BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter: THE CALIFORNIA CORPORATIONS COMMISSIONER, Complainant, Vs. BENCHMARK FINANCIAL SERVICES, INC., a California corporation and STEVEN ARTHUR SCOTT, an individual doing business as BENCHMARK FINANCIAL SERVICES, Respondents.	OAH No. L2006090112

ORDER OF REJECTION OF PROPOSED DECISION
AND REFERRAL TO ADMINISTRATIVE LAW JUDGE
FOR RECONSIDERATION
(Government Code Section 11517(c)(2)(D))

The California Corporations Commissioner hereby rejects the Proposed Decision In the Matter of THE CALIFORNIA CORPORATIONS COMMISSIONER v. BENCHMARK FINANCIAL SERVICES, INC., a California corporation and STEVEN ARTHUR SCOTT, an individual doing business as BENCHMARK FINANCIAL SERVICES, dated February 8, 2007, and refers the matter to Administrative Law Judge Ralph B. Dash, if reasonably available, otherwise to another administrative law judge for reconsideration. (Govt. Code,§ 11517(c)(2)(D); Cal. Code Regs., tit. 1, § 1050.)

The issues to be considered shall include, but not be limited to, the following:

1) Whether the California Corporations Commissioner should deny Respondents' application for a certificate as an investment adviser under subdivisions (c) and (e) of Corporations Code Section 25232;

2) Whether the California Corporations Commissioner may deny an application for an investment adviser certificate under subdivisions (d)(1) and (d)(2) of Corporations Code Section 25232, where the Accusation does not charge these grounds for denial;

3) Whether the record supports denying an investment adviser certificate under subdivision (d)(1) and/or (d)(2) of Corporations Code Section 25232; and

4) Whether Respondent Steven Arthur Scott should be barred from any position of employment, management or control of any investment adviser, broker-dealer or commodity adviser pursuant to Corporations Code Section 25232.1 for acts committed as specified under subdivisions (c) and (e) of Corporations Code Section 25232.

DATED: MAY 24, 2007

CALIFORNIA CORPORATIONS COMMISSIONER

Preston DuFauchard

BEFORE THE
DEPARTMENT OF CORPORATIONS
OF THE STATE OF CALIFORNIA

In the Matter of: THE CALIFORNIA CORPORATIONS COMMISSIONER, Complainant, Vs. BENCHMARK FINANCIAL SERVICES, INC., a California corporation and STEVEN ARTHUR SCOTT, an individual doing business as BENCHMARK FINANCIAL SERVICES, Respondents.	OAH No. L2006090112

PROPOSED DECISION

Ralph B. Dash, Administrative Law Judge, Office of Administrative Hearings, heard this matter on November 20 and 21, 2006, at Los Angeles, California.

Alex M. Calero, Corporations Counsel, represented Complainant.

Patrick J. Burns, Jr., Attorney at Law, represented Benchmark Financial Services, Inc, a California corporation (Benchmark, Inc.) and Steven Arthur Scott, (Scott), individually and doing business as Benchmark Financial Services

The record was left open until January 2, 2007 for the parties to submit closing and reply briefs. Both parties submitted closing briefs. Complainant submitted a reply brief; Respondent did not. The matter was deemed submitted on January 2, 2007.

Oral and documentary evidence having been received and the matter having been submitted, the Administrative Law Judge makes the following Proposed Decision.

FINDINGS OF FACT

1. Preston DuFauchard prepared and filed the charging allegations in his official capacity as the California Corporations Commissioner (Commissioner) of tee Department of

Corporations (Department). Although the operative pleading herein is denominated as an Accusation, the charging allegations frame a Statement of Issues.[1]

2. At the hearing of this matter, the parties stipulated that some of the charging allegations are true, and may be deemed established without requiring evidence to be presented thereon.[2] Accordingly, the following allegations are found to be true:

a. On or about December 12, 1993, Scott registered with the Department as a securities broker-dealer agent (CRD number 1174431). From that time, until 1999, Scott was employed by various securities broker-dealer firms.

