BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of the First Amended Accusation Against: Highland Capital Group, Inc. and John McPhail, Respondents.	OAH No. 2019081064 **ORDER OF DECISION**

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Business Oversight as its Decision in the above-entitled matter.

This Decision shall become effective on June 18, 2020.

IT IS SO ORDERED this 19th day of May, 2020.

[redacted]

MANUEL P. ALVAREZ
Commissioner of Business Oversight

BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of the First Amended Accusation against:

HIGHLAND CAPITAL GROUP, INC. And JOHN MCPHAIL,

Respondents

CRD No. 2592183

OAH No. 2019081064

PROPOSED DECISION

Irina Tentser, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on March 9 and 10, 2020 in Los Angeles, California.

Marlou de Luna, Senior Corporations Counsel, and Taylor Herrlinger, Counsel, Department of Business Oversight (Department), represented complainant Manuel P. Alvarez, Commissioner of Business Oversight (Commissioner).

John McPhail (McPhail), owner and chief executive officer of Highland Capital Group, Inc. (Highland) represented himself and Highland at hearing (collectively, Respondents).

Oral and documentary[1] evidence was received. The record was closed and the matter was submitted for decision on March 10, 2020.

SUMMARY

The Commissioner established through clear and convincing evidence that an order is warranted barring McPhail from any position of employment, management or control of any investment adviser, broker-dealer, or commodity adviser pursuant to Corporations Code section 25232.1. McPhail, as an officer, employee and owner of Highland, willfully violated several provisions of the Corporate Securities Law of 1968 (CSL), regulations, and orders necessary for the protection of investors, as more fully set forth below.

FACTUAL FINDINGS

Jurisdictional Matters

1. The Commissioner brings this action in his official capacity, pursuant to Corporations Code section 25232.1 and the rules promulgated thereunder to bar McPhail from any position or employment, management or control of any investment adviser, broker-dealer, or commodity adviser.

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[1] The ALJ, without objection by the parties, ordered the redaction of the dates of birth of the consumers contained in the exhibits to protect their privacy.

2. Highland is an investment adviser licensed by the Commissioner (CRD No. 139923), pursuant to the CSL, as set forth in Corporations Code section 25000 et seq., and accompanying regulations in California Code of Regulations, title 10, section 260.000 et seq.[2]

3. Highland has its principal place of business located at 1875 Century Park East, Suite 700, Los Angeles, California 90067.

4. McPhail is, and was at all relevant times, the owner and chief executive officer of Highland, licensed as an investment adviser representative (CRD No. 2592183).

5. The Commissioner is authorized to administer and enforce the provisions of the CSL and the rules adopted under the CSL.

Respondents' CSL Violations

6. McPhail, as an officer, employee and owner of Highland, willfully violated several CSL provisions, regulations, and orders necessary for the protection of investors, as set forth below.

7. On February 22, 2016, Department examiners Anh Vu and Brian Denzler examined the books and records of Highland as part of a routine examination. Both examiners testified in a credible and convincing manner at hearing regarding the

[2] All further section and rule references are to the California Corporations Code and title 10 of the California Code of Regulations, respectively, unless otherwise noted.

examination results. In addition, corroborating contemporaneous documentary evidence was submitted into evidence at hearing regarding Respondents' violations.

8. During this examination, the Department found that Highland maintains custody of client accounts and detected several CSL violations and violations of rules adopted under the CSL. The Department communicated its findings to Highland in four regulatory letters dated March 25, June 6, July 5, and August 25, 2016.

FAILURE TO SUBMIT TO A REASONABLE EXAMINATION

9. Respondents failed to provide information from books and records during the examination, thereby not submitting to a reasonable examination by the Commissioner in violation of section 25241, subdivision (c),[3] as set forth in Factual Findings 9 through 11. Despite receiving four separate regulatory letters from the Department, Respondents failed to respond to at least 17 requests in these regulatory letters.

