehl by Riehl Investors through the Riehl Loan Program;

f. Respondent E Martin's purchase of his ownership interest in Respondent TSC using funds loaned to Respondent E Martin by E Martin Investors through the E Martin Loan Program;

g. Respondents D Martin, E Martin, and Riehl had borrowed money from other individuals to fund personal loans to Respondent TSC;

h. The lack of documentation of personal loans to Respondent TSC from Respondents D Martin, E Martin and Riehl;

i. Respondent Riehl's receipt of a total of at least $954,250 in checks from Respondent TSC's bank accounts from in or about December 2015 until February 2018;

j. Respondent Byers' receipt of a total of at least $31,688 in checks from Respondent TSC's bank accounts from in or about September 2015 until February 2018;

k. Respondent E Martin's receipt of a total of at least $40,000 in checks from Respondent TSC's bank accounts in or about August 2016;

l. Respondent D Martin's receipt of a total of at least $379,930 in checks from Respondent TSC's bank accounts from in or about December 2015 until January 2018;

m. Respondent TSC made payments to Respondents D Martin, E Martin, Byers, and Riehl before making any payments to the Respondent TSC's investors;

n. At all relevant times, Respondent TSC was insolvent and unable to fulfill its financial obligations stemming from the sale of its Notes;

o. From in or about July 2015 to March 2018, Respondent TSC paid Agri-Service $921,804.07, resulting in an overpayment $253,301.50 more than the amount invoiced by Agri-Services;

p. Respondent TSC's payments to Agri-Service were inconsistent with Agri-Service's invoices to Respondent TSC;

q. In 2016, the SEC began an investigation of Respondent Riehl and the Riehl Loan Program;

r. Respondent TSC received no additional capital when Respondent Riehl transferred his debt to Respondent TSC through Respondent TSC's sales of Notes; and

Besides failing to disclose that information to potential investors, Respondents also failed to use much of the funds raised from the Notes as promoted, i.e. as additional capital for building cheese inventory. Instead, a majority of the Notes that Respondent TSC sold simply took the debt Respondent Riehl owed to the Riehl Investors and transferred that debt to Respondent TSC, thereby eliminating Respondent Riehl's personal liability to the Riehl Investors. And that occurred without Respondent Riehl's making any of the Riehl Investors – or any of Respondent TSC's investors – aware of it. In fact, Respondent TSC received no additional capital when Respondent Riehl transferred his debt to Respondent TSC through the sales of Respondent TSC's Notes. Respondent TSC's investors did not know that, either.

And instead of paying investors back when funds were available, Respondent TSC's funds during the period in question went to overpay Agri-Service, Respondent D Martin's company, $253,301.50 more than it had invoiced, as well as to pay Respondent Riehl $938,250 for repayment of short term loans, Respondent Byers $31,688 for reimbursement of monies that he expended on behalf of Respondent TSC (which is essentially the same as a short-term loan), Respondent E Martin $40,000 for the repayment of short term loans, and Respondent D Martin $379,390.00,

primarily for the repayment of short term loans. As Respondent Byers testified, their expenses were handled in such a way that made their interests supersede the Note holders' interests, in that Respondents were reimbursed before Note holders were paid.

Respondents assert that Respondent TSC neither made any untrue statement of material fact nor omitted any material fact that was necessary in order to make the statements made not misleading, in light of the circumstances under which they were made. But *Commonwealth v. Stockard*, 413 A.2d 1088 (Pa. 1980), with analogous facts, does not support Respondents' argument. There, Stockard sold shares of corporate stock and used the proceeds to repay personal loans instead of investing the money in the corporation. Among other things, he was charged under and found guilty of violating this same provision, section 401(b), 10 P.S. § 1-401(b). On appeal, he asserted that there was insufficient evidence to support his conviction under that provision. However, the Pennsylvania Supreme Court determined that, by selling the stock to five investors and not informing them of his intention to pay a personal creditor with the proceeds from the sales, Stockard omitted to state material facts which were necessary in order to make his statements regarding the corporation not misleading. *Stockard*, 413 A.2d at 1091.

The same thing is true here. By selling Notes to investors in Respondent TSC without informing them of the legion of omitted facts enumerated earlier, including the fact that rather than raising additional capital, to be used for building cheese inventory, a majority of the Notes that Respondent TSC sold would simply eliminate Respondent Riehl's debt and personal liability, Respondents omitted to state material facts which were "necessary" in order to make their statements about Respondent TSC "not misleading." *Id.* Accordingly, all seven elements of the second type of violation of section 1-401(b) are present here, demonstrated by a preponderance of the evidence.