b. On or about May 19, 1995, the National Association of Securities Dealers, Inc. (NASD), a self-regulatory organization authorized by Congress to regulate the activities of securities broker-dealers, censured and fined Scott $2,500 for violations of Article III, sections 1 and 43, of the NASD Rules of Fair Practice. Scott signed a Letter of Acceptance, Waiver and Consent stating, "Scott received compensation . . . from public customers . . . in connection with his participation in outside business activities in that he provided financial planning and advisory services to these customers for a fee." Further, the Letter of Acceptance, Waiver and Consent indicates "[t]hat these services were outside the scope of Scott's relationship with his employer firm."[3]

c. On or about April 30, 1999, Scott was terminated by his employer firm, located in Southern California, based on that company's determination that "Scott borrowed money from 13 clients and charged investment advisory fees to 13 clients without proper qualification""

d. On or about September 27, 1999, Scott applied for an Orange County Fictitious Business License for a business named "Benchmark Financial Services."

e. On or about December 7, 2000, the NASD fined Scott $15,000 and suspended him from associating with any NASD member for two years, for violations of NASD rules 2110,

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[1] The objective of this proceeding, as set forth in the pleadings, is to determine whether Benchmark's application for an investment adviser certificate should be granted. Government Code section 11504 provides, "A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed shall be initiated by filing a statement of issues." Government Code section 11503 provides, "A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation"

[2] Although not required to do so, the Commissioner did present substantial evidence to support the charging allegations to which the stipulation applies. However, in light of the stipulation, it is unnecessary to summarize that evidence in this Proposed Decision.

[3] Although not part of the Stipulation, it is found that the gravamen of the Letter was to chastise Respondent for doing business without his employer's knowledge; however Respondent's acceptance of the Letter also constitutes an admission that Scott was not independently licensed to perform these activities.

3030 and 3040.[4] Scott signed a Letter of Acceptance, Waiver and Consent stating that during April 1995 through May 1998, "Scott sold securities in the form of promissory notes to 13 public customers," raising approximately $160,000. "Scott told investors that their funds would be used to finance his company called Master Market Forum ('MMF'). MMF was a developmental stage company through which Scott intended to conduct financial planning seminars and produce video tapes." "With respect to three of the customers . . . Scott charged them $500 annually in exchange for various financial planning services." Further, the Letter of Acceptance, Waiver and Consent indicates that Scott engaged in these activities without first receiving permission from his employer firm (see, footnote 3).

f. In or about 1999, Scott began providing investment advice to California residents in connection with his business, Benchmark Financial Services. Benchmark Financial Services provides services including asset management, investment management and portfolio analysis and evaluation. Further, Benchmark Financial Services researches "picks" and recommends mutual funds for clients to invest in.

g. Benchmark Financial Services receives compensation for the investment advisory services it provides to California residents. Benchmark Financial Services charges a fee, which can reach up to $2,000 per client, for developing and drafting financial plans. Further, for Benchmark Financial Services' mutual fund research and recommendations, clients are charged a 1% annual fee based on the balance held in clients' mutual fund accounts. The fee is charged in semi-annual increments on December 31 and June 30, which is billed to clients in January and July, respectively.

h. Scott estimated that Benchmark Financial Services has about 40 clients with approximately $15,000,000 invested in mutual funds. Thus, Benchmark Financial Services receives approximately $150,000 in commissions annually as a result of the 1% fee charge to clients for the mutual fund research and recommendations.

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[4] Official Notice is taken of the following: NASD rule 2110 states, "A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." NASD rule 3030 provides, "No person associated with a member in any registered capacity shall be employed by, or accept compensation from, any other person as a result of any business activity, other than a passive investment, outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member. Such notice shall be in the form required by the member. Activities subject to the requirements of Rule 3040 shall be exempted from this requirement." NASD rule 3040 (a) provides, "No person associated with a member shall participate in any manner in a private securities transaction except in accordance with the requirements of this Rule." NASD rule 3040 (b) provides in part, "Prior to participating in any private securities transaction, an associated person shall provide written notice to the member with which he is associated describing in detail the proposed transaction and the person's proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction; . . . ." NASD rule 3040 (e)(2) provides: "'Selling compensation' shall mean any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security, including, though not limited to, commissions; finder's fees; securities or rights to acquire securities; rights of participation in profits, tax benefits, or dissolution proceeds, as a general partner or otherwise; or expense reimbursements."

i. In order to attract new clients, Benchmark Financial Services hosts monthly seminars.[5] Attendees commonly receive a free meal at the seminar. Solicitation materials provided to seminar attendees identify Scott as "founder of BENCHMARK FINANCIAL SERVICES . . . an independent financial planner and Registered Investment Advisor."

