

**FINANCIAL INDUSTRY REGULATORY AUTHORITY**

**OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Complainant,

v.

Ridgeway & Conger, Inc. (CRD No. 113055),

Kenley Brisard (CRD No. 2641960),

Philip Brisard (CRD No. 2646923)

and

Leigh Garber (CRD No. 2768572),

Respondents.

DISCIPLINARY PROCEEDING  
No. 2010022046101

**COMPLAINT**

The Department of Enforcement alleges:

**SUMMARY**

1. From June through August 2010 (the Relevant Period), Respondents sold an unregistered security that consisted of interest-only strips from loans issued by the United States Small Business Association meant only for Qualified Institutional Buyers (QIBs) to individual retail investors at undisclosed markups of 14–33% using general solicitation emails that fraudulently misrepresented the product and the Respondents' role in its development.
2. By inducing five customers to purchase the interest-only unregistered security with false and fraudulent representations, Respondents Kenley Brisard and Philip Brisard,

- registered representatives at Respondent firm Ridgeway & Conger, violated Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), Rule 10b-5 promulgated thereunder, and FINRA Rules 2020 and 2010, or in the alternative, negligently made material misstatements in violation of FINRA Rule 2010, by violating Sections 17(a)(2) and (3) of the Securities Act of 1933 (Securities Act).
3. By sending false and fraudulent emails containing similar misrepresentations and omissions to more than approximately 115 additional customers and prospects, the Brisard Respondents violated FINRA Rule 2010 by failing to comply with Section 17(a)(1) of the Securities Act, or in the alternative, negligently made material misstatements in the general solicitation emails in violation of FINRA Rule 2010, by failing to comply with Sections 17(a)(2) and (3) of the Securities Act.
  4. By charging excessive markups of 14-33% on the five customers' unregistered securities transactions, the Respondent Firm violated NASD Rules 2440, IM-2440-1 and IM-2440-2 and FINRA Rule 2010. Additionally, by fraudulently failing to disclose the excessive markups on the trade confirmations or otherwise, the Firm violated Section 10(b) of the Exchange Act, Rule 10b-5 thereunder and FINRA Rules 2020 and 2010.
  5. By marketing and selling the unregistered securities through general solicitation without an exemption, the Firm and the Brisards violated FINRA Rule 2010 by failing to comply with Section 5 of the Securities Act, which prohibits the offer or sale of unregistered securities through the instrumentalities of interstate commerce.
  6. Garber gave her written approval for the sale of the unregistered securities to five individual customers despite the fact that three months earlier she had provided a

written representation to the placement agent that the Firm would only sell the product, a Rule 144A security, to QIBs. Garber was the designated supervisor for markups, and she approved the excessive markups and signed the internal trade tickets. Garber was the designated supervisor for private placements, yet she approved the sales of unregistered securities despite the fact that they violated Section 5.

7. Despite the fact that the Firm was engaged in the business of selling and buying securities issued pursuant to Rule 144A of the Securities Act (Rule 144A Securities), the Firm did not have a reasonable supervisory system, including written supervisory procedures for this activity.
8. By failing to establish and maintain proper supervisory systems and procedures for the Firm's sales of Rule 144A Securities, markup and Section 5 activities related to the sales of the interest-only unregistered security, the Firm and Respondent Garber, its President and CEO, violated NASD Rules 3010 (a) and (b) and FINRA Rule 2010.

#### **RESPONDENTS AND JURISDICTION**

9. The Firm has been registered as a regulated broker-dealer since October 2001 with the U.S. Securities and Exchange Commission and FINRA. It is a full-service, retail independent broker-dealer located in New Woodstock, New York. It currently has approximately 60 registered individuals operating out of approximately 20 branch offices. The Firm's registration as an SEC and FINRA member remains in effect, and it therefore remains subject to FINRA's jurisdiction.
10. Respondent Leigh Garber entered the securities industry in April 1998, when she became associated as a registered representative with Firm 1, a FINRA-regulated

broker-dealer, which was affiliated with the Respondent Firm during the Relevant Period. From 1998 to the present, she has been employed by six FINRA-regulated broker-dealers.