Section 401(c), 70 P.S. § 1-401(c)

Lastly, the order to show cause charged Respondents with 175 (again, based on the number of Notes sold) willful violations of section 401(c) of the 1972 Act, which provides as follows:

> **Section 401. Sales and purchases**
> It is unlawful for any person, in connection with the offer, sale or purchase of any security in this State, directly or indirectly:
>
> * * *
>
> **(c)** To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.
>
> * * *

70 P.S. § 1-401(c).

Based on this language, an offense under section 401(c) comprises the following elements:

1. Any person
2. In connection with the offer sale or purchase of
3. Any security
4. Directly or indirectly
5. Engages in any act, practice or course of business
6. Which operates or would operate as a fraud or deceit on any person.

The first four of these elements are identical to the first four elements of an offense under section 401(b). Accordingly, the analysis under section 401(b), above, applies here as well, and the first four elements are present for purposes of section 401(c).

As to Element 5, the evidence indicates that Respondents engaged in the following acts, practices, or course of business. From in or about February 2015 until October 2017, Respondent TSC offered and sold at least 175 Notes to at least 110 investors within the United States for an aggregate amount of at least $7,803,829; Respondent TSC offered and sold at least 20 of those Notes to at least 15 Pennsylvania residents for an aggregate amount of at least $963,104; no one at Respondent TSC registered the Notes with the Department; no one at Respondent TSC prepared

or used any offering materials to promote the sale of the Notes; and no one at Respondent TSC prepared or provided any formal disclosures to its investors, with the exception of some of Respondent TSC's tax returns and financial statements, in the form of a balance sheet and profit and loss statements, which Respondent Riehl provided to fewer than 20 potential investors only when the potential investor actually requested financial information on Respondent TSC. Accordingly, a preponderance of the evidence supports the existence of Element 5.

Element 6 is that Respondents' acts, practices or course of business operated or would operate as a fraud or deceit on any person. Here, the evidence discussed earlier indicates that, while engaged in the acts, practices or course of business described above, Respondents omitted to provide Respondent TSC's investors with material information of various kinds and made outright misrepresentations to Respondent TSC's investors about Respondent TSC's assets and how Respondent TSC would use the investors' funds.

As already discussed above, the 1972 Act's definition of "fraud" and "deceit" at section 102(h), 70 P.S. § 1-102(h), clearly broadens the terms "fraud" and "deceit" beyond the confines of the common law definitions of fraud or deceit. Therefore, the use of those terms in section 401(c), which makes it unlawful "[t]o engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person," 70 P.S. § 1-401(c), must be taken as prohibiting actions that beyond the confines of that common law definition.

Indeed, the United States Supreme Court has analyzed substantially identical language found in federal law, the Investment Advisers Act, 15 U.S.C. § 80b-6(2), which prohibits an investment adviser from engaging in any practice which "operates as a fraud or deceit upon any client or prospective client." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 181 (1963). In that case, the Court found that fraud, as used in that statutory language, has a broader

meaning than at common law, a meaning which encompasses nondisclosure, without the requirement of any intent to defraud or misrepresent. *Id.* at 193, 195. Furthermore, the Court has been consistent in its analysis of the phrase, "*operates* or *would operate* as a fraud or deceit," finding in *Aaron v. SEC*, 446 U.S. 680, 697 (1980), that no scienter is required in the face of that language, because the language "quite plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than upon the culpability of the person responsible." *Id.*

Significantly, the Court in *Capital Gains Research Bureau* also ruled that "[f]ailure to disclose material facts *must be deemed fraud or deceit* within" the intended meaning of that statutory language. *Capital Gains Research Bureau, supra*, 375 U.S. at 200 (emphasis added). Given this analysis by the highest court in the land of the same phrase, "operates as a fraud or deceit upon," the *Capital Gains Research Bureau* case should be followed in this case. Accordingly, Respondents' omission of – or failure to disclose – material facts when offering its Notes for sale operated as a fraud or deceit upon Respondent TSC's investors. Element 6 has been demonstrated by a preponderance of the evidence, so all of the elements necessary to find a violation of section 401(c), 70 P.S. § 1-401(c), are present.

