Dear Tim,

Enclosed please find 26 pages of thoughts, ramblings if you will. I apologize for the length and the handwriting. The material is sensitive so I could not ask Norma to type. If I tried to type it, you would be on your 3rd day at Beaver Creek when I finished. You will have difficulty reading it, but please take the time.

After reading it (maybe a couple of times), please feel free to comment and criticize. It is meant to be thought provoking, not the final solution to anything. I would like you to give it substantial thought before we get together. I believe that will be enormously helpful towards a productive end to our meeting. I would like to get together with you to discuss the enclosed before our Wednesday meeting with Brian and Mary Ann. I believe we need to do that away from the office - maybe a meeting room at the FOC.

Livingston Exhibit 31

File No. 3-15514

We have a lot of hard work ~~at~~ ahead of us, and we need to be rowing the boat together in order to successfully complete the tasks before us. My hope is that you recognize my comments for what they are — well intended, without malice, necessary to get us working together again in an agreed upon direction.

I will be in around 10:00, as I have to stop by CSDS. I know we have a meeting with Bill Sporer at 10:00. After meeting with Bill we can get together to determine the best time for our meeting.

Thanking you in advance for your ~~patients~~ patience and understanding

Sincerely—

RS

[redacted]

Dear Tim,

I have chosen to put my thoughts on paper rather than express them in our planned meeting with Brian and Mary Ann on Wednesday evening for several reasons. First and foremost, the present crisis we are facing is really our crisis, and our discussions should remain confidential. We are the ones responsible for a plan, and any comments or ideas from Brian and Mary Ann will probably be more supplementary than structural. Secondarily, I am sensitive to the fact that there may come a time when they may be asked to recount these discussions, and I would not want either of them to be in a position that forces them to choose between testimony harmful to us or perjury.

I am hopeful that you are reading this prior to our meeting on Tuesday. I wanted to get together with just you, to express some things that should be addressed solely between partners; and, after our more personal discussions I am looking forward to

[redacted]

developing a course of action that will stave off our immediate financial crisis and then lead to an ultimate resolution.

The idea that I am communicating to you by this means is awkward at best and probably seen as somewhat ridiculous. However, my present state of mind is such that this exercise will hopefully have a therapeutic effect as well as communicative.

We have worked together for over 20 years in a generally benign, ~~prop~~ prosperous, and endearing relationship. We have been through so much together to get where we are. Building and holding together a business for over 20 years is no small fete. There are very, very few who can point to this kind of accomplishment. From very early on it has been very apparent to me that the vast majority of the credit for the success of this business is a result of your efforts. It has been your intellect, your vision, and your good business instincts that have been responsible for us not

[redacted]

only surviving, but succeeding. Every business or enterprise needs a leader, and you have filled that role extremely well. Over the years I have assumed the mantel of caretaker, one that is also necessary, but one that without leadership is merely an appendage. Our functions have meshed well, and for twenty some years I have been the beneficiary of an extremely well balanced and satisfied life. I have enjoyed monetary rewards, but not at the expense of family or leisure. In short, it has been a great life.

However, for the last year, and in particular the last few months, I find myself overwhelmed and in a state recently that is probably bordering on depression. My work, my life at home, and I am sure my personality have all become negatively impacted. It is a result of one thing, and one thing only – the thought that the present situation with C^4 is about to explode, and with it everything I have ever cherished.

[redacted]

I am sure that you will agree, that if our trusts go into default, everything else will come apart. The business has become addicted to the cash flow from the trust business, and without ~~it we~~ them will have a difficult time surviving. Although, I believe that we are on the verge of being able to develop other investment banking businesses, just as the importance of the brokerage revenues are diminishing. But we need time, and I am not convinced we will be able to acquire that time. The default of the trusts will drastically reduce revenues, cause us to lose brokers and at least their confidence in us, bring on crushing litigation and devastating publicity, and I am convinced prosecution by regulators or worse. The impact on our employees, customers, friends, and family will be devastating. I am just overwhelmed by the thought of the financial losses, the humiliation, the perceived betrayal of trust. I am trying to be strong in face of all

[redacted]

of this, but I can't sleep,
I am convinced I have developed
an ulcer, and I am
being driven to moods of
depression. I am sure that
you are feeling some of these
things as well. I know
Mary Ann is. I have not
shared any of this with Lynn,
I assume because I have
determined that it won't be
helpful.

Aside from the above,
I, unlike you, feel that
we are vulnerable to
criminal prosecution. Aside
from the probable violation
of Reg D as it relates
to accredited investors, I
am not aware of any action
that would be remotely considered
illegal. However, I would
never underestimate the zeal
of local or state or even SEC
prosecutors to make a story
out of our failure. Convictions
of fat cat financiers
is a great stepping stone up
the career ladder.

I believe that we are
at risk for the continued
raising of investment dollars
that are ~~not~~ now clearly
unlikely to be repaid in
full. As we do each

[redacted]

transaction we distribute every excess dollars back to C4 or McGinn, Smith/its partners. More recently, those dollars for the most part are used to fulfill the investment promise to earlier investors. While you have previously rejected my characterization of these acts as similar to a "Ponzi Scheme" because new dollars being raised are in fact buying new product, and only "profit dollars" are being used to cover shortfalls, I believe that our actions could be defined otherwise. The reason for my belief is that we are now in possession of indisputable empirical evidence that the new investments have no chance of being repaid in full. Whether less than 100% collections (64%) is due to normal attrition, fraud, billing errors, or poor credit judgement, it really does not matter. The facts are that we will never collect 100% or close to it. Therefore, our "profits" which we use are not profits at all, but rather monies that should be held in reserve to allow for the default collections for the protection of the new investors.

[redacted]

For us not to allow for these defects by setting up adequate reserves is, in my judgement, bordering on fraud. Certainly, by not disclosing in the prospectus our poor history of collections, we are not providing the prospective investor an accurate picture of his risk. We both know why we don't make that disclosure - because such disclosure would cause our Salesman to cease selling and investors to cease buying. Thus, we are misleading both our own employees and customers.

I fully understand, as well as you, our need to continue raising money, and that a number of the collection defects were isolated incidents of fraud or gross incompetence by some of our dealers. However, those incidents have not impacted the majority of collections. Most of the defects are from poor credit risks. We now know that, and we continue to accept their contracts without adequate reserves, and treat the excess discounted cash flow as certain profit to be distributed as we see fit.

[redacted]

This is wrong. I strongly believe that in civil or criminal litigation we would lose badly on this point. "We knew the poor collection history, and yet continued to raise money as if we were ignorant of our own collection experience."

I am not an Eagle Scout, but I believe that both you and I are violating the high standards of integrity and ethics that have been the historical standard for us. That bothers me very, very much. But what terrifies me is the possibility of being indicted for such conduct, and worse, the prospect of conviction. I cannot emphasize enough how strongly I feel about this point.

I believe, and insist upon, that any plan we initiate to solve our problem must demonstrate our intentions to no longer proceed with "business as usual". We must be able to point to corrective action that was intended to prevent the recurrence of poor credit collections.

[redacted]

I am nearing the end of this personal confession, so I hope that I still have your attention. I apologize for the length.

Before we can realistically hope to overcome this crisis, we need to address how we are going to work together. One of the really great joys of building McGinn, Smith was the close personal style and relationship that we developed together. We became best friends, our families socialized together, and we worked very closely together. Yes, we assumed different responsibilities over the years, but we always did things together. We discussed business plans prior to implementation, consulted on problems and possible solutions, and always shared equally in profits and losses. Partners from beginning to end. While I would always give you the lion's share of the credit for those successes, I do believe there was and is a great benefit from having a partner to draw upon. I feel the last couple of years has seen us move away from that approach.

Your interests in NYRA and Pointe have stolen some of the time that you would naturally be devoting to McGinn, Smith. This is a result of the excessive travel that both interests demand. I am not remotely suggesting that these interests have negatively impacted your effort or contribution. Far from it. You accomplish more in two days than most of us do in one. Where it has had an effect is that these times away have left less hours for us to get together and share our thoughts on business developments and personal feelings. When you are in the office, the door is generally closed, I assume to avoid the many interruptions from brokers and staff. While that is understandable, again it has an effect on the time we have to communicate with each other. I don't think we need to start making appointments to see each other or to draw up daily agendas, but I do think that it is critical for us to start meeting more regularly to discuss the implementation of whatever plan we agree upon.

[redacted]

~~This~~ kind of personal crises that we are going through needs a lot of support. Due to the highly confidential nature of the crises, we are kind of stuck with each other. Besides, you have a great way of always giving me some glimmer of hope that all will end well. It usually does. I love you like a brother, and I am in awe of your many talents and abilities. ~~If so~~ I am hopeful that you see this epistle for what it is - a call to arms for both of us. A realization that we have to do things radically different and that we must start immediately. We must work closely together, but that we can expect help and support from both Mary Ann and Brian. With a lot of effort and a little luck, a year from now we can look back upon this time as our finest effort together. We really have no choice but to make that effort, the consequences of failure are absolutely intolerable.

Your everlasting friend
and partner
Dave

[redacted]

Facts to think about

1. C^4 trusts

Year	approximate funding
1994	2,500,000
95	8,575,000
96	10,200,000
97	22,846,000
98	26,000,000
99	35,601,000

Substantial growth in year 97-99 ~~are~~ is a result of business with Phase I and Safe Lock - dealers with poor collection history. Attrition in future years likely to accelerate. Deals have seen lengthened maturities in these years, adding to probable increased attrition.

Older deals are better deals, so as they are paid down, the ongoing requirements and defaults grow

2. Total debt outstanding at the end of 1999 is 70,000,000. This is a huge number in anybody's world.

Prior to BC, CPD, MTP total debt was 61,000,000.
Collected monthly cash flow: 1,100,000
At 38 X RMR = Portfolio value = 41,800,000

[redacted]

Debt: 61,000,000
Portfolio value: 41,800,000
19,200,000 deficit
Albank MS Credit line: 2,000,000

$21,200,000 Present value deficit and liability

3. Structural monthly deficit of 600,000 and growing
Under present plan and approaches, the need is for new funding of 4,000,000/mo. Assumes no future defaults.
Thus, we need to raise 48,000,000 in 2000, 12,400,000 more than 1999 - a 35% increase.
This is not realistic. Brokers are running out of sources. At sales meeting last week, the consensus was they would probably be able to match 1999. Slowness in closing recent deals would confirm this.

4. 1999 game plan called for structural monthly deficit to decrease from $315,000 to $243,000. Instead, it has grown to $600,000. Plan called for a surplus of $2,414,000 - does not exist.

2000 Plan - Same approach, same business mix, same assumptions

[redacted]

5. even if we assumed that we were able to generate $800,000/mo, the deficit will soon reach that if we continue to fund the same credits, leaving nothing for other uses.
Once we exceed it - game, set, match.
If we stay on this course, I see us with no more than 6 mos. life

6. We are also paying monthly monitoring costs of $110,000, including 25,000 for Tim's.
This too, will probably continue to grow

7. Albank credit line no longer secured with separate contracts.
Now is unsecured for Tim & Dave.
Balance around $2,000,000 ouch!

8. Present morale of Brian and Mary Ann is very low.
Both are fearful - Brian for the future of McGinn, Smith, Mary Ann for personal legal liability and loss of license to practice. Plan needs to instill confidence in them.

[redacted]

9. Safeback — all of staff is extremely uncomfortable with them. They are outside people - we should listen to them. This kind of business is no different than Phase I. Result will be the same. We must continue to demand higher standards, give no exceptions to those standards, and seek to move away from this kind of dealer and this type of business ASAP

10. Distributions to Tim & Dave going forward should be eliminated. Not only should those monies be set up as reserves for investor protection, but in future litigation, these distributions would be extremely detrimental to us. Hard to justify investors losing 1/2 their money, while we continue to ~~keep~~ prosper at compensation levels that would seem obscene to the average citizen sitting in judgement. This is a very personal issue for us, but I feel strongly about it. You have larger financial commitments than I, and loss of

distributions would be more of an impact. I am in a position to help. Let's talk!

11. Is it time to ask ourselves a fundamental question as to this whole business? Are the business concepts flawed? With industry leaders now giving away the product, it is not surprising that sales are being made to anyone and everyone. As long as a dealer has access to a funder, such as ourselves, his risk is negligible. The entire approach invites poor credit policy at best and fraud at the worst. Our problems are hardly unique - Protection One, Monitronics, Devcon - all have the same problems. If we are going to remain in business - we must upgrade the credit quality and find new ways to help ensure payments will be made for the life of the contract.

[redacted]

 [redacted]

Plan ideas / ramblings

1. First and foremost - we must stop funding deficit creating business. We can't fix the past problems if we are creating future problems at an equal or faster rate

2. Obviously, we must reduce the present deficit:
   a. dramatically increase collections
   and/or
   b. restructure debt

3. Increase collections:
   here we have made a start. We should hire mgt. and staff from Key Bank. All 3 that we interviewed last week are interested. They believe they can bring staff collectors with them. None can start until April 1st - this is a problem, but we can use them to consult prior to that date.

We need to determine who, how many, where, budgets, and equipment/resource needs

[redacted]

4. We also need to review our legal remedies and approaches. One of the key people we interviewed holds that responsibility at Key.

5. While collections are a priority, we need to continue to find ways to improve due diligence and install better credit reviews. Again, let's seek experienced people.

6. The collapse of NFC (Clifton Park) in December might hold some resources and opportunities. This was a fast growing sub-prime lender of mortgages. Bear Stearns was financing. 500 employees. National presence. A number of local financial institutions have already been hiring. Let's talk to the principals. See what we can learn. Get possible leads on key people

Next Page - finally something new to think about. I hope that I haven't already lost you.

[redacted]

Heart & Soul of some ideas to restructure debt and reduce present financing costs.

1. First, I believe it is in our interest to bring the overall debt level down. If we are forced to deal with defaults in the future, it will be easier to restructure a smaller debt load. Plus, it is obviously easier to reduce debt before any defaults occur.

I had previously suggested repackaging existing RMR, selling it, and paying down Trust debt. Probably this can only be done where we have only Junior tranche remaining, otherwise we will violate Senior tranche cover ratios. You were calling Monotronics, etc. Can people like Rory be of help here? I understand that he is doing some selling away from us. If we can get an acceptable price, this seems like an idea worth pursuing. I haven't even tried to do numbers - that I leave up to you.

2. Absence the ability to package and sell existing RMR, we should consider reselling those Trusts as senior debt where the Senior is paid down. This amounts to approximately $9,000,000. These include LAI, IDES, NJO, RTD, KT, STP, FMD, MBM, EB. This would accomplish saving some interest costs, shifting liability from retail to institutional, putting cash in the hands of retail customers for future reinvestment. One stumbling block may be the additional coverage required by banks. However, our more accomodative lenders (BSB etc) might be willing to be buyers.
We might get some grumbling from customers and brokers because of loss of higher yield (most are 13½%), but we can probably counter by saying most of the contracts are due to expire and we don't want to take the risk of homeowners not renewing.

3. Another idea might be to start to establish ourselves as a broker. Buy and sell RMR for fees and the spread.

[redacted]

-3-

Obviously, we would try to do as reckless transactions. Maybe get brokers working not only to bring us product but to sell product as well. Or better yet, make the purchases and sales within, in order to avoid paying brokerage costs and thus adding to our returns.

4. All of the aforementioned might be helpful, but they certainly do not present the opportunity for a final solution. However, there is a more daring and challenging path we can take that I believe can be a tremendous opportunity and eventually absolve a lot of our problems. The plan I speak of is to dramatically grow C^4 into a major financial company. The business plan would be centered around C^4 being a financial company that buys credit that is presently in arrears. Bob Wade the head of Key Bank's Collection and Loan Recovery mentioned this during our interview.

[redacted]

Evidently there is a huge market in purchasing credit that has been deemed uncollectable and has been forced by regulators to be written off. This credit is purchased at 6-12¢/1.00. It can then be packaged and resold or the debt can be turned over to collection people for another attempt at recovery. The concept is that a lot of this debt has never been properly handled by the existing collection departments. Experienced and highly competent recovery groups can do very well! Obviously, what debt is ~~chos~~ selected for purchase and at what price is critical to success. I believe that we have the opportunity to acquire Key Bank's unit by hiring individuals and not have to pay for acquiring a complete business.

The attractiveness of this idea is not only that we might be able to develop a business with substantial cash flows to help reduce our present deficits, but it could be an outlet for ~~to~~ the Trusts to sell some of its accounts that are

[redacted]

 [redacted]

in arrears and then provide cash to help pay down the Trust debt. These transactions would have to be a part of the overall business otherwise they would be accurately perceived as a bailout to the Trusts. But if they were part of an overall business strategy of buying loans and credit in default, and returns were commensurate with ~~othe~~ the returns on other asset purchases, I believe it could be done.

We would need to capitalize the company with substantial equity and ~~bank~~ ~~lines~~ acquire bank lines of credit to help finance the asset purchases. Potential equity partners might be:

1. Key Capital
2. GE Capital
3. Banks looking for a strategic partner and who understand the business
4. Venture Capital

I was thinking that your friend John Meriwether might have an interest or that he could be helpful in referring some investment sources.

[redacted]

John could certainly be helpful ~~in helping~~ with the structure - he certainly understands leverage. Pointe Financial might have an interest. They would certainly understand the business concept.

The key to getting these people involved would be making them comfortable with who was running the business. If they saw the experienced hands of Key Bank personnel, they might be more inclined to become investors. Just as we see the possibility of recovering dollars for the Trusts, banks might see the possibility of recovering some of their own assets that had been charged off. Thus, we would play the strategic partner angle and get a source of business.

The major benefit to us would be the transfer of assets from the various trusts. We would not have to sell only paper in arrears. We could also sell paper that is presently current. At what multiple I do not know, but every asset transfered out of the trusts into a commercial enterprise would

[redacted]

be helpful to us in managing our defaults and thus keeping McGinn, Smith and its customers out of harms way.

Management structure for C4 would be critical. We would need a President, one experienced in these affairs. Collection and credit departments would have to be set up or reorganized. Documents would have to be acquired, laws governing credit companies researched, procedure manuals put together, training of employees, etc. A major commitment of our available resources - time, personnel, money ~~too~~ would have to be pledged. Your attention and commitment would be critical. Your ability in loan restructuring and deal making would be invaluable.

One of the reasons I like ~~about~~ this approach is that it gives a major deal to focus on. You are at your best when you are out elephant hunting. I don't know how much equity capital would be needed, but I am thinking in the $50,000,000

[redacted]

range. I am trying to arrange a lunch with Bob Wade this week to get a better understanding of the business - its costs and its opportunities. I want you to join us.

This needs to be done in a big way if it is going to work. Now is the time for us to do this. Money is available. I believe people are at least starting to look for alternatives to a very pricey stockmarket. The challenge can get our motors working again, and we can do it together.

I have obviously not covered all possible approaches or solutions to our problems. Nor has there been an indepth due diligence ~~done~~ done on the ideas that I did present. However, I think that they present a good starting point. Hopefully, you and I will have an opportunity to examine these in depth and outline the steps to get started. We need to hit the ground running. I am available Tuesday afternoon and night and Wednesday morning.

Thanks for your attention.

[redacted]

Dear Tim,

Enclosed please find 26 pages of thoughts, ramblings if you will. I apologize for the length and the handwriting. The material is sensitive so I could not ask Norma to type. If I tried to type it, you would be on your 3rd day at Beaver Creek when I finished. You will have difficulty reading it, but please take the time.

After reading it (maybe a couple of times), please feel free to comment and criticize. It is meant to be thought provoking, not the final solution to anything. I would like you to give it substantial thought before we get together. I believe that will be enormously helpful towards a productive end to our meeting. I would like to get together with you to discuss the enclosed before our Wednesday meeting with Brian and Mary Ann. I believe we need to do that away from the office – maybe a meeting room at the FOC.

We have a lot of hard work head of us, and we need to be rowing the boat together in order to successfully complete the tasks before us. My hope is that you recognize my comments for what they are – well intended, without malice, necessary to get us working together again in an agreed upon direction.

I will be in around 10:00, as I have to stop by CSDS. I know we have a meeting with Bill Spoyer at 10:00. After meeting with Bill we can get together to determine the best time for our meeting.

Thanking you in advance for your patience and understanding.

Sincerely -

DLS

Livingston Exhibit 32

File No. 3-15514

GOVERNMENT EXHIBIT

GL4

Dear Tim,

I have chosen to put my thoughts on paper rather than express them in our planned meeting with Brian and Mary Ann on Wednesday evening for several reasons. First and foremost, the present crisis we are facing is really our crisis, and our discussions should remain confidential. We are the ones responsible for a plan, and any comments or ideas from Brian and Mary Ann will probably be more supplementary than structural. Secondarily, I am sensitive to the fact that there may come a time when they may be asked to recount these discussions, and I would not want either of them to be in a position that forces them to choose between testimony harmful to us or perjury.

I am hopeful that you are reading this prior to our meeting on Tuesday. I wanted to get together with just you, to express some things that should be addressed solely between partners; and, after our more personal discussions I am looking forward to developing a course of action that will stave off our immediate financial crisis and then lead to an ultimate resolution.

The idea that I am communicating to you by this means is awkward at best and probably seen as somewhat ridiculous. However, my present state of mind is such that this exercise will hopefully have a therapeutic effect as well as communicative.

We have worked together for over 20 years in a generally benign, prosperous, and endearing relationship. We have been through so much together to get where we are. Building and holding together a business for over 20 years is no small fete. There are very, very few who can point to this kind of accomplishment. From very early on it has been very apparent to me that the vast majority of the credit for the success of this business is a result of your efforts. It has been your intellect, your vision, and your good business instincts that have been responsible for us not only surviving, but succeding. Every business or enterprise needs a leader, and you have filled that role extremely well. Over the years I have assumed the mantel of caretaker, one that is also necessary, but one that without leadership is merely an appendage. Our functions have meshed well, and for twenty some years I have been the beneficiary of an extremely well balanced and satisfied life. I have enjoyed monetary rewards, but not at the expense of family or leisure. In short, it has been a great life.

However, for the last year, and in particular the last few months, I find myself overwhelmed and in a state recently that is probably bordering on depression. My work, my life at home, and I am sure my personality have all become negatively impacted. It is a result of one thing, and one thing only – the thought that the present situation with C^4 is about to implode, and with it everything I have ever cherished.

I am sure that you will agree, that if our trusts go into default, everything else will come apart. The business has become addicted to the cash flow from the trust business, and without them will have a difficult time surviving. Although, I believe that we are on the verge of being able to develop other investment banking business, just as the importance of the brokerage revenues are diminishing. But we need time, and I am not convinced we will be able to acquire that time. The default of the trusts will drastically reduce revenues, cause us to lose brokers and at least their confidence in us, bring on crushing litigation and devasting publicity; and I am convinced prosecution by regulators or worse. The impact on our employees, customers, friends, and family will be devasting. I am just overwhelmed by the thought of the financial losses, the humiliation, the perceived betrayal of trust. I am trying to be strong in face of all of this, but I can't sleep, I am convinced I have developed an ulcer, and I am being driven to moods of depression. I am sure that you are feeling some of these things as well. I know Mary Ann is. I have not shared any of this with Lynn, I assume because I have determined that it won't be helpful.

Aside from the above, I, unlike you, feel that we are vulnerable to criminal prosecution. Aside from the probable violation of Reg 17 as it relates to accredited investors, I am not aware of any action that would be remotely considered illegal. However, I would never underestimate the zeal of local or state or even SEC prosecutors to make a story out of our failure. Convictions of fat cat financiers is a great stepping stone up the career ladder.

I believe that we are at risk for the continual raising of investment dollars, that are now clearly unlikely to be repaid in full. As we do each transaction we distribute every excess dollar back to C^4 or McGinn, Smith/MS partners. More recently, those dollars for the most part are used to fulfill the investment promise to earlier investors. While you have previously rejected my characterization of these acts as similar to a "Ponzi Scheme" because new dollars being raised are in fact buying new product, and only "profit dollars" are being used to cover shortfalls. I believe that our actions could be defined otherwise. The reason for my beliefs is that we are now in possession of indisputable empirical evidence that the new investments have no chance of being repaid in full. Whether less than 100% collections (66%) is due to normal attrition, fraud, billing errors, or poor credit judgment, it really does not matter. The facts are that we will never collect 100% or close to it. Therefore, our "profits" which we use are not profits at all, but rather monies that should be held in reserve to allow for the deficit collections for the protection of the new investors.

For us not to allow for these deficits by setting up adequate reserves is, in my judgment, bordering on fraud. Certainly, by not disclosing in the prospectus our poor history of collections, we are not providing the prospective investor an accurate picture of his risk. We both know why we don't make that disclosure – because such disclosure would cause our salesmen to cease selling and investors to cease buying. Thus, we are misleading both our own employees and customers.

I fully understand, as well as you, our need to continue raising money, and that a number of the collection deficits were isolated incidents of fraud or gross incompetence by some of our dealers. However, those incidents have not impacted the majority of collections. Most of the deficits are from poor credit risks. We now know that, and we continue to accept their contracts without adequate reserves, and treat the excess discounted cash flow as certain profit to be distributed as we see fit.

This is wrong. I strongly believe that in civil or criminal litigation we would lose badly on this point. "We knew the poor collection history, and yet continued to raise money as if we were ignorant of our own collection experience".

I am not an Eagle Scout, but I believe that both you and I are violating the high standards of integrity and others that have been the historical standard for us. That bothers me very, very much. But what terrifies me is the possibility of being indicted for such conduct, and worse, the prospect of conviction. I cannot emphasize enough how strongly I feel about this point.

I believe, and insist upon, that any plan we initiate to solve our problem must demonstrate our intentions to no longer proceed with "business as usual". We must be able to point to corrective action that was intended to prevent the recurrence of poor credit collections.

I am nearing the end of this personal confession, so I hope that I still have your attention. I apologize for the length.

Before we can realistically hope to overcome this crisis, we need to address how we are going to work together. One of the really great joys of building McGinn, Smith was the close personal style and relationship that we developed together. We became best friends, our families socialized together, and we worked very closely together. Yes, we assumed different responsibilities over the years, but we always did things together. We discussed business plans prior to implementation, consulted on problems and possible solutions, and always shared equally in profits and losses. Partners from beginning to end. While I would always give you the lion's share of the credit for those successes, I do believe there was and is a great benefit from having a partner to draw upon. I feel the last couple of years has seen us move away from that approach.

Your interests in NYRA and Pointe have stolen some of the time that you would naturally be devoting to McGinn, Smith. This is a result of the excessive travel that both interests demand. I am not remotely suggesting that these interests have negatively impacted your effect or contribution. Far from it. You accomplish more in two days than most of us do in one. Where it has had an effect is that those times away have left less hours for us to get together and share our thoughts on business developments and personal feelings. When you are in the office, the door is generally closed, I assume to avoid the many interruptions from brokers and staff. While that is understandable, again it has an effect on the time we have to communicate with each other. I don't think we need to start making appointments to see each other or to draw up daily agendas, but I do think that it is critical for us to start meeting more regularly to discuss the implementation of whatever plan we agree upon.

This kind of personal crisis that we are going through needs a lot of support. Due to the highly confidential nature of the crisis, we are kind of stuck with each other. Besides, you have a great way of always giving me some glimmer of hope that all will end well. It usually does. I love you like a brother, and I am in awe of your many talents and abilities. I am hopeful that you see this epistle for what it is – a call to arms for both of us. A realization that we have to do things radically different and that we must start immediately. We must work closely together, but that we can expect help and support from both Mary Ann and Brian. With a lot of effort and a little luck, a year from now we can look back upon this time as our finest effort together. We really have no choice but to make that effort, the consequences of failure are absolutely intolerable.

Your everlasting friend and partner

Dave

Facts to think about

1. C^4 trusts

Year	approximate funding
1994	2,500,000
95	8,575,000
96	10,200,000
97	22,846,000
98	26,000,000
99	35,601,000

   Substantial growth in year 97-99 is a result of business with Phase I and Safelink – dealers with poor collection history. Attrition in future years <u>likely</u> to accelerate. Deals have seen lengthened maturities in those years, adding to probable increased attrition.

   Older deals are better deals, so as they are paid down, the ongoing requirements and deficits grow

2. Total debt outstanding at the end of 1999 is 70,000,000. This is a huge number in anybody's world.

   Prior to BC, CPD, MTP total debt was 61,000,000. Collected monthly cash flow: 1,100,000

   At 38 x RMR = Portfolio value = <u>41,800,000</u>

Debt:	61,000,000	
Portfolio value:	41,800,000	
	19,200,000	deficit
Albank MS Credit: line	2,000,000	
	$21,200,000	Present value deficit and liability

3. Structural monthly deficit of 600,000 and growing
   Under present plan and approaches, the need is for new funding of 7,000,000/mo. assumes no future deficits.
   Thus, we need to raise 48,000,000 in 2000, 12,400,000 more than 1999 – a 35% increase.
   This is not realistic. Brokers are running out of sources. at sales meeting last week, the consensus was they would probably be able to match 1999. Slowness in closing recent deals would confirm this.

4. 1999 game plan called for structural monthly deficit to decrease from $319,000 to $243,000. Instead, it has grown to $600,000. Plan called for a surplus of $2,414,000 – does not exist.

   2000 Plan – Same approach, same business mix, same assumptions

5. even if we assumed that we were able to generate $800,000 /mo, the deficit will soon reach that if we continue to fund the same credits, leaving nothing for other uses. Once we exceed it – game, set, match.

   If we stay on this course, I see us with no more than 6 mos. life

6. We are also paying monthly monitoring costs of $110,000, including 75,000 for King. This too, will probably continue to grow

7. Albank credit line no longer secured with separate contracts. Now is unsecured for Tim & Dave. Balance around $2,000,000 ouch!

8. Present morale of Brian and Mary Ann is very low. Both are fearful – Brian for the future of McGinn, Smith, Mary Ann for personal legal liability and loss of license to practice. Plan needs to instill confidence in them.

9. Safelink – all of staff is extremely uncomfortable with them. They are our line people – we should listen to them. This kind of business is no different than Phase I. Result will be the same. We must continue to demand higher standards, give no exceptions to those standards, and seek to move away from this kind of dealer and this type of business ASAP
10. Distributions to Tim & Dave going forward should be eliminated. Not only should those monies be set up as reserves for investor protection, but in future litigation, those distributions would be extremely detrimental to us. Hard to justify investors losing ½ their money, while we continue to prosper at compensation levels that would seem obscene to the average citizen sitting in judgment. This is a very personal issue for us, but I feel strongly about it. You have larger financial commitments than I, and loss of

distributions would be more of an impact. I am in a position to help. Let's talk!

11. Is it time to ask ourselves a fundamental question as to this whole business? Are the business concepts flawed? With industry leaders now giving away the product, it is not surprising that sales are being made to anyone and everyone. As long as a dealer has access to a funder, such as ourselves, his risk is neglible. The entire approach invites poor credit policy at best and fraud at the worst.

    Our problems are hardly unique – Protection One, Monotronics, Demak – all have the same problem. If we are going to remain in business – we must upgrade the credit quality and find new ways to help ensure payments will be made for the life of the contract.

Plan ideas / ramblings

1. First and foremost – we must stop funding deficit creating business. We can't fix the past problems if we are creating future problems at an equal or faster rate
2. Obviously, we must reduce the present deficit:
   a. Dramatically increase collections

      and/or

   b. Restructure debt
3. Increase collections:

   here we have made a start. We should hire mgt. and staff from Key Bank. All 3 that we interviewed last week are interested. They believe they can bring staff collectors with them. None can start until April 1st – this is a problem, but we can use them to consult prior to that date.

   We need to determine who, how many, where, budgets, and equipment/resource needs

4. We also need to review our legal remedies and approaches. One of the Key people we interviewed holds that responsibility at Key.

5. While collections are a priority, we need to continue to find ways to improve due diligence and install better credit reviews. Again, let's seek experienced people.

6. The collapse of NFC (Clifton Park) in December might hold some resources and opportunities. This was a fast growing sub-prime lender of mortgages. Bear Stearns was financing. 500 employees. National presence. A number of local financial institutions have already been hiring. Let's talk to the principals See what we can learn. Get possible leads on key people.

Next page – finally something <u>new</u> to think about. I hope that I haven't already lost you.

Heart & Soul of some ideas to restructure debt and reduce present financing costs.

1. First, I believe it is in our interest to bring the overall debt level down. If we are forced to deal with defaults in the future, it will be easier to restructure a smaller debt load. Plus, it is obviously easier to reduce debt before any defaults occur.

   I had previously suggested repackaging existing RMR, selling it, and paying down Trust debt. Probably this can only be done where we have only Junior tranche remaining, otherwise we will violate Senior tranch cover ration. You were calling Monotronics, etc. Can people like Rory be of help here? I understand that he is doing some selling away from us. If we can get an acceptable price, this seems like an idea worth pursuing. I haven't even tried to do numbers – that I leave up to you.

2. Absence the ability to package and sell existing RMR, we should consider reselling those trusts as Senior debt where the Senior is paid down. This amounts to approximately $9,000,000. These include LAI, IDES, NJO, RTD, KT, JTP, FMD, MBM, EB. This would accomplish saving some interest costs, shifting liability from retail to institutional, putting cash in the hands of retail customers for future reinvestment. One stumbling block may be the additional coverage required by banks. However, our more accomodative lenders (BSB etc) might be willing to be buyers.

   We might get some grumbling from customers and brokers because of loss of higher yield (most are 13 1/2%), but we can probably counter by saying most of the contracts are due to expire and we don't want to take the risk of homeowners not renewing.

3. Another idea might be to start to establish ourselves as a broker. Buy and sell RMR for fees and the spread.

Obviously, we would try to do as riskless transactions. Maybe get brokers working not only to bring us product but to sell product as well. Or better yet, make the purchases and sales within, in order to avoid paying brokerage costs and thus adding to our returns.

4. All of the aforementioned might be helpful, but they certainly do not present the opportunity for a final solution. However, there is a more daring and challenging path we can take that I believe can be a tremendous opportunity and eventually absolve a lot of our problems. The plan I speak of is to dramatically grow C^4 into a major financial company. The business plan would be centered around C^4 being a financial company that buys credit that is presently in arrears. Bob Wade the head of Key Bank's Collection and Loan Recovery mentioned this during our interview.

Evidently there is a huge market in purchasing credit that has been deemed uncollectable and has been forced by regulators to be written off. This credit is purchased at 6-12 ¢/1.00. It can than be packaged and resold or the debt can be turned over to collection people for another attempt at recovery. The concept is that a lot of this debt has never been properly handled by the existing collection departments. Experienced and highly competent recovery groups can do very well. Obviously, what debt is selected for purchase and at what price is critical to success. I believe that we have the opportunity to acquire Key Bank's unit by hiring individuals and not have to pay for acquiring a complete business.

The attractiveness of this idea is not only that we might be able to develop a business with substantial cash flows to help reduce our present deficits, but it could be an outlet for the Trusts to sell some of its accounts that are in arrears and thus provide cash to help pay down the Trust debt. Those transactions would have to be a part of the overall business otherwise they would be accurately perceived as a bailout to the Trusts. But if they were part of an overall business strategy of buying loans and credit in default, and returns were commensurate with the returns on other asset purchases, I believe it could be done.

We would need to capitalize the company with substantial equity and acquire bank lines of credit to help finance the asset purchases. Potential equity partners might be:

1. Key Capital
2. GE Capital
3. Banks looking for a strategic partner and who understand the business
4. Venture Capital

I was thinking that your friend John Merriwhether might have an interest or that he could be helpful in referring some investment sources.

John could certainly be helpful with the structure – he certainly understands leverage. Pointe Financial might have an interest. They would certainly understand the business concept.

The key to getting these people involved would be making them comfortable with who was running the business. If they saw the experienced hands of Key Bank personnel, they might be more inclined to become investors. Just as we see the possibility of recovering dollars for the Trusts, banks might see the possibility of recovering some of their own assets that had been charged off. Thus, we would play the strategic partner angle and get a source of business.

The major benefit to us would be the transfer of assets from the various trusts. We would not have to sell only paper in arrears. We could also sell paper that is presently current. at what multiple I do not know, but every asset transferred out of the trusts into a commercial enterprise would be helpful to us in managing our deficits and thus keeping McGinn, Smith and its customers out of harms way.

Management structure for C^4 would be critical. We would need a President, one experienced in these affairs. Collection and credit departments would have to be set up or reorganized. Documents would have to be acquired, laws governing credit companies researched, procedure manuals put together, training of employees, etc. A major commitment of our available resources – time, personnel, money would have to be pledged. Your attention and commitment would be critical. Your ability in loan restructuring and deal making would be invaluable.

One of the reasons I like this approach is that it gives a major deal to focus on. You are at your best when you are out elephant hunting. I don't know how much equity capital would be needed, but am thinking in the $50,000,000 range. I am trying to arrange a lunch with Bob Wade this week to get a better understanding of the business – its costs and its opportunities. I want you to join us.

This needs to be done in a big way if it is going to work. Now is the time for us to do this. Money is available. I believe people are at least starting to look for alternatives to a very pricey stock market. The challenge can get our motors working again, and we can do it together.

I have obviously not covered all possible approaches or solutions to our problems. Nor has there been an indepth due diligence done on the ideas that I did present. However, I think that they present a good starting point. Hopefully, you and I will have an opportunity to examine these in depth and outline the steps to get started. We need to hit the ground running. I am available Tuesday afternoon and night and Wednesday morning. Thanks for your attention.

DLS

McGinnSmith
& Company, Inc.

Investment Bankers • Investment Brokers

99 Pine Street
Albany, NY 12207
518-449-5131
Fax 518-449-4894
www.mcginnsmith.com

March 23, 2004

Mr. Steven C. Vitulano
Branch Chief
Broker-Dealer Inspection Program
Securities and Exchange Commission
233 Broadway
New York, New York 10279

Dear Mr. Vitulano:

Please accept the following as changes in procedures or policy as it relates to the violation of rules and regulations of the "Exchange Act" and the NASD that were determined by the SEC 2003 staff examinations of the Albany Office and the Manhattan branch office of McGinn, Smith & Co., and dated in your letter of February 26, 2004.

1. Section 15(a) of the Exchange Act an affiliate of McGinn, Smith & Co., Capital Center Credit Corp (C4) was operated as an unregistered broker-dealer.

C4 was and is a specialty finance company whose principal business purpose was to acquire and finance home security alarm contracts through purchases or loans. Those activities, in my judgment were normal corporate activities and would not fall under any securities regulation. Based on the exit interview with your staff, I believe that there were certain other corporate activities that resulted in their conclusion that C4 was in fact acting as an unregistered broker-dealer. Those activities included the purchase and resale of certain private placements from individual investors who had previously purchased offerings through McGinn, Smith & Co. These offerings primarily consisted of assets (home security alarm contracts) that C4 had previously been involved in acquiring or financing. The purchase of these private placements from customers of McGinn, Smith & Co., were designed to assist customers who found themselves in a position of need for capital and no public market place to sell their investments. While private placements are sold on the basis that there is not any or limited liquidity, often clients find themselves in a position of financial need that was unanticipated. McGinn, Smith was trying to offer a solution. Often the issuer, upon request, will entertain repurchasing these investments when a need arises. However, the issuer in all these circumstances were structured in a way that they did not have the cash resources to repurchase the investments. McGinn, Smith & Co. was unable to do so because they were precluded from accepting customer

Livingston Exhibit
101

File No. 3-15514

securities or funds. Thus, we believed that C4 offered an acceptable solution, and in fact had previously received guidance from another regulatory body as to this approach. Please excuse the lengthy preamble to our plans to prevent further violations, but I felt that it was important for the SEC to understand why C4 was involved in these limited activities.

Capital Center Credit Corp. will immediately refrain from engaging in the purchase and sale of any securities, private or public, for the purpose of providing liquidity to individual investors. Further, they will refrain from the purchase of any investments where the purpose is to resell those investments to another entity involved in a security offering. Capital Center Credit Corp. is a business that will shortly be liquidated. Its primary business purpose of financing home security alarm contracts is now encumbered by a non-compete provision with Integrated Alarm Services Group (IASG) whose principal shareholders are common. While there are certain assets and liabilities that will require time for orderly liquidation, none of those transactions will be of a securities nature. The principals of C4 have no desire to have the company be registered as a broker-dealer because they do not anticipate any activities that would require such registration. The alternative of incorporating the books and records of C4 into McGinn, Smith is also undesirable. If C4 were in its normal course of business to acquire assets by way of assuming debt, it is likely that this would be punitive to the balance sheet of McGinn, Smith. The assets would most likely be no-allowable and the debt would act as a direct liability to the firm's net capital. Thus, it appears that the only solution is to cease any activities that might be construed as a securities transaction and to orderly liquidate the company.

2. Rule 17a-4 (b)(4) and NASD Conduct Rule 3110

The SEC staffs' examination discovered certain deficiencies with the firm's computerized system for record keeping of e-mails. The firm has engaged a consultant to review all of our systems and to recommend changes and additions that will bring the firm into total compliance. These procedural changes will include the ability to not only retain the records, bring them up on demand, but also a better system of reviewing all electronic communications for approval before they are sent. We are also pursuing a system that will allow better access and review of incoming e-mails and a system that will be able to better filter both incoming and outgoing e-mails that will be helpful in our compliance responsibility.

The firms has also made arrangements for two of its officers, Brian Mayer, branch manager of the Manhattan branch, and Steven Smith, Compliance officer to attend a two-day program offered by the NASD Institute to be held in June 2004 in NYC. The two-day symposium address a wide range of topics related to branch office management, including several sessions relating to monitoring e-mail and instant messaging and record keeping. I believe the exposure at this conference will be most helpful to the firm in

- to minimize or eliminate unsolicited marketing e-mail commonly know as "spam;"
- a comprehensive archiving and monitoring solution for Instant Messaging;

Details for Execution:

The recommended solution would consist of the following:

A vendor hosted application solution – this solution will consist of an e-mail server hosted by a vendor. All e-mails will be processed by the vendor hosted e-mail server computer. Our firm's employees will use their existing "Microsoft Outlook" e-mail client software to access this e-mail.

- **SEC compliance in relation to electronic messaging:** This solution will provide a centralized capture and archiving of all outgoing and incoming e-mails before they are delivered to their final destinations. These e-mails are written to (WORM – Write Once Read Many) optical media. E-mails are kept in an easily accessible format for 3 years. All e-mails past 3 years up to 7 years are kept in a long term storage. The long term storage will be kept in a temperature and humidity controlled environment. All e-mails are sent to McGinn, Smith & Co., Inc. monthly or quarterly on CD or DVD as a backup copy.
- **internal controls and monitoring capabilities to mitigate customer oriented liability and litigation:** The solution will provide the ability to append legal disclaimers to all e-mails sent from McGinn, Smith & Co., Inc. from a central server. This message can be altered by an administrator only. This message should be appended to textual and html formatted e-mails. Also, all e-mails can be actively or passively monitored. A database of offending words or phrases can be created and actively customized. All e-mails that contain these words can be either quarantined for approval by an administrator for final delivery (in active mode) or simply logged for review (in passive mode). The solution should allow application of passive and active modes per e-mail user. The solution should allow oversight assignment of any e-mail user to a particular jurisdiction (all users in Albany assigned to compliance manager A and all users in NYC to compliance manager B). Each jurisdiction should allow multiple compliance personal to review and approve e-mails in active mode.
- **provide reliable e-mail service with high uptimes and availability:** The hosted applications should be hosted on a robust server with mirrored storage, redundant power supplies and redundant communication lines.
- **provide geographically dispersed back-up copy of all e-mails:** A copy of all e-mails should be backed-up and kept off site for business continuity.

Many vendors will transport taped copies off all e-mails to external storage site. Generally these are stored underground in climate-controlled, spent salt mines, professional storage companies or bank vaults. A monthly or quarterly copy of all e-mails are also provided to the BD for safe keeping and to provide an addition level of redundancy.

- **provide safety from or eliminate malicious computer code know as "viruses;"**: All e-mails and attachments (including archival or compressed files eg. Zip) will be scanned centrally, for malicious computer code, using the latest signatures. Each machine at McGinn, Smith will also have individual virus scanners to provide a second level of protection.
- **minimize or eliminate unsolicited marketing e-mail commonly known as "spam":** Minimize "spam" e-mail, preferably using a Bayesian statistical analysis engine. The spam engine should quarantine all e-mails for period of 1 week for retrieval of false positives by an administrator. The spam filter should preferable provide the customization necessary to prevent or minimize false positives. Customization should include the ability to set spam classification threshold levels per e-mail user. Customization should also allow an administrator to "white list" a set of outside e-mails senders to allow pass-through access to its final destination within the firm. It should also allow an administrator to "black list" e-mail senders by domain, e-mail address or "IP" (numeric network ID) address.
- **comprehensive archiving and monitoring solution for Instant Messaging:** Instant messaging today has become an invaluable tool as e-mail. The solution should provide "secure gateway" proxy access to public instant messaging networks. This central gateway will act as a proxy that will 1) log all communications – all users will be notified that they are being recorded; 2) filter out malicious computer code, commercial, pirated software copyrighted music, that may be conveyed through the networks 3) flag offending words used in this medium – pre-defined by a McGinn, Smith administrator.

As regards to the firm's failure to provide separate complaint files for Joyce Magnivito and Robert Hill, the firm does have in place policies and procedures for monitoring written complaints, arbitrations and settlements. However, I believe that the complaint from Mrs. Magnavito and our written response was improperly filed in Mrs. Magnavito's account file and Mr. Smith's correspondence file instead of the firm's complaint file. This appears to have been an administrative oversight and not a deficiency in policy and procedure. As regards to Robert Hill, the communication from Dr. Hill was concerning the status of a past investment and his seeking of advice on the opportunity to exchange it for an anticipated public offering. I did not consider his communication to be a complaint and therefore kept a record of it in my correspondence file. In the future we will keep all such communication in the firm's complaint file for the review of examiners.

In an effort to further our preventive compliance program, two of our firm's representatives, will participate in a conference call hosted by NASD Districts 9 and 11 at 10:00 a.m. on Thursday, March 25, 2004. Included on the agenda for that call will be discussion of "reporting requirements for customer complaints" – NASD Conduct Rule 3070.

We will incorporate into our policies and procedures any suggestions as a result of that conference call that we believe will strengthen our compliance efforts.

With respect to the branch office examination:

5. Section 5 of the Act of 1933 was violated in that M&S accepted certain customer funds for the purchase of IASG initial public offering. There were apparently multiple violations as regards to opening new accounts and anticipation of the IPO. The branch was evidently attempting to have customers open new accounts with a deposit to guard against the possibility of the clients' failure to pay if the stock started trading at a price below the IPO price. In the future the practice will not be permitted and the firm will have to manage its risk through customer due diligence and share allocation for new accounts.

6. Rule 17a-4(b)(4) and NASD Conduct Rule 2210. The cited violations were a result of the deficiencies in reviewing and maintaining electronic mail.

The firm is taking action as outlined in #2 and #4, including having firm representatives participate in the NASD sponsored conference call on March 25, 2004 and to attend the NASD Institute symposium in June 2004. The implementation of the McGinn, Smith & Co., Inc. Enterprise-wide Messaging Proposal as outlined in Response #4 to address the violation of NASD Conduct Rule 3010 will correct and prevent any future violations in this area.

7. NASD Conduct Rule 3010

The SEC staff, through its own investigation, has alleged that three of McGinn, Smith & Co. sales representatives, specifically Bernardo Misseri, Gregory Gatto, and Teekachard Tiwari, violated NASD Conduct Rule 3040 "selling away" or offering securities transactions that were not approved by and without the knowledge of McGinn, Smith & Co. management. While I am not in possession of the facts surrounding these allegations, interviews conducted with the three former members suggest that they were most likely involved in those activities. Tiwari, who had represented upon his resignation that he was going to work for a software firm apparently started a hedge fund and requested Misseri and Gatto to help solicit investors. It is the believe of McGinn, Smith management that these solicitations did not take place during regular office hours ant that no amount of written procedures or supervision would have been able to detect these illegal activities. However, a more pro-active approach by management in communicating with customers might have led to the detection of these activities. McGinn, Smith is therefore presently engaged in developing as part of its compliance procedures a program of both written and telephonic communications by management with customers of the firm that will inquire as to whether they have been offered investment opportunities that have some of the following characteristics:

1) offer is not accompanied by a prospectus
2) subscription agreements that make no mention of McGinn, Smith & Co.
3) funds for investment are instructed to be sent to an address that is not the address of McGinn, Smith's clearing agent or an escrow agent that is not specified by McGinn, Smith & Co.
4) customer did not receive a confirmation with McGinn, Smith's name on it nor the name of their clearing agent
5) investment material, including subscription agreements, did not arrive in a McGinn, Smith envelope
6) dividends or interest payments are directed to an account other than your McGinn, Smith & Co., account

Customers will be urged to contact specific branch management or compliance officers of the firm, and not their other brokers, if any of the aforementioned characteristics are present in their investment material. A record of the specific form of communication and the customer's response will be stored in a separate file. The communications will be done on a random basis, but with special emphasis on high net worth, risk oriented clients. If there is any evidence that the firms' clients are being solicited for these unapproved investments, a complete audit of all of the broker's accounts will be immediately conducted and the broker suspended immediately pending the outcome of the investigation.

I wish to assure your offices that McGinn, Smith takes its compliance responsibilities very seriously. While we are disappointed that we were found to be in violation of several rules and regulations, we are cognizant that these audits are most helpful in identifying shortfalls in our policies and procedures and that corrective measures will ultimately lead to the well being of our customers and to help reduce the potential liability resulting from those violations.

Finally, I wish to commend you on the professionalism of your audit staff. They were thorough, understanding of our need to continue to conduct our business while complying with their document requests, and courteous to my staff at all times. They were most patient in their document demands and they conducted staff interviews in a non-intimidating manner.

Mr. Steven C. Vitulano
March 23, 2004
Page 8

I have submitted a copy of this response to Fred McDonald, District Director,NASD District 11 Office, per your request. However, McGinn, Smith has recently been reassigned to District 9, and therefore I am also sending a copy to Gary Liebowitz, District Director, NASD District 9, Woodbridge, New Jersey.

If I may respond to any of your questions or provide clarification to any of my responses, please feel free to call me directly at 518-449-5131, extension 202.

Sincerely,

David L. Smith

David L. Smith
President

DLS/pas

cc: Fred McDonald
Gary Liebowitz

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, v. TIMOTHY M. MCGINN, DAVID L. SMITH, Defendants.	Case No. 12-CR-028 (DNH) STIPULATIONS AS TO THE ADMISSIBILITY OF DOCUMENTS

The United States of America, by and through its counsel of record, the United States Attorney for the Northern District of New York and defendants Timothy M. McGinn and David L. Smith, by and through their counsel of record, E. Stewart Jones, Esquire and William J. Dreyer, Esquire hereby agree and stipulate as follows:

The records that are listed below, including Private Placement Memorandums (PPMs), investor materials and documents, accounting records and records stored electronically on computers or in hard copy format, satisfy all of the requirements of Federal Rules of Evidence 901 (authentication) and 803(6) ("the business records exception" to the hearsay rule). Thus, they are both authentic and admissible to prove the truth of the matters asserted in and on them, all without the need for testimony by a custodian of records or other witness:

1.) <u>PPMs (with corresponding government exhibit number)</u>:
GA-2: PPM for TDM Cable Trust 06 (first raise)
GA-3: PPM for TDM Cable Trust 06 (second raise)
GA-4: PPM for TDM Verifier Trust 07
GA-5: PPM for Firstline Trust 07
GA-6: PPM for Firstline Senior Trust 07
GA-7: PPM for TDM Luxury Cruise Trust 07
GA-8: PPM for Firstline Trust 07 Series B
GA-9: PPM for Firstline Senior Trust 07 Series B
GA-10: PPM for TDM Verifier Trust 08
GA-11: PPM for Integrated Excellence Junior Trust 08
GA-12: PPM for Integrated Excellence Senior Trust 08
GA-13: PPM for Fortress Trust 08
GA-15: PPM for TDM Verifier Trust 09
GA-16: PPM for TDMM Cable Junior Trust 09
GA-18: PPM for TDMM Cable Senior Trust 09
GA-19: PPM for TDM Verifier Trust 07R
GA-20: PPM for TDM Verifier Trust 08R
GA-21: PPM for TDMM Benchmark Trust 09
GB-2: PPM for McGinn Smith Transaction Funding Corporation
GC-1: PPM for First Independent Income Notes
GC-2: PPM for First Excelsior Income Notes
GC-3: PPM for Third Albany Income Notes
GC-4: PPM for First Advisory Income Notes

2.) <u>A.) Records recovered from the search of McGinn, Smith & Co. Inc.'s storage units located on Ushers Road in Clifton Park, New York (with corresponding government exhibit number)</u>:
GF-15: Stan Rabinovich investor documents for purchase of $600k of Firstline Trust 07 Series B
GF-28: Stan Rabinovich investor documents for sale of $600k of Firstline Trust 07 Series B
GF-41: September 10, 2009 Letter from MS Capital to A. Greenberg
GF-43: R. and S. Babcock investor documents for Firstline Trust 07 Series B
GF-44: T. Brown investor documents for Firstline Senior Trust 07 Series B
GF-45: A. Cahn investor documents for Firstline Trust 07 Series B
GF-46: H. Crist investor documents for Firstline Trust 07 Series B & Firstline Senior Trust 07 Series B
GF-47: M. and K. Dale investor documents for Firstline Senior Trust 07 Series B
GF-48: M. Gallo investor documents for Firstline Senior Trust 07 Series B
GF-49: A. Greenberg investor documents for Firstline Trust 07 Series B
GF-50: B. and B. Kogan investor documents for Firstline Trust 07 Series B

GF-51: R. and J. Pugliese investor documents for Firstline Trust 07 Series B
GF-52: T. Radice investor documents for Firstline Trust 07 Series B
GF-53: J. Vanasek investor documents for Firstline Senior Trust 07 Series B
GF-55: A. Cahn investor documents for Firstline Trust 07 Series B
GF-56: A. Cahn investor documents for Firstline Senior Trust 07 Series B
GF-57: H. Crist investor documents for Firstline Trust 07 Series B
GF-58: R. Pugliese investor documents for Firstline Trust 07 Series B
GF-59: September 10, 2009 Letter from MS Capital to S. Babcock
GF-60: September 10, 2009 Letter from MS Capital to T. Brown
GF-61: September 10, 2009 Letter from MS Capital to A. Cahn
GF-62: September 10, 2009 Letter from MS Capital to M. Dale
GF-63: September 10, 2009 Letter from MS Capital to B. Kogan
GF-64: September 10, 2009 Letter from MS Capital to S. Rabinovich
GF-65: September 10, 2009 Letter from MS Capital to T. Radice
GF-66: September 10, 2009 Letter from MS Capital to R. Pugliese
GG-3: May 28, 2008 Residential Monitoring Receivable Financing Agreement (Integrated Excellence Funding, LLC)
GG-6: June 10, 2008 First Amendment to the Residential Monitoring Receivable Financing Agreement (Integrated Excellence Funding, LLC)
GG-10: July 7, 2008 Second Amendment to the Residential Monitoring Receivable Financing Agreement (Integrated Excellence Funding, LLC)
GG-14: July 18, 2008 Third Amendment to the Residential Monitoring Receivable Financing Agreement (Integrated Excellence Funding, LLC)
GG-15: August 1, 2008 Fourth Amendment to the Residential Monitoring Receivable Financing Agreement (Integrated Excellence Funding, LLC)
GG-31: B. Smith investor documents for Integrated Excellence Senior Trust 08
GG-32: H.A. Smith investor documents for Integrated Excellence Senior Trust 08
GG-33: St. Joseph the Worker investor documents for Integrated Excellence Senior Trust 08
GL-2: December 15, 1995 fax to Mr. Phillips
GM-1: S. Babcock investor documents for Fortress Trust 08
GM-2: T. Brown investor documents for TAIN
GM-3: G. Eisenberg investor documents for TDM Cable Trust 06
GM-4: G. Eisenberg investor documents for TDM Luxury Cruise Trust 07
GM-5: G. Eisenberg investor documents for TDM Verifier Trust 07
GM-6: G. Eisenberg investor documents for Fortress Trust 08
GM-7: G. Eisenberg investor documents for MSTF

GM-8: G. Eisenberg investor documents for MSTF
GM-9: W. Ferrero investor documents for Fortress Trust 08
GM-10: W. Ferrero investor documents for TDM Verifier Trust 07R
GM-11: A. Greenberg investor documents for Fortress Trust 08
GM-12: A. Greenberg investor documents for MSTF
GM-13: A. Greenberg investor documents for MSTF
GM-14: B. Kogan investor documents for TDM Luxury Cruise Trust 07
GM-15: C. Loffredo investor documents for FEIN
GM-16: J. Loffredo investor documents for FIIN
GM-17: W. Lutz investor documents for FIIN
GM-18: W. Lutz investor documents for TDM Cable Trust 06
GM-19: W. Lutz investor documents for TAIN
GM-20: P. Pavlishin investor documents for TDM Verifier Trust 07R
GM-21: R. Pugliese investor documents for TDM Luxury Cruise Trust 07
GM-22: S. Rabinovich investor documents for TDM Cable Trust 06
GM-23: S. Rabinovich investor documents for FEIN
GM-24: St. Joseph the Worker investor documents for TDMM Cable Senior Trust 09
GM-25: H. A. Smith investor documents for TDM Verifier Trust 07
GM-26: H. A. Smith investor documents for TAIN
GM-27: K. Thursby investor documents for TDM Verifier Trust 07
GM-28: K. Thursby investor documents for Integrated Excellence Junior Trust 08
GM-29: K. Thursby investor documents for MSTF

GM-30: G. Wagner investor documents for Integrated Excellence Junior Trust 08
GM-31: Stewart's Shops investor documents for MSTF
GM-32: M. Dale investor documents for Fortress Trust 08
GM-33: K. Dale investor documents for TDMM Cable Senior Trust 09
GM-34: G. Eisenberg investor documents for TDM Verifier Trust 08
GM-35: W. Ferrero investor documents for MSTF
GM-36: W. Ferrero investor documents for MSTF
GM-37: A. Greenberg investor documents for TDM Verifier Trust 08
GM-38: A. Greenberg investor documents for TDM Cable Trust 06
GM-39: P. Sokol investor documents for TDMM Cable Junior Trust 09
GM-40: P. Sokol investor documents for TDMM Cable Junior Trust 09
GM-41: R. Pugliese investor documents for TDM Luxury Cruise Trust 07
GM-43: R. Deleonardis investor documents for FIIN
GM-44: R. Deleonardis investor documents for FIIN

B.) Records recovered from the search of McGinn, Smith & Co. Inc. located at 99 Pine Street, Albany, New York (with corresponding government exhibit number):

GB-3: McGinn Smith Transaction Funding Client Investor List
GB-9: Accounting records for MSTF
GB-13: April 14, 2009 promissory note for $50k loan from FIIN to MSTF
GB-16: May 14, 2009 Quickbooks showing due from MSTF with/November promissory notes
GB-17: Brian Shea spreadsheet regarding investor payment diversions
GB-44: October 26, 2009 Quickbooks from MSTF due from Timothy McGinn
GB-45: October 31, 2009 NEI Capital balance sheets by quarter
GB-49: February 3, 2010 Brian Shea handwritten accrual of fees and Quickbooks due from MSTF and Quickbooks due to NEI Capital
GB-50: Brian Shea handwritten book fees to loans (MSTF)
GB-51: February 3, 2010 MSTF balance sheet as of December 31, 2009
GD-5: October 26, 2009 Quickbooks for David Smith ("DLS Loan")
GD-6: October 26, 2009 Quickbooks for Timothy McGinn ("TMM Loan")
GD-7: February 2, 2010 Quickbooks for David Smith ("DLS Rec")
GD-8: February 2, 2010 Quickbooks for Timothy McGinn ("TMM Rec")
GD-9: October 26, 2009 Quickbooks ("DF-DLS")
GD-10: October 26, 2009 Quickbooks ("DF-TMM")
GD-11: January 30, 2010 Quickbooks ("DF-MR")
GD-12: October 3, 2007 fax to Ron Simons from Dave Rees (TDM Cable books and records)
GD-14: October 26, 2009 Quickbooks ("Loan-TMM")
GD-15: October 26, 2009 Quickbooks ("Loan-Matt R")
GD-16: October 26, 2009 Quickbooks ("Loan-TMM") with promissory notes
GD-17: October 26, 2009 Quickbooks ("Loan-DLS") with promissory notes
GD-18: October 26, 2009 Quickbooks ("Loan-Matt R") with promissory notes
GD-19: October 26, 2009 bank statement attachment B-F, H-I
GD-21: Summary schedules of "loan" transactions prepared by in-house accountants
GD-22: Annotated copy of FINRA letter grid
GF-40: September 3, 2009 Joe Carr meeting notes
GF-54: Releases for R. and S. Babcock for Firstline Trust 07 Series B and T. Radice for Firstline Trust 07 Series B
GG-24: October 26, 2009 Quickbooks for Timothy McGinn "loan" (Integrated Excellence)
GG-25: October 26, 2009 Quickbooks for David Smith "loan" (Integrated Excellence)
GG-27: February 2, 2010 Quickbooks for Timothy McGinn no longer showing "loan" in heading
GG-28: February 2, 2010 Quickbooks for David Smith no longer showing "loan" in heading
GK-2: June 23, 1993 promissory note for $20,600
GD1b: file creation data and file last saved by data for word

processing documents containing promissory notes between TDM Cable Funding LLC and Timothy McGinn, David Smith and Matthew Rogers in the amounts of $352,341.00, $350,000.00, and $350,000.00, respectively.

GD-1b: Back-up for promissory notes, created by Kimberly Spath, involving loans between McGinn Smith entities and Timothy McGinn, David Smith and Matthew Rogers

C.) Records recovered from the search of David Smith's home located at 2 Rolling Brook Drive, Saratoga Springs, New York (with corresponding government exhibit number):

GB-30: October 10, 2009 handwritten memorandum from David Smith and Timothy McGinn to Jay Kaplowitz

GB-31: Typewritten version of GB-30 (produced by the U.S. Attorney's Office)

GB-32: Exhibits to GB-30

GB-41a: Handwritten schedule of fees owed to McGinn Smith Advisors and McGinn Smith Capital Holdings

GB-41b: October 12, 2009 due from McGinn Smith Advisors and McGinn Smith Capital Holdings

GB-41c: David Smith handwritten schedule of fees owed to McGinn Smith Advisors and McGinn Smith Capital Holdings

GB-46: David Smith handwritten documents (MSTF offset calculations part I)

GE-12:[1] Memo to Timothy McGinn, Tom Livingston and Joe Carr (faced with a number of financial challenges)

GK-3: July 30, 2003 promissory note for $465k

GK-4: Timothy McGinn handwritten note to David Smith (thanks a million)

GK-5: Timothy McGinn handwritten note to David Smith $25k and $275k loans)

GK-6: October 17, 2003 $650k promissory note from Lynn Smith to Timothy McGinn (unexecuted)

GK-7: October 15, 2004 $970k promissory note from Lynn Smith to Timothy McGinn

GL-3:[2] David Smith handwritten letter to Timothy McGinn

GL-4: Typed version of GL-3 (prepared by the U.S. Attorney's Office)

GL-5: April 7, 2005 Demand Note for $30k loan from David Smith to Tom Livingston

---

[1] Notwithstanding the language of this stipulation, the parties agree that exhibit GE-12 is authentic under Fed. R. Evid. 901, but the parties do not stipulate to GE-12's admissibility.

[2] Notwithstanding the language of this stipulation, the parties agree that exhibits GL-3 and GL-4 are authentic under Fed. R. Evid. 901, but the defendants contest the admissibility of exhibits GL-3 and GL-4.

D.) Records recovered from the search of Timothy McGinn's home located at 126, Via Palma Lane, Boca Raton, Florida (with corresponding government exhibit number):

Pending exhibit number: 20 page LOTUS spreadsheet showing financial analysis for TDM Cable Trust 06 (recovered from computer within residence)
GK-1b: Back-up to LOTUS spreadsheets (recovered from computer within residence)

3.) Records obtained from Gersten Savage LLP (with corresponding government exhibit number):

GB-22: October 10, 2009 spreadsheets regarding Joseph Cornacchia and other interest payments
GB-33: Handwritten memorandum from David Smith and Timothy McGinn to Jay Kaplowitz
GB-34: Attachments to GB-33
GB-43: October 16, 2009 letter to FINRA
GB-48: November 5, 2009 Gersten Savage LLP billing records

4.) Records obtained from Piaker & Lyons P.C. (with corresponding government exhibit number):

GI-1: December 19, 2006 income tax summary for David Smith
GI-3: April 13, 2007 income tax summary for David Smith
GI-5: October 2, 2007 Ron Simons' handwritten notes
GI-6: October 3, 2007 Ron Simons' handwritten notes
GI-7: October 5, 2007 Ron Simons' handwritten notes
GI-9: October 8, 2007 fax from Dave Rees to Ron Simons
GI-10: November 4, 2008 personal financial statement for David Smith
GI-11: March 23, 2009 personal financial statement for David Smith
GI-13: April 23, 2009 personal financial statement for Timothy McGinn
GI-16: David Smith's 2006 Income Tax handwritten notes
GI-17: TDM Cable Funding LLC work papers for year ending December 31, 2006
GI-18: TDM Cable Funding LLC work papers for year ending December 31, 2007

5.) Records obtained from FINRA (with corresponding government exhibit number):

GH-2: September 30, 2009 letter from FINRA to David Franceski
GH-3: October 8, 2009 letter from Brian Shea to FINRA
GH-6: October 14, 2009 letter from Jay Kaplowitz to R. Pearlman
GH-8: October 16, 2009 letter from B. Santos to R. Pearlman
GH-9: October 22, 2009 letter from B. Santos to R. Pearlman

GH-10: November 16, 2009 letter from Brian Shea to R. Pearlman
GH-12: February 2, 2010 letter from R. Pearlman to Dave Franceski
GH-13: February 9, 2010 letter from Joe Carr to R. Pearlman with attachments (loans)
GH-14: February 12, 2010 letter from R. Pearlman to Dave Franceski
GH-15: March 1, 2010 letter from Joe Carr to R. Pearlman
GH-16: March 2, 2010 letter from Joe Carr to R. Pearlman

6.) Records obtained from Firstline Security, Inc. / John Atkinson (with corresponding government exhibit number):

GF-5: May 9, 2007 Residential Monitoring Receivable Financing Agreement
GF-6: May 9, 2007 Letter from Parr Waddoups et al (MS Funding)
GF-9: October 4, 2007 Residential Monitoring Receivable Financing Agreement
GF-42: Accounting records from Firstline Security, Inc. (records of repayment on May 2007 and October 2007 loans)

7.) Records obtained from the McGinn, Smith & Co. Inc. Receiver (with corresponding government exhibit):

GD-4: May 29, 2007 fax from Timothy McGinn

8.) Record obtained from Investor R. Pugliese (with corresponding government exhibit number):

GE-13: McGinn Smith Brochure
GM-42: January 14, 2009 letter from McGinn Smith (Re: TDM Luxury Cruise Trust 07)

9.) Records obtained from the Securities and Exchange Commission (with corresponding government exhibit number):

GB-4: January 15, 2008 letter from David Smith to investors in the four funds
GB-7: April 11, 2008 letter from David Smith to investors in the four funds

SO STIPULATED.

RICHARD S. HARTUNIAN
United States Attorney

Elizabeth C. Coombe
Richard D. Belliss
Assistant United States Attorney
Bar Roll Numbers 511925 & 515295

1/8/2013
Date

E. Stewart Jones, Esquire
Counsel for defendant Timothy M. McGinn
Bar Roll # 103064

1/8/13
Date

William J. Dreyer, Esquire
Counsel for defendant David L. Smith
Bar Roll # 101539

1/8/2013
Date

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

- -

UNITED STATES OF AMERICA

-v- 1:12-CR-28

TIMOTHY M. MCGINN and DAVID L. SMITH,

Defendants.

- -

FINAL JURY INSTRUCTIONS

FEBRUARY 1, 2013
Utica, New York

Court's Exhibit No. 3

I. INTRODUCTION

Now that you have heard all the evidence and the arguments of counsel, it is my duty to instruct you on the law applicable to this case. Before I start, just a few words of introduction. I believe my charge will take about one hour.

This case involves federal criminal charges against the defendants Timothy M. McGinn and David L. Smith. I am confident that if you continue to pay attention and listen carefully, as you have done throughout the trial, you will be able to follow and apply the law to the facts of this case as you find them to be.

I will begin by giving you some general instructions, then I will instruct you on the law with respect to the charges asserted against the defendants. Parts of this instruction may seem repetitive of the preliminary instructions, so please bear with me.

II. ROLE OF THE COURT AND JURY

Your duty as jurors is to determine the facts of this case on the basis of the admitted evidence. Once you have determined the facts, you must follow the law as I state it and apply the law to the facts. On these legal matters, you must take the law as

I give it to you; that is, if any attorney has stated a legal principle different from any that I state to you in these instructions, it is my instructions that you are bound to follow. You are not to consider one instruction alone as stating the law, but are to consider the instructions as a whole.

You should not concern yourself with the wisdom of any rule of law. You are bound to accept and apply the law as I give it to you, whether or not you agree with it. In deciding the facts of this case, you must not be swayed by feelings of bias, prejudice, or sympathy towards any party. In addition, since your verdict must be based solely upon the evidence, or the lack of evidence, developed at this trial, it would be improper for you to consider any personal feelings you may have about the defendants' race, national origin, sex, or age. It would be equally improper for you to allow any feelings you may have about the nature of the charges against the defendants to influence you in any way.

The parties and the public expect you to carefully and impartially consider all the evidence in this case, follow the law as stated by me, and reach a decision regardless of the consequences. The defendants are entitled to the presumption of innocence and the government has the burden of proof, as I will discuss in a moment. Our judicial system cannot work unless you reach your verdict through a fair and impartial consideration of the evidence.

You are about to be asked to decide whether or not the United States of America, which I will refer to as the government, has proven beyond a reasonable doubt the guilt of defendants Timothy M. McGinn and David L. Smith. Your verdict should be based solely upon the evidence or lack of evidence, in accordance with my instructions.

This case is important to the government, for the enforcement of criminal law is a matter of prime concern to the community. Equally, it is important to the defendants, who are charged with serious crimes. The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded the defendants. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals before the law. The question can never be: Will the government win or lose this case? The government always wins when justice is done, regardless of whether the verdict is not guilty or guilty.

The superseding indictment names both Timothy M. McGinn and David L. Smith as defendants. In reaching a verdict, however, you must bear in mind that guilt is personal and individual. Your verdict as to each defendant on each individual count must be determined separately solely on the evidence, or lack of evidence, presented against that defendant without regard to the guilt or innocence of anyone else.

You may not draw any inference, favorable or unfavorable, towards the government or the defendants from the fact that certain persons were not named as defendants in the superseding indictment. Whether a person should be indicted as a defendant is a matter within the sole discretion of the United States Attorney and the grand jury. Therefore, you may not consider it in any way in reaching your verdict as to the defendants on trial.

III. TYPES OF EVIDENCE

As stated earlier, your duty is to determine the facts based on the evidence I have admitted. The term "evidence" includes the sworn testimony of witnesses, sworn testimony is the question combined with the answer of the witness, stipulations, and exhibits admitted in the record. As you heard, the attorneys stipulated to various facts as detailed in Court's Exhibit 1a, of which you have a copy. You should regard these facts as true. The arguments and statements of lawyers as well as questions to witnesses, standing alone, are not evidence.

The law recognizes two types of evidence—direct and circumstantial. Direct evidence is when witnesses testify about something they know by virtue of their own senses, that is, something they have seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is its present existence or condition.

Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other facts. You infer on the basis of reason, experience, and common sense from one established fact the existence or non-existence of some other fact. Circumstantial evidence is of no lesser value than direct evidence; for, it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but simply requires that your verdict must be based on all of the evidence presented. While you should consider only the admitted evidence, you may draw inferences from the testimony and exhibits that are justified in light of common experience.

The attorneys showed you some charts that were admitted into evidence. These were shown to you in order to make the other evidence more meaningful and to aid you in considering the evidence. They are no better than the testimony or documents upon which they are based, and are not themselves independent evidence. Therefore, you are to give no greater consideration to these charts than you would give to the evidence upon which they are based.

It is for you to decide whether the charts correctly present the information contained in the testimony or exhibits on which they are based. You are entitled to consider the charts if you find that they are of assistance to you in analyzing and understanding the evidence.

Various exhibits in the form of tables and typed versions of handwritten letters were received into evidence. These exhibits are aids to summarize information contained in documents and spreadsheets and to assist you in understanding the contents of the handwritten letters. As they were received into evidence, you should consider them as you would any other evidence. However, you alone should make your own interpretation of what appears in the documents, spreadsheets, and handwritten letters. If you think the documents, spreadsheets, and letters contain something different than appears in these exhibits, then your interpretation is controlling.

Let me say again, you, the jury, are the sole judges of the facts.

IV. WEIGHT OF THE EVIDENCE

You have had the opportunity to observe all the witnesses and now it is your job to decide how believable each one was in his or her testimony. There is no magic formula to help you decide how much weight to give to the testimony of a particular witness. You should consider each witness's intelligence, motive, state of mind, appearance, and manner while on the witness stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate memory or recollection on these matters.

Consider also any relation each witness may bear to either side of the case; the manner in which each witness may be affected by the verdict; any bias, resentment, or hostility each witness may harbor; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

You heard the testimony of Geoffrey Smith. As the son of defendant David L. Smith, he is considered an interested witness. In evaluating the credibility of this witness, you should take into account any evidence that he may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances self-interests. Therefore, if you find that Geoffrey Smith may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his testimony and accept it with great care. This is not to suggest that every witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness's interest has affected or colored his testimony.

A defendant in a criminal case never has any duty to testify or come forward with any evidence. This is because, as I have told you, the burden of proof beyond a reasonable doubt remains on the government at all times, and the defendants are presumed innocent. In this case, the defendants Timothy M. McGinn and David L. Smith did testify, and they were subject to cross-examination like any other witness. You should examine and evaluate this testimony just as you would the testimony of any witness with an interest in the outcome of the case.

You also heard the testimony of Brian Shea, Ronald Simons, David Rees, Brian Cooper, Matthew Rogers, and Joseph Carr. These witnesses testified that they were actually involved in carrying out some of the acts at issue in this case.

There has been a great deal said about these witnesses and whether or not you should believe their testimony. The government argues, as it is permitted to do, that it must take witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to show criminal behavior by others. For those very reasons, the law allows the use of such testimony. Indeed, it is the law in federal courts that the testimony of such witnesses may be enough in itself for conviction, if the jury finds that the testimony establishes guilt beyond a reasonable doubt.

However, you have also been informed that Brian Shea signed a cooperation agreement with the government and was advised that in exchange for his cooperation and testimony at this trial, the government may recommend a lesser punishment when he is sentenced for the crimes he pleaded guilty to.

Similarly, David Rees, Brian Cooper, and Joseph Carr were promised that in exchange for testifying truthfully, completely, and fully, they will not be prosecuted by the federal government for any crimes that they may have admitted to either here in court or in interviews with the prosecutors. These promises were not formal orders of immunity by the court, but were arranged directly between these witnesses and the government.

The government is permitted to enter into these kinds of agreements and promises. You, in turn, may accept the testimony of such a witness and convict the defendants on the basis of his testimony alone, if it convinces you of the guilt of the defendant under consideration beyond a reasonable doubt.

However, you should bear in mind that a witness who has entered into an agreement with the government has an interest in this case different than any ordinary witness's interest. Witnesses who realize that they may be able to receive a lighter sentence or not be prosecuted at all have a motive to testify falsely. You should examine their testimony with greater care than the testimony of an ordinary witness.

In evaluating the credibility of such witnesses' testimony, you should ask yourselves whether they would benefit more by lying or by telling the truth. Was their testimony made up in any way because they believed or hoped that they would somehow receive favorable treatment by testifying falsely? Or did they believe that their interests would be best served by testifying truthfully? If you believe that the witnesses were motivated by hopes of personal gain, was the motivation one that would cause them to lie or was it one that would cause them to tell the truth? Did this motivation color the witnesses' testimony? Therefore, you must examine this testimony with caution and weigh it with great care.

Moreover, Brian Shea pleaded guilty in federal court to a felony charge of corruptly interfering with the administration of the internal revenue laws. Matthew Rogers pleaded guilty in federal court to a felony charge of filing a false tax return. These two witnesses are therefore convicted felons. A prior conviction of a felony is one of the circumstances that you may consider in determining the credibility of a witness. You may decide to accept all, none, or part of such a witness's testimony as true.

Further, Ronald Simons has pleaded guilty in federal court to a misdemeanor charge of delivering and disclosing a false tax return. If, after scrutinizing the testimony of these witnesses, you decide to accept it, you may give it whatever weight, if any, you find it deserves.

However, you are instructed that you are to draw no conclusions or inferences of any kind about the guilt of defendants Timothy M. McGinn and David L. Smith from the fact that Brian Shea, Ronald Simons, and Matthew Rogers pleaded guilty to charges stemming from related facts. Mr. Shea's, Mr. Simons's, and Mr. Rogers's decision to plead guilty was a personal decision about their own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendants.

You have heard the testimony of Steven Rowen and Christopher Rattiner, employees of the Financial Industry Regulation Authority (or "FINRA"). FINRA is a private self-regulatory agency. It is not a federal regulatory agency. The testimony of these witnesses is entitled to no greater or lesser weight than ordinary witnesses.

You also heard from Douglas Miller, Dianne Adelberg, and Alyssa Daversa, agents with the Internal Revenue Service. The fact that these witnesses are employed by the federal government does not mean that their testimony deserves more or less consideration, or greater or lesser weight, than that of an ordinary witness.

At the same time, it is quite legitimate to try to attack the credibility of a federal official on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case. It is your decision, after reviewing all the evidence, whether to accept or reject all or part of the testimony of these officials and to give to that testimony whatever weight, if any, you find it deserves.

You have heard evidence that several witnesses made statements on an earlier occasion that counsel argues is inconsistent with the witness's trial testimony. Evidence of a prior inconsistent statement is not to be considered by you as affirmative evidence bearing on either defendant's guilt. Evidence of the prior inconsistent statement was placed before you for the limited purpose of helping you decide whether to believe the trial testimony of the witnesses. If you find that a witness made an earlier statement that conflicts with his or her trial testimony, you may consider that fact in deciding how much of his or her trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a minor detail;

whether the witness had an explanation for the inconsistency, and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and if so how much, if at all, it impacts your impression of the witness's testimony.

If you find that any witness has willfully testified falsely as to any material fact, the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one material fact is likely to testify falsely about everything. However, you are not required to consider such a witness totally unworthy of belief. You may accept so much of the testimony as you deem true, and disregard what you feel is false.

By the processes that I have just described to you, you may, as the sole judges of the facts, determine which of the witnesses, if any, you will believe, what portion of their testimony you accept, and what weight you will give it.

V. BURDEN OF PROOF

As a result of the defendants pleas of not guilty to the charges contained in the superseding indictment, the burden is on the government to prove their individual guilt beyond a reasonable doubt. The law presumes the defendants to be innocent of the charges against them. I therefore instruct you that the defendants are to be presumed innocent throughout your deliberations until such time, if ever, you as a unanimous jury are satisfied that the government has proven either or both of them guilty beyond a reasonable doubt.

The defendants Timothy M. McGinn and David L. Smith began this trial with a clean slate. This presumption of innocence alone is sufficient to acquit them unless you as jurors are unanimously convinced of their guilt beyond a reasonable doubt after careful and impartial consideration of all the evidence in this case. If the government fails to sustain its burden of proving the defendant under consideration guilty beyond a reasonable doubt, you must find him not guilty.

I have said that the government must prove guilt beyond a reasonable doubt.

The question naturally is, "What is a reasonable doubt?" The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life.

Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the guilt of the defendant under consideration. A reasonable doubt is not caprice or whim; it is not speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy.

In a criminal case, the burden is at all times upon the government to prove guilt beyond a reasonable doubt. The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. Again, this burden never shifts to either defendant, which means that it is always the government's burden to prove each of the elements of the crimes charged against each individual defendant beyond a reasonable doubt.

If the government's evidence gives equal or nearly equal circumstantial support to competing explanations for an element of a charge, one consistent with the prosecution's theory of guilt but the other an equally plausible innocent reason for the same facts as offered by the defense, then you must necessarily entertain a reasonable doubt as to the truth of an element of the charge and, therefore, find the defendant under consideration not guilty of that charge.

Under your oath as jurors, you are not to be swayed by sympathy. You are to be guided solely by the evidence, or lack of evidence, introduced in this trial. It is for you to decide, on the basis of the evidence I have admitted and the law on which I will instruct you, whether the government has proven that the defendant under consideration is guilty of the crimes charged. If, after fair and impartial consideration of all of the evidence, you are not firmly convinced of that defendant's guilt, you must give him the benefit of the doubt and find him not guilty on that count. On the other hand, if you are firmly and unanimously convinced that the defendant under consideration is guilty of the count under consideration, you must vote to convict.

I will now charge you on the law that you are to apply as to the criminal charges in this case. Before instructing you on the particular elements of the crimes charged, I remind you that nothing said in these instructions is to suggest or convey in any way or manner what verdict I think you should find. Similarly, any witness commentary as to the issue of either defendant's innocence or guilt is irrelevant. What the verdict shall be is the sole and exclusive responsibility and duty of you, the jury.

VI. CRIMES CHARGED

Let me now turn to the charges against the defendants Timothy M. McGinn and David L. Smith contained in the superseding indictment. A copy of the superseding indictment will be sent into the jury room with you. I remind you that an indictment itself is not evidence. It merely describes the charges against the defendants. It is an accusation. It may not be considered by you as any evidence of guilt. Your job is limited to deciding whether the government has proven one or more of the crimes charged against the defendants in the superseding indictment. In reaching your decision of whether the government has proven the defendant under consideration guilty beyond a reasonable doubt, you may consider only the evidence introduced, or lack of evidence, with regard to that defendant. A defendant's guilt is individual, and your verdict as to each defendant must be determined separately with respect to him, without regard to the guilt or innocence of anyone else.

Again, the defendants have pleaded not guilty to the charges contained in the superseding indictment, thus requiring the government to establish each element of the crimes charged by proof beyond a reasonable doubt. The superseding indictment contains thirty-two (32) total counts—twenty-nine (29) against defendant Timothy M. McGinn and twenty-nine (29) against defendant David L. Smith. You must consider each count and each defendant's involvement in that count separately, and you must return a separate verdict of not guilty or guilty for each defendant on each count.

The superseding indictment charges that specific acts occurred on specific dates and involved specific amounts of money. However, the law only requires a substantial similarity between the dates and amounts alleged in the superseding indictment and those established by testimony or exhibits at trial.

A. COUNT 1: CONSPIRACY TO COMMIT MAIL AND WIRE FRAUD

Count 1 of the superseding indictment charges both defendants with conspiracy to commit mail and wire fraud in violation of Title 18, United States Code, section 1349. Generally, it is alleged that from about September 29, 2006, through about April 20, 2010, defendants conspired to commit mail and wire fraud for the purpose of misleading investors and FINRA in order to obtain money from investors and enrich themselves.

The crime of conspiracy to commit mail and wire fraud is an independent offense. It is separate and distinct from the actual crimes of mail and wire fraud, which the law refers to as "substantive crimes." It is not necessary for the government to prove that the conspiracy was successful. Indeed, you may find the defendant under consideration guilty of the crime of conspiracy to commit mail and wire fraud even though the substantive crime of mail or wire fraud was not actually committed.

In order to satisfy its burden of proof on Count 1, the government must establish the following four essential elements beyond a reasonable doubt:

1. First Element

The first element that the government must prove beyond a reasonable doubt is that two or more persons entered into an unlawful agreement to commit mail and wire fraud starting on or about September 29, 2006.

A conspiracy is an agreement among two or more persons to achieve an unlawful object. In this case, the alleged unlawful object of the conspiracy was to commit mail and wire fraud in order to mislead investors and FINRA.

To show a conspiratorial agreement, the government is not required to prove that two or more people met together and entered into any express or formal agreement. Similarly, you need not find that the alleged conspirators stated, in words or writing, what the scheme was, its object or purpose, or every precise detail of the alleged scheme. The government need only show that there was a mutual understanding, either spoken or unspoken, between two or more people to cooperate with each other to accomplish the unlawful act.

You may, of course, find that the existence of an agreement to commit mail and wire fraud has been established by direct proof. However, since conspiracy is, by its very nature, characterized by secrecy, you may also infer its existence from the circumstances of this case and the conduct of the parties involved.

Also, it is not necessary for the government to prove that the conspiracy lasted throughout the entire period alleged—that is, from September 29, 2006, to April 20, 2010—but only that it existed for some time within that period.

If you find that there was no conspiracy to commit mail and wire fraud in existence from about September 29, 2006, to about April 20, 2010, then you must find the defendant under consideration not guilty of Count 1. If, however, you find beyond a reasonable doubt that such a conspiracy existed, you must continue and consider the second element of Count 1.

2. <u>Second Element</u>

<u>The second element that the government must prove beyond a reasonable</u>

doubt is that the defendant under consideration knowingly and willfully became a member of the conspiracy.

A person acts "knowingly" if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. To act "willfully" means to act purposely and with an intent to do something unlawful. Thus, a defendant enters into a conspiracy "knowingly and willfully" if he joins and participates in the conspiracy with knowledge of, and the intent to further, its unlawful object. Whether a defendant acted knowingly and willfully may be proven by his conduct and by all of the facts and circumstances surrounding the case.

It is not necessary, however, that a defendant be fully informed of all the details of the conspiracy or all of its participants. On the other hand, mere association by a defendant with a conspirator does not itself make the defendant a member of the conspiracy, even if he knows of the conspiracy. In other words, knowledge is not enough; the defendant himself must have intentionally participated in the conspiracy with the purpose of helping to achieve at least one of its unlawful objects.

If you find that the defendant under consideration did not knowingly and willfully join the conspiracy to commit mail and wire fraud, then you must find him not guilty of Count 1. If, however, you find beyond a reasonable doubt that the defendant under consideration knowingly and willfully became a member of the conspiracy, then you must consider the third element.

3. Third Element

The third element that the government must prove beyond a reasonable doubt is that some member of the conspiracy knowingly committed at least one of the overt acts listed in paragraphs 80 through 100 of the superseding indictment. Again, a copy of the superseding indictment will be sent into the jury room with you.

An "overt act" is any action intended to help achieve the object of the conspiracy. An overt act need not itself be a criminal act, but it must contribute to furthering the conspiracy. The government is not required to prove that all of the overt acts alleged in the superseding indictment occurred. One overt act, knowingly committed by a member of the conspiracy at or about the time and place alleged, is sufficient.

Similarly, you need not find that the defendant under consideration committed the overt act. It is sufficient if one of the conspirators knowingly committed the overt act since such an act becomes, in the eyes of the law, the act of all of the members of the conspiracy.

If you find that no members of the conspiracy committed an overt act as detailed in paragraphs 80 through 100 of the superseding indictment, then you must find the defendant under consideration not guilty of Count 1. If, on the other hand, you find beyond a reasonable doubt that a member of the conspiracy committed at least one such overt act, then you must consider the fourth element.

4. Fourth Element

The fourth and final element that the government must prove beyond a reasonable doubt with respect to Count 1 is that the overt act(s) was (were) committed to further some objective of the conspiracy to commit mail and wire fraud. The alleged objectives of the conspiracy to commit mail and wire fraud were to mislead investors and FINRA in order to obtain money from investors and enrich the defendants.

In order to meet its burden on this element, the government must show that the overt act(s) that you found to have occurred was (were) committed in furtherance of some object or purpose of the conspiracy. Again, the overt act, standing alone, may be an innocent lawful act. However, if that act is a step in carrying out, promoting, aiding, or assisting the conspiracy, then this element is established.

If you find that the overt act(s) was (were) not committed to further some objective of the conspiracy to commit mail and wire fraud, then you must find the defendant under consideration not guilty of Count 1. However, if you find that the overt act(s) was (were) committed to further an objective of the conspiracy, then you must find the defendant under consideration guilty of Count 1.

B. <u>COUNTS 2–10: MAIL FRAUD</u>

Counts 2 through 10 charge both defendants with mail fraud in violation of Title 18, United States Code, section 1341. It is alleged that on specific dates from October 2007 to September 2009 defendants caused specific documents or checks to be mailed in furtherance of a scheme to defraud investors by soliciting investments under false pretenses or by concealing material information.

Each specific date, and the specific documents or checks mailed on that date, constitutes a separate count of mail fraud. These counts are detailed on page 28 of the superseding indictment and reflected in the stipulations contained in Court's Exhibit 1a. You must consider each count separately and return a verdict for each defendant on each of these counts.

In order to sustain its burden of proof on these counts, the government must prove the following four essential elements beyond a reasonable doubt:

1. First Element

The first element that the government must prove beyond a reasonable doubt is that there was a scheme to defraud investors or to obtain money or property by soliciting investments under false and fraudulent pretenses, representations, or promises or through the concealment of or failure to disclose information.

A "scheme" is merely a plan for the accomplishment of an object. A scheme to defraud is any plan, device, or course of action to obtain money or property by means of false or fraudulent pretenses, representations, or promises reasonably calculated to deceive persons of average prudence.

"Fraud" is a general term that embraces all the various means which human ingenuity can devise and which are resorted to by an individual to gain an advantage over another by false representations, suggestions, suppression of the truth, or deliberate disregard for the truth.

Thus, a "scheme to defraud" is merely a plan to deprive another of money or property by trick, deceit, deception, or swindle. A scheme to defraud need not be shown by direct evidence, but may be established by all of the circumstances and facts in the case.

In this case, the alleged scheme to defraud was allegedly carried out by making or providing false or fraudulent statements, representations, or documents to investors or by failing to disclose certain information to investors, all in order to deprive the investors of money.

A statement, representation, claim, or document is false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made. A representation or statement is fraudulent if it was falsely made with the intention to deceive.

Deceitful statements of half truths or the concealment of material facts, and the expression of an opinion not honestly entertained may also constitute false or fraudulent statements under the statute. The deception need not be premised upon spoken or written words alone. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance. If there is deception, the manner in which it is accomplished is immaterial.

The failure to disclose information may also constitute a fraudulent representation if the defendant under consideration was under a legal, professional, contractual, or fiduciary duty to make such a disclosure, he actually knew such disclosure was required, and he failed to make such disclosure with the intent to defraud.

Whether a fiduciary relationship exists is a matter of fact for you, the jury, to determine. A fiduciary duty arises where there is a relationship of trust and confidence. At the heart of the fiduciary relationship lies reliance and de facto control. The relationship exists when confidence is reposed on one side and there is resulting superiority and influence on the other. One acts in a fiduciary capacity when the business which he transacts or the money which he handles is not his own or for his own benefit but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part.

A fiduciary has a duty to disclose all material facts concerning the transaction entrusted to it. The concealment by a fiduciary of material information that he is under a duty to disclose to another, under circumstances where the non-disclosure can or does result in harm to the other, can be a violation of the statute, if the government has proven the other elements of the offense beyond a reasonable doubt.

In addition to proving that a statement was false or fraudulent, the government must prove that the alleged scheme contemplated depriving another of money or property. However, the government is not required to prove that the defendant under consideration originated the scheme to defraud. Further, it is not necessary that the government prove that the defendant actually realized any gain from the scheme or that the intended victims actually suffered any loss. In this case, the government contends that investors were defrauded and that the defendants profited. Although whether the scheme actually succeeded is not the question, you may consider whether it succeeded in determining whether the scheme existed.

If, after considering all of the evidence in this case, you find that there was not a scheme to defraud investors or to obtain money or property by soliciting investments under false and fraudulent pretenses, representations, or promises or through the concealment of or failure to disclose information, then you must find the defendant under consideration not guilty of the count under consideration. If, on the other hand, you find that the government has proven beyond a reasonable doubt that such a scheme to defraud existed, then you must proceed to the second element.

2. Second Element

The second element that the government must prove beyond a reasonable doubt is that the false or fraudulent pretenses, representations, or promises or concealed information was "material."

A material fact is one that would be of importance to a reasonable person in relying upon the representation or statement in making a decision about a particular matter, such as with respect to a proposed investment. That means that if you find a particular representation or statement to have been false, you must determine whether that statement was one that a reasonable person or investor might have considered important in making his or her decision. The same principle applies to fraudulent half truths or omissions of material facts.

If you find that the false representations or statements or concealed information detailed in the count under consideration was not material, then you must find the defendant under consideration not guilty of that count. If, however, you find beyond a reasonable doubt that the false representations or statements or concealed information was material, then you must consider the third element.

3. Third Element

The third element that government must prove beyond a reasonable doubt is that the defendant under consideration knowingly and willfully participated in the scheme, with knowledge of its fraudulent nature and with specific intent to defraud.

I have already defined "knowingly" and "willfully" for you. "Intent to defraud" means to act knowingly and with the specific intent to deceive, for the purpose of causing some financial or property loss to another.

The question of whether a person acted knowingly, willfully, and with intent to defraud is a question of fact for you to determine, like any other fact question. This question involves one's state of mind. Direct proof of knowledge and fraudulent intent is almost never available, and it is not required. The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's words, conduct, acts, and all surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

Therefore, if you find that the defendant under consideration was not a knowing participant in the scheme to defraud investors of money or property, or that he lacked the specific intent to defraud, you must find him not guilty of the mail fraud count under consideration. On the other hand, if you find that the government has established beyond a reasonable doubt that the defendant under consideration was a knowing participant in the scheme to defraud investors and that he acted with the specific intent to defraud, then you must consider the fourth element.

4. Fourth Element

The fourth and final element of the mail fraud counts that the government must prove beyond a reasonable doubt is that the defendant under consideration used the mails or caused the mails to be used to advance, further, or carry out the scheme to defraud investors.

The mailed matter need not contain a fraudulent representation or purpose or request for money. It must, however, further or assist in the carrying out of the scheme to defraud. It is not necessary for the defendant under consideration to be directly involved in the mailing, as long as the mailing was reasonably foreseeable in the execution of the scheme to defraud.

The parties have stipulated that each of the documents and checks described in Counts 2 through 10 on page 28 of the superseding indictment—and detailed in Court's Exhibit 1a—was sent through the mails. They dispute, however, whether these mailings were sent in furtherance of the alleged scheme to defraud investors.

If you find that the defendant under consideration did not use the mails or cause the mails to be used to further the scheme to defraud investors, then you must find him not guilty of the mail fraud count under consideration. However, if you find that the government has proven beyond a reasonable doubt that there was a scheme to defraud investors in which the defendant under consideration knowingly participated with the specific intent to defraud and, in furtherance of this scheme to defraud, he used the mails or caused the mails to be used, then you must find him guilty of the mail fraud count under consideration.

C. <u>COUNTS 11–20: WIRE FRAUD</u>

Counts 11 through 20 charge both defendants with wire fraud in violation of Title 18, United States Code, section 1343. Similar to the mail fraud counts, it is alleged that on specific dates between April 2008 to July 2009 defendants devised a scheme to defraud investors by soliciting investments under false pretenses and concealing material information, and that defendants knowingly transmitted information through interstate wire communications such as faxes and wire transfers to further this scheme.

Each specific date, and the specific faxes and wire transfers transmitted on that date, constitutes a separate count of wire fraud. These counts are listed on pages 29 and 30 of the superseding indictment and reflected in the stipulations contained in Court's Exhibit 1a. You must consider each count separately and return a verdict for each defendant on each of these counts.

In order to sustain its burden of proof for these counts, the government must prove <u>four</u> essential elements beyond a reasonable doubt. The first three elements of wire fraud are exactly the same as the first three elements of mail fraud I just discussed. Therefore, when you consider each wire fraud count, you should apply the first three elements of the mail fraud counts as described above. The only difference between mail and wire fraud is a slight variation in the fourth element. If you determine the government has proven the first three elements of the wire fraud count under consideration beyond a reasonable doubt, then you must continue to consider the fourth element.

The fourth and final element of the wire fraud counts that the government must prove beyond a reasonable doubt is that the defendant under consideration used or caused to be used an interstate wire communication to advance, further, or carry out the scheme to defraud investors.

You will notice that Counts 18 and 19 allege multiple wire transfers. It is not necessary for the government to prove that every one of the wire transfers alleged in each of these counts was made in furtherance of the scheme to defraud. Any one is sufficient for a conviction on the count under consideration, if you so find, but you must be unanimous as to which wire transfer was made in furtherance of the scheme to defraud.

The use of the wires need not itself be a fraudulent representation. It must, however, further or assist in the carrying out of the scheme to defraud. It is not necessary for the defendant under consideration to be directly or personally involved in the wire communication, as long as the communication was reasonably foreseeable in the execution of the scheme to defraud.

The parties have stipulated that each of the faxes and wire transfers described in Counts 11 through 20 on pages 29 and 30 of the superseding indictment—and detailed in Court's Exhibit 1a—was knowingly transmitted by means of wire communications in interstate commerce. They dispute, however, whether these wires were sent in furtherance of the alleged scheme to defraud.

If you find that the defendant under consideration did not use or cause to be used an interstate wire communication to further the scheme to defraud investors, then you must find him not guilty of the count under consideration. However, if you find that the government has proven beyond a reasonable doubt that there was a scheme to defraud investors in which the defendant under consideration knowingly participated with the specific intent to defraud and, in furtherance of this scheme to defraud, he used or caused to be used an interstate wire communication, then you must find him guilty of the wire fraud count under consideration.

D. <u>COUNTS 21–26: SECURITIES FRAUD</u>

Counts 21 through 26 charge both defendants with securities fraud with respect to specific communications that occurred on specific dates between January 2008 and November 2008 and related to two trusts—TDM Verifier Trust 08 and Fortress Trust 08. These charges involve alleged violations of Title 15, United States Code, section 78j(b) and Rule 10b-5 as promulgated by the Securities and Exchange Commission.

As you will see on page 31 of the superseding indictment and in the stipulations contained in Court's Exhibit 1a, specific wire transfers and an email are associated with specific dates. Each grouping of dates and communications constitutes a separate count of securities fraud. Again, you must consider each count separately and return a verdict for each defendant on each of these counts.

In order to sustain its burden of proof on these counts, the government must prove the following three essential elements beyond a reasonable doubt:

1. First Element

The first element that the government must prove beyond a reasonable doubt is that in connection with the purchase or sale of TDM Verifier Trust 08 (for Counts 21 and 22) or Fortress Trust 08 (for Counts 23 through 26) the defendant under consideration did any one or more of the following:

(1) employed a device or scheme to defraud, or

(2) made an untrue statement of material fact or failed to state a material fact which made what was said misleading under the circumstances, or

(3) engaged in an act, practice, or course of business that operated, or would operate, as a fraud or deceit upon a purchaser or seller.

It is not necessary for the government to establish all three types of unlawful conduct in connection with the sales or purchases of these trusts. Any one is sufficient for a conviction, if you so find, but you must be unanimous as to which type of unlawful conduct you find has been proven.

As I already explained, a device or scheme to defraud is merely a plan for the accomplishment of any objective. Fraud is a general term that embraces all efforts and means that individuals devise to take advantage of others. The law that the defendants are alleged to have violated prohibits all kinds of manipulative and deceptive acts.

The fraudulent or deceitful conduct alleged need not relate to the investment value of the securities involved in this case.

You need not find that the defendant under consideration actually participated in any securities transaction if he was engaged in fraudulent conduct that was "in connection with" a purchase or sale. The "in connection with" aspect of this element is satisfied if you find that there was some nexus or relation between the allegedly fraudulent conduct and the sale or purchase of securities. Fraudulent conduct may be "in connection with" the purchase or sale of securities if you find that it "touched upon" a securities transaction.

It is no defense to an overall scheme to defraud that the defendant was not involved in the scheme from its inception or played only a minor role with no contact with the investors and purchasers of the securities in question. Nor is it necessary for you to find that the defendant under consideration was the actual seller or offeror of the securities. It is sufficient if the defendant participated in the scheme or fraudulent conduct that involved the purchase or sale of the securities. By the same token, the government need not prove that the defendant personally made the misrepresentation or that he omitted the material fact. It is sufficient if the government establishes that the defendant caused the statement to be made or the fact to be omitted. With regard to the alleged misrepresentations and omissions, you must determine whether the statement was true or false when it was made and whether the omission was misleading.

If you find that the government has established beyond a reasonable doubt that a statement was false or omitted, you must next determine whether the fact misstated was "material" under the circumstances. Again, a material fact is one that would have been significant to a reasonable investor's investment decision. This is not to say that the government must prove that the misrepresentation would have deceived a person of ordinary intelligence. If you find that there was a material representation or an omission of a material fact, it does not matter whether the intended victims were gullible buyers or sophisticated investors. Securities laws protect the gullible and unsophisticated as well as the experienced investor.

Nor does it matter whether the alleged unlawful conduct was successful, or that the defendant profited or received any benefit as a result of the alleged scheme. Success is not an element of the crime charged. However, if you find that the defendant did profit from the alleged scheme, you may consider that in relation to the third element of intent, which I will discuss in a moment.

If you find that, in connection with the purchase or sale of TDM Verifier Trust 08 (for Counts 21 and 22) or Fortress Trust 08 (for Counts 23 through 26), the defendant under consideration did not do any of the three types of unlawful conduct I just described, then you must find him not guilty of the securities fraud count under consideration. On the other hand, if you find beyond a reasonable doubt that the defendant under consideration engaged in one or more of the three types of unlawful conduct in connection with the sales or purchases related to these two trusts, then you must consider the second element.

2. Second Element

The second element that the government must prove beyond a reasonable doubt is that the defendant under consideration acted willfully, knowingly, and with the intent to defraud. I have already defined the terms "willfully," "knowingly," and "intent to defraud" in the third element of the mail fraud counts above.

If you find that the defendant under consideration did not act willfully, knowingly, and with the intent to defraud when he engaged in the unlawful conduct you found in the first element, then you must find him not guilty of the count under consideration. However, if you find beyond a reasonable doubt that the defendant under consideration acted willfully, knowingly, and with the intent to defraud when he engaged in the unlawful conduct you found in the first element, then you must consider the third element.

3. Third Element

The third and final element the government must prove beyond a reasonable doubt in relation to the securities fraud charges is that the defendant under consideration knowingly used, or caused to be used, any means of communication in interstate commerce in furtherance of the unlawful fraudulent conduct. The interstate communications involved here are wire transfers and an email.

You will notice that Counts 21, 23, and 24 allege multiple wire transfers. It is not necessary for the government to prove that every one of the wire transfers alleged in each of these counts was made in furtherance of the unlawful conduct. Any one is sufficient for a conviction on the count under consideration, if you so find, but you must be unanimous as to which wire transfer was made in furtherance of the unlawful conduct.

Like the mail and wire fraud counts, it is not necessary that the defendant under consideration be directly or personally involved in the wire transfers and email. It is sufficient if he was an active participant in the scheme and engaged in conduct that he knew or could reasonably foresee would probably result in the use of the wire transfers and email.

Nor is it necessary that the items sent by means of the wire transfers and email contained fraudulent material or anything criminal. Further, the use of wire transfers and email need not be central to the execution of the scheme. All that is required is that the wire transfers and email bear some relation to the object of the scheme or fraudulent conduct. In fact, the actual purchase or sale related to the trusts need not be accompanied by the use of wire transfers and email, so long as the defendant under consideration is still engaged in actions that are a part of the fraudulent scheme.

The parties have stipulated that each of the wire transfers and the email described in Counts 21 through 26 on page 31 of the superseding indictment—and detailed in Court's Exhibit 1a—was knowingly transmitted by means of communications in interstate commerce. They dispute, however, whether the wire transfers and the email were sent in furtherance of the alleged scheme to defraud.

If you find that the defendant under consideration did not use or caused to be used the wire transfers or email to further the unlawful fraudulent conduct, then you must find him not guilty of the securities fraud count under consideration. However, if you find that the government has proven beyond a reasonable doubt that the defendant under consideration knowingly used or caused to be used the wire transfers or email to further the unlawful conduct, then you must find him guilty of the count under consideration.

E. <u>GOOD FAITH DEFENSE</u>

As you can see, an essential element of the mail fraud, wire fraud, and securities fraud causes of action (Counts 2–26) is a specific intent to defraud. As I already explained, the government must establish such a specific intent in the third element of the mail and wire fraud counts and in the second element of the securities fraud counts.

It follows that "good faith" on the part of the defendant under consideration is a complete defense to these charges. The defendants, however, have no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt.

Even false representations or statements, or omissions of material facts, do not amount to a fraud unless done with fraudulent intent. However misleading or deceptive a plan may be, it is not fraudulent if it was devised or carried out in good faith. An honest belief in the truthfulness and completeness of the representations made by a defendant is a good defense, however inaccurate or incomplete the statements may turn out to be.

There is another consideration to bear in mind in deciding whether or not the defendant under consideration acted in good faith. You are instructed that if the defendant participated in a scheme to defraud, then a belief by the defendant that ultimately everything would work out so that no one would lose any money does not require a finding, by you, that he acted in good faith. If the defendant under consideration participated in the scheme for the purpose of causing some financial or property loss to another, then no amount of honest belief on his part that the scheme would ultimately make a profit for the investors will excuse fraudulent actions, false representations, or material omissions by him.

As a practical matter, then, in order to sustain the mail, wire, and securities fraud charges against the defendant under consideration, the government must establish beyond a reasonable doubt that he knew that his conduct as a participant in the scheme was calculated to deceive and, nonetheless, he associated himself with the alleged fraudulent scheme for the purpose of causing some financial loss to another.

F. <u>COUNTS 27–32: FILING FALSE TAX RETURNS</u>

Counts 27 through 32 charge the defendants with filing false tax returns in violation of Title 26, United States Code, section 7206(1). Defendant Timothy M. McGinn is charged with filing false tax returns for tax years 2006 (Count 27), 2007 (Count 28), and 2008 (Count 29). Similarly, defendant David L. Smith is charged with filing false tax returns for tax years 2006 (Count 30), 2007 (Count 31), and 2008 (Count 32). The government alleges that the total income the defendants had received during each of these tax years was substantially more than they reported in their tax returns. Again, you must consider each count and each defendant separately. Unlike the mail, wire, and securities fraud counts, the defense of good faith is not applicable to the filing false tax returns charges.

In order to sustain its burden of proof on these counts, the government must prove the following four essential elements beyond a reasonable doubt:

1. First and Second Elements

The first element that the government must prove beyond a reasonable doubt is that the defendant under consideration signed and filed a tax return for the year in question. The second element is that the tax return contained a written declaration that it was made under penalty of perjury.

I instruct you that the first and second elements of Counts 27 through 32 are established. Indeed, as reflected in Court's Exhibit 1a, the parties have stipulated that both defendants filed or caused to be filed tax returns that were prepared in the Northern District of New York, were verified by written declarations that they were made under penalty of perjury, and were filed with the Internal Revenue Service for tax years 2006, 2007, and 2008. They further stipulate that these tax returns reported the amount of income reflected on pages 32 and 33 of the superseding indictment and in the chart on the bottom of page five of Court's Exhibit 1a. Therefore, you should begin your deliberations for Counts 27 through 32 with the third element.

2. Third Element

The third element that the government must prove beyond a reasonable doubt is that the defendant under consideration did not believe the tax return to be true and correct as to every material matter. To prove this element, the government must prove that the tax return involved in the count under consideration contained a materially false statement and that the defendant under consideration knew it was materially false.

The false statement in the tax return must be material. This means that it must be essential to an accurate determination of the defendant's tax liability.

An income tax return may be false not only by reason of understatement of income, but also because of an overstatement of lawful deductions or because deductible expenses are mischaracterized on the return.

There has been testimony and argument about whether certain money the defendants received—as outlined in paragraph 55 of the superseding indictment—were loans or income. Under the Internal Revenue Code, a taxpayer is not required to report a legitimate loan as income on his tax return. If the purported loan is not legitimate, however, the taxpayer must report it as income. A legitimate, non-reportable loan is identified by a mutual understanding between the borrower and the lender of the obligation to repay the loan and a bona fide intent on the borrower's part, at the time he received the funds, to repay them. In determining whether the defendant under consideration had such a bona fide intent to repay the funds, you may consider all of the evidence and circumstances of the case.

Therefore, if you determine that at the time the defendant under consideration received the funds detailed in paragraph 55 of the superseding indictment he had a bona fide intent to repay that money, then he was not required to report this as income on his tax return. If, however, the defendant under consideration lacked such an intent to repay the money at the time he received it, then he was obligated to report it as income on his tax return.

The government must also prove that the defendant under consideration knew the statement in the return was materially false. I have already defined the term "knowingly" for you. Whether the defendant under consideration acted knowingly may be proven by his conduct and by all of that facts and circumstances surrounding the case.

If you determine that the tax return involved in the count under consideration did not contain a materially false statement or that the defendant under consideration did not know it contained such a statement, then you must find the defendant under consideration not guilty of the count under consideration. If, on the other hand, you find beyond a reasonable doubt that the tax return at issue contained a materially false statement of which the defendant under consideration knew, then you must consider the fourth element.

3. Fourth Element

The fourth and final element that the government must prove beyond a reasonable doubt is that the defendant under consideration acted willfully. I have already defined the term "willfully" for you. In short, the government must establish that the defendant under consideration acted voluntarily and intentionally with the specific intent to make a false statement on the tax return involved in the count under consideration, despite knowing that it was his legal duty to answer truthfully.

If, after considering all of the evidence in this case, you determine that the defendant under consideration did not act willfully, then you must find him not guilty of the count under consideration. If, however, you find that the government has proven beyond a reasonable doubt that the defendant under consideration willfully caused a tax return to be filed with a statement that he knew to be materially false, then you must find him guilty of the count under consideration.

VII. PUNISHMENT

As a final matter, I instruct you that the question of possible punishment of the defendants is of no concern to you, and should not, in any sense, enter into or influence your deliberations. Your only concern is to determine innocence or guilt. You make that determination by weighing the evidence as I have explained, drawing the inferences that you find warranted, and finding the facts to which you apply the law as I gave it to you in these instructions. A consideration of the type or extent of any penalties that may or may not be imposed has no place in that process. You are not to be swayed or influenced or concerned in any way by the question of any punishment that might be imposed. You must not even discuss punishment in the jury room.

VIII. CONCLUSION

I have outlined the rules of law applicable to this case and the processes by which you should weigh the evidence and determine the facts. In a few minutes, you will retire to the jury room for your deliberations. Your first order of business in the jury room will be to elect a foreperson. The foreperson's responsibility is to ensure that deliberations proceed in an orderly manner, but of course, the foreperson's vote is not entitled to any greater weight than the vote of any other juror.

Your job as jurors is to reach a fair and just verdict from the law and evidence. When you are in the jury room, listen to each other, and discuss the evidence and issues. It is the duty of each of you, as jurors, to consult with each other, and to deliberate with a view to reaching an agreement, if you can do so without violating your individual judgment and conscience.

Remember in your deliberations that this case is very important to the government and, of course, the defendants. I know you will give full and conscientious consideration to the issues and the evidence before you. You must do justice in accordance with the facts and the law.

If, in the course of your deliberations, your recollection of any part of the testimony should fail, it is your privilege to return to the courtroom to have the testimony read back to you. During the trial, various documents were received into evidence. Most will be sent into the jury room with you. Please advise me if you wish to receive any other items that were received in evidence but not sent into the jury room.

Should you desire to communicate with me during your deliberation, please put your message or question in writing. The foreperson should sign the note and pass it to the Marshal who will bring it to my attention. I will then respond, either in writing or orally by having you returned to the courtroom. I caution you, however, that in your communications with me, or anyone else, you should never state how you stand on any issue, or your division by number, until after a unanimous verdict is reached.

Your verdict, whether not guilty or guilty as to each defendant on each count, must be unanimous.

You have already been provided with Preliminary Instructions (Court's Exhibit No. 1) and the stipulations (Court's Exhibit No. 1a). A copy of the superseding indictment (Court's Exhibit No. 2) will be sent into the jury room. Each of you have now been provided with these instructions (Court's Exhibit No. 3) and the Verdict Forms (Court's Exhibit Nos. 4a and 4b).

Once you have reached a unanimous verdict on all counts against each defendant, your foreperson should complete only the original verdict form. All of you must sign the original verdict form. Then inform the Marshal that a unanimous verdict has been reached. You will then be returned to the courtroom and your verdict will be announced in open court.

INITIAL DECISION RELEASE NO. 566
ADMINISTRATIVE PROCEEDING
FILE NO. 3-15461

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	INITIAL DECISION MAKING FINDINGS AND
	:	IMPOSING SANCTION BY DEFAULT AS TO
TIMOTHY M. MCGINN and	:	TIMOTHY M. MCGINN
DAVID L. SMITH	:	February 20, 2014

SUMMARY

This Initial Decision bars Timothy M. McGinn (McGinn) from the securities industry.[1]

I. BACKGROUND

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on September 6, 2013, pursuant to Sections 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and 203(f) of the Investment Advisers Act of 1940 (Advisers Act). The OIP alleges that McGinn was convicted of mail, wire, and securities fraud and other offenses. McGinn appeared, through counsel, at a December 18, 2013, prehearing conference; counsel advised that McGinn was planning to execute an Offer of Settlement that would resolve the proceeding against him. However, McGinn did not execute an Offer of Settlement;[2] nor has he filed an Answer to the OIP, which was due within twenty days of service of the OIP. See OIP at 3; 17 C.F.R. § 201.220(b). The Division of Enforcement filed a motion for default on January 31, 2014, and McGinn did not respond. Accordingly, McGinn has failed to answer or otherwise to defend the proceeding within the meaning of 17 C.F.R. § 201.155(a)(2). Therefore, McGinn is in default, and the undersigned finds that the allegations in the OIP are true as to him. See OIP at 3; 17 C.F.R. §§ 201.155(a), .220(f).

II. FINDINGS OF FACT

McGinn was convicted of mail, wire, and securities fraud, conspiracy to commit mail and wire fraud, and filing a false tax return, in violation of 15 U.S.C. §§ 78j(b), 78ff; 18 U.S. C. §§ 1341, 1343; and 26 U.S.C. § 7206(l). United States v. McGinn, No. 1:12-cr-00028 (N.D.N.Y. Aug.

[1] The proceeding has been stayed as to David L. Smith, who has executed an Offer of Settlement that will resolve the proceeding as to him. See Timothy M. McGinn, Admin. Proc. Rulings Release No. 1112, 2013 SEC LEXIS (A.L.J. Dec. 18, 2013).

[2] The Division of Enforcement (Division) represents that counsel for McGinn informed the Division on January 9, 2014, that McGinn did not intend to enter an Offer of Settlement.

13, 2013). He was sentenced to 180 months of incarceration and a three-year term of post-release supervision and ordered to pay $5,992,800 in restitution and a $100,000 criminal monetary penalty. Id. At the August 7, 2013, sentencing hearing, the court noted the "very seriousness of the crimes" and described McGinn as an "arrogant" man who ran his business for his personal benefit and that of his favorite clients "regardless of the law or the rules." Transcript (Tr.) at 34, 37. The court further stated, "There is a reasonable foreseeable risk that [McGinn] may engage in criminal conduct similar or related to the present offense or [his] past criminal conduct." Tr. at 40.

McGinn was a founder and primary owner of McGinn, Smith & Co., Inc., a broker-dealer based in Albany, New York, from 1981 through August 2012. He was also an indirect owner of McGinn Smith Advisors, LLC, which was registered with the Commission as an investment advisor from January 2006 to April 2009. Through various securities offerings from 2006 through 2009, McGinn and another devised schemes to defraud investors, made misrepresentations and omissions in private placement memoranda, and misused investor funds.

III. CONCLUSIONS OF LAW

McGinn has been convicted within ten years of the commencement of this proceeding of a felony that "arises out of the conduct of the business of a broker, dealer, . . . [or] investment adviser" and "involves the violation of section . . . 1341 [and] 1343. . . of title 18, United States Code" within the meaning of Sections 15(b)(4)(B)(ii), (iv) and 15(b)(6) of the Exchange Act and Sections 203(e)(2)(B), (D), and 203(f) of the Advisers Act.

IV. SANCTION

McGinn will be barred from the securities industry. This sanction will serve the public interest and the protection of investors, pursuant to Sections 15(b)(6) of the Exchange Act and 203(f) of the Advisers Act, and accords with Commission precedent and the sanction considerations set forth in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979). McGinn's unlawful conduct was recurring and egregious; extending over a period of several years, McGinn's scheme resulted in the loss of millions of dollars. There is a reasonable foreseeable risk that, if he were allowed to resume his former business activities, he would engage in similar criminal conduct.

V. ORDER

IT IS ORDERED that, pursuant to Section 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*o*(b), and Section 203(f) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-3(f), TIMOTHY M. MCGINN IS BARRED from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock.[3]

[3] Thus, he will be barred from acting as a promoter, finder, consultant, or agent; or otherwise engaging in activities with a broker, dealer, or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock, pursuant to Exchange Act Section 15(b)(6)(A), (C).

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.[4]

Carol Fox Foelak
Administrative Law Judge

[4] A respondent may also file a motion to set aside a default pursuant to 17 C.F.R. § 201.155(b). See Alchemy Ventures, Inc., Exchange Act Release No. 70708, 2013 SEC LEXIS 3459, at *5-6 (Oct. 17, 2013).

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 71865 / April 3, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3809 / April 3, 2014

Admin. Proc. File No. 3-15461

In the Matter of

TIMOTHY M. MCGINN

NOTICE THAT INITIAL DECISION HAS BECOME FINAL

The time for filing a petition for review of the initial decision in this proceeding has expired. No such petition has been filed by Timothy M. McGinn and the Commission has not chosen to review the decision on its own initiative.

Accordingly, notice is hereby given, pursuant to Rule 360(d) of the Commission's Rules of Practice,[1] that the initial decision of the administrative law judge[2] has become the final decision of the Commission with respect to Timothy M. McGinn. The order contained in that decision is hereby declared effective. The initial decision ordered that, pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, Timothy M. McGinn is barred from association with any broker, dealer, investment

1 17 C.F.R. § 201.360(d).

2 *Timothy M. McGinn*, Initial Decision Rel. No. 566 (Feb. 20, 2014), 108 SEC Docket 06, 2014 WL 651951.

adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization and from participating in an offering of penny stock.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72004 / April 23, 2014

INVESTMENT ADVISERS ACT OF 1940
Release No. 3821 / April 23, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15461

In the Matter of

TIMOTHY M. MCGINN and,
DAVID L. SMITH,

Respondents.

ORDER MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940 AS TO DAVID L. SMITH

I.

On September 6, 2013, the Securities and Exchange Commission ("Commission") instituted public administrative proceedings pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against David L. Smith ("Smith" or "Respondent").

II.

In connection with these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, Respondent consents to the Commission's jurisdiction over them and the subject matter of these proceedings and to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 and Section 203(f) of the Investment Advisers Act of 1940, ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

1. Smith and Timothy M. McGinn ("McGinn") were the founders and primary owners of McGinn, Smith & Co., Inc. (MS & Co.), a broker-dealer based in Albany, NY. Smith was registered from 1981 through August 2012, and was associated with MS & Co. during that time. McGinn and Smith were also indirect owners of McGinn Smith Advisors, LLC, which was registered with the Commission as an investment adviser from January 2006 to April 2009.

2. On February 6, 2013, following a four-week trial in *United States v. David L. Smith and Timothy M. McGinn*, 12-cr-0028 (N.D.N.Y.) (DNH), a jury in the United States District Court for the Northern District of New York found McGinn and Smith guilty on multiple counts charged in the Superseding Indictment, including conspiracy to commit mail and wire fraud, mail fraud, wire fraud, securities fraud and filing a false tax return. On August 13, 2013, the Court entered judgments against McGinn and Smith. Smith was sentenced to a prison term of 120 months, and ordered to pay a fine of $50,000 and restitution of $5,989,726.

3. The counts of the Superseding Indictment to which Smith was found guilty alleged, among other things, that through various securities offerings from 2006 through 2009 he devised schemes to defraud investors, made misrepresentations and omissions in private placement memoranda, and misused investor funds.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent Smith's Offer.

> Accordingly, it is hereby ORDERED pursuant to Section 15(b)(6) of the Exchange Act and Section 203(f) of the Advisers Act that Respondent Smith be, and hereby is:
>
> barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; barred from participating in any offering of a penny stock, including: acting as a promoter, finder, consultant, agent or other person who engages in activities with a broker, dealer or issuer for purposes of the issuance or trading in any penny stock, or inducing or attempting to induce the purchase or sale of any penny stock.

Any reapplication for association by the Respondent will be subject to the applicable laws and regulations governing the reentry process, and reentry may be conditioned upon a number of factors, including, but not limited to, the satisfaction of any or all of the following: (a) any disgorgement ordered against the Respondent, whether or not the Commission has fully or partially waived payment of such disgorgement; (b) any arbitration award related to the conduct that served as the basis for the Commission order; (c) any self-regulatory organization arbitration award to a customer, whether or not related to the conduct that served as the basis for the Commission order; and (d) any restitution order by a self-regulatory organization, whether or not related to the conduct that served as the basis for the Commission order.

By the Commission.

Jill M. Peterson
Assistant Secretary

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 9454 / September 23, 2013

SECURITIES EXCHANGE ACT OF 1934
Release No. 70473 / September 23, 2013

INVESTMENT ADVISERS ACT OF 1940
Release No. 3674 / September 23, 2013

INVESTMENT COMPANY ACT OF 1940
Release No. 30694 / September 23, 2013

ADMINISTRATIVE PROCEEDING
File No. 3-15514

In the Matter of **DONALD J. ANTHONY, JR.,** **FRANK H. CHIAPPONE,** **RICHARD D. FELDMANN,** **WILLIAM P. GAMELLO,** **ANDREW G. GUZZETTI,** **WILLIAM F. LEX,** **THOMAS E. LIVINGSTON,** **BRIAN T. MAYER,** **PHILIP S. RABINOVICH, and** **RYAN C. ROGERS,** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, SECTIONS 15(b) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, SECTION 203(f) OF THE INVESTMENT ADVISERS ACT OF 1940, AND SECTION 9(b) OF THE INVESTMENT COMPANY ACT OF 1940 AND NOTICE OF HEARING**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act"), Sections 15(b) and 21C of the Securities Exchange Act of 1934 ("Exchange Act"), Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act"), and Section 9(b) of the Investment Company Act of 1940 ("Company Act") against Donald J. Anthony, Jr., Frank H. Chiappone, Richard D. Feldmann, William P. Gamello, Andrew G. Guzzetti, William F. Lex, Thomas E. Livingston, Brian T. Mayer, Philip S. Rabinovich and Ryan C. Rogers ("Respondents").

II.

After an investigation, the Division of Enforcement alleges that:

A. RESPONDENTS

1. **Donald J. Anthony, Jr.**, 60 years old, is a resident of Loudonville, NY. He was registered with McGinn, Smith & Co., Inc. ("MS & Co.") from November 1997 to December 2009, and McGinn, Smith Advisors, LLC ("MS Advisors") from February 2006 to December 2009.

2. **Frank H. Chiappone**, 57 years old, is a resident of Clifton Park, NY. He was registered with MS & Co. from February 1989 to December 2009.

3. **Richard D. Feldmann**, 74 years old, is a resident of Delmar, NY. He was registered with MS & Co. from July 1987 to December 2009.

4. **William P. Gamello**, 49 years old, is a resident of Rexford, NY. He was registered with MS & Co. from April 2005 to December 2009.

5. **Andrew G. Guzzetti**, 66 years old, is a resident of Saratoga Springs, NY. He was registered with MS & Co. from September 2004 to December 2009.

6. **William F. Lex**, 67 years old, is a resident of Phoenixville, PA. He was registered with MS & Co. from January 1983 to December 2009.

7. **Thomas E. Livingston**, 55 years old, is a resident of Slingerlands, NY. He was registered with MS & Co. from October 1988 to December 2009, and became a 20% shareholder of MS Holdings in 2004.

8. **Brian T. Mayer**, 40 years old, is a resident of Princeton, NJ. Mayer was registered with MS & Co. from July 2001 to December 2009, and MS Advisors from February 2006 to April 2009.

9. **Philip S. Rabinovich**, 39 years old, is a resident of Roslyn, NY. He was registered with MS & Co. from July 2001 to December 2009, and with MS Advisors from August 2006 to December 2009.

10. **Ryan C. Rogers**, 40 years old, is a resident of East Northport, NY. He was registered with MS & Co. from July 2001 to December 2009, and with MS Advisors from February 2006 to April 2009.

B. RELEVANT ENTITIES[1] AND INDIVIDUALS

11. **MS & Co.**, a New York corporation founded in 1980 by David Smith and Timothy McGinn, had its principal place of business at 99 Pine Street, Albany, NY, and maintained branch offices at Clifton Park, NY, New York, NY, and King of Prussia, PA. MS & Co. was registered with the Commission as a broker-dealer beginning in 1980 and as an investment adviser in April 2009. It was owned by Smith (50%), McGinn (50%; 30% after 2004), and Thomas Livingston (20% after 2004). From 2003 to 2009, MS & Co. had about 55 employees, including about 35 registered representatives. On December 24, 2009, MS & Co. filed a partial BD-W. On March 9, 2010, MS & Co. also withdrew its investment adviser registration. FINRA terminated MS & Co.'s FINRA membership on August 4, 2010.

12. **MS Advisors** was a New York corporation formed in 2003 with its principal place of business at 99 Pine Street, Albany, New York. MS Advisors was owned by Smith (50%), McGinn (30%) and Livingston (20%). MS Advisors was registered as an investment adviser with the Commission from January 3, 2006 to April 24, 2009, and was the investment adviser to the Four Funds (defined below) until April 2009, when it was replaced by MS & Co.

13. **McGinn, Smith Holdings, LLC ("MS Holdings")** was owned by Smith (50%), McGinn (30%) and Livingston (20%).

14. **McGinn, Smith Capital Holdings Corp. ("MS Capital")** was a New York corporation formed in 1989 with its principal place of business at 99 Pine Street, Albany, New York. MS Capital was owned by MS Holdings (52%), McGinn (24%) and Smith (24%). MS Capital was the indenture trustee, the servicing agent and the collateral agent for the Four Funds, and the trustee for all the Trusts created between 2006 and 2009. Smith was president and McGinn was chairman of the board.

15. The **Four Funds** were New York limited liability companies, whose sole managing member was MS Advisors. MS & Co. served as the placement agent for the Four Funds offerings, and MS Capital acted as the Trustee. The Four Funds shared offices with MS & Co. and the other McGinn Smith entities at 99 Pine Street, Albany, NY. The Four Funds offerings are listed below, along with the promised rate of return, the maximum amount of the offering, and the date of the PPM:

---

[1] On April 20, 2010, the United States District Court for the Northern District of New York granted the SEC's motion for a temporary restraining order and appointed a Receiver over numerous entities controlled or owned by Timothy McGinn and David Smith. *See SEC v. McGinn Smith & Co., Inc., et al.*, 10-CV-457 (N.D.N.Y.) (GLS/CFH) (Dkt. Nos. 4, 5, 96). All the McGinn Smith entities–including MS & Co., MS Advisors, MS Capital, MS Holdings, FIIN, FEIN, FAIN and TAIN–remain under the Receiver's control.

(a) First Independent Income Notes, LLC ("FIIN"), 5%/7.5%/10.25% ($20 million) (9/15/03);
(b) First Excelsior Income Notes LLC ("FEIN"), 5%/7.5%/10.25% ($20 million) (1/16/04);
(c) Third Albany Income Notes, LLC ("TAIN"), 5.75%/7.75%/10.25% ($30 million) (11/1/04); and
(d) First Advisory Income Notes, LLC ("FAIN"), 6%/7.75%/10.25% ($20 million) (10/1/05).

16. The **Trust Offerings** were offerings by special purpose entities, purportedly to invest in contracts for burglar alarm service, "triple play" (broadband, cable and telephone) service or luxury cruises. MS & Co. acted as a placement agent and MS Capital acted as Trustee for the Trust Offerings. The Trust Offerings are listed below, along with the promised rate of return, the maximum amount of the offering, and the date of the PPM:

(a) TDM Cable Trust 06, 7.75%/9.25% ($3,550,000) (11/13/06)
(b) TDM Verifier Trust 07, 8.25%/9% ($3,475,000) (2/23/07)
(c) Firstline Senior Trust 07, 9.25% ($1,850,000) (5/19/07)
(d) Firstline Trust 07, 11% ($1,867,000) (5/19/07)
(e) Firstline Senior Trust 07 Series B, 9.5% ($1,435,000) (10/19/07)
(f) TDM Luxury Cruise Trust 07, 10% ($3,630,000 (7/16/07)
(g) Firstline Trust 07 Series B, 11% ($2,115,000) (10/19/07)
(h) TDM Verifier Trust 08, 8.50%/10% ($3,850,000) (12/17/07)
(i) Cruise Charter Ventures Trust 08, 13% ($3,250,000) (2/14/08)
(j) Integrated Excellence Sr. Trust 08, 9% ($900,000) (5/30/08)
(k) Integrated Excellence Jr. Trust 08, 10% ($580,000) (5/30/08)
(l) Fortress Trust 08, 13% ($3,060,000) (9/24/08)
(m) TDM Cable Trust 06, 10% ($1,380,000) (11/17/08)
(n) TDM Verifier Trust 09, 10% ($1,300,000) (12/15/08)
(o) TDMM Cable Jr Trust 09, 11% ($1,325,000) (1/19/09)
(p) TDMM Cable Sr. Trust 09, 9% ($1,550,000) (1/19/09)
(q) TDM Verifier Trust 07R, 9% ($2,100,000) (2/2/09)
(r) TDM Verifier Trust 08R, 9% ($2,005,000) (7/6/09)
(s) TDMM Benchmark Trust 09, 8%, 9%, 10%, 11%, 12% ($3,000,000) (8/20/09)
(t) TDM Verifier Trust 11, 9% ($1,550,000) (9/3/09)
(u) Cruise Charter Ventures, LLC, 12% ($400,000) (9/25/09)

17. **McGinn Smith Transaction Funding ("MSTF")** was a New York corporation formed in 2008. Like the Four Funds and Trust offerings, the $10 million MSTF offering on April 22, 2008 was underwritten by MS & Co.

18. **Timothy M. McGinn,** 64 years old, was the chairman, secretary and co-owner of MS & Co. From July 2003 through May 2006, McGinn served as CEO of Integrated Alarm Services Group, Inc. ("IASG"), which went public in July 2003. In September 2011, FINRA permanently barred McGinn from associating with any FINRA member. On February 6, 2013, following a four-week trial, a jury in the Northern District of New York found McGinn guilty of multiple counts of mail and wire fraud, securities fraud, and filing false tax returns. *United States v. Timothy M. McGinn & David L. Smith*,

12-CR-28 (DNH) (N.D.N.Y.). On August 7, 2013, McGinn was sentenced to 15 years in prison and ordered to pay restitution of $5,992,800.

19. **David L. Smith**, 67 years old, was the president and chief executive officer of MS & Co. and the manager of the Four Funds. Until 2007, Smith was also the chief compliance officer of MS & Co. In September 2011, FINRA permanently barred Smith from associating with any FINRA member. On February 6, 2013, following a four-week trial, a jury in the Northern District of New York found Smith guilty of multiple counts of mail and wire fraud, securities fraud, and filing false tax returns. *United States v. Timothy M. McGinn & David L. Smith*, 12-CR-28 (DNH) (N.D.N.Y.). On August 7, 2013, Smith was sentenced to 10 years in prison and ordered to pay restitution of $5,989,736.

C. OVERVIEW

20. Respondents Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers were among the top-selling brokers at MS & Co. They sold millions of dollars of MS & Co. private placements in spite of numerous red flags, including a policy–which was clearly inconsistent with the terms of the offerings–that required them to "replace" customers seeking to redeem notes with new customers before the redemption would be honored. Guzzetti, a supervisor at MS & Co., failed to take any action despite knowledge of red flags. Based on their conduct, Respondents committed the following violations:

a) Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers willfully violated Sections 5(a) and (c) of the Securities Act by offering and selling notes for which no registration statements were in effect;

b) Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, by knowingly or recklessly, or negligently, failing to perform reasonable due diligence to form a reasonable basis for their recommendations to customers, and made misrepresentations and omissions in recommending the Four Funds and Trust Offerings; and

c) Guzzetti failed reasonably to supervise the other Respondents, pursuant to Section 15(b)(6), incorporating by reference Section 15(b)(4)(E) of the Exchange Act.

D. THE MS & CO. OFFERINGS

21. David Smith and Timothy McGinn created and controlled the Four Funds and Trust Offerings. The offerings raised more than $125 million from more than 750 investors. Investor losses exceed $80 million.

22. The Four Funds offerings–FIIN (Sept. 2003), FEIN (Jan. 2004), TAIN (Nov. 2004) and FAIN (Oct. 2005) –raised at least $85 million. Smith controlled the

issuers, prepared the private placement memoranda ("PPMs"), set the terms of the offerings, controlled the investor money, and made all the investment decisions. Four Funds investors were promised quarterly interest payments and a return of principal upon maturity. Each offering had three tranches: the five-year "secured junior" notes paid 10.25%; the three or five year "secured senior subordinated" paid 7.5% or 7.75%; and the one-year "secured senior" notes paid 5%, 5.75% or 6%.

23. Although the Four Funds PPMs labeled each tranche as "secured," there were no secured assets subject to forfeiture in the event that a particular Fund failed.

24. According to the PPMs, MS & Co., as the placement agent, was to receive a commission of 2% of the offering proceeds. In addition, according to the PPMs, the brokers were entitled to (and did receive) "incentive commissions . . . [paid] to our managing member's salesmen at the rate of 2% of the aggregate principal amount of the notes per year over the term of the notes."

25. Smith had no experience in making investment decisions and managing investments for entities like the Four Funds, and Smith had broad flexibility in making investment decisions. As the PPMs for the offerings stated, each of the Four Funds was:

> formed to identify and acquire various public and/or private investments, which may include, without limitation, debt securities, collateralized debt obligations, bonds, equity securities, trust preferred, collateralized stock, convertible stock, bridge loans, leases, mortgages, equipment leases, securitized cash flow instruments, and any other investments that may add value to our portfolio . . . .

26. The PPMs stated that the notes would be offered only to accredited investors, as defined in Rule 501(a) of Regulation D. To this end, the PPMs required that each investor "represent in writing that it qualifies as an 'accredited investor' . . . and must demonstrate the basis for such qualification." The subscription agreements similarly reiterated that the notes were offered to accredited investors only.

27. Despite these representations, each of the Four Funds offerings had more than 35 unaccredited investors. The Respondents sold the Four Funds to unaccredited investors.

28. In September 2003, just weeks after the launch of the FIIN offering, Smith began diverting millions of dollars to pay investors in pre-2003 MS & Co. offerings.[2]

[2] From 1990 through early 2003, Smith and McGinn orchestrated, through MS & Co. and related entities, dozens of note offerings secured by residential alarm contracts.

Overall, Smith used at least $12.8 million of the Four Funds offering proceeds to pay investors in pre-2003 MS & Co. offerings.

29. Smith invested a majority of the Four Funds' proceeds in entities that were affiliated with MS & Co., even though the PPM did not disclose this, and in risky and highly speculative venture capital investments. For example, Smith invested $8.8 million in alseT Management, a start-up partially-owned and controlled by Livingston and Smith himself, which never earned any revenue. The Four Funds' investments did not generate sufficient returns required to meet the issuers' obligations to investors.

30. In 2006, McGinn returned to MS & Co. on a full-time basis after nearly three years as CEO of IASG. McGinn created the twenty-one Trust Offerings, plus MSTF, that raised over $41 million. The Trust Offerings ostensibly were created to fund entities engaged in specific areas, such as burglar alarm service, triple play service, or luxury cruises. These entities, however, were not funded directly by the issuer; instead, in most cases, the offering proceeds were first transferred to various conduit entities, primarily McGinn Smith Funding LLC (the "MSF Conduit") or TDM Cable Funding LLC (the "TDM Conduit").

31. The proceeds of the Trust Offerings were commingled and then used as needed by MS & Co., including infusing cash into the faltering Four Funds. The conduits and their corresponding Trust Offerings are listed below:

<u>TDM Conduit</u>

- TDM Cable Trust 06, 7.75%/9.25% (11/13/2006)
- TDM Verifier Trust 07, 8.25%/9.00% (2/23/2007)
- TDM Luxury Cruise, 10% (7/16/2007)
- TDM Cable Trust 06, 10% (11/17/2008)
- TDMM Cable Senior Trust 09, 9% (1/19/2009)
- TDMM Cable Jr. Trust 09, 11% (1/19/2009)
- TDM Verifier Trust 07R, 9% (2/2/2009)
- TDM Verifier Trust 08R (7/6/2009)

<u>MSF Conduit</u>

- Firstline Senior Trust 07, 9.25%/11% (5/19/2007)
- Firstline Trust 07 Series B, 9.5%/11% (10/19/2007)
- TDM Verifier Trust 08, 8.5%/10% (12/17/2007)
- TDM Verifier Trust 09, 10% (12/15/2008)

32. The Trust PPMs stated that they would "generally be offered only to accredited investors," but also provided for 35 or fewer unaccredited investors, supposedly under Rule 506. None of the Trust Offerings exceeded 35 unaccredited investors. When integrated according to their Conduit entity, however, Rule 506's limitation on unaccredited investors was breached: at least 69 investors in the Trusts tied to the TDM Conduit were unaccredited, and at least 59 investors in the Trusts linked to the MSF Conduit were unaccredited.

33. The Trust Offerings continued the egregious misuse of investor funds. Smith and McGinn, for example, took for personal use millions of dollars in offering proceeds from the TDM Cable 06, TDMM Cable, Integrated Excellence, MSTF and Fortress offerings, used investor funds to pay earlier noteholders, and used the Trust Offering proceeds to satisfy liquidity needs for other MS & Co. entities.

E. <u>THE RESPONDENTS' ILLEGAL CONDUCT</u>

34. The Respondents, as associated persons of a broker-dealer, had an obligation to conduct a reasonable investigation of the issuers in order to form a reasonable basis for any recommendation to customers regarding the MS & Co. offerings. By making a recommendation, the Respondents implicitly represented to their customers that they had an adequate basis for the recommendation. A broker has a duty to investigate the truth of the representations he makes to customers, because, by virtue of his title, customers are entitled to presume that the representations made were the result of reasonable investigation.

35. The Respondents blindly relied upon Smith and McGinn, even in the face of red flags. The Respondents, as licensed securities professionals, knew or should have known that securities issued by smaller companies of recent origin require more thorough investigation. They should not simply parrot the marketing information furnished by Smith and McGinn, particularly in the face of red flags. In addition, where Respondents lacked essential information about an issuer or its securities when making a recommendation, they failed to disclose this fact as well as the risks that arose from their lack of information.

36. The Respondents' due diligence, which at best consisted of reading the PPMs, was wholly inadequate, despite their knowledge that the issuers were completely controlled by Smith and McGinn. There were numerous red flags, moreover, that should have alerted the Respondents to the need for a thorough investigation. Instead, the Respondents blindly sold whatever private placement Smith and McGinn told them to sell.

37. The Respondents also made material misrepresentations and omissions when recommending the Four Funds and Trust Offerings to their customers.

The Respondents Knew of Red Flags <u>Surrounding the Four Funds Offerings</u>.

38. Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers performed inadequate due diligence prior to recommending the Four Funds to their customers. The PPMs for the Four Funds, which they read or were reckless in not reading, made disclosures that should have caused the Respondents, as associated persons of a broker-dealer, to conduct a searching inquiry prior to recommending the products to their customers. This heightened duty arose from the following factors:

a. The PPMs made clear that Smith owned and controlled each of the issuers−which were new, single-purpose entities with no operating history− as well as the placement agent (MS & Co.) and the trustee. Smith also had total control over the disposition of investor funds, with absolutely no oversight or control. As a result, the Respondents should have made specific inquiries as to how customer money would be invested before recommending the Four Funds to their customers.

b. The Respondents knew or should have known that Smith had never before managed offerings of the size and scope of the Four Funds. The debt offerings that MS & Co. had done before 2003 were small-scale note offerings tied to the income streams from home alarm contracts, far different from the broad and non-specific investment mandate of Four Funds offerings.[3] Given Smith's lack of experience in this area, and the Respondents' knowledge of this lack of experience, they should have made specific inquiries as to how Smith planned to invest the offering proceeds. This is particularly true given fact that the issuers' ability to make the relatively high interest payments, and to return the investors' principal, depended on the nature of the investments;

c. The PPMs stated that the Four Funds could acquire investments "from our managing member [MS Advisors] or any affiliate," could "purchase securities from issuers in offerings for which [MS & Co.] is acting as underwriter or placement agent," and that "[a]ffiliates of the placement agent may purchase a portion of the notes offered hereby." As a result, the Respondents should have inquired whether Smith−who controlled without oversight the issuers, the placement agent and the disposition of investor funds−did engage in any transactions with affiliates. If they had, they would have discovered that nearly half of the offering proceeds had been invested in affiliates; and

d. Despite the complete prohibition on sales to unaccredited investors in the Four Funds PPMs, the Respondents knew that sales were being made to unaccredited investors. The Respondents, therefore, knew that the PPMs' prohibition on sales to unaccredited investors was disregarded, which should have caused them to make inquiries.

---

[3] The Respondents, when recommending the Four Funds and Trust Offerings, held out the pre-2003 alarm note offerings as indicative of Smith and McGinn's integrity and skill. These earlier offerings, however, were also mismanaged. In a handwritten letter from Smith to McGinn in 2000, Smith characterized the pre-2003 offerings as a "Ponzi Scheme" because the offering proceeds "for the most part are used to fulfill the investment promise to earlier investors . . . the new investments have no chance of being repaid in full." These offerings were eventually paid off not from the income stream generated by the investments, but rather through the IASG IPO in July 2003, as well as over $12 million from the Four Funds offerings.

39. These factors should have prompted the Respondents to conduct a searching inquiry into the offerings. Instead, they essentially turned a blind eye and sold the Four Funds offerings with no specific knowledge of how investor funds were being used.

Smith's Refusal to Disclose to the Brokers How He Had Invested Four Funds Offering Proceeds Was a Red Flag.

40. From the commencement of the FIIN offering in September 2003 until January 2008, Smith provided his brokers with no specific information about how he had invested the offering proceeds. Any questions by the brokers were deflected with the claim that Smith had made loans to local Albany businesses with Four Funds proceeds, and those businesses desired anonymity. Indeed, Smith steadfastly refused to give the brokers any meaningful information about how he had invested the Four Funds offering proceeds. This refusal should have prompted the brokers to further question the propriety of the Four Funds.

41. The information blackout that Smith imposed was contrary to the PPMs, which stated that an "annual statement of the operations consisting of a balance sheet and income statement" would be provided to investors upon request. These reports, however, were never made available and it appears that no brokers requested this information before January 2008, when Smith disclosed that the Four Funds would be restructured.

42. MS & Co.'s compliance manual, moreover, stated that "it will make a reasonable investigation . . . [and] Paperwork recording the due diligence will be kept in the legal files." The Respondents also never asked to see the due diligence files, notwithstanding the red flags regarding the Four Funds.

The Respondents Continued to Recommend MS & Co. Offerings Despite Knowledge of the Redemption Policy – Another Major Red Flag.

43. By 2006, the Funds began having significant difficulty in meeting the redemption requests. Smith therefore instituted a policy that required brokers to "replace" customers seeking to redeem Four Funds notes, including maturing notes, with new customers (the "Redemption Policy"). The PPMs, however, did not state that a customer's right to redemption depended on finding a "replacement."

44. The Redemption Policy was another red flag that put the Respondents on notice that the Four Funds were being handled much differently from what the PPMs provided. None of the Respondents, however, undertook any investigation of the offerings; they also failed to disclose this material information to their customers; and they continued to recommend MS & Co. private placements to their customers for several more years.

45. The Respondents learned of the policy at different times beginning in late 2006. They were shocked by the policy and knew that it was contrary to the PPMs. The Respondents, however, did not disclose the Redemption Policy to customers, even those who sought to reinvest, or "roll over," Four Funds notes at maturity. Collectively, the Respondents raised millions of dollars in MS & Co. private placements after learning of the

policy. They stood to profit if a customer elected to roll over, and would receive their annual commission for the life of the note. The Respondents sought redemptions for current customers even knowing that the redemption would be paid not with investment returns, as the PPMs represented, but rather with new investor funds.

The Respondents Continued to Sell the Trust Offerings Despite Learning in January 2008 that the Four Funds Had Been Mismanaged.

46. On January 8, 2008, Smith and McGinn held an all-day meeting to inform the brokers, including the Respondents, that the Four Funds were in default, that payments to investors would be curtailed, and that the offerings would be restructured. Smith revealed that the Four Funds investment portfolios consisted of loans to small, local businesses, some of which had already filed for bankruptcy; risky venture capital investments; investments with sub-prime exposure; and other nonperforming investments. By contrast, the Four Funds each had made only one investment in a publicly-traded security: Exchange Boulevard.com, a risky venture capital company that was quoted on OTC Link, formerly known as the Pink Sheets.

47. None of the Respondents, despite the alarming disclosures in this meeting, requested any kind of probing investigation into what happened to the Four Funds or the ongoing Trust Offerings. After the January 2008 meeting, there were thirteen offerings by MSTF and the Trusts, which raised at least $20 million. As a result of the accumulation of red flags since the launch of the Four Funds in September 2003, the Respondents should have conducted a searching inquiry regarding any MS & Co. private placement. Instead, they recommended the Trust Offerings to their customers based on insufficient due diligence.

48. During the three years of the Trust and MSTF Offerings, investor funds were being used in ways contrary to the uses described in the PPMs; for example, Smith and McGinn took at least $4 million in offering proceeds for themselves and another MS & Co. officer. Offering proceeds also were used to pay investors in earlier offerings and MS & Co.'s payroll.

49. In the Trust Offerings, the amount actually invested pursuant to a particular PPM was far less than that PPM disclosed.

50. The Trust PPMs, moreover, like the Four Funds PPMs, raised red flags that should have been readily apparent to the brokers. For example, the August 2009 TDMM Benchmark Trust 09 ("Benchmark") PPM should have raised a red flag. Benchmark promised a high rate of return, which ranged from 8% to 12%, during a time when the prime rate was only 3.25%. The Respondents should have been skeptical of Benchmark's ability to meet the promised interest payments especially when considering that the PPM disclosed that only $1,950,000 (approximately 65%) of the total $3 million raised would actually be invested, with the remainder siphoned off in fees. The Respondents who recommended the Benchmark offering did so despite the exorbitant fees, and without questioning how MS & Co. planned to make 8 – 12% interest payments and redeem the principal upon maturity while taking over one-third of the money raised in fees.

51. The second Firstline Trust offering of October 19, 2007 raised $3.2 million from investors (an earlier Firstline offering in May 2007 had raised $3.7 million). In this offering, a McGinn Smith affiliate loaned the offering proceeds to Firstline Securities, Inc., a Utah corporation that sold residential alarm contracts. At the time of the October 2007 offering, McGinn had been informed of the threat of crippling litigation by one of Firstline's creditors, and McGinn was personally involved in trying to resolve the dispute. Litigation resulted and, on January 25, 2008, Firstline filed a voluntary petition for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the District of Utah. If the Respondents had conducted due diligence in response to red flags, they would have discovered the legal issues, which should have caused them to stop selling the Firstline offering. Instead, they were unaware of the bankruptcy filing until McGinn finally disclosed it in September 2009. Lex, Feldmann, Chiappone, Rabinovich and Mayer sold Firstline trust certificates after the bankruptcy filing.

F. SALES AND COMMISSIONS

52. **Anthony** sold approximately $2.2 million of the Four Funds, and approximately $630,000 of the Trust Offerings. He earned approximately $104,000 in commissions.

53. **Chiappone** sold approximately $12 million of the Four Funds offerings and approximately $3.4 million of the Trust Offerings. He earned approximately $513,000 in commissions.

54. **Feldmann** sold approximately $5.4 million of the Four Funds offerings and approximately $595,000 of the Trust Offerings. Feldmann earned approximately $299,000 in commissions.

55. **Gamello** sold approximately $1.3 million of the Four Funds offerings and approximately $1.6 million of the Trusts. He earned approximately $74,500 in commissions.

56. **Lex** sold approximately $38.5 million of the Four Funds offerings and approximately $6.6 million of the Trust Offerings. He earned approximately $1,523,000 in commissions.

57. **Livingston** sold approximately $3.5 million of the Four Funds offerings and approximately $380,000 of the Trust Offerings. His total commissions were approximately $143,000.

58. **Mayer** sold approximately $1.7 million of the Four Funds offerings and approximately $1.9 million of the Trust Offerings. He earned approximately $81,000 in commissions, plus an additional 2% of the gross commissions generated by the New York City office.

59. **Rabinovich** sold approximately $20.3 million of the Four Funds offerings and approximately $6.8 of the Trust Offerings. He earned approximately $578,000 in commissions.

60. **Rogers** sold approximately $2 million of the Four Funds and approximately $5.2 million of the Trust Offerings. He earned approximately $240,000 in commissions.

G. GUZZETTI FAILED REASONABLY TO SUPERVISE

61. Guzzetti was the managing director of the MS & Co. Private Client Group from 2004 until late 2009. During this period, Guzzetti supervised MS & Co. registered representatives with regard to the Four Funds and Trust Offerings.

62. Guzzetti, who also earned about $6,000 in commissions, had direct supervisory responsibilities of the Respondents. He carried out numerous managerial duties, including recruiting and hiring MS & Co. employees; assigning and reassigning customers to brokers; evaluating employee performances and awarding commissions; addressing customer grievances; answering employee questions regarding the firm; and issuing instruction and guidance regarding specific financial products and transactions, administrative issues, and broader firm policy.

63. Guzzetti also sent regular e-mails summarizing MS & Co. products available for sale to customers. In a February 2006 email, for example, Guzzetti stated that "there are many investors sitting in money market accounts (fear of higher interest rates) who are losing return (cost of waiting). Our FAIN'S offer a way of locking in higher returns with $ sitting in money markets waiting for the 'top' in interest rates."

64. Guzzetti learned of the Redemption Policy by December 2006, when he received an email from Smith stating that Rabinovich "needs to replace the $100,000 before doing the trade. I am running on fumes with all of these redemptions and cannot afford any[]more." In November 2007, Guzzetti received an email from Smith stating that "I do not have the liquidity. Any redemptions have to have replacement sales beforehand. . . . My preference is for there to be no redemptions." Guzzetti instructed the brokers to adhere to the Redemption Policy.

65. Guzzetti had a duty to investigate red flags that suggest misconduct may be occurring and to take action when made aware of suspicious conduct. Had Guzzetti responded reasonably to the red flags, he would have prevented or detected the underlying violations committed by Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers.

H. VIOLATIONS

66. As a result of the conduct described above, Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers willfully violated Sections 5(a) and (c) of the Securities Act.

67. As a result of the conduct described above, Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers willfully violated Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

68. As a result of the conduct described above, Guzzetti failed reasonably to supervise Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers, pursuant to Section 15(b)(6), incorporating by reference Section 15(b)(4)(E) of the Exchange Act, with a view toward preventing and detecting their violations of Sections 5(a) and (c) and 17 of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

III.

In view of the allegations made by the Division of Enforcement, the Commission deems it necessary and appropriate in the public interest that public administrative and cease-and-desist proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and, in connection therewith, to afford Respondents an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 15(b) of the Exchange Act including, but not limited to, disgorgement and civil penalties pursuant to Section 21B of the Exchange Act;

C. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 203(f) of the Advisers Act including, but not limited to, disgorgement and civil penalties pursuant to Section 203 of the Advisers Act;

D. What, if any, remedial action is appropriate in the public interest against Respondents pursuant to Section 9(b) of the Investment Company Act including, but not limited to, disgorgement and civil penalties pursuant to Section 9 of the Investment Company Act; and

E. Whether, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondents Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Rogers should be ordered to cease and desist from committing or causing violations of and any future violations of Sections 5(a), (c) and 17(a) of the Securities Act, and Section 10(b) and Rule 10b-5 of the Exchange Act, whether Respondents should be ordered to pay a civil penalty pursuant to Section 8A(g) of the Securities Act, Section 21B(a) of the Exchange Act, Section 203(i) of the Advisers Act, and Section 9(d) of the Investment Company Act, and whether Respondents Anthony, Chiappone, Feldmann, Gamello, Lex, Livingston, Mayer, Rabinovich and Roger should be ordered to pay disgorgement pursuant to Section 8A(e) of the Securities Act, Sections 21B(e) and 21C(e) of the Exchange Act, Section 203 of the Advisers Act, and Section 9 of the Investment Company Act.

IV.

IT IS ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof shall be convened not earlier than 30 days and not later than 60 days from service of this Order at a time and place to be fixed, and before an Administrative Law Judge to be designated by further order as provided by Rule 110 of the Commission's Rules of Practice, 17 C.F.R. § 201.110.

IT IS FURTHER ORDERED that Respondents shall file an Answer to the allegations contained in this Order within twenty (20) days after service of this Order, as provided by Rule 220 of the Commission's Rules of Practice, 17 C.F.R. § 201.220.

If Respondents fail to file the directed answer, or fail to appear at a hearing after being duly notified, the Respondents may be deemed in default and the proceedings may be determined against them upon consideration of this Order, the allegations of which may be deemed to be true as provided by Rules 155(a), 220(f), 221(f) and 310 of the Commission's Rules of Practice, 17 C.F.R. §§ 201.155(a), 201.220(f), 201.221(f) and 201.310.

This Order shall be served forthwith upon Respondents personally or by certified mail.

IT IS FURTHER ORDERED that the Administrative Law Judge shall issue an initial decision no later than 300 days from the date of service of this Order, pursuant to Rule 360(a)(2) of the Commission's Rules of Practice.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision of this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 551 of the Administrative Procedure Act, it is not deemed subject to the provisions of Section 553 delaying the effective date of any final Commission action.

By the Commission.

Elizabeth M. Murphy
Secretary

CONFIDENTIAL PRIVATE PLACEMENT MEMORANDUM

$7,500,000

RTC TRUST 02

MAXIMUM OFFERING $7,500,000 CONTRACT CERTIFICATES
MINIMUM OFFERING $100,000 CONTRACT CERTIFICATES
SIXTY SIX MONTHS: 11.00 %

RTC TRUST 02 (the "Trust Fund") is hereby offering $7,500,000 of Contract Certificates, entitled to interest at the rate of 11.00% per annum (the "Certificates"). Principal and interest on the Certificates will be payable in monthly installments commencing on July 1, 2002. See "Description of the Certificates and the Trust Agreement".

The Certificates will be issued and registered in the names of the purchasing Certificateholders. Interests in the Certificates will be shown on, and transfers thereof will be effected through, records maintained by the Trustee under the Trust Agreement. See "Description of the Certificates and the Trust Agreement."

Price of Certificates 100%

See "Risk Factors" for a discussion of certain risks that should be considered by prospective purchasers of the Certificates offered hereby.

THESE CERTIFICATES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION OR ANY STATE SECURITIES COMMISSION NOR HAS THE SECURITIES AND EXCHANGE COMMISSION OR ANY STATE SECURITIES COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS MEMORANDUM. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

	Price to the Public	Underwriting Discount	Proceeds to the Trust Fund
	100%	5.0%	95%
Minimum Offering	$100,000	$5,000	$95,000
Maximum Offering	$7,500,000	$375,000	$7,125,000

The date of this Memorandum is May 22, 2002

MCGINN, SMITH & CO., INC.
Capital Center • 99 Pine Street
Albany, New York 12207

MS-E-1978498

TABLE OF CONTENTS

The Offering of Certificates will terminate on August 21, 2002, unless the Minimum Amount of Certificates are sold prior to that date. All subscriptions will be held in an escrow account (the "Escrow Account") at Charter One Bank , FSB (the "Escrow Agent") or such other financial institution as may be selected by the Trust Fund in the event that the Escrow Agent is unable or unwilling to serve. Interest will be earned on funds held in the Escrow Account commencing three days after the funds are deposited until the earlier of the termination of this Offering or the investment of such funds in Certificates. During the period that an investor's funds are held in the Escrow Account, he will not be a Certificateholder of the Trust Fund. An investor's funds will not be held in the Escrow Account more than two months before being invested in the Certificates, with Escrow Agent fees being deducted from escrow interest payable to investors. See "Terms of the Offering".

The Trust Fund will furnish to investors certain reports, financial statements and tax information. See "Description of the Certificates and the Trust Agreement - Reports".

WHO MAY INVEST

The Certificates will be offered only to accredited investors as that term is defined under Regulation D promulgated under the Act ("Accredited Investors"). With certain exceptions (primarily with respect to institutional investors) an Accredited Investor is an individual who (i) has a net worth (along and together with the Investor's spouse) in excess of $1,000,000 or (ii) has had gross income in excess of $200,000 in each of the past two years or joint income with that person's spouse in excess of $300,000 in each of those years and reasonably expects gross income at the same level in the current year. Corporations, partnerships and other entities will be considered Accredited Investors if each of its beneficial owners individually qualify as Accredited Investors, or if such entity has total assets in excess of $5 million. Prospective investors to be admitted as Accredited Investors will be required to represent that they satisfy the requirements of an Accredited Investor. See "Suitability".

The Certificates offered hereby are suitable only for those investors whose business and investment experience makes them capable of evaluating the merits and risks of their prospective investment in the Certificates, who can afford to bear the economic risk of their investment for an indefinite period of time and have no need for liquidity in this investment. Each investor will be required to represent in the Subscription Agreement that he is acquiring the Certificates for his own account as principal for investment, and not with a view to resale or distribution, and that he is aware that (a) his transfer rights are restricted; and (b) that the Certificates have not been registered under the Securities Act of 1933, as amended, and therefore, cannot be resold unless they are so registered or unless exemption from registration is available with respect to such transaction. (See "Suitability".) Since there can be no assurance that the Contracts will generate sufficient income Necessary to pay the Certificates, investment in the Certificates is suited for persons who have substantial income from other sources. See "Risk Factors".

The Trust Fund may require prospective investors to complete a questionnaire relating to the suitability on the investment for them, and may make or cause to be made such further inquiry as it deems appropriate. The Trust Fund and Sales Agent will collectively have the sole discretion regarding sale of the Certificates to any prospective investor. The Trust Fund and Sales Agent reserve the right to reject any subscription for any reason and to allocate to any investor a smaller amount of Certificates, or fractions thereof, than that for which he has subscribed. See "Suitability".

THE SECURITIES OFFERED PURSUANT TO A CONFIDENTIAL PRIVATE PLACEMENT MEMORANDUM DATED MAY 22, 2002, AND EXHIBITS A, B, C, D, AND E ATTACHED THERETO (COLLECTIVELY, THE "OFFERING MATERIALS"), HAVE NOT BEEN FILED OR REGISTERED WITH OR APPROVED BY THE SECURITIES AND EXCHANGE COMMISSION (THE "COMMISSION"), NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THE OFFERING MATERIALS. NO STATE SECURITIES LAW ADMINISTRATOR HAS PASSED ON OR ENDORSED THE MERITS OF THIS OFFERING OR THE ACCURACY OR THE ADEQUACY OF THE OFFERING MATERIALS. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL.

IT IS INTENDED THAT THE SECURITIES OFFERED HEREBY WILL BE MADE AVAILABLE ONLY TO ACCREDITED INVESTORS, AS DEFINED IN RULE 501 OF REGULATION D PROMULGATED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"). THE SECURITIES OFFERED HEREBY ARE BEING OFFERED PURSUANT TO AN EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT AND APPLICABLE STATE SECURITIES LAWS FOR NON-PUBLIC OFFERINGS. SUCH EXEMPTIONS LIMIT THE NUMBER AND TYPES OF INVESTORS TO WHICH THE OFFERING WILL BE MADE AND RESTRICT SUBSEQUENT TRANSFER OF THE INTERESTS.

CONFIDENTIAL INFORMATION

THE INFORMATION CONTAINED IN THE MEMORANDUM IS CONFIDENTIAL AND PROPRIETARY TO THE TRUST AND BEING SUBMITTED TO PROSPECTIVE INVESTORS SOLELY FOR SUCH INVESTORS' CONFIDENTIAL USE WITH THE EXPRESS UNDERSTANDING THAT, WITHOUT THE PRIOR WRITTEN PERMISSION OF THE TRUST, SUCH PERSONS WILL NOT RELEASE THIS DOCUMENT OR DISCUSS THE INFORMATION CONTAINED HEREIN OR MAKE REPRODUCTIONS OF OR USE THIS MEMORANDUM FOR ANY PURPOSE OTHER THAN EVALUATING A POTENTIAL INVESTMENT IN THE SECURITIES.

THE SECURITIES ARE SUBJECT TO RESTRICTIONS ON TRANSFERABILITY AND RESALE AND MAY NOT BE TRANSFERRED OR RESOLD EXCEPT AS PERMITTED UNDER THE ACT UNDER APPLICABLE STATE SECURITIES LAWS OR PURSUANT TO REGISTRATION OR EXEMPTION THEREFROM. INVESTORS SHOULD BE AWARE THAT THEY MAY BE REQUIRED TO BEAR THE FINANCIAL RISKS OF THIS INVESTMENT FOR AN INDEFINITE PERIOD OF TIME.

WE DRAW YOUR ATTENTION TO THE ANTI-FRAUD PROVISIONS OF THE FEDERAL AND STATE SECURITIES LAWS, PARTICULARLY RULE 10b-5 UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED, WHICH PROHIBITS THE PURCHASE OR SALE OF SECURITIES ON THE BASIS OF MATERIAL NON-PUBLIC INFORMATION. IN LIGHT OF THESE PROVISIONS, INCLUDING RULE 10b-5, WE ADVISE YOU THAT, IF YOU ARE IN POSSESSION OF MATERIAL INFORMATION RELATING TO THE TRUST WHICH YOU KNOW OR HAVE REASON TO KNOW IS NON-PUBLIC, YOU SHOULD NOT PURCHASE OR SELL OR CAUSE TO BE PURCHASED OR SOLD ANY OF THE TRUST'S SECURITIES. IN ADDITION, YOU SHOULD NOT DISCLOSE ANY OF SUCH INFORMATION UNLESS AND UNTIL SUCH INFORMATION HAS BEEN PUBLICLY DISCLOSED.

THE MEMORANDUM CONSTITUTES AN OFFER ONLY TO THE OFFEREE TO WHOM THE MEMORANDUM IS INITIALLY DISTRIBUTED AND DOES NOT CONSTITUTE AN OFFER TO SELL OR A SOLICITATION OF AN OFFER TO BUY BY ANYONE IN ANY COUNTRY OR STATE

IN WHICH SUCH OFFER OR SOLICITATION IS NOT AUTHORIZED, OR TO ANY PERSON TO WHOM IT IS UNLAWFUL TO MAKE SUCH AN OFFER OR SOLICITATION. THE TRUST AND THE SALES AGENT RESERVE THE RIGHT TO ACCEPT OR REJECT ANY SUBSCRIPTION FOR SECURITIES, IN WHOLE OR IN PART, OR TO ALLOT TO ANY PROSPECTIVE INVESTOR FEWER THAN THE NUMBER OF SECURITIES SUCH INVESTOR DESIRES TO PURCHASE.

IN DECIDING WHETHER TO PURCHASE SECURITIES, EACH INVESTOR MUST CONDUCT AND RELY ON ITS OWN EVALUATION OF THE TRUST AND THE TERMS OF THE OFFERING, INCLUDING THE MERITS AND RISKS INVOLVED IN MAKING AN INVESTMENT DECISION WITH RESPECT TO THE SECURITIES. PROSPECTIVE INVESTORS SHOULD NOT CONSTRUE THE CONTENTS OF THIS MEMORANDUM OR ANY PRIOR OR SUBSEQUENT COMMUNICATIONS FROM THE TRUST, OR ANY PROFESSIONAL ASSOCIATED WITH THE OFFERING, AS LEGAL OR TAX ADVICE. THE OFFEREE AUTHORIZED TO RECEIVE THE MEMORANDUM SHOULD CONSULT ITS OWN TAX COUNSEL, ACCOUNTANT OR BUSINESS ADVISOR, RESPECTIVELY, AS TO LEGAL, TAX AND RELATED MATTERS CONCERNING ITS PURCHASE OF THE SECURITIES.

THE INFORMATION PRESENTED HEREIN WAS PREPARED BY THE TRUST AND IS BEING FURNISHED SOLELY FOR USE BY PROSPECTIVE INVESTORS IN CONNECTION WITH THE OFFERING. THE INFORMATION CONTAINED IN THIS MEMORANDUM HAS BEEN SUPPLIED BY THE TRUST AND HAS BEEN INCLUDED HEREIN IN RELIANCE ON THE TRUST. THIS MEMORANDUM CONTAINS SUMMARIES OF CERTAIN DOCUMENTS, BELIEVED BY THE TRUST TO BE ACCURATE, BUT REFERENCE IS HEREBY MADE TO SUCH DOCUMENTS FOR COMPLETE INFORMATION CONCERNING THE RIGHTS AND OBLIGATIONS OF THE PARTIES THERETO. COPIES OF SUCH DOCUMENTS ARE AVAILABLE AT THE OFFICES OF THE TRUST. ALL OF SUCH SUMMARIES ARE QUALIFIED IN THEIR ENTIRETY BY THIS REFERENCE.

EXCEPT AS OTHERWISE INDICATED, THE MEMORANDUM SPEAKS AS OF THE DATE HEREOF. NEITHER THE DELIVERY OF THIS MEMORANDUM NOR ANY SALE MADE HEREUNDER SHALL, UNDER ANY CIRCUMSTANCES, CREATE ANY IMPLICATION THAT THERE HAS BEEN NO CHANGES IN THE AFFAIRS OF THE TRUST AFTER THE DATE HEREOF.

NO GENERAL SOLICITATION WILL BE CONDUCTED AND NO OFFERING LITERATURE OR ADVERTISING IN ANY FORM WILL OR MAY BE EMPLOYED IN THE OFFERING OF THE COMMON STOCK, EXCEPT FOR THIS MEMORANDUM (INCLUDING AMENDMENTS OR SUPPLEMENTS HERETO) AND THE DOCUMENTS SUMMARIZED HEREIN. NO PERSON IS AUTHORIZED TO GIVE ANY INFORMATION OR TO MAKE ANY REPRESENTATION NOT CONTAINED IN THIS MEMORANDUM OR THE DOCUMENTS SUMMARIZED HEREIN AND, IF GIVEN OR MADE, SUCH OTHER INFORMATION OR REPRESENTATION MUST NOT BE RELIED UPON.

BY ACCEPTING DELIVERY OF ANY OFFERING MATERIAL, THE OFFEREE AGREES (I) TO KEEP CONFIDENTIAL THE CONTENTS THEREOF, AND NOT TO DISCLOSE THE SAME TO ANY THIRD PARTY OR OTHERWISE USE THE SAME FOR ANY PURPOSE OTHER THAN EVALUATION BY SUCH OFFEREE OF A POTENTIAL PRIVATE INVESTMENT IN THE TRUST, AND (II) TO RETURN THE SAME TO THE SALES AGENT IF (A) THE OFFEREE DOES NOT SUBSCRIBE TO PURCHASE ANY SECURITIES, (B) THE OFFEREE'S SUBSCRIPTION IS NOT ACCEPTED, OR (C) THE OFFERING IS TERMINATED OR WITHDRAWN.

THE TRUST WILL MAKE AVAILABLE TO ANY PROSPECTIVE INVESTOR, PRIOR TO THE CLOSING, THE OPPORTUNITY TO ASK QUESTIONS OF AND TO RECEIVE ANSWERS FROM REPRESENTATIVES OF THE TRUST CONCERNING THE TRUST OR THE TERMS AND CONDITIONS OF THE OFFERING AND TO OBTAIN ANY ADDITIONAL RELEVANT INFORMATION TO THE EXTENT THE TRUST POSSESSES SUCH INFORMATION OR CAN OBTAIN IT WITHOUT UNREASONABLE EFFORT OR EXPENSE. INVESTORS AGREE TO ADVISE THE TRUST IN WRITING IF THEY ARE RELYING UPON ANY SUCH INFORMATION.

FOR RESIDENTS OF ALL STATES

IN MAKING AN INVESTMENT DECISION INVESTORS MUST RELY ON THEIR OWN EXAMINATION OF THE ISSUER AND THE TERMS OF THE OFFERING, INCLUDING THE MERITS AND RISKS INVOLVED. THESE SECURITIES HAVE NOT BEEN RECOMMENDED BY ANY FEDERAL OR STATE SECURITIES COMMISSION OR REGULATORY AUTHORITY. FURTHERMORE, THE FOREGOING AUTHORITIES HAVE NOT CONFIRMED THE ACCURACY OR DETERMINED THE ADEQUACY OF THIS DOCUMENT. ANY REPRESENTATIONS TO THE CONTRARY IS A CRIMINAL OFFENSE.

THESE SECURITIES ARE SUBJECT TO RESTRICTIONS ON TRANSFERABILITY AND RESALE AND MAY NOT BE TRANSFERRED OR RESOLD EXCEPT AS PERMITTED UNDER THE SECURITIES ACT OF SECURITIES, AS AMENDED, AND THE APPLICABLE STATE SECURITIES LAWS, PURSUANT TO REGISTRATION OR EXEMPTION THEREFROM. INVESTORS SHOULD BE AWARE THAT THEY MAY BE REQUIRED TO BEAR THE FINANCIAL RISKS OF THIS INVESTMENT FOR AN INDEFINITE PERIOD OF TIME.

SUMMARY OF THE OFFERING

The following summary is qualified in its entirety by the detailed information appearing elsewhere in this Memorandum and the exhibits attached to the Memorandum.

The Trust Fund
RTC Trust 02 (the "Trust Fund") is a common law trust formed under the laws of the State of New York on May 20, 2002. The Trustee of the Trust Fund is McGinn Smith Capital Holdings Corp., a New York Corporation. The Trustee will have no liability in connection with the Certificates or the affairs of the Trust Fund in the absence of willful misconduct or gross negligence. Although Certificateholders will have recourse to all assets of the Trust Fund, the Portfolios of Contracts acquired with the proceeds of this Offering will be the Trust Fund's only asset. See "Risk Factors", "The Trust Fund" and "Disclaimer of Liability of Trustee."

The sole business activity of the Trust Fund will be to acquire the portfolio of contracts (the "Contracts"), consisting of payment rights in exchange for the provision of electronic security monitoring services for security alarm systems in residential homes ("Residential Monitoring Contracts"). Security monitoring is the process of notifying designated parties (either individuals or public authorities) if an unauthorized entry, fire, medical or other emergency signal from a customer alarm system is received at a central monitoring station.

The Trust Fund will acquire a portfolio of Contracts (the " Portfolio") consisting of Contracts acquired by Integrated Alarm Services, Inc., a Delaware corporation ("IAS"), and originated by various security alarm dealers, herein sometimes collectively referred to as the "Security Alarm Dealers".

The Trust Fund will enter into a Monitoring Receivable Financing Participation Agreement (the "Participation Agreement") for acquisition of the Portfolio. The Portfolio of Contracts consists of the monthly scheduled cash flow received from the Portfolio of Contracts as set forth on Exhibit B to the Participation Agreement.

The Trust Fund intends to apply the entire net proceeds of the Offering to the purchase of the Portfolio of Contracts. The Contracts in the Portfolio to be purchased will require the subscriber to make monthly or quarterly payments for a term up to sixty months (the "Mandatory Period"). See "Use of Proceeds", "The Trust Fund" and "Portfolio Acquisition and Monitoring."

As the owner of the Portfolio, the Trust Fund will receive a scheduled amount of payments from subscribers for monitoring services provided to them by the Security Alarm Dealers. See "Portfolio Acquisition and Monitoring". For more detailed information concerning the proposed business activity of the Trust Fund, see "The Trust Fund - Business of the Trust Fund."

Risk Factors
In evaluating this Offering, prospective investors should consider carefully, among others, the following risk factors:

- No assurance that the Certificates will be paid;
- No market for resale of Certificates;
- Illiquid collateral;
- Potential for Contract defaults;
- Potential conflicts of interest in connection with the acquisition of the Portfolio of Contracts by the Trust Fund.

See "Risk Factors" and "Conflicts of Interest."

Description of the Certificates and the Trust Agreement
The Certificates will be issued under a Declaration of Trust by McGinn Smith Capital Holdings Corp., the Trustee. The Certificates will be available for purchase in denominations of $10,000.00 and increments of $1,000.00. The Certificates will be registered in the name of the individual Certificateholders. See "Description of the Trust Agreement and the Certificates."

The Certificates will bear interest at a per annum rate of 11.00%. Principal and interest on the Certificates will be payable to Certificateholders in monthly installments commencing on July 1, 2002 to and including December 1, 2007, in accordance with Exhibit B of the "Participation Agreement" set forth in "Exhibit D".

Compensation and Fees
McGinn Smith Acceptance Corp., an affiliate of McGinn Smith & Co., the Sales Agent, will be paid a brokerage fee in connection with the acquisition of the Portfolio by the Trust Fund. See "Compensation and Fees" and "Conflicts of Interest."

Uses of Proceeds
The net proceeds from the Offering of the Certificates will be used to purchase the Portfolio of Contracts. See "Use of Proceeds" and "Portfolio Acquisition and Monitoring".

Income Tax Considerations
The Certificates will be treated as indebtedness of the Trust Fund for federal income tax purposes. Each Certificateholder will generally be required to report interest income on a Certificate in accordance with such Certificateholder's method of accounting. Each prospective investor should consult with his or her own tax advisor with respect to the tax consequences of the acquisition, ownership and disposition of the Certificates.

RISK FACTORS

In evaluating this Offering, prospective investors should consider carefully all of the information contained in this Memorandum and, in particular, the factors discussed below. The following summary is not intended to state in full or replace portions of this Memorandum that discuss these factors and others in greater depth. Although the risk factors are intended to be presented in order of their materiality to investors, such order may not be indicative of their relative importance to any particular investor.

Limitation of Transfer of Certificates
The Certificates may not be offered for resale to any person without the consent of the Trust Fund. Prior to this offering, there has been no market for the Certificates of the Trust Fund. Each investor will be required to represent that his purchase of the Certificates will be for investment only and not with a view towards the resale or distribution thereof. A Certificateholder will not have any right to sell, transfer, exchange or otherwise dispose of his Certificates, or to cause a security interest to be created therein, unless the Trust Fund has received evidence satisfactory to it that such disposition or creation of a security interest is not in violation of federal or state securities laws. The Certificates have not been registered or qualified under the Securities Act of 1933 or applicable state securities laws and may not be sold or transferred without such registration or qualification or an exemption therefrom.

Limited Liquidity of Collateral
In the event of a default under the Certificates which necessitates a liquidation of the Portfolio of Contracts, the ability of the Trustee to sell the Collateral may be restricted since it is anticipated that there will be a limited market for the Contracts. In that event, the Trustee may have to wait for the Contracts to mature.

Potential for Contract Defaults
Defaults by subscribers under Contracts may result in reduced scheduled cash flow to the Trust Fund. Defaults may occur for a variety of reasons, including relocation of subscribers, dissatisfaction with service, defaults by monitoring companies, and changes in economic conditions. An attrition reserve account (the "Attrition Reserve Account") will be established in the amount of $50,000.00 to help insure that the Security Alarm Dealers comply with their obligations (the "Monitoring Recourse Obligation") to repurchase or substitute a performing Contract of equal value for a non-performing Contract. The Security Alarm Dealers will represent that each Contract will legally obligate the subscriber to pay for monitoring services for the Mandatory Period. Nevertheless, should the level of Contract defaults exceed that anticipated, the ability of the Trust Fund to pay the Certificates will be adversely affected. See "Portfolio Acquisition and Monitoring."

No Assurance as to Financial Worthiness or Capabilities of Response
The Trust Fund will use the entire proceeds of this Offering to purchase the Portfolio of Contracts which require subscribers to pay fees for a Mandatory Period in exchange for monitoring services. In the event that the Security Alarm Dealers do not meet their obligations under the Contracts, it is likely that the affected subscribers will cancel the Contracts and refuse to pay, either in whole or in part, the fees due and owing thereunder. Furthermore, because the Monitoring Recourse Obligation to repurchase or replace non-performing Contracts depends on the financial capability of the Security Alarm Dealers, the ability of the Trust Fund to pay the principal of and interest on the Certificates can be adversely affected by the failure or weakened financial position of the Security Alarm Dealers.

No Independent Counsel to Investors
No independent counsel has been retained to represent the interests of the Certificateholders. Each investor is therefore urged to consult with his own counsel regarding the terms and provisions of the Certificates and all other documents relating to this offering.

Lack of Financial Statements

This Memorandum does not include financial statements for the Trust Fund. The Trust Fund is newly formed for the limited purpose of acquiring the Portfolio of Contracts.

Mandatory Term of the Residential Monitoring Contracts May Be Less Than Term of Monthly Scheduled Cash Flow
The Residential Monitoring Contracts in the Portfolio to be acquired from the Security Alarm Dealers with the proceeds of the Certificates may not be terminated by the subscriber for a Mandatory Period of up to sixty months. The Trust Fund is acquiring the Portfolio of Contracts which is the monthly scheduled cash flow received from the Portfolio of Contracts over a period of sixty-six months. Although the Contracts automatically renew unless canceled by the subscriber in writing, some of the subscribers may elect to cancel their Contracts, thereby affecting the monthly amount of Cash Flow received from the Portfolio of Contracts. Nevertheless, the Security Alarm Dealers have an obligation to repurchase or substitute a performing Contract of equal value for a non-performing or canceled Contract (the "Monitoring Recourse Obligation").

Availability of the Residential Monitoring Contracts
The portfolio of contracts is comprised of Residential Monitoring Contracts to be acquired by IAS from various Security Alarm Dealers doing business in different geographic locations. The time at which these Residential Monitoring Contracts are acquired from each Security Alarm Dealer may vary. At the time the entire Offering is subscribed for, only the amount of Offering Proceeds necessary to acquire the available Residential Monitoring Contracts will be released from escrow. The remainder of the Offering Proceeds will continue to be held in escrow until such time as the additional Residential Monitoring Contracts comprising the balance of the Portfolio are available for financing. In the event there is a substantial delay in acquiring the total amount of Residential Monitoring Contracts comprising the Portfolio, there may be a shortfall in the monthly amount of Cash Flow received from the Portfolio and the Trust Fund's ability to pay the Certificates will be adversely affected. See "Use of Proceeds".

No Tax Opinion
The Trust Fund has not obtained an independent tax opinion with regard to this offering of Certificates. Each potential investor is encouraged to seek his own tax advisor with respect to his personal tax situation and the tax consequences of the acquisition, ownership and disposition of the Certificates.

Conflicts of Interest

The Trust Fund is acquiring the Portfolio of Contracts from Integrated Alarm Services, Inc. ("IAS"), a Delaware corporation. The common stock of IAS is owned by M&S Partners, a New York partnership. M&S Partners is owned equally by Timothy M. McGinn and David L. Smith.

The Trust Fund will purchase the Portfolio of Contracts through McGinn Smith Acceptance Corp., an affiliate of the Trustee. McGinn Smith Acceptance Corp. will receive a broker's fee in connection with such transaction. The close relationship between McGinn Smith Acceptance Corp. and McGinn Smith Capital Holdings Corp. may affect the price paid for the Portfolio of Contracts. Although there is no specified formula for determining the purchase price, and Certificateholders will not have a voice in the amount paid by the Trust Fund, the Trustee will purchase the Portfolio of Contracts only when McGinn Smith Acceptance Corp. represents to the Trustee, that the price of such Portfolio will allow the Trust Fund to pay its operating expenses and discharge its obligations with respect to the Certificates. In addition, the Trustee's liability is limited. See Section entitled "Disclaimer of Liability of Trustee". McGinn, Smith & Co., Inc. will receive an Underwriting Discount equal to Five (5%) of the gross proceeds of the Offering.

USE OF PROCEEDS

The net proceeds to the Trust Fund from the sale of the Certificates offered hereby, after deducting the Underwriting Discount, will be approximately $7,125,000 (95% of gross proceeds) if the Maximum Offering for the Certificates is achieved. The Trust Fund intends to use all of the net proceeds of the Offering to purchase the Portfolio of Contracts.

The net proceeds to the Trust Fund from the sale of the Certificates offered hereby, after deducting the Underwriting Discount, will be approximately $95,000 (95% of gross proceeds) if the Minimum Offering for the Certificates is achieved. The Trust Fund intends to use all of the net proceeds of the Offering to purchase a proportionate interest in the Portfolio of Contracts.

The Residential Monitoring Contracts comprising the Portfolio are to be acquired by IAS from various Security Alarm Dealers doing business in various geographic locations. The time at which all of the Residential Monitoring Contracts are acquired from the Security Alarm Dealers may vary.

At the time the entire Offering is subscribed for, only the funds necessary to finance the available Residential Monitoring Contracts will be released from escrow. The remainder of the Offering Proceeds will be held in escrow until such time as the additional Residential Monitoring Contracts comprising the balance of the Portfolio are available for financing. McGinn Smith Acceptance Corp., the Portfolio Financial Manager, anticipates that all of the Residential Monitoring Contracts comprising the Portfolio will be available for financing within two (2) months of the time in which the entire Offering is subscribed for.

THE TRUST FUND

The Trust Fund is a common law trust formed under the laws of the State of New York on May 20, 2002. The principal executive office of the Trust Fund is located at c/o McGinn Smith Capital Holdings Corp., Trustee, Capital Center, 99 Pine Street, Albany, NY 12207, and its telephone number is (518) 449-5131. McGinn Smith Capital Holdings Corp. is the Trustee of the Trust Fund. McGinn, Smith & Co., Inc. is the Sales Agent for the Offering. The owners of all issued and outstanding common stock of the Sales Agent are Timothy M. McGinn (50%) and David L. Smith (50%). McGinn Smith Acceptance Corp. will receive a broker's fee in connection with the purchase of the Portfolio of Contracts by the Trust Fund. McGinn Smith Acceptance Corp. is an affiliate of the Sales Agent.

Business of the Trust Fund

The Trust Fund has been formed solely for the acquisition of the Portfolio of Contracts to be acquired from the Security Alarm Dealers. Subsequent to the Closing Date the Trust Fund will utilize the net proceeds from the Offering to acquire the Portfolio.

Each Contract in the Portfolio to be acquired will include the obligation of the Security Alarm Dealers to provide central station monitoring services for the subscriber in consideration for the subscriber's payment of a monthly or quarterly monitoring fee. The Trust Fund does not intend to acquire equity interests in monitoring companies or other security alarm monitoring or installation firms; rather, a scheduled amount of cash flow from the Contracts entered into or originated by the Security Alarm Dealers will be acquired by the Trust Fund through McGinn Smith Acceptance Corp.. The Security Alarm Dealers will perform the monitoring and other services required under the Contracts.

The Security Alarm Industry

The security alarm industry involves (i) manufacturers of alarm system components, (ii) wholesalers who distribute such components, (iii) parties that sell or lease, install and maintain security alarm systems, and (iv) parties that monitor security alarm signals. Sales, leasing, installation, maintenance and monitoring overlap significantly. Within each geographic market, many companies sell or lease, install, maintain, and monitor systems. Larger local and regional full service firms and national companies with branch offices, as well as numerous regional and local security companies, also may be present in each geographic market.

Monitoring Companies in the security alarm industry typically sell or lease, maintain, monitor and service alarm equipment (directly through their own facilities or indirectly through a contractual relationship with a third party) installed with their subscribers. Generally, the monitoring company and the subscriber enter into a monitoring agreement with respect to the security alarm system when the equipment is installed. The typical monitoring agreement provides that the monitoring company will monitor the system 24 hours per day for a specified fee, payable monthly or quarterly in advance. The monitoring agreement, either a contract or a lease, will typically require the subscriber to pay for monitoring and other services over a specified mandatory period of months, usually 24 to 60 months, at a specified cost per month, usually between $20.00-$60.00 per month. Such agreements may also provide that title to the monitoring system equipment during the Mandatory Period remains with the monitoring company.

The Contracts in the Portfolio to be acquired from the Security Alarm Dealers with the proceeds of the Certificates will not be terminable by the subscriber for a specified Mandatory Period of up to sixty months from the day of system installation. The Contracts will automatically renew for one year periods unless canceled by the subscriber upon thirty days prior written notice to the Security Alarm Dealers. Accordingly, the Contracts may continue in effect after the end of the Mandatory Period, subject to the subscriber's right to terminate, and the Trust Fund will purchase the right to receive payments under Contracts for sixty-six months. At the end of sixty-six months, if the Security Alarm Dealers have complied with all of their obligations under the agreement pursuant to which the Trust Fund intends to acquire the Contracts (the "Monitoring Receivable Financing Agreement"), the Contracts are returned to IAS or its assigns.

The Contracts may provide that the Monitoring Company is not responsible for interruption of monitoring services due to conditions or circumstances beyond its control, and may include a limitation of liability provision which specifies that the Monitoring Company is not to be considered an insurer of the system and that the system or service supplied will not avert or prevent occurrences or the consequences therefrom which the system or service is designed to detect. These clauses typically specify that the Monitoring Company's liability is limited to an amount equal to a percentage of the annual service charge or a fixed dollar amount, whichever is greater, in the event of a failure of the system or service. However, there can be no assurance that such clauses will be given full force and effect by a court of law.

Security Alarm Competition
The security alarm business is highly competitive and includes large national and regional companies, as well as small local dealers/installers. Competition is based on the cost of providing a given service and the quality of the service. During recent years, consolidation has ocurred in the industry, partially as a result of companies realizing that monitoring cost are relatively fixed and profits can be increased directly by increasing the number of Contracts monitored. It is anticipated that this industry consolidation will continue. These competitors include national companies which are currently or may become vertically integrated to the point of generating their own Contracts by selling the installation of security alarm systems.

PORTFOLIO ACQUISITION AND MONITORING

Acquisition of Portfolio
The Trust Fund intends to apply the net proceeds of the Offering, $7,125,000, to the purchase of a Portfolio of Contracts. The Trust Fund will acquire the Monitoring Revenue Payment (the "Scheduled Amount") generated from the Residential Monitoring Contracts to be acquired from the Security Alarm Dealers. The Residential Monitoring Contracts from the Security Alarm Dealers comprise the "Portfolio". McGinn Smith Acceptance Corp., an affiliate of the sales agent, will receive a broker's fee in connection with the Trust Fund's purchase of the Portfolio. The Portfolio will be acquired upon the terms and conditions set forth in the Monitoring Receivable Financing Agreement, subject to payment of the McGinn Smith Acceptance Corp. broker's fee.

The Portfolio will include Contracts that meet the acquisition criteria specified in the Monitoring Receivable Financing Agreement discussed below. See the form of "Monitoring Receivable Financing Agreement". These criteria include certain credit standards for subscribers, and standards governing the terms and conditions of Contracts to be purchased. The Security Alarm Dealers are required to make appropriate representations that the Contracts conform to the requirements set forth in the Monitoring Receivable Financing Agreement. See "Monitoring Receivable Financing Agreement," below.

Monitoring Receivable Financing Agreement

McGinn Smith Acceptance Corp. will enter into agreements (the "Monitoring Receivable Financing Agreement") IAS which specify the terms and conditions under which the Contracts will be acquired from the Security Alarm Dealers.

In the Monitoring Receivable Financing Agreement, the Security Alarm Dealers covenant, represent, and/or warrant to McGinn Smith Acceptance Corp. , its successors and assigns, among other things, that: (a) all Contracts will be valid mandatory deferred payment obligations covering the monitoring services to be provided to the subscriber, which the Security Alarm Dealers have a legal right to sell, assign and transfer; (b) the Contracts are not subject to any disputes, offsets or counterclaims; (c) the subscriber is neither delinquent in payment nor in default under the Contract at the time of the financing; (d) the Security Alarm Dealers have performed, except for future obligations, all of its obligations to the subscriber; (e) the information contained in the Contract is true in all respects; (f) McGinn Smith Acceptance Corp., its successors and assigns will have absolute right to the Scheduled Amounts of the Monitoring Revenue Payment generated from the Contracts, and the Contracts are not subject to any prior assignments or security interests; (g) the Contracts and the underlying transaction giving rise to the Contracts do not violate any law, rule or regulation; and (h) the Security Alarm Dealers and the subscriber will not modify the Contract. McGinn Smith Acceptance Corp., its successors and assigns, must approve the form of each Contract and the terms and conditions thereof.

McGinn Smith Acceptance Corp. will assign all of its right, title and interest in and to the Monitoring Receivable Financing Agreement to the Trust Fund.

McGinn Smith Acceptance Corp., its successors and assigns do not assume any obligations or liabilities of the Security Alarm Dealers in connection with the Contracts, including any monitoring duties and responsibilities. The Security Alarm Dealers will each indemnify and hold McGinn Smith Acceptance Corp., its successors and assigns, harmless from and against any claim, suit, loss, liability or expense incurred by McGinn Smith Acceptance Corp., its successors and assigns, in connection with the Contracts.

The Security Alarm Dealers will direct the subscribers under the Contracts to remit all payments to a pre-designated remittance call box servicer. Preferred Data, Inc., a New York Corporation, ("Preferred") will act as such a servicer. The Security Alarm Dealers will also agree not to accept any payment made by a subscriber and to refer all such payments to Preferred. The Security Alarm Dealers will be required to prudently and effectively pursue the collection of all delinquent payments due to the Trust Fund immediately upon receipt of appropriate payment advice reports from Preferred. The Security Alarm Dealers will provide the Trust Fund with monthly status reports on all purchased Contracts, reflecting current payment status, delinquency and unpaid balances due and owing. See the "Lock Box Agreement" below.