j. On June 16, 2006, the Department filed an application for a temporary restraining order (TRO) and accompanying civil complaint against Scott individually and doing business as Benchmark Financial Services in Orange County Superior Court, case number 06OC07158. That same date, Judge Nakamura signed the TRO enjoining Scott and Benchmark Financial Services, in relevant part, from violating California Corporations Code sections 25230 and 25235 by engaging in unlicensed investment adviser activity and distributing solicitation materials containing untrue statements of material fact, respectively.

k. On July 11, 2006, as a result of stipulation by all parties, Judge Andler entered a preliminary injunction enjoining Scott individually and doing business as Benchmark Financial Services from further violations of the California Corporations Code.

l. On July 28, 2006, Scott filed an application with the Commissioner for a certificate to engage in the business of an investment adviser under the name Benchmark Financial Services, Inc., a California corporation (Benchmark, Inc.) incorporated on July 13, 2006 (CRD # 141086). The application identifies Scott as the president and chief compliance officer of Benchmark, Inc., and Deborah Anne Scott (CRD # 5184854) is its secretary. Scott is the registered agent for service of process for Benchmark, Inc.

m. In or about 1999, Scott began providing investment advice to California residents in connection with his business, Benchmark Financial Services. Scott provides financial services including asset management, investment management and portfolio analysis and evaluation. Scott also conducts market research and monitoring, and recommends investment opportunities to clients. Scott receives compensation for the investment advice he provides.

n. Scott, in conducting said investment adviser business, is an investment adviser with the meaning of California Corporations Code section 25009.

o. At all relevant times, neither Scott nor Benchmark Financial Services possessed a certificate from the Commissioner authorizing them to engage in the business activities of an investment adviser. Further, neither Scott nor Benchmark Financial Services are exempt from the provision of California Corporations Code section 25230 requiring investment advisers to obtain a certificate from the Commissioner.

3. On June 30, 2001, the then California Corporations Commissioner issued a Desist and Refrain Order to Scott under the provisions of California Corporations Code section

[5] Although not part of the stipulation, the evidence shows these seminars are geared towards retirees and senior citizens.

25532 alleging that Scott had "acted as an investment adviser in violation of Section 25230 . . ." The basis for issuance of this Order was not set forth therein, nor was evidence for such basis presented at the hearing of this matter. No proof was provided that Scott had ever been served with this Order. It apparently had been sent to Scott by certified mail, at Scott's correct address, but was returned to the Department marked "unclaimed."[6]

4. The solicitation materials referred to in Finding 2i were substantially unchanged from month to month or year to year. In the seminar packet for April 5, 2006, Scott refers to himself as "personal financial and investment advisor since 1983." He used the same language in packets presented at two other seminars in 2006. On September 28, 2005, Scott used slightly different language--in the written materials, he referred to himself as, "a personal financial planner since 1983 and an independent investment advisor." He used this same language in packets handed out in at least nine seminars he held during 2004 and 2005. In his retainer agreements, he would refer to himself either as "financial planner/investment advisor" or "Registered Investment Advisor."[7]

5. Respondent is licensed by the Department of Insurance and estimates that 75% of his income comes from "the insurance side" of his business, with the remainder from the "investment" side. Since the initiation of these proceedings, Respondent has declined to take a fee for his investment advisory services. Respondent has hired "Beverly Hills Regulatory," a firm that ensures investment advisors properly comply with licensing laws. Respondent stated that he had not realized he needed to be licensed by the Department for rendering his financial planning services. Given his lengthy background in this area, Respondent's protestations of ignorance are given little weight. In any event, as noted below, "ignorance of the law is no excuse." Similarly, Respondent's contention that his repeated violations of the Corporate Securities Law were unintentional are not persuasive. As set forth below, Respondent "willfully" violated the law, as that term is defined by California case law.

* * * * *

CONCLUSIONS OF LAW

1. The standard of proof in this proceeding is "preponderance of the evidence," meaning that respondent is obliged to adduce evidence that has more convincing force than that opposed to it. The administrative law judge applies this standard of proof because respondent is applying for a license in which he currently holds no vested interest. *(San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1893.)

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[6] Respondent's made much of the fact that there was no proof this Order had been served, and thus Scott had not been put on notice as to the facts upon which the Order was based. However, the Accusation/Statement of Issues does not contain any charging allegations with respect to any of the alleged violations which prompted the issuance of the Order, nor any charging allegations regarding any alleged violations of the Order.

[7] Respondent argued that his use of the latter term was de minimis. That is of no moment. As set forth in the Conclusions of Law, the statutes require licensure for the use of <u>any</u> title whereby one refers to himself as an "investment advisor," whether or not "registered."