Respondents assert that the language of section 401(c) is unconstitutionally vague. *Post-Hearing Reply Brief of Respondents*, page 9. However, given the guidance provided by the United States Supreme Court's construction of the identical language in *Capital Gains Research Bureau* and *Aaron, supra*, there is no merit to be found in this argument. The language in question clearly is capable of a construction that provides a concrete meaning. Respondents argue in their Reply Brief that the intent of the United States Congress in promulgating identical language (and, by extension, the applicability of federal case law construing that language) is not relevant in construing the 1972 Act. But in fact, the 1972 Act specifically states, in section 703(a), "Statutory

policy," that

> [t]his act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact the "Uniform Securities Act" and *to coordinate the interpretation and administration of this act with related Federal regulation.*

70 P.S. § 1-703(a) (emphasis added). In the face of this specific language, Respondent's argument cannot succeed, and the United States Supreme Court's determinations in *Capital Gains Research Bureau* and *Aaron, supra*, hold sway.

Willfulness

Respondents assert their violations of sections 401(b) and (c) were not willful, arguing that the Department must prove that they had the *intent* to defraud or commit deceit. But the rulings in *Capital Gains Research Bureau* and *Aaron, supra,* indicate that the term "fraud," as used in the nearly identical provisions in federal law, "quite plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than upon the culpability of the person responsible," requiring no scienter, *Aaron* at 697, and "intention to defraud or misrepresent is not a necessary element" of fraud under the statutory language. *Capital Gains* at 193 and 195. These U.S. Supreme Court determinations are consistent with the 1972 Act's definitions of "fraud" and "willful": "fraud" is broader than the common law meaning, and "wilful" means the actor intended to do the act, not that the actor intended to violate the law or commit a crime. Therefore, Respondent's actions were willful, as the 1972 Act defines the term, and the argument that their violations of sections 401(b) and (c) were not willful cannot be credited.

Sanction

The remaining question is the appropriate sanction. In the order to show cause, the Department first requested that an order be issued pursuant to section 305 of the 1972 Act, 70 P.S. § 1-305, suspending, revoking, or conditioning the registrations of all five Respondents, or

censuring all five Respondents. However, while section 305(a), 70 P.S. § 1-305(a), certainly authorizes the Department to deny, suspend, revoke or condition *any registration* or censure *any registrant*, there is no evidence in this case that any of the Respondents is a registrant or possesses a registration. Accordingly, section 305 is inapplicable.

The Department's second prayer for relief in the order to show cause requests that an order be issued pursuant to section 512 of the 1972 Act, which provides, in pertinent part, as follows:

> **§ 1-512. Statutory bars**
> **(a)** After giving notice and opportunity for a hearing, the department, where it has determined that a person wilfully violated this act or any rule or order thereunder or knowingly aided in the act or transaction constituting such violation, may issue an order accompanied by written findings of fact and conclusions of law which bars, conditionally or unconditionally and either permanently or for such period of time as the department shall determine, such person from:
>
> (1) Representing an issuer offering or selling securities in this State;
> (2) Acting as a promoter, officer, director or partner of an issuer (or an individual occupying a similar status or performing similar functions) offering or selling securities in this State or of a person who controls or is controlled by such issuer;
> (3) Being registered as a broker-dealer, agent, investment adviser or investment adviser representative under section 301 of the 1972 Act;
> (4) Being an affiliate of any person registered under section 301 of the 1972 Act; or
> (5) Relying upon an exemption from registration contained in section 202, 203 or 302.

10 P.S. § 1-512(a). In this case, per the discussion above, the determination has been made that all five Respondents willfully violated the 1972 Act at both sections 201 and 401(b) and (c). Accordingly, an order permanently barring Respondents from all of the activities enumerated in section 512(a) is appropriate.

The Department's third requested sanction, set forth in the order to show cause, is that Respondents be ordered to effect a rescission offer pursuant to section 513 of the 1972 Act. Section

513 provides as follows:

> **§ 1-513. Department orders of rescission**
> After giving notice and opportunity for a hearing, the department, *where it has determined that an issuer wilfully violated section 201 or 401, may issue an order* accompanied by written findings of fact and conclusions of law *which requires the issuer* or any control person of the issuer who knowingly aided in the act or transaction constituting such violation *to effect a rescission offer* in a manner which the department by rule or order may prescribe to persons who purchased securities of the issuer in this State involved in the violation. The department shall not issue an order under this section with respect to any public proceeding which was instituted prior to the date of enactment.

70 P.S. § 1-513 (emphasis added). As discussed above, all Respondents have been found to have willfully violated both sections 201 and 401(b) and (c), so a rescission offer would be authorized under this provision.