11. Garber currently serves as President and Chief Executive Officer of the Respondent Firm. She is also the President and Chief Executive Officer for Firm 2, a FINRA-regulated retail broker-dealer, and another affiliate of the Respondent Firm. She is also recently associated as a registered representative with Firm 3, a FINRA-regulated retail broker-dealer. Firm 1 became a branch of Firm 3 in or about November 2015. Garber holds the following securities industry licenses: General Securities Representative (Series 7), Municipal Securities Representative (Series 52), Uniform Securities Agent (Series 63), Registered Options Principal (Series 4), General Securities Principal (Series 24), and Municipal Securities Principal (Series 53). Because she is currently registered with the Firm, Garber remains subject to FINRA jurisdiction pursuant to Article V, Section 2 of FINRA's By Laws.
12. Respondent Kenley Brisard entered the securities industry in July 1995. Between 1995 and 2009, he was employed as a General Securities Representative with six FINRA-regulated broker-dealers.
13. In March 2009, K. Brisard became associated with the Respondent Firm as a General Securities Representative, where he continues to be associated. He holds the following securities industry licenses: General Securities Representative (Series 7), Uniform Securities Agent (Series 63) and Corporate Securities Representative (Series 62). Because he is currently registered with the Respondent Firm, K. Brisard remains subject to FINRA jurisdiction pursuant to Article V, Section 2 of FINRA's By Laws.

14. Respondent Philip Brisard entered the securities industry in July 1995. Between 1995 and 2009, he was employed as a General Securities Representative with the same six FINRA-regulated broker-dealers as his brother, K. Brisard.
15. In March 2009, P. Brisard became associated with the Respondent Firm as a General Securities Representative, where he continues to be associated. He is licensed as a General Securities Representative (Series 7) and Uniform Securities Agent (Series 63). Because he is currently registered with the Respondent Firm, P. Brisard remains subject to FINRA jurisdiction pursuant to Article V, Section 2 of FINRA's By Laws.
16. At all relevant times hereto, the Brisards transacted business through a separate entity known as Brisard & Brisard, Inc. They received commissions from the Respondent Firm through a joint representative number as well as through individual representative numbers.

#### BACKGROUND

17. The IOTA SBA COOF Trust Series 2010-A Pass-Through Certificates (the SBA Interest-Only Security) were a fixed income security that securitized a strip of interest payments owed on Small Business Administration (SBA) guaranteed loans that had been pooled into a different collateralized debt obligation. The underlying collateral for the SBA Interest-Only Security was interest from a pool of Confirmations of Originator Fee(s) (COOF) of Section 7(a) loans issued by the SBA's fiscal and transfer agent. The certificates were designed to provide a stream of income from the interest on the COOFs and did not provide for a return of an investor's principal at the end of the term. As a result, if the underlying loans were pre-paid, the investor stood to lose all or a substantial part of their investment.

18. Issuer 1 issued the SBA Interest-Only Security. Issuer 1's sole purpose was to issue private placement securities.
19. In early 2010, DS, another Firm representative, who was barred from association with any FINRA member firm in November 2014, learned about the SBA Interest-Only Security from a principal at Issuer 1 and brought it to the Firm's attention.
20. On March 30, 2010, Garber signed a letter to Placement Agent 1 certifying that the Firm would "only purchase Rule 144A securities in transactions in which it acts as a riskless principal (as defined in Rule 144A) on behalf of a qualified institutional buyer[.]"
21. The private placement memorandum (PPM) for the SBA Interest-Only Security provided that the security was restricted for sale only to QIBs as defined under Rule 144A under the Securities Act. The PPM warned that a secondary trading market for the SBA Interest-Only Security was unlikely to develop and thus purchasers of the security may be required to bear the risks of their investment in the SBA Interest-Only Security for an indefinite period of time.
22. The SBA Interest-Only Security was first issued and offered for sale via private placement on or about June 24, 2010. Placement Agent 1 acted as the sole placement agent for the SBA Interest-Only Security.
23. Between June 28, 2010, and August 4, 2010, the Brisards improperly sold the SBA Interest-Only Security to five individual retail customers in riskless principal trades, after having sent false general solicitation emails to existing and prospective customers. The Firm had the customers' purchase orders in hand when it purchased the SBA Interest-Only Security from the placement agent.