2. The California Corporate Securities Act was designed to prevent deception, exploitation of ignorance, and all unfair dealings in the issuance of securities. It was also designed to protect the public against imposition of unsubstantial, unlawful and fraudulent stock and investment schemes, and securities based thereon. (*Sandor v Ruffer, Ballan & Co.* (1970, SD NY) 309 F.Supp. 849, 854; *People v Jaques* (1955) 137 Cal.App.2d 823, 832.)

3. Corporations Code section 25009 states, in relevant part:

> (a) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as a part of a regular business, publishes analyses or reports concerning securities . . . .
>
> (b) "Investment adviser" also includes any person who uses the title "financial planner" and who, for compensation, engages in the business, whether principally or as part of another business, of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as part of a regular business, publishes analyses or reports concerning securities . . . .

4. Corporations Code section 25232 states, in pertinent part:

> The commissioner may, after appropriate notice and opportunity for hearing, by order censure, deny a certificate to, or suspend for a period not exceeding 12 months or revoke the certificate of, an investment adviser, if the commissioner finds that the censure, denial, suspension, or revocation is in the public interest and that the investment adviser, whether prior or subsequent to becoming such . . . .
> [¶] . . . [¶]
>
> (d) Is or has been subject to (1) any order of the Securities and Exchange Commission or the securities administrator of any other state denying or revoking or suspending his or her registration as an investment adviser, or investment adviser representative, or as a broker or dealer or agent, (2) any order of any national securities association or national securities exchange (registered under the Securities Exchange Act of 1934) suspending or expelling him or her from membership in that association or exchange or from association with any member thereof . . . .

Therefore, under Corporations Code section 25232, grounds would exist to deny respondent's application for a certificate as an investment advisor if denial would be in the

public interest and the investment advisor had done any of the items enumerated under the statute.

5. In determining whether denial of respondent's application for a certificate as an investment advisor is in the public interest, the Corporations Commissioner must consider certain factors relevant to that determination. Because federal precedents reflect the same interests as those underlying Corporations Code section 25232, they furnish reliable authority in construing that section. Thus, it is appropriate to adopt and apply a set of factors that has been used by the SEC in administrative disciplinary proceedings when determining whether, based on the particular circumstances and the entire record of a case, a remedial, disciplinary sanction is in the public interest. (See, e.g., *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 658.)

Such a federal precedent was established in *In The Matter Of Marshall E. Melton and Asset Management & Research, Inc.* (July 25, 2003) 2003 SEC Lexis 1767. In *Melton*, a proceeding before the SEC, a registered investment adviser and its president, who was also associated with a registered broker-dealer, were permanently enjoined, with their consent, from violating antifraud provisions of the securities laws.

> The Commission's determination that a remedial, disciplinary sanction is in the public interest is based on the particular circumstances and entire record of the case. The Commission considers a range of factors relevant to that determination, including: the seriousness of the violation; the isolated or recurrent nature of the violation; the respondent's state of mind; the sincerity of the respondent's assurances against future violations; the respondent's recognition of the wrongful nature of the misconduct; the respondent's opportunity to commit future violations; the age of the violation; and the degree of harm to investors and the marketplace resulting from the violation.

(*Id.* at pp. 4-5.)

6. As indicated in *Melton*, in disciplinary proceedings in which an injunctive complaint was settled by consent, the SEC considers the allegations in the complaint and the circumstances surrounding the injunctive action when making a public interest determination. The SEC has found that such complaints are clearly relevant and has adopted the policy in administrative proceedings based on consent injunctions that the injunctive allegations may be given considerable weight in assessing the public interest. (*Melton, supra*, 2003 SEC Lexis 1767 at pp. 6.)

> [T]he mere issuance of the injunctions, the validity of which has not been attacked, furnishes a statutory basis for revocation if we find such action to be in the public interest. We are of the view that, whether or not the decrees are res judicata, we need not litigate the factual assertions made in the injunctive proceedings in here resolving the issue of public interest, but may give consideration to the fact that registrant has been twice enjoined from

> engaging in fraudulent and improper conduct in connection with the purchase and sale of securities. . . . [¶] . . . [¶] Thus, the Commission has concluded that a consent injunction, "no less than one issued after trial upon a determination of the allegations, may furnish the sole basis for remedial action . . . if such action is in the public interest." [Footnote omitted.] Indeed, the mere existence of an injunction may support revocation of registration or a bar from participation in the securities industry where the nature of the acts enjoined and the circumstances indicate that such is in the public interest.