The practical question, however, is whether a rescission offer is even a possibility, given the insolvency of Respondent TSC, which the Department proved by a preponderance of the evidence as part of its case. Although the Department has not provided any suggestion as to what it would seek by way of a rescission offer, the term "rescission," which is not defined in the 1972 Act, means "the act of rescinding," WEBSTER'S NEW WORLD DICTIONARY 1141 (3d coll. ed. 1994), and "rescind" means "to revoke, repeal or cancel." *Id.*

Based on these definitions, a rescission offer, seemingly, would give Respondent TSC's investors the opportunity to cancel their Notes and receive their investments back. But in light of Respondent TSC's insolvency, there is little chance that Respondent TSC actually possesses the ability to repay those investments. Accordingly, a rescission offer would be a useless exercise unless it were overseen by the Department in some way, perhaps with the Department acting as a kind of trustee in bankruptcy. As to that, the 1972 Act does not contain any provisions empowering the Department to act in such a fashion. Indeed, the Department, in its initial post-hearing brief, stated that

> a bankruptcy restructuring under Federal bankruptcy laws would be the only method of an organized repayment to TSC Investors to ensure compliance with Pennsylvania law and Federal bankruptcy law. . . Without independent oversight, there is no way to ensure a systematic and fair repayment to the TSC Investors, if any. . .

Initial Brief of Department of Banking and Securities, Bureau of Securities Compliance and Examinations ("DoBS initial brief") at 30. Accordingly, from a practical standpoint, a rescission offer would be neither effective nor appropriate in these circumstances.

The fourth sanction that the Department requested in the order to show cause is that Respondents be ordered to return to purchasers of securities in this Commonwealth, in cash, the amount of compensation received for effecting those securities transactions pursuant to section 514 of the 1972 Act, 10 P.S. § 1-514. Section 514 requires, among other things, a determination by the Department that the person against whom this sanction is assessed was "in willful violation of section 301(a)." 70 P.S. § 1-514(a). Since there has been no finding in this matter that any of the Respondents violated section 301(a), this provision is inapplicable.

The Department's fifth request for relief in the order to show cause is that Respondents be ordered to pay the costs of the investigation, pursuant to section 602.1(b) of the 1972 Act, 70 P.S. § 1-602.1(b). However, the Department presented no evidence of its costs of investigation at the hearing. Accordingly, there is no factual basis in the record to support an assessment of the costs of investigation under this provision.

The sixth and final request for relief in the order to show cause, which is also the only sanction that the Department discussed in its post-hearing briefs, is that Respondents be ordered to pay an administrative assessment of up to $100,000.00 for each act or omission constituting a willful violation of the 1972 Act, pursuant to section 602.1(c). That section provides, in pertinent part, as follows:

§ 1-602.1. Assessments

* * *

(c) . . . the department may issue an order. . . which imposes an administrative assessment in the amounts provided in paragraph (1). . . against any other person if the department determines that the person wilfully violated section. . . 401. . . .

(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.

* * *

(ii) In issuing an order against a person for wilful violation of section 401...(c)..., 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 any of those sections. . . .

* * *

(2) For purposes of determining the amount of administrative assessment to be imposed in an order issued under this subsection, the department shall consider:

(i) The circumstances, nature, frequency, seriousness, magnitude, persistence and willfulness of the conduct constituting the violation.
(ii) The scope of the violation, including the number of persons in and out of this Commonwealth affected by the conduct constituting the violation.
(iii) The amount of restitution or compensation that the violator has made and the number of persons in this Commonwealth to whom the restitution or compensation has been made.

* * *

(v) Any other factor that the department finds appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of this act.

(3) An administrative assessment imposed by an order issued under this subsection is not mutually exclusive of any other remedy available under this act.

* * *

70 P.S. §1-602.1(c). Because this proposed decision finds Respondents to have violated section 401(b) and (c), an administrative assessment authorized under this provision is clearly an available

sanction in this matter.

The Department argues in favor of an assessment as "the only way to hold Respondents accountable for their actions." DoBS Initial Brief at 29. Respondents, on the other hand, assert that a significant assessment will do more harm than good, because Respondent TSC is broke, and any funds used to pay the assessment will come from money that would otherwise be used to repay Respondent TSC's Note holders. *Post-Hearing Brief of Respondents* ("Respondents' Initial Brief") at 15, 16. But to not impose an assessment both excuses conduct by Respondents that has resulted in extraordinary outstanding debt to their investors that may never be paid, and sends a message to others similarly situated that they can violate the 1972 Act by taking millions of dollars from trusting investors without ever being called to account for such actions. Neither of these things is acceptable. Accordingly, an assessment is required.

It is, therefore, necessary to consider the factors set forth in section 602.1(c)(2) in arriving at a determination as to the appropriate amount of the assessment. The first consideration is the circumstances, nature, frequency, seriousness, magnitude, persistence and willfulness of the conduct constituting the violation. The circumstances and nature of the conduct were these: Respondents took advantage of the trust within their Mennonite religious community by offering members of that community the opportunity to invest within that community by purchasing Notes in Respondent TSC, which was owned by the Individual Respondents, who were all members of the Mennonite community. The Mennonite community does not believe it is acceptable to declare bankruptcy or sue someone. Additionally, the Mennonite community may excommunicate a member for engaging in an "unequal yoke," which is a partnership with those who do not hold the same beliefs as the Mennonites. Based on those beliefs, Mennonites would be looking for partnerships within the Mennonite community, which Respondents offered. Also, Respondents

told Respondent TSC's potential investors that they were raising the funds through the Notes to keep Respondent TSC growing and operating, when in fact Respondent TSC was insolvent and among other things, had had to borrow $2 million dollars to meet payroll in the seven years prior to the issuance of the Notes.

As for the frequency, seriousness, magnitude, and persistence of the conduct, Respondents did this at least 175 times over a period of approximately two and a half years, despite the fact that the SEC had initiated an investigation during that time. And Respondents sent letters to some of Respondent TSC's investors, after they had invested, seeking additional investment on the promise that Respondent TSC needed cash to build up its cheese inventory. That demonstrates both frequency and persistence.

The seriousness and magnitude of the conduct are evident from the fact that Respondents raised an aggregate amount of at least $7,803,829 from their investors in their religious community, including an aggregate amount of at least $963,104 from Pennsylvania residents, and as of the date of the hearing, the chance of Respondent TSC's being able to pay its investors back was very small. It is reasonable to find that Respondent TSC's investors will never get their invested savings back. That is the highest level of seriousness.

On the issue of willfulness, the evidence indicates that, rather than raising additional capital, as had been represented to Respondent TSC's investors, a majority of the Notes that Respondent TSC sold simply took the debt Respondent Riehl owed to the Riehl Investors and transferred that debt to Respondent TSC. In so doing, Respondent Riehl eliminated his personal liability to the Riehl Investors, made Respondent TSC liable for Respondent Riehl's debt, and produced no additional capital for Respondent TSC. And his fellow owners, who attended Board meetings, at which they discussed Respondent TSC's financial condition and the need to obtain

additional funding, and who knew about the issuance of the Notes, would have been aware of this. Based on the definition of "wilfull" and "wilfully" in the 1972 Act, i.e. that the person intended to do the act and was aware of what the person was doing, without the need for proof of any evil motive, intent to violate the 1972 Act, or knowledge that the person's conduct violated the 1972 Act, this evidence clearly indicates a significant level of willfulness.

The second consideration under section 602.1(c)(2) is the scope of the violation, including the number of persons in and out of this Commonwealth affected by the conduct constituting the violation. On this point, the evidence demonstrates that from in or about February 2015 until October 2017, Respondent TSC offered and sold at least 175 Notes, to at least 110 investors within the United States, for an aggregate amount of at least $7,803,829, and during the same period, Respondent TSC offered and sold at least 20 Notes to at least 15 Pennsylvania residents for an aggregate amount of at least $963,104. To reiterate, as of the date of the hearing, the chance of Respondent TSC's being able to pay those 110 people back was very small. Therefore, at least 110 people, both in and out of the Commonwealth, have been negatively affected by the Respondents' conduct, to the tune of at least $7,803,829.

The third consideration is the amount of restitution or compensation that the violator has made and the number of persons in this Commonwealth to whom the restitution or compensation has been made. As of the date of the hearing, in the event a Note holder should demand payment, Respondent TSC was not capable of paying any of the Notes it had issued, and the chance of Respondent TSC's being able to pay its investors back was very small. The number of persons in the Commonwealth to whom Respondent TSC had sold Notes was at least 20, according to the *Joint Stipulations of the Parties*, Exhibit DoBS 44. Moreover, according to Investment Account Statements that Respondent TSC issued, as of March 31, 2018, Respondent TSC still owed an

aggregate of $1,414,099.89 to 14 of the 18 investors in Pennsylvania to whom it issued Investment Account Statements. (There were not Investment Account Statements provided for three of the Pennsylvania residents to whom Respondents issued Notes. *See* DoBS Exhibit 13, pp. 100, 101 and 158 and *compare* DoBS Exhibit 17.) Therefore, Respondent has made very little restitution or compensation to very few persons in the Commonwealth.

Lastly, section 602.1(c)(2) requires consideration of any other factor that the Department finds appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of the 1972 Act. A number of such factors exist, all of which point to unconscionable behavior by the Respondents and thus support the determination that an assessment should be made.

First, Respondents D Martin, E Martin, and Riehl borrowed from other individuals to fund their personal loans to Respondent TSC, and they commingled the borrowed funds with their own, so that they could not tell which funds they used for what purpose. Also, all four of the Individual Respondents were owners of Respondent TSC when it offered and sold the Notes. Moreover, Respondent TSC paid back loans made to it by the Individual Respondents, reimbursed them for money they had expended on behalf of Respondent TSC (which is similar to a loan), and paid the Individual Respondents' affiliated companies, including Respondent Byers' trucking business, and Respondent D Martin's business, Agri-Services, before making any payments to Respondent TSC's investors, so the Individual Respondents benefited before Respondent TSC's investors did.

Besides that, Respondent TSC's net worth as of December 31, 2015 was a loss of $525,957.71, and its net worth as of December 2016 was a loss of $6,064,264.02. As of December 31, 2015, Respondent TSC had liabilities in excess of the fair value of its assets, so Respondent TSC met the second definition of "insolvency" and was "insolvent" by the end of 2015. Similarly,

as of December 31, 2016, Respondent TSC was unable to pay its debts as they came due in the usual course of its business and also had liabilities in excess of the fair value of its assets, so Respondent TSC met both definitions of "insolvency" and was "insolvent" at the end of 2016. In fact, at all relevant times, Respondent TSC was insolvent and unable to fulfill its financial obligations stemming from the sale of the Notes. Also, from 2008 until 2014, the seven years before Respondents issued the Notes, Respondent Riehl had loaned Respondent TSC $2,000,000 just to enable it to make payroll.

These figures show a significantly negative financial situation, even if Respondents did not know the actual definitions of "insolvency" and "insolvent" under the 1972 Act. The Individual Respondents, with their life and business experience, maintain that they did not understand the significance of this information. But they owned Respondent TSC and attended its Board meetings, at which "there were sometimes discussions about finances and the need to obtain additional capital," and "discussions about the need for funds at times because the balance was low." Therefore, they had information about Respondent TSC's negative finances.

Furthermore, Respondent Riehl clearly knew Respondent TSC was not in good financial condition for the prior seven years, because he knew it could not meet payroll. Additionally, in 2012 and 2013, members of the Mennonite community had raised concerns to Respondent Riehl about the Riehl Loan Program, so he knew that others in his community viewed his loan program as problematic. On top of that, at some point prior to September 2016, the federal SEC began an investigation of the Riehl Loan Program and Respondent Riehl. From that investigation, Respondent Riehl understood that there was a problem with his being the middle man in the Riehl Loan Program, borrowing money and then loaning it to other people. This means he also knew that his loan program was problematic from a regulatory standpoint.

Nonetheless, despite the SEC's investigation in 2016 and Respondent Riehl's understanding of the problem with being the middle man in the Riehl Loan Program, borrowing money and then loaning it to other people, and commingling the borrowed funds with his own, Respondent Riehl continued to loan borrowed money to Respondent TSC from 2015 to 2018, and Respondent TSC continued to offer and sell Notes into 2017. Furthermore, Respondent Riehl and Respondent D Martin continued to engage in the issuance of Notes, even after it became problematic for Respondent TSC, by taking funds forwarded by investors for investment in Respondent TSC and putting them into Agri-Services instead – conduct which is the same as the conduct that led to Respondent TSC's unpayable debt.

Respondent D Martin had access to Respondent TSC's QuickBooks file, so he could be informed about Respondent TSC's financial condition. And then, when funds came in from the sale of Notes, Respondent Riehl would pass the funds along to Respondent D Martin, as Respondent TSC's Chief Operating Officer, and Respondent D Martin would issue the Notes with his signature on them. Therefore, Respondent D Martin had knowledge about Respondent TSC's financial condition.

Like Respondent Riehl, Respondent E Martin had no way of distinguishing his own money from his investors' money, which all went into the same account, with no clear separation, and a lack of accounting for how much was his and how much belonged to his investors. Therefore, like Respondent Riehl, Respondent E Martin commingled his personal assets with funds he borrowed from E Martin Investors for investment in the E Martin Loan Program, and Respondent E Martin purchased his ownership interest in Respondent TSC using funds he had borrowed from the E Martin Investors for investment in the E Martin Loan Program. Respondent E Martin also sat on Respondent TSC's Board and participated at meetings, where there were discussions about the

need for funds at times because the balance was low. Therefore, he knew about Respondent TSC's financial condition.