10. Further, as credibly testified to by former Department Supervising Corporations Examiner Maria Shimohara, who oversaw Respondents' examination, from the date of the Department's first March 25, 2016 regulatory letter to the date of the last August 25, 2016 letter, the Department gave Respondents at least four extensions to reply. Despite the extensions, Respondents failed to provide requested information, thereby failing to fully comply by submitting only partial information. As of the date of hearing, Respondents failed to respond to the Department's final August 25, 2016 letter.

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[3] See Legal Conclusion 5.

FAILURE TO COMPLY WITH BOOKS AND RECORDS REQUIREMENTS

11. Rule 260.241.3[4] requires every licensed investment adviser to keep true, accurate and current books and records. Despite four regulatory letters requesting information from the books and records of Highland, Respondents failed to provide the following to the Department:

A. General ledger, as required by Rule 260.241.3, subdivision (a)(2).

B. Account reconciliations for Charles Schwab account number xxxx2071 and Fidelity account number xxxx8970, as required by Rule 260.241.3, subdivision (a)(4).

C. Financial statements and worksheets, as required by Rule 260.241.3, subdivision (a)(6).

D. Copies of third-party manager contracts, as required by Rule 260.241.3, subdivision (a)(10).

E. Monthly computations of net worth, as required by Rule 260.241.3, subdivision (j).

FAILURE TO COMPLY WITH CUSTODY REQUIREMENTS

12. Rule 260.237[5] provides that it is unlawful and deemed to be a fraudulent, deceptive and manipulative practice or course of business for a licensed investment

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[4] See Legal Conclusion 6.

[5] See Legal Conclusion 7.

adviser to have custody of client funds, unless the investment adviser complies with certain notification of custody and verification of funds requirements.

13. Respondents engaged in fraudulent, deceptive and manipulative practices in violation of Rule 260.237, because they failed to provide: (a) notification of custody on Form ADV, as required by Rule 260.237, subdivision (a)(1), and (b) independent verification of client funds and securities, as required by Rule 260.237, subdivision (a)(6).

FAILURE TO COMPLY WITH MINIMUM FINANCIAL REQUIREMENTS

14. Rule 260.237.2, subdivisions (a), (c), (d), and (j),[6] requires an investment adviser who has custody or discretionary authority of client funds or securities to maintain a minimum net worth in accordance with generally accepted accounting principles (GAAP); and to notify the Commissioner when its net worth is less than the minimum required by rule.

15. Respondents violated Rule 260.237.2 by failing to provide the Department with (i) financial statements in accordance with GAAP demonstrating a minimum net worth, as required by Rule 260.237.2, subdivisions (a) and (d), and (ii) notification that the net worth of Highland was less than the minimum required by Rule 260.237.2, subdivisions (c) and (j).

[6] See Legal Conclusion 8.

FAILURE TO COMPLY WITH REPORTING REQUIREMENTS

16. Rule 260.241.2, subdivisions (a) and (d),[7] require every licensed investment adviser subject to Rule 260.237.2 (custody and discretionary authority) to file an annual financial report; to have the financial statements in the annual report prepared by an independent accountant; and to file interim reports when its net worth fails to meet the minimum required by law.

17. Respondents violated Rule 260.241.2 by failing to provide the Department with (i) annual reports for the most recent fiscal years, as required by Rule 260.241.2, subdivisions (a)(2) and (4), (ii) financial statements audited by an independent accountant, as required by Rule 260.241.2, subdivision (a)(3), and (iii) interim reports of net worth as required by Rule 260.241.2, subdivision (d)(2), (3), and (4).

FAILURE TO FOLLOW FAIR, EQUITABLE AND ETHICAL PRINCIPLES

18. Rule 260.238,[8] subdivisions (a), (h), and (n), for purposes of section 25238, prohibit an investment adviser from making investment recommendations without reasonable inquiry concerning a client's investment objectives, financial situation, needs, and records; prohibit misrepresenting the nature of the fees charged to clients; and prohibit investment adviser contracts that are not in writing.

19. Respondents violated Rule 260.238 by failing to provide the Department with (i) current and accurate suitability information to determine suitability for clients

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[7] See Legal Conclusion 9.

[8] See Legal Conclusion 10.

CS,[9] DP, HH, J&GF, KB, L&GB, MC, N Family Trust, S&RB, SF, and WG, as required by Rule 260.238, subdivision (a), (ii) evidence showing client fees were paid quarterly in accordance with contracts of clients D&RP, HH, CS, KB, GB, D&LM, SF, WG, and S&RB, as required by Rule 260.238, subdivision (h), and (iii) copies of written advisory contracts for clients DP, SF, and WG, as required by Rule 260.238, subdivision (n).

FAILING TO ADVERTISE ACCURATELY AND COMPLETELY

20. Rule 260.235, subdivision (a)(5),[10] for purposes of section 25235, makes it unlawful to advertise misleading statements. During the Department's examination, examiners requested revisions to Highland's website in order not to mislead the public concerning the years of experience held by Highland or McPhail. Respondents failed to update the website to clarify that Highland commenced business as a registered investment adviser in 2007, not in 2005, as implied. In addition, Respondents failed to update the website to clarify that McPhail, rather than Highland, has more than 20 years of investment experience. Based on the foregoing, Respondents violated Rule 260.235, subdivision (a)(5).

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[9] First and last name initials and abbreviations of entity names are used in lieu of Respondents' client full names and entities to protect their privacy.

[10] See Legal Conclusion 11.

Failure to Comply with Investment Adviser Representative Report Requirements

21. Rule 260.236.1, subdivision (a)(3),[11] requires an investment adviser representative to update Form U-4 within 30 days of any changes. Based on the Department's examination, Respondents reported outside business activities in its March 12, 2013 Form U-4 that McPhail advised examiners no longer exist. McPhail failed to update the Form U-4 to reflect the changes, as required. Accordingly, Respondents violated Rule 260.236.1, subdivision (a)(3).

Failure to Provide Notice of Changes

22. Rule 260.241.4, subdivision (a),[12] requires each licensed investment adviser to promptly make changes to an application. Respondents failed to update Form ADV Part 1, Item 9.A(1), of Highland's application to indicate it has custody of client accounts. As a result, Respondents violated Rule 260.241.4, subdivision (a).

Respondents' Violations of Orders

23. On December 6, 2018, the Department served on Respondents an Order to Discontinue Violations, pursuant to section 25249.[13] Respondents failed to request a hearing by January 5, 2019, so that order became final and effective. On February 21, 2019, the Department confirmed that Respondents continued to violate that Order by

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[11] See Legal Conclusion 12.

[12] See Legal Conclusion 13.

[13] See Legal Conclusion 14.

not complying with the above-referenced laws, by, among other things, overcharging investment advisory fees, as more fully described below. The Order was necessary for the protection of investors to ensure Respondents were complying with these laws that are designed to guard against mismanagement, misappropriation and misrepresentation.

24. On December 6, 2019, the Department served Notice of Intent to Levy Administrative Penalties of $270,000 pursuant to section 25252.[14] Respondents failed to request a hearing by January 5, 2019. On April 11, 12 and 15, 2019, the Department served a final and effective Order Levying Administrative Penalties of $270,000 on Respondents, giving them 30 days, until May 15, 2019, to pay the penalty to the Department. Respondents failed to pay the administrative penalty. The Order was necessary for the protection of investors to further ensure that Respondents complied with the above-referenced laws, which they both continued to violate.

Respondents' Overcharges of Investment Advisory Fees

25. SA, one of Respondents' clients since 2009, credibly testified at hearing regarding Respondents' fraudulent overcharges of investment advisory fees on her accounts. In late September 2019, SA had lunch with McPhail, which was their custom several times a year. McPhail informed SA that he had made a decision to merge with another firm and notified SA that she would be required to move her accounts from Charles Schwab to Wells Fargo. SA reluctantly agreed and received a stack of papers in the mail several weeks later, around October 2019, regarding the funds transfer.

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[14] See Legal Conclusion 15.

26. McPhail made no mention of the Department's ongoing examination of Respondents at the time of his lunch with SA. In fact, there was no merger, contrary to McPhail's false statement to SA.

27. On December 5, 2019, SA received an email and a subsequent call from Marshall Eichenhauer of Sagent Wealth Management, Inc. informing her that Respondents would not be able to manage her accounts because their certification was going to be revoked by the Department. SA became alarmed and decided to do a thorough examination of her accounts.

28. Based on her examination, SA discovered that beginning in 2015, Respondents had been overcharging her well in excess of the .90 percent fee deduction specified in the investment advisory agreement between SA and Respondents. (Exhibit 41.) Based on her calculation, Respondents had fraudulently overcharged her approximately $72,000 in excess fees between 2015 and mid-2019.

29. SA reported her findings to the Department. As a result, the Department examined and conducted a financial analysis of a sample of 12 of Respondents' client accounts records. The Department's examination revealed that beginning in at least 2015 to mid-2019, Respondents deducted advisory fees from those 12 client accounts that substantially exceeded the agreed-upon fee schedule and withdrew advisory fees much more frequently than the quarterly schedule described in the advisory agreements with clients, totaling fraudulent overcharges of investment advisory fees of

$359,491.69. Respondents' fraudulent overcharges of investment advisory fees violated sections 25235[15] and 25238, and Rule 260.238, subdivision (h).[16]

Respondents' Argument

30. McPhail did not testify at hearing. However, he made a closing argument at the conclusion of hearing in which he argued that Respondents had complied with the Departments' examination fully and asserted that any overcharges to client accounts were the result of unintentional error based on his preoccupation with the care of his elderly ill parents and his children. He maintained that the Department's requested order was unsupported by evidence and would have the negative effect of precluding his ability to support his family. McPhail's closing argument is afforded no evidentiary weight as it was argument, McPhail never having been placed under oath.

LEGAL CONCLUSIONS

Standard and Burden of Proof

1. The burden of proof in this matter is on Complainant to establish the charging allegations by clear and convincing evidence. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 857.)

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[15] See Legal Conclusion 16.

[16] See Legal Conclusion 17.

Applicable Statutes and Regulations

2. The Commissioner is authorized to administer and enforce provisions of the CSL and rules adopted under the CSL.

3. Section 25232, subdivision (e), provides, in pertinent part, that the Commissioner may bar any officer or employee of an investment adviser who "[h]as willfully violated any provision of . . . Title 4 (commencing with Section 25000) [CSL] . . . or . . . any rule or regulation under . . . those statutes, or any order of the Commissioner which is or has been necessary for the protection of any investor."

4. Section 25232.1 provides, in pertinent part:

> The Commissioner may, after appropriate notice and opportunity for hearing, by order censure, or suspend for a period not exceeding 12 months, or bar from any position of employment, management or control of any investment adviser, broker-dealer or commodity adviser, any officer, director, partner, employee of, or person performing similar functions for, an investment adviser, or any other person, if he or she finds that the censure, suspension or bar is in the public interest and that the person has committed any act or omission enumerated in subdivision . . . (e) . . . of Section 25232 . . . .

5. Section 25241, subdivision (c) provides that all records of an investment adviser are subject to reasonable examination by the Commissioner.

6. Rule 260.241.3 states, in relevant part:

(a) Every licensed investment adviser shall make and keep true, accurate and current the following books and records relating to such person's investment advisory business: [¶] . . . [¶] (2) General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts. . . . [¶] . . . [¶] (4) All check books, bank statements, cancelled checks and cash reconciliations of the investment adviser. . . . [¶] . . . [¶] (6) All trial balances, financial statements, worksheets that contain computations of minimum financial requirements required under Section 260.237.2 of these rules, and internal audit working papers relating to the business of such investment adviser. . . . [¶] . . . [¶] (10) All written agreements (or copies thereof) entered into by the investment adviser with any client or otherwise relating to the business of such investment adviser as such. . . . [¶] . . . [¶]

(j) Any investment adviser who is subject to the minimum financial requirements of Section 260.237.2 shall, in addition to the records otherwise required under this section, maintain a record of the proof of money balances of all ledger accounts in the form of trial balances and a record of the computations of minimum net worth pursuant to Section 230.237.2 of these rules (as of the trial balance date). The trial balances and computations shall be prepared currently at least once a month.

7. Rule 260.237 states, in relevant part:

> (a) Safekeeping required. It is unlawful and deemed to be a fraudulent, deceptive, or manipulative act, practice or course of business within the meaning of Section 25235 of the Code for an investment adviser licensed or required to be licensed, to have custody of client funds or securities unless: (1) Notice to the Commissioner. The investment adviser notifies the Commissioner that the investment adviser has or may have custody. Such notification is required to be given on Form ADV. [¶] . . . [¶] (6) Independent Verification. The client funds and securities of which the investment adviser has custody are verified by actual examination at least once during each calendar year, by an independent certified public accountant, pursuant to a written agreement between the investment adviser and the independent certified public accountant, at a time that is chosen by the independent certified public accountant without prior notice or announcement to the investment adviser and that is irregular from year to year. The written agreement must provide for the first examination to occur within six months of becoming subject to this paragraph, except that, if the investment adviser maintains client funds or securities pursuant to this section as a qualified custodian, the agreement must provide for the first examination to occur no later than six months after obtaining the internal control report required by paragraph

(a)(7)(B). The written agreement must require the independent certified public accountant to:

(A) File a certificate on Form ADV-E, Expires January 31, 2016, hereby incorporated by reference, with the Commissioner within 120 days of the time chosen by the independent certified public accountant in section (a)(6) of this section, stating that it has examined the funds and securities and describing the nature and extent of the examination;

(B) Upon finding any material discrepancies during the course of the examination, notify the Commissioner within one business day of the finding, by means of a facsimile transmission or electronic mail, followed by first class mail, directed to the attention of the Commissioner; and

(C) Upon resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed, file within four business days Form ADV-E accompanied by a statement that includes:

1. The date of such resignation, dismissal, removal, or other termination, and the name, address, and contact information of the independent certified public accountant; and

2. An explanation of any problems relating to examination scope or procedure that contributed to such resignation, dismissal, removal, or other termination.

8. Rule 260.237.2 states, in relevant part:

(a) Every investment adviser who has custody of client funds or securities shall maintain at all times a minimum net worth of $35,000, and every investment adviser who has discretionary authority over client funds or securities but does not have custody of client funds or securities, shall maintain at all times a minimum net worth of $10,000. . . . [¶] . . . [¶]

(c) Unless otherwise exempted, as a condition of the right to continue to transact business in this state, every investment adviser shall, by the close of business on the next business day following the discovery that the investment adviser's net worth is less than the minimum required, notify the Commissioner that the investment adviser's net worth is less than the minimum required. After transmitting such notice, by the close of business on the next business day each investment adviser shall file a report with the Commissioner of its financial condition, including the following:

(1) A trial balance of all ledger accounts;

(2) A statement of all client funds or securities which are not segregated;

(3) A computation of the aggregate amount of client ledger debit balances; and

(4) A statement as to the number of client accounts.

(d) For purposes of this rule, the term "net worth" shall mean an excess of assets over liabilities, as determined by generally accepted accounting principles, but shall not include as assets: prepaid expenses (except as to items properly classified as current assets under generally accepted accounting principles), deferred charges, goodwill, franchise rights, organizational expenses, patents, copyrights, marketing rights, unamortized debt discount and expense, and all other assets of intangible nature; home, home furnishings, automobile(s), and any other personal items not readily marketable in the case of an individual; advances or loans to stockholders and officers in the case of a corporation; and advances or loans to partners in the case of a partnership. . . . . [¶] . . . [¶]

(j) For purposes of subsection (c) of this rule, if the failure to discover that an investment adviser's net worth is less than the minimum required is the result of the investment adviser's failure to keep true, accurate and current the books and records required under Section 260.241.3, the

investment adviser will be deemed to have discovered that the investment adviser's net worth is less that the minimum required by this section.

9. Rule 260.241.2 states, in relevant part:

(a) General Rule. Subject to the provisions of subsection (c) of this section, every licensed broker-dealer, and every licensed investment adviser subject to the provisions of Section 260.237.2 of these rules, shall file an annual financial report, as follows: . . . [¶] . . . [¶]

(2) The annual report for an investment adviser shall contain a balance sheet, income statement, and computations of the minimum financial requirements required under Section 260.237.2 of these rules. . . . [¶] . . . [¶]

(4) The report shall be filed not more than 90 days after the investment adviser or broker-dealer's fiscal year end. . . . [¶] . . . [¶]

(d) Interim Reports. . . . [¶] . . . [¶]

(2) Every investment adviser subject to the provisions of Section 260.237.2 of these rules shall file a report within 15 days after its net worth is reduced to less than 120% of its required minimum net worth.

(3) The report required by subsections (d)(1) and (d)(2) of this section shall be as of a date within the 15 day period.

Additional reports shall be filed within 15 days after each subsequent monthly accounting period until three successive months have elapsed during which none of the conditions specified in subsection (d)(1) or (d)(2) of this section have occurred.

(4) For an investment adviser, the interim report shall consist of a balance sheet, income statement, and computation of the minimum financial requirement under Section 260.237.2 of these rules, including the verification in subdivision (b) of this section. . . . [¶] . . . [¶]

10. Rule 260.238 states, in relevant part:

The following activities do not promote "fair, equitable or ethical principles," as that phrase is used in Section 25238 of the Code:

(a) Recommending to a client to whom investment supervisory, management or consulting services are provided the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known or acquired by the adviser after reasonable examination of

such of the client's records as may be provided to the adviser. . . . [¶] . . . [¶] . . .

(h) Misrepresenting to any advisory client, or any prospective advisory client, the qualifications of the adviser, its representatives or any employees, or misrepresenting the nature of the advisory services being offered or fees to be charged for such service, or omitting to state a material fact necessary to make the statements made regarding the qualifications, services or fees, in light of the circumstances under which they are made, not misleading. . . . [¶] . . . [¶]

(n) Entering into, extending or renewing any investment advisory contract, other than a contract for impersonal advisory services, unless such contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee or the formula for computing the fee the amount or the manner of calculation of the amount of the prepaid fee to be returned in the event of contract termination or nonperformance, whether the contract grants discretionary power to the adviser or its representatives. . . . [¶] . . . [¶]

11. Rule 260.235, subdivision (a)(5), provides that "(a) It shall constitute a fraudulent, deceptive, or manipulative act, practice or course of business, within the meaning of Section 25235 of the Code, for an investment adviser, directly or indirectly, to publish, circulate or distribute any advertisement: . . . [¶] . . . [¶] (5) which contains any untrue statement of a material fact, or which is otherwise false or misleading."

12. Rule 260.236.1, subdivision (a)(3), provides that "(a) The procedures set forth in this subsection are applicable to investment advisers licensed pursuant to Section 25230 of the Code. References to an investment adviser representative shall mean both an investment adviser representative and an associated person of an investment adviser, as those terms are defined in Section 25009.5(a) of the Code. . . . [¶] . . . [¶] (3) Within thirty (30) days of any changes to the information contained in Form U4, an amendment to Form U4 shall be filed with CRD. If Form U4 is being amended due to a disciplinary occurrence, a copy of the amendment shall be filed with the Commissioner upon request."

13. Rule 260.241.4, subdivision (a), provides that "(a) Each licensed broker-dealer and each licensed investment adviser shall, upon any change in the information contained in its application for a certificate (other than financial information contained therein) promptly file an amendment to such application setting forth the changed information."

14. Section 25249 provides, "[I]f, after examination or investigation, the commissioner has reasonable grounds to believe that any broker-dealer or investment adviser has violated any law or rule binding upon it, the commissioner shall, by written order addressed to the broker-dealer or investment adviser, direct the discontinuance of the violation. The order shall be effective immediately, but shall not become final except in accordance with the provisions of Section 25251."

15. Section 25252 provides:

> The commissioner may, after appropriate notice and opportunity for hearing, by orders, levy administrative penalties as follows:

(a) Any person subject to this division, other than a broker-dealer or investment adviser, who willfully violates any provision of this division, or who willfully violates any rule or order adopted or issued pursuant to this division, is liable for administrative penalties of not more than one thousand dollars ($1,000) for the first violation, and not more than two thousand five hundred dollars ($2,500) for each subsequent violation.

(b) Any broker-dealer or investment adviser that willfully violates any provision of this division to which it is subject, or that willfully violates any rule or order adopted or issued pursuant to this division and to which it is subject, is liable for administrative penalties of not more than five thousand dollars ($5,000) for the first violation, not more than ten thousand dollars ($10,000) for the second violation, and not more than fifteen thousand dollars ($15,000) for each subsequent violation.

(c) The administrative penalties shall be collected by the commissioner and paid into the State Corporations Fund.

(d) The administrative penalties available to the commissioner pursuant to this section are not exclusive, and may be sought and employed in any combination with civil, criminal, and other administrative remedies deemed advisable by the commissioner to enforce the provisions of this division.

(e) After the exhaustion of the review procedures provided in accordance with the provisions of the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, the commissioner may apply to the appropriate superior court for a judgment in the amount of the administrative penalty and costs awarded in a final decision and order compelling the respondent, or the named or cited person, to comply with the final decision of the commissioner brought under this division. The application shall include a certified copy of the final decision of the commissioner and shall constitute a sufficient showing to warrant the issuance of the judgment and order from superior court.

16. Section 25235, subdivision (b), provides that it is unlawful for an investment adviser to "engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any client or prospective client."

17. Section 25238 provides that "[n]o investment adviser . . . shall engage in investment advisory activities, or attempt to engage in investment advisory activities, in this state in contradiction of such rules as the commissioner may prescribe designed to promote fair, equitable and ethical principles." Rule 260.238, subdivision (h) provides that "[m]isrepresenting to any advisor client . . . the nature of the advisory services being offered or fees to be charged for such service, or omitting to state a material fact necessary to make the statements made regarding the . . . service or fees, in light of the circumstances under which they were made, not misleading."

Cause to Bar McPhail

18. Based on Factual Findings 1 through 30 and Legal Conclusions 1 through 17, cause was established through clear and convincing evidence for an order barring McPhail (CRD No. 2592183) from any position of employment, management or control of any investment adviser, broker-dealer or commodity adviser pursuant to section 25232.1.[17]

ORDER

John McPhail (CRD No. 2592183) is 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.

DATE: April 8, 2020

DocuSigned by:
[redacted]
IRINA TENTSER

Administrative Law Judge

Office of Administrative Hearings

[17] Highland is named as a separate respondent, but Complainant seeks no relief against Highland.

ERRATA SHEET

(Changes to Proposed Decision – In the Matter of the First Amended Accusation against Highland Capital Group, Inc. and John McPhail, Respondents - OAH No. 2019081064)

1) On page 7 of the Proposed Decision, Paragraph Number 16, line 4, delete "prepared" and insert instead "audited".

2) On page 13 of the Proposed Decision, Paragraph Number 3, line 1, insert "and Section 25232.1" after "subdivision (e),"

3) On page 19 of the Proposed Decision, Paragraph Number 9, insert between item (2) and item (4):

(3) The financial statements included in the annual report shall be prepared in accordance with generally accepted accounting principles and shall be audited by either an independent certified public accountant or independent public accountant;. . . . [¶]. . . . [¶]