24. On June 28, 2010, customer NT purchased 310 million shares of the SBA Interest-Only Security. The Firm paid approximately \$161,395 for the shares seven minutes before charging NT approximately \$200,145, resulting in a markup of approximately \$38,750 or 24%. On June 30, 2010, customer CS purchased 318 million shares of the SBA Interest-Only Security. The Firm paid approximately \$170,640 one day before charging CS approximately \$199,417, resulting in a markup of approximately \$28,777 or 17%. On July 8, 2010, customers SJ and PC purchased 158 million and 99 million shares of the SBA Interest-Only Security respectively. The Firm paid approximately \$87,124 for the shares purchased by SJ and approximately \$54,591 for the shares purchased by PC five minutes before charging SJ approximately \$99,468 and PC approximately \$62,325, resulting in respective markups of approximately \$12,344 and approximately \$7,734 or 14% each. On August 4, 2010, customer VH purchased 127.5 million shares of the SBA Interest-Only Security. The Firm paid approximately \$74,972 for the shares one hour and 41 minutes before charging VH approximately \$99,776, resulting in a markup of approximately \$24,804 or 33%.
25. The Firm did not make a market in this security. The price the Firm charged its retail customers for the security was not reasonably related to its contemporaneous cost, which was the price it paid for the security shortly before selling it to its customers.

**FIRST CAUSE OF ACTION**  
(K. Brisard and P. Brisard)

**(Fraudulent Misrepresentations and Omissions of  
Material Fact in Connection with Customer Purchases)**  
(Willful Violation of Section 10(b) of the Exchange Act, Rule 10b-5 thereunder and FINRA  
Rules 2020 and 2010)

26. The Department realleges and incorporates by reference paragraphs 1-25 above.

27. Section 10(b) of the Exchange Act provides that “it shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange:”

(b) To use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules or regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

28. Rule 10b-5 promulgated under the Exchange Act and which is entitled “Employment of Manipulative and Deceptive Practices” provides that:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,  
(a) To employ any device, scheme, or artifice to defraud,  
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or  
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

29. FINRA Rule 2020 provides that “[n]o member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.”

30. A violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and FINRA Rule 2020 constitutes a violation of FINRA Rule 2010.

31. K. Brisard and P. Brisard used email to solicit both existing and prospective clients to buy the SBA Interest-Only Security using materially false and misleading information.

32. On June 24, 2010, K. Brisard sent separate emails to existing Firm customers NT, SJ, and CS making the following statements:

- a. "The cash flow is 20% on investment SBA loans which are backed by full faith credit [sic] of the United States Goverement [sic]."
- b. "Our portfolio selection of seasoned loans allows the purchaser to see this seasoning as though buying a secondary offering."
- c. "[W]e can conclude that our loan portfolio has passed with very high marks. I cannot stress enough the care with which we are purchasing collateral – we are looking at each loan with an eye for prepayment/default risk."
- d. "As we researched collateral before structuring the SBA Bond, we looked at all government agency options, avoiding other vehicles because of credit risk."
- e. "We have taken great care over a year of research and effort to package an attractive yield with the most safeguards for investor protection and satisfaction."

33. The statements in the June 24, 2010 email were false and misleading because neither the Firm nor either of the Brisards selected the portfolio of loans for the SBA Interest-Only Security or had any role with researching, analyzing, or purchasing the collateral for the product. The email also guaranteed a 20% return on the investment without any basis, and it misled readers into believing that the security's payments were guaranteed by the U.S. Government.