As for Respondent Byers, his expenses related to Respondent TSC were handled in such a way that his interest superseded the Note holders' interests, in that he was reimbursed before Note holders were paid. And like the others, Respondent Byers attended Board meetings, at which there were discussions about finances and the need to obtain additional capital. Therefore, he knew that Respondent TSC's financial condition was problematic.

All of this evidence demonstrates unconscionable actions by the Individual Respondents. But they argue that they are unsophisticated and lacked the education to understand the ramifications of what they were doing. However, the lack of formal education does not equate with not understanding financial transactions; people can learn about money and finances without going to school to do so. For example, Respondent Riehl has been a tax accountant for 26 or 27 years, demonstrating he has a level of understanding of financial matters greater than that of the average person who might need to secure the services of a tax accountant.

Similarly, Respondent E Martin completed a correspondence course in accounting from LaSalle Extension University in Chicago, and does tax preparation for a living, which again demonstrates a level of understanding of financial matters greater than that of the average person. And Respondent Byers has operated a small trucking business for 30 years, so he clearly possesses a level of business understanding that has allowed him to keep his business running that entire time. Likewise, Respondent D Martin has operated Agri-Services since 2001 and has owned it since 2015. Based on the fact that, from in or about July 2015 to March 2018, Agri-Services invoiced Respondent TSC $668,502.57 for various supplies and services provided to Respondent TSC, Agri-Services was bringing in hundreds of thousands of dollars a year from just a single

client. Certainly, that demonstrates the Respondent D Martin possesses a high level of business understanding sufficient to operate a nearly million-dollar business.

Based on these factors, the Individual Respondents are far more sophisticated, and have a much higher business and financial acumen, than they would like the tribunal to believe. Therefore, without more, the Individual Respondents' lack of formal education does not mean that they did not understand what they were doing. On the contrary, their longtime vocations and business experience suggest that they did. Indeed, in the context of all of this evidence, it is simply unbelievable that they had no inkling of the scale of Respondent's losses. These, then, are additional factors to consider in the public interest and for the protection of investors.

As a consequence of all of the foregoing considerations, there are justifications for different sanctions in this matter. First, with regard to Respondents' willful violations of section 201, an order permanently barring Respondents from all of the activities enumerated in section 512(a) is the only sanction available. That sanction is also available as to Respondents' willful violations of section 401(b) and (c). Accordingly, such a bar will be included in the proposed order.

More significantly, however, the factors set forth in section 602.1(c)(2) for arriving at a determination as to the appropriate amount of the assessment weigh very heavily against Respondents. Although Respondents argue that they are unable to pay an assessment and that any assessment will only take away from Respondent TSC's ability to repay its investors, neither the Respondents' ability to pay, nor the impact an assessment will have on Respondent TSC's ability to repay investors, is a consideration authorized by section 602.1(c)(2).

The purpose of an assessment, like the purpose of a civil penalty in other regulatory contexts, is remedial in nature, designed to deter similar behavior in future, both by Respondents and by other persons, and in so doing, to protect the public. *Blair v. B.P.O.A.*, 72 A.3d 742, 750

(Pa. Cmwlth. 2013); *Nicoletti v. State Board of Vehicle Manufacturers, Dealers and Salespersons*, 706 A.2d 891, 894 – 895 (Pa. Cmwlth. 1998). Respondents have demonstrated that they will continue to engage in similar behavior, as they have been doing by redirecting funds sent to them for investment in Respondent TSC by issuing Notes from Agri-Services. In light of that fact, an assessment with significant deterrent effect is warranted.

The Department requested that all five Respondents be ordered to pay an administrative assessment of $25,000 for each of the 175 violations of section 401(c), 10 P.S. § 1-401(c), for a total assessment in the amount of $4,375,000, pursuant to section 602.1(c), 70 P.S. § 1-602.1(c). Under the circumstances, that recommended assessment is commensurate with the required level of deterrence. 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 Compliance	:	
and Examinations,	:	**Docket No. 180099 (SEC-OSC)**
Petitioner	:	
	:	
v.	:	
	:	
Trickling Springs Creamery, LLC,	:	
Philip Elvin Riehl,	:	
Gerald A. Byers,	:	
Elvin M. Martin,	:	
Dale L. Martin,	:	
Respondents	:	