Under the Monitoring Receivable Financing Agreement, McGinn Smith Acceptance Corp., its successors or assigns, may require the Security Alarm Dealers to repurchase a Contract, or substitute a performing Contract in place of a non-performing Contract, upon the occurrence of (a) a subscriber's failure to make two (2) consecutive monthly monitoring service payments; (b) the failure of the Security Alarm Dealers to perform any of their obligations under the Monitoring Receivable Financing Agreement or a Contract; or (c) the breach of any warranty or representation by the Security Alarm Dealers under the Monitoring Receivable Financing Agreement or a Contract (such repurchase or substitution obligation being referred to herein as the "Monitoring Recourse Obligation").

An Attrition Reserve Account will be established for the Portfolio of Contracts. The Attrition Reserve Account will be established by withholding $50,000.00 of the purchase price paid by the Trust Fund for the Portfolio. The Attrition Reserve Account will at all times be the property of the Trust Fund, and will be held by McGinn Smith Acceptance Corp. for the benefit of the Trust Fund to assure performance by the Security Alarm Dealers of their obligations under the Monitoring Receivable Financing Agreement, including the Monitoring Recourse Obligation. The Attrition Account will remain in place until such time as the Trust Fund has received the Scheduled Amounts of the Monitoring Revenue Payment from the Portfolio. Any balance remaining in the Attrition Reserve Account at that time shall be transferred to the Security Alarm Dealers. (See "Monitoring Receivable Financing Participation Agreement" below.) Withdrawals from the Attrition Reserve Account may be made by McGinn Smith Acceptance Corp. if the total amount remitted to the Trust Fund by Preferred for the month is less than the Scheduled Amount due to the Trust Fund pursuant to Exhibit A-1 of the Monitoring Receivable Financing Agreement with the Security Alarm Dealers.

The Security Alarm Dealers may elect to utilize the services of an independent, third party Central Station to perform the monitoring services due to Subscribers under the Contracts. The Trust Fund shall be a third party beneficiary to any monitoring service contract executed between the Security Alarm Dealers and any independent Central Station. The Security Alarm Dealers and/or the Central Station will agree to perform all monitoring services under the Contracts in accordance with generally accepted industry practices, and the Security Alarm Dealers or the Central Station shall, in all respects, service, bill, perform collection efforts and enforce the Trust Fund's contractual right to receive the Scheduled Amounts of the Monitoring Revenue Stream associated with each Contract.

In the event the Security Alarm Dealers or the Central Station are unable to perform their monitoring duties and responsibilities to the Subscribers (collectively) or to the Trust Fund, as the alarm monitoring servicer of the Subscribers (collectively) security systems under the Contracts, they will immediately notify the Trust Fund of such fact and will promptly arrange for the orderly transfer of monitoring services to a third party alarm monitoring service company selected in the sole discretion of the Trust Fund. The Trust Fund shall have the right to unilaterally demand and effect the immediate transfer of monitoring services on Contracts from the Security Alarm Dealers or the Central Station to a third party monitoring service company, with the complete cooperation of the Security Alarm Dealers and/or the Central Station, upon the happening of any of the following events:

A) The filing of a petition of bankruptcy protection with respect to any business of the Security Alarm Dealers or the Central Station, either voluntary or involuntary;

B) The Security Alarm Dealers or the Central Station, or any of their principal officers being found guilty of any felony or upon the finding of liability in any criminal or civil action involving impropriety in business dealings or operations which, in either case materially affects the operation of the Security Alarm Dealers or the Central Station, or the performance of the Contracts;

C) The abandonment of monitoring service operations by the Security Alarm Dealers or the Central Station.

D) The occurrence of a material default under the Monitoring Receivable Financing Agreement, which results in the inability of the Security Alarm Dealers or the Central Station to substantially perform under the Monitoring Receivable Financing Agreement, or any Central Station agreement, or the failure of the Security Alarm Dealers to, or inability to perform under the recourse (repurchase or replacement) provisions of the Monitoring Receivable Financing Agreement.

The Security Alarm Dealers are also obligated to maintain comprehensive general liability insurance, including errors and omissions on monitoring operations, in the minimum amount of $1,000,000 covering bodily injury and property damage resulting from the performance of monitoring operations under the Contracts. In the event of a sale or transfer of a controlling interest in the Security Alarm Dealers, the Security Alarm Dealers must guarantee that the Security Alarm Dealer's obligations under the Monitoring Receivable Financing Agreement shall not be impaired or disrupted by such sale or transfer and that the Monitoring Receivable Financing Agreement shall continue in effect and be accepted by the purchaser or transferee of such controlling interest.

IAS irrevocably and unconditionally will guarantee to the Trust Fund the full and timely payment of all sums constituting the Scheduled Amounts of the Monitoring Revenue Payments which are due and owing under the Contracts in the Portfolio. In addition, IAS has agreed to tender to the Trust Fund additional Contracts so as to maintain a ratio of 1.57/1 of available monthly cash flow as set forth on Exhibit A-2 to the Monitoring Receivable Financing Agreement. Contract additions will be calculated quarterly in arrears and the contracts tendered shall have an average monthly recurring revenue of not less than the average monthly revenue for the initial Portfolio.

Monitoring Receivable Financing Participation Agreement
The Trust Fund and McGinn Smith Acceptance Corp. will enter into a Monitoring Receivable Financing Participation Agreement (the "Participation Agreement") which will outline the rights of the Trust Fund in connection with the acquisition of the Portfolio of Contracts.

McGinn Smith Acceptance Corp., as the Portfolio Financial Manager, will covenant that it has inspected all Contracts in the Portfolio and reviewed them for creditworthiness pursuant to the credit standards and procedures set forth in the Monitoring Receivable Financing Agreement discussed above. In addition, McGinn Smith Acceptance Corp., as the Portfolio Financial Manager, will perform a due diligence review of the Security Alarm Dealers so as to insure their capabilities of performing in accordance with the terms of the Monitoring Receivable Financing Agreement.

All Contracts in the Portfolio shall be held by McGinn Smith Acceptance Corp. for the benefit of the Trust Fund, accompanied by the original Contract Obligation Instrument and all other original documents executed by the Subscriber.

The Trust Fund will be provided a yield on the Portfolio of Contracts of 11.00%. The Trust Fund will fund $7,125,000 for the Portfolio of Contracts if the Maximum Offering is achieved. If the Minimum Offering is achieved, the Trust Fund will fund $95,000 for a proportionate interest in the Portfolio of Contracts.

The Trust Fund will be entitled to the monthly scheduled cash flow ("Scheduled Cash Flow") received from the Portfolio of Contracts as set forth on Exhibits B to the Participation Agreement.

The Participation Agreement provides that the Trust Fund will receive the Scheduled Amounts due from the Portfolio of Contracts each month. The Trust Fund shall be entitled to the Scheduled Cash Flow as set forth on Exhibit "B" to the Participation Agreement on the 1st day of each month commencing July 1, 2002. In the event the collected payments from the Portfolio of Contracts for any month are less than the Scheduled Cash Flow due the Trust Fund for that month, McGinn Smith Acceptance Corp. will make withdrawals from the Attrition Reserve Account discussed above. In the event there are insufficient funds in the Attrition Reserve Account, any remaining shortfall for that month will be paid out of the first payments received in the following month. Any Scheduled Amounts not received by the Trust Fund in the month when due shall bear interest at the rate of 15.0% per annum until paid. Thereafter, the Scheduled Amount due the Trust Fund for that month shall be paid from the balance of the Contract payments received that month from Preferred. Thereafter, funds remaining shall be deposited into the Attrition Reserve Account to the extent necessary to restore the Attrition Reserve Account to its initial balance; any funds remaining shall be paid to IAS or its assigns.
Upon receipt by the Trust Fund of all Scheduled Cash Flow, all of the Trust Fund's right, title and interest in the Portfolio of Contracts shall terminate and the Contracts shall be transferred by the Trust Fund to IAS or its assigns without recourse and without warranty. At the same time, the Trust Fund shall also transfer to IAS, all of its right, title and interest to funds held in the Attrition Reserve Account discussed below. See "The Collection Process" below.

The Collection Process
McGinn Smith Acceptance Corp. and Preferred intend to enter into a remittance processing agreement (the "Lock Box Agreement") pursuant to which payments made under the Contracts by subscribers are forwarded to Preferred. Prior to the purchase of Contracts by the Trust Fund, Preferred will open a lock box at a U.S. Postal Service General Mail Facility, which will serve as a receptacle for the receipt of payments from Contract subscribers. During each business day the contents of the lock box will be picked up by Preferred. All payments will be sorted and subsequently deposited, on a daily basis, into an account established by and in the name of the Trust Fund (the "Portfolio Depository Account") at M&T Bank. The Security Alarm Dealers will have no right, title or interest in, or any right to withdraw any amounts held in the Portfolio Depository Account. McGinn Smith Acceptance Corp. will be responsible for any fees charged or imposed by Preferred.

Out of the funds held in the Portfolio Depository Account, McGinn Smith Acceptance Corp. will transfer to the Trust Fund the Scheduled Cash Flow the Trust Fund is entitled to pursuant to Exhibit B to the Participation Agreement. The Trust Fund will then pay the Certificateholders their percentage of the Scheduled Cash Flow to which they are entitled.

The Attrition Reserve Account will also be established. As discussed elsewhere in this Memorandum, the Attrition Reserve Account will be held by McGinn Smith Acceptance Corp. for the benefit of the Trust Fund.

DESCRIPTION OF TRUST AGREEMENT AND THE CERTIFICATES

On May 20, 2002, Timothy M. McGinn as the Chairman of the Board of Directors of McGinn Smith Capital Holdings Corp., executed the Declaration of Trust ("Declaration") of RTC Trust 02 ("Trust"), declaring that McGinn Smith Capital Holdings Corp. was the Trustee of the Trust, establishing the Trust for the benefit of Certificateholders, and defining its purpose.

The Trust is intended to be a common law trust under the laws of the State of New York, with its principal office at Capital Center, 99 Pine Street, Albany, New York 12207, which is the office of McGinn Smith Capital Holdings Corp. The initial capital of the Trust was established at $100.00, and the purpose of the Trust is to acquire, pursuant to the terms of the Participation Agreement, and subject to the terms of the Monitoring Receivable Financing Agreement, the right to receive the Scheduled Amounts of cash flow generated from the Portfolio of Contracts. Under the Declaration, the Trustee acquires virtually complete discretion in the operation of the Trust, so long as that discretion is exercised within the purpose of the Trust. The Declaration limits the liability of the Trustee in two ways. The Trustee will not be liable in the absence of willful misconduct or gross negligence. Further, the Trustee will not be liable, in any event, to pay sums of money beyond the corpus of the Trust. The Trustee is entitled to indemnification from the funds of the Trust (except in the case of willful misconduct or gross negligence) and to reimbursement for the reasonable and Necessary fees and expenses incurred in the administration of the Trust. The Trustee is entitled to indemnification and reimbursement from the corpus of the Trust before payments are made to Certificateholders.

The Declaration specifically provides that the Certificateholder shall not have any legal or equitable title to the Trust Estate, that no Certificateholder shall have a voice in the management or control of the property or affairs of the Trust, that the Trustee has no authority to require additional capital contributions from any Certificateholder, and that the Trustee is precluded from taking any action to make Certificateholders liable for the debts or obligations of the Trust.

Certificates
The Certificates will be issued under the Declaration, a copy of which is included as an exhibit to this Memorandum. The rights of the Certificateholders and the obligations of the Trustee as they relate to the Certificates will be governed by the Declaration. Reference should be made to the Declaration for its

complete terms. The statements contained in this Memorandum concerning the Declaration are merely a summary thereof, do not purport to be complete, and do not modify or amend the Declaration.

Subject to the conditions set forth in this Memorandum, Certificates in the maximum amount of $7,500,000 will be offered by the Trust Fund. The Certificates will be retired in sixty six (66) months from the date of issuance. The Certificates will bear interest on the outstanding principal at a per annum rate of 11.00%. Principal and interest on the Certificates will be paid in monthly installments commencing on the first day of July, 2002 to and including December 1, 2007, in accordance with the Scheduled Cash Flow set forth on Exhibit B to the Participation Agreement.

The Certificates will be issued and registered in the name of the purchasing Certificateholder(s). Interest on the Certificates will be shown on, and transfers thereof will be effected through, records maintained by the Trustee.

Payments
Payments on the Certificates will be made out of the Scheduled Amount of the Monitoring Revenue Payments from the Portfolio of Contracts received by the Trust Fund each month.

Prepayments
The Certificates are not subject to a mandatory prepayment or redemption provision.

Registration
Each Certificate will be registered in the name of the purchaser thereof.

Limited Transferability of the Certificates
The Certificates are not freely transferable, and there is no secondary market for the Certificates and none is expected to develop. The Certificates should not be treated by Certificateholders as securities. **The Certificates have not been registered under the Securities Act of 1933. They may not be offered for resale in the absence of an opinion of counsel, satisfactory to the Trust Fund, that registration is not required.**

Reports
Not later than January 31 of each year, the Trust Fund will furnish to the Certificateholders statements of interest income on IRS Form 1099-INT and such tax information as shall be Necessary in the preparation of such person's Federal income tax return.

CONFLICTS OF INTEREST

The common stock of Integrated Alarm Services, Inc. is owned by M&S Partners, a New York partnership. M&S Partners is owned equally by Timothy M. McGinn and David L. Smith.

Timothy M. McGinn and David L. Smith collectively own 100% of the issued and outstanding common shares of McGinn Smith & Co., Inc. McGinn, Smith & Co., Inc. is acting as the Sales Agent for this Offering and will receive an Underwriting Discount equal to five percent (5%) of the gross proceeds of this Offering. The Underwriting Discount was not negotiated at arms length. In addition, McGinn Smith Acceptance Corp., an affiliate of McGinn, Smith & Co., Inc. will receive a broker's fee in connection with the purchase of the Portfolio by the Trust Fund.
McGinn Smith Capital Holdings Corp. may experience a conflict of interest in performing its obligation to exercise due diligence with respect to the statements made in this Memorandum and, therefore, its due diligence review cannot be considered independent. A qualified independent underwriter has not been retained by the Trust Fund in connection with this offering. However, McGinn Smith Capital Holdings Corp. believes that such due diligence has, in fact, been exercised.

As discussed above, McGinn Smith Acceptance Corp. will receive a broker's fee in connection with the purchase of the Portfolio by the Trust Fund. In addition, McGinn Smith Acceptance Corp. will pay the Trustee's expenses as set forth in the section entitled "Compensation and Fees". Due to the close relationship between these parties, the purchase price paid by the Trust Fund could be affected by the interests of McGinn Smith Acceptance Corp. in its contract brokerage fee.

There has been no independent counsel retained to represent the interests of the Certificateholders. Certain legal matters in connection with the validity of the Certificates will be passed upon by Mary Ann McGinn, Esq. Mary Ann McGinn, is Vice President and General Counsel of McGinn, Smith & Co., Inc. and is the wife of Timothy M. McGinn.

THE TRUSTEE

The names and positions of the directors and executive officers of the Trustee are as follows:

Name	Position
Timothy M. McGinn	Chairman of the Board and Director
David L. Smith	President and Director

The officers and directors of the Trustee will devote such time and effort to the business of the Trust Fund as they may deem Necessary and will actively be engaged in other business ventures.

The principal business occupations of the officers and directors during the past five (5) years are as follows:
Timothy M. McGinn, age 53, is the Chairman of the Board and Secretary of McGinn, Smith & Co., Inc. He has served as Chairman of the Board since the inception of this firm in 1980. Prior to founding McGinn, Smith & Co., Inc. he was with Paine, Webber, Jackson & Curtis. He has served on a number of corporate and charitable boards of directors and holds a bachelor's degree in Mechanical Engineering from Rochester Institute of Technology.

David L. Smith, age 57, is the President of McGinn, Smith & Co., Inc. and a member of the Board of Directors. he has served in this capacity since 1980. Prior to founding McGinn, Smith & Co., Inc. he was with Paine Webber, Jackson & Curtis. Mr. Smith has served on a number of charitable and corporate boards of directors and holds a bachelor's degree from Hamilton College.

COMPENSATION AND FEES

The Trustee of the Trust Fund will serve without fee but will be reimbursed for expenses incurred by the Trustee in connection with the Trust Fund by McGinn Smith Acceptance Corp. Furthermore, McGinn Smith Acceptance Corp., an affiliate of the Sales Agent, McGinn, Smith & Co., Inc., will receive a broker's fee in connection with the acquisition of the Portfolio by the Participants.

SUITABILITY

Certificates will be sold only to investors who make a minimum purchase of $10,000.00.
As described elsewhere in this Memorandum, the Certificates will be sold only to Accredited Investors as defined in Rule 501 of Regulation D promulgated by the Securities and Exchange Commission under the Securities Act of 1933, as amended. Included in the definition of "Accredited Investor", as defined in Rule 501, are the following:

(a) any natural person whose individual net worth (including personal residences, furnishings and automobiles), or joint net worth with that person's spouse, at the time of purchase exceeds $1,000,000;

(b) any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and who reasonably expects gross income at the same level in the current year; and

(c) any entity in which all of the equity owners are Accredited Investors or which has total assets in excess of $5,000,000.

Each investor accepted as an Accredited Investor will be required to represent that he satisfies the requirements of an Accredited Investor under Rule 501.

Among other things, each investor will be required to acknowledge and represent in the Subscription Agreement that: (i) he is purchasing the Certificates for his own account for investment and not with a view to the sale or distribution thereof; (ii) he is aware that the Certificates have not been registered for sale under the Securities Act of 1933 as amended, and that he will not transfer his Certificates in the absence of an opinion of counsel satisfactory to the Trust Fund that the Certificates have been registered or that registration is not required under the Securities Act of 1933, as then in effect, and under applicable state securities laws, if any; (iii) he understands that this investment involves a high degree of risk; (iv) he has adequate means of providing for his current needs and foreseeable personal contingencies, has no need for liquidity in this investment; (v) all books, records and documents pertaining to this investment have been made available to him; and (vi) his overall commitment to investments which are not readily marketable is not disproportionate to his net worth and his purchase of Certificates will not cause such overall commitment to become excessive.

The Sales Agent and Trust Fund reserve the right to reject any subscription in its entirety for any reason or to allocate to any investor Certificates in an aggregate principal amount less than that for which he has subscribed. In the event a subscription is rejected, the investor's subscription check for his Certificates (or the amount thereof) will be returned, and in the event of a partial rejection, a pro rata amount of his subscription check for his Certificates will be refunded.

Prospective investors may be required to complete an Investor Representation Letter relating to the suitability of the investment for them, and the Trust Fund may make or cause to be made such further inquiry as the Trust Fund deems appropriate.

Any prospective investor will be afforded the opportunity to obtain from the Trust Fund prior to the consummation of the transaction contemplated herein any additional information he may request necessary to verify the accuracy of the contents of this Memorandum and which the Trust Fund possesses or can acquire without unreasonable effort or expense and to confer with, ask questions of, and receive answers from the Trust Fund or persons authorized to act on its behalf, concerning the terms and conditions of the transaction, this memorandum and any additional information which has been requested and supplied to a prospective investor or his purchaser representative.

The purchase of Certificates may be suitable for individuals seeking an investment intended to provide income. An investment in Certificates may also be appropriate for corporations and trusts seeking investments which are structured to provide income. Nevertheless, this investment involves a number of significant risks, including no assurance that the Certificates will be paid and illiquidity. See "Risk Factors." Accordingly, the suitability of a purchase of Certificates for any particular investor will depend upon, among other things, such investor's investment objectives and such investor's ability and willingness to accept the risks of an investment in the Certificates.

The Sales Agent Agreement between the Trust Fund and the Sales Agent requires the Sales Agent to make diligent inquiries as required by law of all prospective purchasers in order to ascertain whether a purchase of Certificates is suitable for such person and to transmit promptly to the Trust Fund all fully completed Subscription Agreements. By tendering payment for a Certificate and by acceptance of the confirmation of purchase, an investor represents that he or it satisfies any applicable suitability standards. See "Plan of Distribution."

TERMS OF THE OFFERING

Subject to the conditions set forth in this Memorandum, Certificates in the maximum amount of $7,500,000 (the "Maximum Offering") and the minimum amount of $100,000 (the "Minimum Offering") will be offered by the Trust Fund.

The Certificates will be offered through McGinn, Smith & Co., Inc., the Sales Agent, on a best efforts basis over a period of three months. The Sales Agent is a member of the National Association of Securities Dealers, Inc.

All funds received by the Sales Agent from subscriptions for the Certificates will be placed in an escrow account (the "Escrow Account") maintained at Charter One Bank, FSB, (the "Escrow Agent"). Interest will be earned on funds held in the Escrow Account commencing three (3) business days after the funds are deposited until the earlier of the termination of this Offering or the investment of the funds in the Certificates. During the period that an investor's funds are held in the Escrow Account he will not be considered a Certificateholder.

With respect to the Certificates, no funding from the Escrow Account will occur until the Minimum Offering is subscribed for. If subscriptions for the Minimum Offering are not received within two months from the date of this Memorandum, subscriptions received with respect to the Certificates will be promptly returned in full to the investor by the Escrow Agent, together with all interest earned while funds were held in the Escrow Account after deducting fees payable to the Escrow Agent. Fees payable to the Escrow Agent will be deducted from interest earned on the Escrow Account.

How to Subscribe.
The Certificates will be available for purchase in the minimum denomination of $10,000.00 and increments of $1,000.00. An investor who meets the qualifications set forth under "Who May Invest" and "Suitability" may subscribe for Certificates by completing, signing and delivering to the Sales Agent an executed copy of the Subscription Agreement contained in this Memorandum. All subscriptions must be accompanied by a check in the amount of the Certificate(s) purchased payable to "*Charter One Bank, FSB, Escrow Agent for RTC Trust 02* ". Upon execution of a Subscription Agreement, the investor agrees to all of the terms and conditions contained in the Agreement. Subscriptions are, however, subject to acceptance by the Trust Fund.

PLAN OF DISTRIBUTION

The Trust Fund is offering a maximum of $7,500,000 of Certificates, and a minimum of $100,000 The minimum investment by an investor is $10,000.00 with increments of $1,000.00. The Offering period will end not later than three (3) months from the date of this Memorandum. No Certificates will be sold unless subscriptions for the Minimum Offering are received and accepted within two months of the date of this Memorandum. Subscriptions are subject to acceptance by the Trust Fund. See "Suitability"; "Who May Invest".

During the course of the Offering, the subscription payments will be promptly forwarded by the Sales Agent to the Escrow Agent for deposit in the Escrow Account. For a description of the distribution of funds from the Escrow Account, see "Terms of the Offering".

The Certificates will be offered on a "best efforts" basis by the Sales Agent.

DISCLAIMER OF LIABILITY OF TRUSTEE

Reference is hereby made to the Declaration of Trust dated May 20, 2002, a copy of which is attached hereto as Exhibit "A". Other than potential liability under the Securities Act, the Trustee, nor any shareholder, manager, officer, employee, affiliate or agent of the Trustee may be held to any liability in connection with the Offering or the Certificates, or in connection with the affairs of the Trust Fund, in the absence of willful misconduct or gross negligence. Further, the Trustee will not be liable, in any event, to pay sums of money beyond the corpus of the Trust.

INCOME TAX CONSIDERATIONS

The following discussion summarizes certain material anticipated federal income tax consequences relevant to the acquisition, ownership and disposition of Certificates, but does not purport to address all potential consequences. The summary is for general information only and does not discuss all of the tax consequences that may be relevant to particular investors in light of their personal investment circumstances or holders who receive special treatment under the Internal Revenue Code of 1986, as amended (the "Code"), such as insurance companies, financial institutions, and broker-dealers. In addition, this discussion does not describe any tax consequences arising out of foreign, state or local jurisdictions.

The discussion is based upon current provisions of the Code, applicable regulations promulgated thereunder, judicial authority and administrative rulings and practice. All of the foregoing are subject to change which may be retroactive and could affect the continuing validity of this discussion. There can be no assurance that the Internal Revenue Service (the "IRS") will not take a contrary view, and no ruling from the IRS has been or will be sought.

The Trust Fund has not obtained an independent tax opinion with regard to this Offering. Prospective investors should consult their own tax advisors regarding the federal, foreign, state, local and other tax consequences of purchasing, holding and disposing of the Certificates.

Interest Income to Certificateholders

It is anticipated that the Certificates will be issued at par value and, therefore, no original issue discount will arise with respect to the Certificates. Accordingly, a Certificateholder will be required to report interest on a Certificate as income for federal income tax purposes in accordance with such holder's method of accounting.

Gain or Loss on Disposition of Certificates

In general, the holder of a Certificate will recognize gain or loss on the sale, exchange, redemption or other disposition of a Certificate equal to the difference between the amount realized (except to the extent attributable to the payment of accrued interest) and the adjusted basis in his Certificate. Any gain or loss recognized will generally be a Trust gain or loss if the Certificate is held as a Trust asset and will be long-term gain or loss if the Certificate is held for more than one year.

Information Reporting

The Trust Fund will report interest income to Certificateholders on IRS Form 1099-INT and as otherwise consistent with such treatment.

Backup Withholding
A Certificateholder may be subject to "backup withholding" at the rate of 31% (see IRC§3406(a)) with respect to interest paid on, or the proceeds of a sale, exchange or redemption of, such Certificates, unless such holder (i) is a corporation or comes within certain other exempt categories and, when required, demonstrates this fact, or (ii) provides a taxpayer identification number, certifies as to no loss of exemption from backup withholding, and otherwise complies with applicable exemption from backup withholding rules. Any amount withheld under these rules will be creditable against the Certificate-holder's federal tax liability.

THE FOREGOING DISCUSSION OF CERTAIN FEDERAL INCOME TAX CONSEQUENCES IS FOR GENERAL INFORMATION ONLY AND IS NOT TAX ADVICE. EACH PROSPECTIVE INVESTOR SHOULD CONSULT WITH HIS OR HER OWN TAX ADVISER WITH RESPECT TO THE TAX CONSEQUENCES OF THE ACQUISITION, OWNERSHIP AND DISPOSITION OF THE CERTIFICATES.

LEGAL MATTERS

Legal matters in connection with the validity of the Certificates offered hereby will be passed upon for the Trust Fund by Mary Ann McGinn, Esq., Capital Center, 99 Pine Street, Albany, New York 12207.

TABLE OF CONTENTS OF EXHIBITS

The discussion in this Memorandum of each Exhibit set forth below is qualified in its entirety by reference to such Exhibit.

Exhibit "A"	Declaration of Trust
Exhibit "B"	Subscription Agreement
Exhibit "C"	Purchaser Questionnaire
Exhibit "D"	Monitoring Receivable Financing Agreement
Exhibit "E"	Monitoring Receivable Financing Participation Agreement
Exhibit "F"	Lock Box Agreement

ADDITIONAL INFORMATION

Additional information is available upon request to the Trust Fund. Only additional information provided by the Trust Fund may be relied upon. Prospective investors may request such information from the Sales Agent, McGinn, Smith & Co., Inc., Fifth Floor, 99 Pine Street, Albany, New York 12207.