34. In a June 25, 2010 email to existing Firm customer PC, K. Brisard stated:

- a. "Hand selection of the collateral has given us a distinct advantage in structuring this large tranche, and cash flows are forecasted for a 10-year average life, an extraordinary long payment stream."
- b. "We have taken care to structure the bond with the least prepayment risk and the best stability possible. This tranche will be one of a series of issues with similar structure we plan to bring over the coming months, which will provide a healthy market and good liquidity."
- c. "Should the bondholder desire to sell the tranche back to us in conjunction with our next underwriting, which we estimate to be priced at approximately \$.078125, the selling price should be a slight discount from that issue price."

35. The statements in the June 25, 2010 email were false and misleading because neither the Firm nor either of the Brisards engaged in any "hand selection of the collateral" or "structured" the SBA Interest-Only Security to achieve particular cash flows.

Additionally, neither the Firm nor the Brisards were planning to bring similar issues

to the market as they were neither issuers nor placement agents and none of them had control over whether there would be a future offering and what the pricing would be in the event the issuer engaged in a similar offering. Therefore, the promise of additional liquidity or a healthy market was false. These statements gave the false impression that the SBA Interest-Only Security was a liquid investment, which was false and misleading and directly contradicted the private placement memorandum.

36. On July 8, 2010, K. Brisard sent emails to existing Firm customer PC stating:

- a. "The SBA issue I have shown you was structured well after the collateral was purchased, and since the market has[]moved up in price substantially since that time, the bond was priced very cheaply relative to new underwritings, dictating that our next SBA issue in late July will be a more expensive bond. This creates an unusual opportunity for the owners of the issue you see now – bondholders will have the option to sell bonds back to us in conjunction with our next underwriting, which we estimate to be priced at approximately \$.078125."
- b. "As I mentioned earlier, the price difference between issues is usually not accessible to buyers, so you should give this opportunity serious consideration. Remember that the next issue will be priced by month-end, so time is of essence."
- c. "You would certainly have the opportunity to reinvest in subsequent SBA issues after the sale. I would recommend that we make bonds for you that are customized to your program parameters. A structure designed to keep the offering price low would be a good re-entry point – the lower price limits down-side risk and creates more leverage."
- d. "This is a short term deal so let me know today as these bonds are first come first serve basis."

37. The statements in the July 8, 2010 email were false and misleading because neither the Firm nor either of the Brisards had any knowledge or insight into how the SBA Interest-Only Security was priced. None had any control over whether there would be a future underwriting of a similar private placement; how such a future underwriting would be priced; or whether any such future underwriting would create any opportunity for an investor to sell their interest in the SBA Interest-Only Security to the Firm. These emails gave the false and misleading impression that an investor

of the SBA Interest-Only Security would be able to sell its investment back to the Firm at a favorable price on a short-term basis when in reality, an investment in the SBA Interest-Only Security was highly illiquid and carried no guarantee that an investor would be able to sell the investment on a secondary market at any price.

38. On July 13, 2010, P. Brisard and K. Brisard sent an email to prospective customer VH and her husband stating:

- a. "I have attached the following SBA Bond offering this 20% cash flow"
- b. "Hand selection of the collateral has given us a distinct advantage in structuring this large tranche, and cash flows are forecasted for a 10-year average life, an extraordinary long payment stream."
- c. "We have taken care to structure the bond with the least prepayment risk and the best stability possible. This tranche will be one of a series of issues with similar structure we plan to bring over the coming months, which will provide a healthy market and good liquidity."
- d. "Should the bondholder desire to sell the tranche back to us in conjunction with our next underwriting, which we estimate to be priced at approximately \$.078125, the selling price should be a slight discount from that issue price."
- e. "Our portfolio selection of seasoned loans allows the purchaser to see this seasoning as though buying a secondary offering – there is tremendous safety in seeing this performance history."
- f. "[W]e can conclude that our loan portfolio has passed with very high marks. I cannot stress enough the care with which we are purchasing collateral – we are looking at each loan with an eye for prepayment/default risk."
- g. "As we researched collateral before structuring the SBA Bond, we looked at all government agency options, avoiding other vehicles because of credit risk."
- h. "We have taken great care over a year of research and effort to package an attractive yield with the most safeguards for investor protection and satisfaction."

39. The statements in the July 13, 2010 email were false and misleading because neither the Firm nor the Brisards had any involvement in researching, analyzing or selecting the collateral or structuring the security. Moreover, neither the Firm nor the Brisards had any control over whether there would be a future, similar underwriting, what the pricing would be if there was such an underwriting or what impact such a future underwriting would have on the liquidity of the SBA Interest-Only Security.

Additionally, the Brisards did not have any basis to promise a 20% return on the investment.

40. On July 29, 2010, P. Brisard sent an email to prospective customer VH stating:

- a. "We have taken care to structure the bond with the least prepayment risk and best stability possible."
- b. "This tranche will be one of a series of issues with similar structure we plan to bring over the coming months, which will provide a healthy market and good liquidity."
- c. "Since the interest-only sector has been extremely quiet over the past two years, these issues should easily retain their market value and enjoy trading opportunities. Ridgeway & Conger has keen interest in secondary trading and has a client base of interested bondholders."

41. The statements in the July 29, 2010 email were false and misleading because neither the Firm nor the Brisards conducted any "research[]" or engaged in any "effort" to package the loans underlying the SBA Interest-Only Security. Additionally, neither the Firm nor either of the Brisards had any control over whether there would be any future offerings or whether such future offerings would provide "a healthy market and good liquidity." This statement gave the false impression that the SBA Interest-Only Security was a liquid investment, which was not true. The email also misleads the reader into believing that there would be a secondary market in the SBA Interest-Only Security.

42. In addition, the email solicitations omitted material information necessary to make them not misleading, such as the illiquid nature of the security, the risks associated with the security, including the possibility of prepayment on the underlying loans which would result in an end of the payment stream and a potential full or partial loss of the investment, and the fact that the SBA Interest-Only Security was unregistered with the SEC and restricted to QIBs. The emails were also false in that they gave the misleading impression that the Firm was going to be issuing another offering similar

to the SBA Interest-Only Security and that next issue would increase the value and likelihood of success of the SBA Interest-Only Security.

43. As set forth above, five of the customers to whom the Brisards sent emails purchased the SBA Interest-Only Security, specifically NT, CS, SJ, PC and VH.
44. As described above, the emails that K. Brisard sent to four customers and P. Brisard sent to one customer were false and misleading in that they touted that the Brisards and the Firm had significant and unique knowledge, expertise and involvement in the analysis, structuring and creation of the SBA Interest-Only Security, creating an entirely false impression to potential investors that the SBA Interest-Only Security was a product into which the Firm and its personnel had a high degree of interaction, lending the Firm's and the Brisards' recommendation of the product an unwarranted legitimacy. In fact, the SBA Interest-Only Security was structured and created solely by Issuer 1 and neither the Brisards nor the Firm played any role in the security's analysis, structuring or creation. Nor was the Firm the placement agent for this product. The emails further misled the customers by promising a 20% return on their investment and that there would be a secondary market that would allow them to sell out of the security at will.
45. During the Relevant Period, in connection with the offer and sales of these securities, the Brisards, directly or indirectly, by the use of means or instrumentalities of interstate commerce, or of the mails, knowingly, willfully and/or recklessly: (i) employed devices, schemes, or artifices to defraud, (ii) made untrue statements of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not

misleading, concerning investments in the SBA Interest-Only Security, or (iii) engaged in acts, practices, or courses of business which operated or would operate as a fraud or deceit upon investors.

46. The Brisards acted with scienter because they made the above-described statements to customers with no regard for their truth or falsity and for whether the statements omitted material facts. They knowingly, willfully and/or recklessly ignored and/or contradicted the PPM for the SBA Interest-Only Security to which they had ready access, and they made statements that had no underlying factual basis.
47. The misrepresentations and omissions in the Brisards' statements to customers were material because a reasonable investor would consider them important in making investment decisions, because they significantly altered the total mix of information made available to the solicited customers, and because they denied the investors the opportunity to make an informed decision about whether to invest in the SBA Interest-Only Security.
48. By engaging in the foregoing conduct with respect to the emails that K. Brisard sent to four customers and P. Brisard sent to one customer, the Brisards willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and violated FINRA Rules 2020 and 2010.