PROPOSED ORDER

AND NOW, this 5th day of **December, 2019,** in accordance with the foregoing findings of fact, conclusions of law and discussion, it is **ORDERED** that Trickling Springs Creamery, LLC, Philip Elvin Riehl, Gerald A. Byers, Elvin M. Martin, and Dale L. Martin ("Respondents") shall pay an **ADMINISTRATIVE ASSESSMENT** of **$25,000.00** for each of the 175 violations of section 401(c), 10 P.S. § 1-401(c), found in this matter, for a total assessment in the amount of **$4,375,000,** pursuant to section 602.1(c) of the 1972 Act, 70 P.S. § 1-602.1(c). The Respondents shall be jointly and severally liable for payment of the assessment. Respondents shall make said payment within 30 days, or within such other period agreed to by the Department, 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.

IT IS FURTHER ORDERED, in accordance with section 512(a) of the 1972 Act, 10 P.S. § 1-512(a), that Respondents are permanently barred from:

(1) Representing an issuer offering or selling securities in the Commonwealth;
(2) Acting as a promoter, officer, director or partner of an issuer (or an individual occupying a similar status or performing similar functions) offering or selling securities in the Commonwealth or of a person who controls or is controlled by such issuer;
(3) Being registered as a broker-dealer, agent, investment adviser or investment adviser representative under section 301 of the 1972 Act, 10 P.S. § 1-301;
(6) Being an affiliate of any person registered under section 301 of the 1972 Act, 10 P.S. § 1-301; or
(7) Relying upon an exemption from registration contained in section 202, 203 or 302, 10 P.S. §§ 1-202, 1-203, or 1-301.

This Proposed Order shall be effective as a Final Order in accordance with 1 Pa. Code § 35.226(a)(3) in 40 days unless a Brief on Exceptions is filed within 30 days in accordance with 1 Pa. Code § 35.211 or the Secretary initiates a review within 40 days in accordance with 1 Pa. Code § 35.226(a)(2).

BY ORDER:

Redacted

Ruth D. Dunnewold
Hearing Examiner

For the Commonwealth:

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Date of mailing: 12/6/19

FILED

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF BANKING AND SECURITIES

2019 DEC -6 AM 9:39

PA DEPARTMENT OF
BANKING AND SECURITIES

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF BANKING AND SECURITIES, BUREAU OF SECURITIES COMPLIANCE AND EXAMINATIONS PETITIONER, v. TRICKLING SPRINGS CREAMERY, LLC PHILIP ELVIN RIEHL GERALD A. BYERS ELVIN M. MARTIN DALE L. MARTIN RESPONDENT.	: : : : : : : : : : : : : : : :	**Docket No. : 180099 (SEC-OSC)**

CERTIFICATE OF SERVICE

I hereby certify that on December 6th, 2019, 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:

33.31 (relating to service by agency), in the manner indicated below:

By Hand-Delivery and Electronic Mail:

Seamus D. Dubbs, Esquire
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By:

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Linnea Freeberg, Docket Clerk
PA Department of Banking and Securities
17 North Second Street, Suite 1300
Harrisburg, Pennsylvania 17101

COMMONWEALTH OF PENNSYLVANIA
BANKING AND SECURITIES COMMISSION

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF BANKING AND SECURITIES, BUREAU OF SECURITIES COMPLIANCE AND EXAMINATIONS	:	**Docket No.: 180099 (SEC-OSC)**
v.	:	
TRICKLING SPRINGS CREAMERY, LLC **PHILIP ELVIN RIEHL** **GERALD A. BYERS** **ELVIN M. MARTIN** **DALE L. MARTIN**	:	

CERTIFICATE OF SERVICE

On behalf of the agency, I certify that I have this day caused to be served a copy of the foregoing *Final Order* upon the following persons pursuant to 1 Pa. Code §§ 33.31:

BY CERTIFIED AND FIRST-CLASS MAIL:

Norman E. Greenspan, Esq.
Starfield & Smith, P.C.
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Fort Washington, PA 19034
Counsel for the Respondents

BY HAND DELIVERY:

Stefanie Hamilton, Acting Chief Counsel
David B. Murren, Assistant Counsel
Seamus D. Dubbs, Assistant Counsel
Commonwealth of Pennsylvania
Department of Banking and Securities
17 North Second Street, Suite 1300
Harrisburg, PA 17101
Counsel for the Bureau of Securities Compliance and Examinations

Dated this 31st day of January, 2020

Redacted

Linnea Freeberg, Docket Clerk
PA Banking and Securities Commission
17 N. 2nd Street, Suite 1300
Harrisburg, PA 17101
Telephone: (717) 787-5783