(*Id.* at pp. 7-8.)

7. With respect to Scott's claim that he simply did not know that he needed to be licensed to conduct his investment advisory activities, the courts have long held that "ignorance of the law is no excuse." This doctrine was best explained in *Hale* v. *Morgan* (1978) 22 Cal.3d 388 at page 396:

> Speaking many years ago within a criminal context, we amplified the principle in this way: "It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof. Of course it is based on a fiction, because no man can know all the law, but it is a maxim which the law itself does not permit any one to gainsay. . . . The rule rests on public necessity; the welfare of society and the safety of the state depend upon its enforcement. . . . [If permitted] the plea [of ignorance] would be universally made, and would lead to interminable questions incapable of solution. Was the defendant in fact ignorant of the law? Was his ignorance of the law excusable? The denser the ignorance the greater would be the exemption from liability. The absurdity of such a condition of the law is shown in the consummate satire of Pascal, where, speaking upon this subject, he says, in substance, that although the less a man thinks of the moral law the more culpable he is, yet under municipal law 'the more he relieves himself from a knowledge of his duty, the more approvedly is his duty performed.'" (citing, *People* v. *O'Brien* (1892) 96 Cal.171 atp. 176.)

8. California case law is clear as to what the term "willful" means. The court in *In re Jerry R.* (1994) 29 Cal.App. 4th 1432 at 1438 noted the long standing definition as follows:

> The terms 'willful' and 'willfully', as used in penal statutes, imply 'simply a purpose or willingness to commit the act...' without regard to motive, intent to injure, or knowledge of the act's prohibited character... The terms imply that the person knows what he is doing, intends to do what he is doing, and is a free agent... Stated another way, the term 'willful' requires only that the prohibited act occur intentionally... (citations omitted)

9. In *Tellis v. Contractor's State License Board*, 79 Cal.App. 4th 153 at 159 (2002), the court had to determine whether a contractor had willfully violated trade standards in

connection with a construction project. In essence, the *Tellis* court held that, in the construction project at issue, there were so many defects of such a varied nature by an experience contractor, that a reasonable inference could be drawn that the contractor willingly and/or knowingly departed from trade standards. Much the same can be said for Respondents in this matter. Scott has been in the investment business for well over twenty years. He has worked for licensed investment advisors, and knows the industry very well. His failure to obtain the appropriate license under these circumstances leads to the conclusion that his failure to do so was willful.

10. Complainant has established by a preponderance of the evidence that grounds exist to deny Respondents' application for an investment advisor certificate, pursuant to Corporations Code section 25232, subdivision (d)(1). (Factual Findings 2 through 5; Legal Conclusions 2 through 9.)

11. Complainant has established by a preponderance of the evidence that grounds exist to deny Respondents' application for an investment advisor certificate, pursuant to Corporation's Code section 25232, subdivision (d)(2). (Factual Findings 2a through 2e; Legal Conclusions 2 through 9.)

12. The objective of a disciplinary proceeding is to protect the public and maintain integrity, high standards, and preserve public confidence in the regulated profession or occupation.[8] The purpose of proceedings of this type is not to punish Respondents. In particular, the statutes and regulations relating to investment advisors are designed to protect the public from any potential risk of harm.[9] The law looks with favor upon those who have been properly reformed.[10] To that end, Scott bears the burden to establish his reformation against a history of violating the laws and regulations that apply to investment advisors. (See *Martin v. Alcoholic Bev. App. Bd.* (1950) 52 Cal.2d 259, 265 (the burden of proof may properly be placed upon the applicant in application proceedings).)

14. In light of the foregoing factual findings and legal conclusions, Respondents have not met his burden of establishing by a preponderance of the evidence that the Corporations Commissioner should authorize and issue him an investment advisor certificate. The fact that Respondents have been permanently or temporarily enjoined by

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[8] *Camacho v. Youde* (1975) 95 Cal.App.3d 161, 165; *Clerici v. Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1030-1031; *Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 816.

[9] *Lopez v. McMahon* (1988) 205 Cal.App.3d 1510, 1516; *Arneson v. Fox* (1980) 28 Cal.3d 440.

[10] *Resner v. State Bar* (1967) 67 Cal.2d 799, 811.

order or judgment of a court of competent jurisdiction and had been twice disciplined by other regulatory agencies has especially serious implications for the public interest. Therefore, it is in the public interest to deny Respondents' application for an investment advisor certificate.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Respondents' application for an investment advisor certificate is DENIED.

Date: 2-8-07

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings