SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2409 / July 29, 2005

Admin. Proc. File No. 3-10007-EAJA

In the Matter of

CLARKE T. BLIZZARD

OPINION OF THE COMMISSION

EQUAL ACCESS TO JUSTICE ACT PROCEEDINGS

Applicant, who prevailed in his appeal to the Commission to dismiss charges of aiding and abetting his employer's violations of the Investment Advisers Act, seeks an award of fees and expenses under the Equal Access to Justice Act. Held, the application is denied because the Division of Enforcement's position in the underlying action was substantially justified.

APPEARANCES:

John H. Cunha, Jr., of Cunha & Holcomb, P.C., for Clarke T. Blizzard.

Linda B. Bridgman and Sandra Bailey, for the Division of Enforcement.

Appeal filed: October 20, 2004
Last brief received: January 3, 2005

I.

Clarke T. Blizzard appeals from the decision of an administrative law judge (the "EAJA Decision"), 1/ denying his application for attorneys' fees and other expenses under Section 504 of the Equal Access to Justice Act ("EAJA"). 2/

Blizzard, an associated person of Shawmut Investment Advisers, Inc. ("Shawmut") and its successor company, Fleet Investment Advisers, Inc. ("Fleet"), was charged with aiding and abetting and causing Shawmut to violate antifraud provisions of the Investment Advisers Act of 1940. 3/ Blizzard and another associated person of Shawmut, Rudolph Abel, were alleged to have aided and abetted and caused that violation. 4/

In the underlying proceeding, the law judge presided over eleven days of hearings at which sixteen witnesses testified and over 250 exhibits were introduced. The law judge's initial decision dismissed the charges against Abel but concluded that Blizzard aided and abetted Shawmut's violation of the Advisers Act. The law judge fined Blizzard $100,000, ordered him to disgorge $548,233, ordered him to cease and desist from further violations, and suspended him from association with an investment adviser for ninety days. 5/ Blizzard and the Division of Enforcement both appealed the law judge's decision. Blizzard sought dismissal of the charges against him and the Division argued for imposition of sanctions against Abel and for increased sanctions against Blizzard. In an opinion issued June 23, 2004, we dismissed the charges against both Abel and Blizzard. Although we found that Abel's conduct contributed to a finding that Shawmut committed fraud, we noted the potential applicability to his conduct of the statute of limitations of Title 28 of the United States Code, Section 2462, and exercised our equitable

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1/ Clarke T. Blizzard, Initial Decision Rel. No. 260 (Sept. 29, 2004), 83 SEC Docket 3374.

2/ 5 U.S.C. § 504.

3/ 15 U.S.C. § 80b-6(1) and (2).

4/ The Order Instituting Proceedings, filed September 9, 1999, also authorized proceedings against, among others, Michael J. Rothmeier, Donald C. Berry, Christopher P. Roach, Craig Janutol, and East West Institutional Services, Inc. ("East West"). Rothmeier, Berry, and Janutol settled with the Commission in April 2000 and received sanctions; Roach and East West defaulted in February 2002 and were sanctioned. Shawmut, not charged as a respondent in these proceedings, reached a settlement with the Commission on September 9, 1999 in a separate proceeding based on the conduct at issue here. Fleet Investment Advisors, Inc., Investment Advisers Act Rel. No. 1821 (Sept. 9, 1999), 70 SEC Docket 1654.

5/ Clarke T. Blizzard and Rudolph Abel, Initial Decision Rel. No. 229 (June 13, 2003), 80 SEC Docket 1672.

discretion to dismiss the charges against him. We found that the evidence in the record did not support a finding of liability against Blizzard on the charges brought against him. 6/

Having won his case on appeal, Blizzard filed a claim for reimbursement of legal fees and expenses under the EAJA. The EAJA provides that certain applicants who have prevailed against the government in an adversary proceeding may recover the fees and expenses incurred unless "the position of the agency was substantially justified." 7/ In the EAJA Decision, the law judge found that, although the Commission dismissed the charges against Blizzard, the evidence in the record was reasonably subject to a different interpretation that would support a finding that Blizzard aided and abetted Shawmut's violation of Advisers Act Sections 206(1) and (2). The law judge held that the Division's case against Blizzard was substantially justified, and she accordingly denied Blizzard recovery under the EAJA.

This appeal ensued. Blizzard contends that the Division's position was not substantially justified and that he is therefore entitled to fees and expenses under the EAJA. We base our findings on an independent review of the record.

II.

Shawmut was an investment adviser registered with the Commission from 1984 until December 31, 1995, when it withdrew its registration after its parent company was acquired by Fleet Financial Group. 8/ As an investment adviser, Shawmut made investment decisions for its clients and effected trades of its clients' securities holdings through broker-dealers it selected. Shawmut generally selected the broker-dealers used to make trades unless it was specifically directed to use a certain broker by the client. Investment advisers are generally obligated to obtain the best execution on securities trades for their clients; in doing so, investment advisers must seek the most favorable terms for a customer transaction reasonably available under the circumstances, which might include directing trades to brokers who also provide research or other services to the adviser. Investment advisers must disclose in Form ADV certain material information to clients and prospective clients, including the practice of paying brokers

6/ Clarke T. Blizzard and Rudolph Abel, Investment Advisers Act Rel. No. IA-2253 (June 23, 2004), 83 SEC Docket 362 (hereafter, "Op. ___").

7/ 5 U.S.C. § 504(a)(1).

8/ Shawmut was known as One Federal Asset Management, Inc. from 1984 until October 29, 1993, when the company assumed the name "Shawmut Investment Advisers, Inc." Shawmut was acquired by Fleet Financial Group on December 1, 1995, and, because Fleet had its own investment adviser, Shawmut was subsumed by Fleet Investment Advisors, Inc., effective December 31, 1995.

commission dollars for research services. 9/ Shawmut engaged in these so-called "soft-dollar" payments to brokers for research they provided and disclosed those practices in its Forms ADV. Shawmut's commission-payment practices changed, however, shortly after Blizzard arrived.

Blizzard began working for Shawmut on April 29, 1993. From that time until he resigned from Shawmut's successor company on May 7, 1996, Blizzard's only function was to sell Shawmut's products and services to large, institutional clients. He was not a member of the firm's compliance department and was never involved in preparing or reviewing its Forms ADV.

Blizzard had worked in the investment adviser industry since 1980, had many contacts in the securities industry, and believed that obtaining referrals of potential clients from broker-dealers with whom he had business relationships was the primary way to secure new business. Blizzard relied largely on such referrals to bring in significant amounts of new business to Shawmut, quickly becoming the company's top salesman. In return for the referrals and marketing assistance he received from some brokers in the industry, Blizzard wanted to compensate those brokers by having Shawmut direct client trades to them, a practice he considered routine based on his past employer's policies. 10/

From his first days with Shawmut, Blizzard expressed his desire to reward certain brokers who had been helpful to him in his marketing efforts. Within a month of his hiring, Blizzard met with several individuals at Shawmut to introduce himself, to learn about the products it sold, and to request assistance in directing trades to brokers who had helped him obtain clients. Among others, he met with Rudolph Abel (Chief Investment Officer), James Bixler (Manager of Trading), Dan Willey (Head Equity Trader), and David Rajala (Director of Research). They all told Blizzard that soft-dollar commissions could be directed only to brokers who provided best execution as well as research, and who were approved in accordance with Shawmut policy.

Shawmut approved brokers to receive directed commissions through regular meetings of the Commission Allocation Committee ("CAC"). The CAC allocated commission payment amounts in accordance with a yearly budget that earmarked commission dollars available for distribution to brokers who provided research. Abel, and later his successor, Don Berry, chaired the Committee and had ultimate authority for approving research brokers who were to receive payments through the commission allocation budget. Various other personnel also participated in these meetings, including Willey, Bixler, Rajala, and certain senior portfolio managers. By the

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9/ Investment advisers use Form ADV to register with the Commission (Part I) and to disclose their practices to clients and prospective clients (Part II). See Section 203(c)(1) of the Advisers Act, 15 U.S.C. § 80b-3(c)(1); Advisers Act Rules 203-1 and 203-4, 17 C.F.R. §§ 275.203-1 and 275.203-4; Form ADV.

10/ Before coming to Shawmut, Blizzard worked for Investment Advisers, Inc., which directed client trades to certain brokers in exchange for client referrals. The company disclosed this practice in its Form ADV.

summer of 1994, Blizzard and members of the legal and compliance staff were added as "ex officio" members of the CAC. Blizzard attended most, and the legal and compliance staff attended at least some, CAC meetings.

Conforming to the advice of Abel and others, Blizzard arranged to have the brokers he wished to reward provide research to Shawmut; he then submitted the brokers' names to the CAC for approval, along with suggested annual commission amounts. The use of commissions to pay brokers for marketing assistance was a controversial issue that gave rise to much discussion and debate at Shawmut, especially in light of the tightening commission budget. Some believed that the practice was incompatible with Shawmut's traditional way of doing business; some believed the quality of research from Blizzard's brokers was insufficient to warrant recognition through commission dollars; and some, like Rajala, wondered openly whether the practice would need to be disclosed on Shawmut's Forms ADV. When Rajala informed Abel during a CAC meeting in mid-1994 that he believed it was problematic that Shawmut was not disclosing this use of commission dollars on its Forms ADV, Abel, Shawmut's CIO and the person responsible both for approving brokers to be used for client transactions and for ensuring compliance with Commission regulations, told the attendees (including Rajala, Rothmeier, and Blizzard) that he and Rothmeier would "take that under advisement."

Notwithstanding the conspicuous difference of opinion at Shawmut on the advisability of compensating brokers for providing marketing leads, Shawmut senior management approved the addition of Blizzard's brokers to the list of research brokers that the trading desk would use to execute trades for Shawmut's clients. Shawmut directed trades to Blizzard's brokers with management approval until Fleet took over Shawmut's investment adviser business in early 1996 and stopped the practice. Shawmut never disclosed on its Forms ADV that it used commission dollars to compensate brokers for providing business referrals from 1993 to 1995. 11/

III.

Against this factual backdrop, we consider Blizzard's claim for legal fees and expenses under the EAJA. As noted above, Blizzard may recover fees and expenses incurred in connection with the proceeding "unless . . . the position of the agency was substantially justified." 12/ Because "substantial justification" is a different and less stringent standard than

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11/ Part II, Item 13 of Form ADV requires investment advisers to disclose whether they have any arrangements to compensate any person, directly or indirectly, for client referrals, and if so, to describe those arrangements. Shawmut disclosed that it paid bonus compensation to employees who referred new business, but included no mention of payments of commission dollars to brokers on the basis of referrals.

12/ 5 U.S.C. § 504(a)(1). Applicants for EAJA fees must also meet certain financial criteria to be deemed eligible for fees under the Act. The Division does not dispute Blizzard's

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the "preponderance of the evidence" standard used to determine liability for a substantive securities violation, the conclusions we reached in the proceeding on the merits are not dispositive of the outcome of the matter before us now. 13/ An agency position can be substantially justified even if the trier of fact finds the evidence insufficient to prove the violations alleged. 14/ In an EAJA proceeding, we must independently evaluate whether the Division's case had a "reasonable basis in law and in fact." 15/ Fees are to be awarded to Blizzard unless the Division, which bears the burden of demonstrating substantial justification, 16/ can show its case was "justified to a degree that could satisfy a reasonable person." 17/

Neither party disputes that Blizzard, having won a dismissal of all charges instituted against him in the administrative proceeding below, prevailed in an adversary proceeding for purposes of the EAJA. Further, although the precise amount of fees and expenses for which he may properly apply is contested, the fact that he incurred at least a portion of those expenses in connection with the underlying proceeding is undisputed. Therefore, the key question before us in this appeal is whether the Division has shown that its case against Blizzard, charging him with aiding and abetting Shawmut's securities law violation, was "substantially justified."

The requirements of liability for aiding and abetting a securities violation are: (1) that a principal committed a primary violation; (2) that the aider and abettor was generally aware of, or recklessly disregarded, the wrongdoing and his or her role in furthering it; and (3) that the aider and abettor provided substantial assistance to the primary violator. 18/

12/ (...continued)
eligibility on that basis.

13/ Rita C. Villa, Exchange Act Rel. No. 42502 (Mar. 8, 2000), 71 SEC Docket 2438, 2443.

14/ Richard J. Adams, Exchange Act Rel. No. 48146 (July 9, 2003), 80 SEC Docket 1775.

15/ See FEC v. Rose, 806 F.2d 1081, 1087 (D.C. Cir. 1986) (requiring an independent evaluation to be conducted "through an EAJA perspective"); Villa, 71 SEC Docket at 2443 (establishing reasonableness as the test of whether an agency's argument is substantially justified).

16/ See 17 C.F.R. § 201.35(a).

17/ Pierce v. Underwood, 487 U.S. 552, 565 (1988).

18/ See Monetta Financial Services, Inc. v. SEC, 390 F.3d 952, 956 (7th Cir. 2004); Howard v. SEC, 376 F.3d 1136, 1143, 1149 (D.C. Cir. 2004); Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000), and cases cited therein.

A. Primary Violation

The Order Instituting Proceedings ("OIP") alleged that during the period from mid-1993 through December 1995, Shawmut committed a "fraudulent breach of its fiduciary duty" by using "approximately $1,815,254" of "equity commissions and fixed-income mark-ups and mark-downs" that were "generated from transactions in its clients' accounts to compensate certain broker-dealers" for "actual and potential client referrals" while it "represented to its clients in its disclosure document, Form ADV, that it selected brokers to execute its clients' transactions on the basis of research the brokers provided." The OIP consistently described Shawmut's primary violation as consisting of the "undisclosed practice of directing brokerage on the basis of client referrals." The OIP also paraphrased this same conduct as "Shawmut Adviser's failure to disclose to its clients that it used brokerage commissions generated from its clients' transactions to compensate brokers for client referrals."

Shawmut's course of conduct was alleged to violate Advisers Act Sections 206(1) and (2), which prohibit investment advisers from employing any device, scheme, or artifice to defraud clients or prospective clients, or from engaging in any transaction, practice, or course of business that defrauds clients or prospective clients. 19/ As our June 2004 opinion in this case explained at length, Section 206 imposes on investment advisers a fiduciary duty to exercise the utmost good faith in dealing with their clients, and to disclose all material facts and conflicts of interest to their clients. The referral of business was a benefit to Shawmut, not its clients, and Shawmut referred its clients' brokerage business in exchange for this benefit. An investment adviser's arrangement to direct brokerage in exchange for benefits to the adviser creates a conflict of interest that is material and that must be disclosed. Through senior officials at the firm, Shawmut recklessly engaged in activities that gave rise to a material, undisclosed conflict of interest. We found that this course of conduct violated Section 206.

B. Blizzard's Role as Aider and Abettor

The OIP alleged that Blizzard aided and abetted Shawmut's primary violation by entering into the "undisclosed client referral arrangements with brokers" and "caus[ing] client transactions to be directed to brokers with whom he had client referral arrangements." The OIP also alleged that he made certain attempts to conceal facts about the practice from certain persons at Shawmut, "[firm] clients," and others. Allegedly as a result of Blizzard's conduct, Shawmut obtained the accounts of a number of large institutional clients, including the International Brotherhood of Teamsters Local Union 710 pension fund, and corresponding large commissions and fees. In its case against Blizzard, the Division sought disgorgement, among other remedies,

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19/ Scienter, which includes recklessness, is an element of a Section 206(1) violation, but need not be found to establish a Section 206(2) violation. See Steadman v. SEC, 603 F.2d 1126, 1134 (5th Cir. 1979), aff'd, 450 U.S. 91 (1981); Howard v. Everex Systems, Inc., 228 F.3d 1057, 1063 (9th Cir. 2000).

and presented evidence that Shawmut had paid Blizzard a sizeable sum in salary and commissions related to the assets he brought under management during the relevant period.

The law judge explained her denial of Blizzard's claim for EAJA fees as follows:

> The position of the agency was articulated in the OIP and the Division's conduct of the proceeding, including posthearing pleadings. The position of the Division was that Blizzard rendered substantial assistance to the conduct that constituted Shawmut's violation and had knowledge that his role was part of an overall activity that was improper. While the Commission found that the record did not establish the position of the Division, the evidence is reasonably subject to a different interpretation that meets the lower threshold of substantial justification. That is, it would be reasonable in law and fact to conclude that Blizzard rendered substantial assistance and had knowledge, or reckless disregard, that his role was part of an overall activity that was improper.

Based on our independent review of the record, we agree that the Division's case against Blizzard for aiding and abetting Shawmut's fraud had a reasonable basis in law and in fact.

1. General awareness, or reckless disregard, of wrongdoing

As the law judge correctly noted, the Division presented evidence that Blizzard attended a Commission Allocation Committee meeting in mid-1994 "when Rajala argued against allocating commission business to brokers who had referred clients and stated that the practice was not disclosed in Shawmut's ADV and would violate the law unless disclosed." All that Abel, chair of the CAC, told the attendees, including Blizzard, in response was that Abel and Rothmeier would "take that under advisement."

The law judge concluded that it is "reasonable to infer from this that Blizzard was put on notice that the practice was illegal because it was not disclosed in the ADV." This inference is reasonable, even if it is also reasonable to infer from this evidence, as did our June 2004 opinion after review of the full record, that because the subject of allocating brokerage based on referrals and disclosure of the practice had been raised, Blizzard had reason to believe that the question of disclosure was being handled appropriately.

Blizzard does not claim to have been told by any source – including Abel – during the relevant period that the practice either did not need to be disclosed or that it was being disclosed. This was an environment in which, as our June 2004 opinion found, "[t]he direction of business to Blizzard's referral brokers was a controversial issue at Shawmut from the outset" and [t]he adequacy of the research that Blizzard's referral brokers submitted was also a focus of concern and discussion at Shawmut," where "Rajala was openly critical of the research submitted by the referral brokers, regarding it as inferior to the research Shawmut obtained from brokers who had

been put on the commission allocation list through the usual vetting procedure." The record also includes evidence that during the summer of 1994, Blizzard knew that he was "suppose[d] to be not on the committee" and was re-designated from being a regular CAC member to being an "ex-officio" member. There is evidence indicating that this was done to avoid the appearance that a marketing person participated in allocating client brokerage.

The Division also presented evidence that in 1994 Blizzard spoke with an in-house attorney whose responsibilities during the relevant period included giving legal advice to people who reported to Shawmut's president and chief executive officer. Although it does not appear that the subject of disclosure was discussed, this evidence does indicate that Blizzard asked the lawyer for his views about the practice of sending business to a broker that refers business in return, and was advised of the firm's fiduciary responsibilities to its investment advisory clients and the need for prudence in expending client assets and was advised that the lawyer was uncomfortable with the appearance of the practice. This is consistent with evidence of the lawyer's response to a similar inquiry from Bixler. 20/

Furthermore, there is evidence that Blizzard was sensitive to the appearance of considering referrals in allocating commissions. In both of her decisions in this case, the law judge discussed evidence that Blizzard withheld information about commission arrangements in connection with "a series of meetings between Blizzard and new managers installed by Fleet in late 1995 and early 1996." In her EAJA decision, the law judge correctly determined that it would have been reasonable to find based on this evidence that Blizzard "falsely told" Fleet managers Thomas O'Neill and Peter Vandervelde, both of whom testified at the hearing, "that he had letters from the clients directing that commissions generated by transactions for their accounts be directed to specified brokers," as opposed to it being decided within Shawmut to allocate commissions to the brokers, and "that he obtained a false [research] invoice from one of the brokers." We agree with the law judge that it would be reasonable to infer from this evidence that Blizzard had "knowledge that his role was part of an overall activity that was improper." 21/

20/ The record evidence of Blizzard's conversation with the lawyer included the attorney's November 5, 1996 testimony taken during the Division's investigation and introduced at the hearing as past recollection recorded. After considering the full evidentiary record, including the lawyer's October 24, 2002 hearing testimony that, in the law judge's words, he only had "a vague recollection that Blizzard telephoned him on one occasion and discussed generally giving business to brokers who provided client referrals," the law judge concluded that Blizzard did not receive "meaningful advice" from the lawyer "concerning the propriety of allocating commissions for client referrals." However, it would have been reasonable to infer otherwise from the evidence.

21/ This is true despite the fact that in the prior proceeding the law judge concluded, based on her interpretation of the testimony of Blizzard and the Fleet managers, that Blizzard was not untruthful in responding to the managers' questions about client accounts and

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Similarly, as the law judge noted, by early 1995, Shawmut's consideration of referrals in allocating commissions to East West had led to an allocation that exceeded Shawmut's "allocations to major firms" such as Salomon Brothers, First Boston, and Morgan Stanley, none of which were Blizzard brokers. The Division presented evidence that in July-August 1995, when Blizzard sought to further increase the allocation to East West, he and Berry arranged to disguise the true extent of those commission dollars by allocating some of them to Dean Witter, where a friend of Blizzard's then returned a large portion of the commissions to East West. The Fleet managers testified that Blizzard did not discuss this arrangement with either of them. This evidence indicated that Blizzard was concerned about drawing too much attention to the relationship between referrals and commission allocations at Shawmut. 22/

We therefore find that the Division had a reasonable basis for its position that Blizzard knew or recklessly disregarded the fact that Shawmut was engaging in an improper, undisclosed practice of allocating commissions based in part on referrals, as well as the role that he was playing in that course of conduct. 23/

21/ (...continued)
brokerage allocation and "was attempting to provide whatever the new management wanted in order to continue doing business as he had in the past."

22/ Sections IIF and IIIC(2)&(3) of the law judge's June 2003 initial decision discussed evidence of Blizzard's interaction with a representative of a particular brokerage firm, East West, to which Shawmut ultimately directed trades on behalf of Teamsters Local 710, and with representatives of Local 710. The law judge viewed this evidence as relevant to whether Blizzard was generally aware of or recklessly disregarded Shawmut's Section 206 violation and whether Blizzard substantially assisted it. We believe that this evidence contributes to a reasonable basis for the Division's case on both points.

23/ Section VIIIB of our June 2004 opinion concluded that the record did not establish that Blizzard aided and abetted Shawmut's fraud. This conclusion was based on a combination of factual findings, such as: that Blizzard was not necessarily in a position to know about the firm's disclosures about its trading practices; that Blizzard had shown "openness" at Shawmut "in seeking to have trades sent to brokers who helped him with referrals" and had made it known to persons in Shawmut's senior management "that commissions were going to brokers selected largely on the basis of client referrals"; and that, because Blizzard attended "the CAC meeting when Rajala raised the issue of the possible need for ADV disclosure of the direction of commissions to brokers based on referrals," Blizzard "had reason to believe that the question of disclosure was being handled appropriately." Although a line in the opinion described our holding as being that "the record does not establish that Blizzard substantially assisted in the conduct that constituted the primary violation charged," it must be read in the context of the rest of the opinion, which stands more precisely for the proposition that Blizzard was not generally
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2. Substantial assistance

There is ample evidence that Blizzard was the prime mover in arranging to direct client brokerage in exchange for benefits to Shawmut, the activity that generated the material conflict of interest and concomitant fraudulent breach of Shawmut's fiduciary duty unless the facts were disclosed. The law judge properly noted that Blizzard played a key role "in obtaining new accounts and in urging Shawmut to reward those who helped him." Beginning shortly after his arrival at Shawmut, Blizzard tried hard to ensure that referrals were a factor in choosing brokers. As the law judge stated, Blizzard "was an important person at Shawmut as indicated by his titles; a star salesman who was hired to increase Shawmut's business, he brought in more new business than any other salesman at Shawmut." Blizzard was added as a member of the firm's Commission Allocation Committee, despite the fact that previously there were no provisions for sales or marketing personnel to be involved in the commission allocation process.

Blizzard's efforts overbore the objections of some within Shawmut, and broke with its longstanding policy of not considering client referrals received from a brokerage firm as a factor when directing trades to brokers. At Blizzard's instigation, brokers who had not gone through Shawmut's usual evaluation process were included on its research brokers list, entitling them to receive commission allocations. This occurred over the objections of some within Shawmut that

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23/ (...continued)
aware of, and did not recklessly disregard, Shawmut's fraud.

Some court cases and some Commission cases, including one cited in our June 2004 opinion (Op. 371 n.10), have in the past stated the "substantial assistance" element of aiding and abetting as "knowing or reckless substantial assistance" or language to that effect. This was how the law judge stated the element and how the Division and Blizzard briefed the issue to us in the prior proceeding. On those terms, the substantial assistance element itself, let alone any other element of aiding and abetting, cannot be met if there is a lack of knowledge or recklessness concerning the primary violation.

Instead, an aider-abettor's state of mind is best analyzed under the awareness/recklessness element of aiding and abetting liability, fully stated: that the aider and abettor was generally aware of, or recklessly disregarded, the wrongdoing and his or her role in furthering it. See Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 168-169 (1994) (in discussing lower court decision, describing issue of whether alleged aider and abettor "rendered substantial assistance to the primary violators" as a "separate question" from "recklessness by the aider and abettor as to the existence of the primary violation"); Graham, 222 F.3d at 1000, 1004-1006 (listing requisite state of mind as its own separate element of aiding and abetting liability and analyzing each element in turn). In no event did our prior holding in this case stand for the proposition that there was no legal or factual basis for maintaining that Blizzard substantially assisted Shawmut's fraud, the issue to which we now turn.

the research was inadequate to justify directing business to those firms based on Shawmut's stated policy. Nearly a dozen referral brokers were added to the research brokers list at Blizzard's urging; as the law judge noted, Shawmut's "research department never included any of Blizzard's brokers on its input to the allocation process." As a result of Blizzard's actions, the referrals were a very significant factor in the direction of business to the referral brokers.

In addition, the Division presented evidence that, through other actions, Blizzard further assisted Shawmut's fraudulent course of conduct. It is reasonable to infer from evidence in the record that Blizzard attempted to disguise the extent of commission allocations to East West and that Blizzard attempted to deceive the newly arrived Fleet managers about Shawmut's practices that Blizzard's actions helped in these ways, too, to assist the fraud.

Blizzard takes the position that as a matter of law his actions in securing commission allocations for his referral brokers cannot be considered substantial assistance because, in his view, "[t]he fraudulent behavior of Shawmut was fraudulent only because of it[s] failure to disclose its behavior in its Form ADV." The error of this argument is shown by the fact that there would have been no fraud if Shawmut – through Blizzard's efforts – had not arranged to direct brokerage in the manner that it did.

Whether conduct constitutes a "device, scheme, or artifice to defraud" or a "transaction, practice, or course of business which operates as a fraud or deceit" depends on the whole conduct. 24/ As our prior opinion explained (Op. 366 & nn. 4-6, 372-373 & nn. 13-15), Shawmut's "behavior" was fraudulent because of the nature of the overall activity – using client funds to pay for referrals of business for the adviser's own benefit, giving rise to a material conflict of interest and breach of Shawmut's fiduciary duty, without disclosure of the practice.

The activities in which Blizzard engaged were a very significant part of that course of conduct. Indeed, his activities were significant enough to require disclosure by the firm. Op. 373 n.15 ("the inherent conflict of interest posed by using client funds to pay for referrals of business falls well within" the "well established" "requirement that investment advisers must disclose conflicts of interest").

Blizzard cites shorthand references to a 206 violation as "failure to disclose" or "non-disclosure." Such references make clear that per se prohibited underlying conduct or actual

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24/ See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 200-201 (1963) (in response to argument of defendant investment adviser who had "trade[d] on the market effect of his own recommendations without fully and fairly revealing his personal interests in these recommendations to his clients" that his "advice was `honest' in the sense that [he] believed it was sound and did not offer it for the purpose of furthering personal pecuniary objectives," the Court stated, "It is the practice itself, however, with its potential for abuse, which `operates as a fraud or deceit' within the meaning of the [Advisers] Act when relevant information is suppressed.").

injury is not necessary to a violation; emphasize that non-disclosure is an element of the violation charged in the case; and elucidate what correct disclosure would have been. 25/ However, under the statute the violation depends on the overall course of conduct.

Similarly, Blizzard's point that he "advocated the use of brokerage commissions to compensate brokers for client referrals" but "had neither the responsibility nor the authority" to "disclose [Shawmut's] behavior in its form ADV" does not mean that his activities cannot amount to substantial assistance of Shawmut's fraud. A person need not engage in conduct that would itself constitute, or even that would be in the nature of, a primary violation to aid and abet a primary violation, if all of the elements of aiding and abetting liability are met, including the requisite state of mind and substantial assistance. 26/

25/ At times, the Division's briefs in this case had seemed to argue that Shawmut's allocation of commissions to Blizzard's brokers was per se illegal because none of those brokers provided best execution and qualified research – an issue the parties hotly contested – leaving referrals as the sole basis for the commission allocations. See Prohibition on the Use of Brokerage Commissions To Finance Distribution, Investment Company Act Rel. No. 26591, 69 FR 174, at 54728 (Sept. 9, 2004) (adopting prohibition on use of mutual fund brokerage to compensate broker-dealers for selling fund shares and noting that brokers were already "prohibited from conditioning the promotion of fund shares on the receipt of brokerage commissions from a fund," though since 1981 "fund advisers have been permitted to follow a disclosed policy `of considering sales of shares that the fund issues as a factor in the selection of broker-dealers to execute portfolio transactions, subject to best execution'") (emphasis added). In addition, the law judge's decision in the prior proceeding had drawn an erroneous "distinction between disclosures necessary when brokerage is directed solely on the basis of referrals and disclosures necessary when brokerage is directed on the basis of best execution, research, and referrals" (Op. 374 n.18).

In response, we noted (see Op. 373 n.15, 374 n.18, 376 n.21, 379 n.24) that arguments that Shawmut may have engaged in quid pro quo arrangements were, in the end, irrelevant, in the sense that an investment adviser could still commit a violation – the violation charged in the OIP – even if the broker had provided best execution and research, in addition to referrals, so long as the adviser considered referrals in directing brokerage without disclosing that fact.

26/ In Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 176-178 (1994), an action under another antifraud provision of the securities laws, Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5, the Supreme Court noted that "aiding and abetting liability extends beyond persons who engage, even indirectly, in a proscribed activity," to "acts that are not themselves manipulative or deceptive within the meaning of the statute." As the

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In sum, we conclude that the record evidence of Blizzard's activities provides a reasonable basis for the Division's position that Blizzard substantially assisted Shawmut's fraud.

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For the foregoing reasons, we conclude that the Division's case against Blizzard for aiding and abetting Shawmut's fraud had a reasonable basis in law and fact and was substantially justified. We therefore find that Blizzard is not entitled to an award of fees under the EAJA. 27/ Accordingly, we deny Blizzard's application under the EAJA for attorneys' fees and expenses. 28/ An appropriate order will issue.

By the Commission (Acting Chairman GLASSMAN and Commissioners GOLDSCHMID, ATKINS, and CAMPOS).

Jonathan G. Katz
Secretary

26/ (...continued)
Court observed, to say that a defendant "must have committed a manipulative or deceptive act" is to impose "a requirement that in effect forecloses liability on those who do no more than aid or abet a 10b-5 violation." Id. at 170. According to the Court, "aiding and abetting reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do." Id. at 176. The Court's statements about the nature of primary and aider-abettor liability in the securities fraud context are instructive, notwithstanding its ultimate holding that aiding and abetting is not encompassed within the implied private right of action under Section 10(b).

27/ In light of our denial of Blizzard's fee application, we do not consider a dispute between the parties about the amount of fees claimed. Blizzard applied for reimbursement of $329,617.14, a sum that, according to the EAJA Decision, reflected a reduction to comport with the regulatory maximum of $75 per hour in attorney fees. See 17 C.F.R. § 201.36(b). The Division argued that, notwithstanding this reduction, the amount Blizzard claims is excessive because it includes reimbursement for hours spent by counsel on matters not related to this litigation, a contention that Blizzard has not addressed. Resolution of this issue would require further development of the record and findings of fact by the law judge.

28/ We have considered all of the contentions advanced by the parties. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 2409 / July 29, 2005

Admin. Proc. File No. 3-10007-EAJA

In the Matter of

CLARKE T. BLIZZARD

ORDER DENYING APPLICATION UNDER THE EQUAL ACCESS TO JUSTICE ACT

On the basis of the Commission's opinion issued this day, it is

ORDERED that the application of Clarke T. Blizzard for an award of fees and expenses under the Equal Access to Justice Act be, and it hereby is, denied.

By the Commission.

Jonathan G. Katz
Secretary