**SECOND CAUSE OF ACTION**  
(ALTERNATIVE TO FIRST CAUSE OF ACTION)  
(K. Brisard and P. Brisard)

(Negligent Misrepresentations and Omissions of Material Fact  
in Connection With Customer Purchases)  
(FINRA Rule 2010)

49. The Department realleges and incorporates by reference paragraphs 1-48 above.

50. Sections 17(a)(2) and 17(a)(3) of the Securities Act entitled "Fraudulent Interstate Transactions," provide that:

- (a) It shall be unlawful for any person in the offer or sale of any securities ... by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly-
- (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

51. The Brisards failed to reasonably and/or independently investigate and understand the SBA Interest-Only Security before they recommended and sold the investment to customers. They failed to reasonably consider the information contained in the PPM and, as a result, they made statements that directly contradicted the PPM. Rather, K. Brisard relied on, and reiterated verbatim to solicited customers, false information provided to him by DS, while P. Brisard relied on false information provided by K. Brisard.
52. Accordingly, in connection with the emails that K. Brisard sent to four customers and P. Brisard sent to one customer, the Brisards used the means or instrumentalities of interstate commerce (including email) to obtain money or property in the form of markups from the five customers by means of negligently making untrue statements of material fact and omissions of material fact, as described above.
53. The Brisards negligently engaged in a course of business which operated as a fraud or deceit upon the five purchasers, as described above.

54. Accordingly, the Brisards failed to observe high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010, by failing to comply with Sections 17(a)(2) and (3) of the Securities Act.

**THIRD CAUSE OF ACTION  
(K. Brisard and P. Brisard)**

**(Fraudulent Misrepresentations and Omissions of Material Fact  
in Connection with Offers of the SBA Interest-Only Security)  
(FINRA Rule 2010)**

55. The Department realleges and incorporates by reference paragraphs 1-54 above.

56. Section 17(a)(1) of the Securities Act, entitled "Fraudulent Interstate Transactions," provides that

(a) It shall be unlawful for any person in the offer or sale of any securities ... by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly-  
(1) to employ any device, scheme, or artifice to defraud.

57. A violation of Section 17(a)(1) of the Securities Act constitutes a violation of FINRA Rule 2010.

58. In June, July and October 2010, K. Brisard sent separate emails to more than 100 customers or prospective customers making the same statements in the emails that the Brisards sent to purchasers outlined in paragraphs 32-40 above.

59. Similarly, in June and July 2010, P. Brisard and K. Brisard sent separate emails to approximately 15 customers or prospective customers making the same statements in the emails that the Brisards sent to purchasers outlined in paragraphs 32-40 above.

60. Each of these emails constituted an offer for the SBA Interest-Only Security and each contained statements that were false and misleading as described above and in that, among other things, they touted that the Brisards and the Firm had significant and

unique knowledge, expertise and involvement in the analysis, structuring and creation of the SBA Interest-Only Security, which was not true.

61. In addition, the solicitations that each of the Brisards separately sent to the customers and prospective investors listed above omitted material information necessary to make the emails not misleading. In particular, the email solicitations omitted the illiquid nature of the security, the risks associated with the security, including the possibility of prepayment on the underlying loans which would result in a diminution or end of the payment stream and partial or complete loss of the investment, and the fact that the SBA Interest-Only Security was unregistered with the SEC and restricted to QIBs. The emails were false in that they gave the misleading impression that the Firm was going to be issuing another offering similar to the SBA Interest-Only Security and that the next issue would increase the value and likelihood of success of the SBA Interest-Only Security.
62. K. Brisard and P. Brisard used interstate commerce (including email) to offer unregistered securities to more than 115 customers or prospective customers using fraudulently made untrue statements of material fact and omissions of material fact, as described above.
63. The Brisards acted with scienter because they made their statements to potential investors with no regard for their truth or falsity and for whether the statements omitted material facts. They knowingly, willfully and/or recklessly ignored and/or contradicted the PPM for the SBA Interest-Only Security to which they had ready access, and they made statements that had no underlying factual basis.

64. K. Brisard and P. Brisard fraudulently engaged in a course of business which operated as a fraud or deceit upon more than 115 solicited investors respectively who were offered the SBA Interest-Only Security, as described above.
65. Accordingly, the Brisards failed to observe high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010 by failing to comply with Section 17(a)(1) of the Securities Act.

**FOURTH CAUSE OF ACTION**  
**(ALTERNATIVE TO THIRD CAUSE OF ACTION)**  
**(K. Brisard and P. Brisard)**

**(Negligent Misrepresentations and Omissions of Material Fact**  
**in Connection With Offers of the SBA Interest-Only Security)**  
**(FINRA Rule 2010)**

66. The Department realleges and incorporates by reference paragraphs 1-65 above.
67. As an alternative to the allegations in the Third Cause of Action, K. Brisard and P. Brisard negligently engaged in a course of business which operated as a fraud or deceit upon the more than 115 solicited investors to whom the Brisards collectively offered the SBA Interest-Only Security, as described above.
68. The Brisards failed to reasonably and/or independently investigate and understand the SBA Interest-Only Security before they recommended the investment to customers. They failed to reasonably consider the information contained in the PPM and, as a result, they made statements that directly contradicted the PPM. Rather, K. Brisard relied on, and reiterated verbatim to solicited customers, false information provided to him by DS, while P. Brisard relied on false information provided by K. Brisard.

69. Accordingly, the Brisards failed to observe high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010 by failing to comply with Sections 17(a)(2) and (3) of the Securities Act.

**FIFTH CAUSE OF ACTION  
(The Firm)**

**(Charging Excessive Markups in the Sale of the SBA Interest-Only Security)  
(NASD Rules 2440, IM-2440-1, IM-2440-2, and FINRA Rule 2010)**

70. The Department realleges and incorporates by reference paragraphs 1-69 above.

71. NASD Rules 2440, IM-2440-1, and IM-2440-2 prohibit member firms from charging customers prices that are not reasonably related to the current market price of a security. IM-2440-1 establishes a "5% Policy" that states, *inter alia*, "a markup pattern of 5% or even less may be considered unfair or unreasonable[.]"

72. In each of the transactions listed in the following chart, the Firm purchased the SBA Interest-Only Security for its own account from Placement Agent 1 and shortly thereafter sold it to individual, retail customers. In each of these transactions, the Firm already had the order from the customer in hand before it purchased the security from the placement agent.

| Date      | Customer        | Number of shares | Cost to Firm | Amount Firm Charged Customer | Mark ups        | Time between buy from placement agent and sell to customer |
|-----------|-----------------|------------------|--------------|------------------------------|-----------------|------------------------------------------------------------|
| 6/28/2010 | NT              | 310,000,000      | \$161,395    | \$200,145                    | \$38,750 or 24% | 7 min                                                      |
| 6/30/2010 | CS <sup>1</sup> | 318,000,000      | \$170,640    | \$199,417                    | \$28,777 or 17% | 25 hrs, 3 min (waiting for wire)                           |
| 7/8/2010  | SJ              | 158,000,000      | \$87,124     | \$99,468                     | \$12,344 or 14% | 5 min                                                      |
| 7/8/2010  | PC              | 99,000,000       | \$54,591     | \$62,325                     | \$7,734 or 14%  | 5 min                                                      |
| 8/4/2010  | VH              | 127,500,000      | \$74,972     | \$99,776                     | \$24,804 or 33% | 1 hr, 41 min                                               |

73. In each instance Garber, on behalf of the Firm signed the trade tickets approving the markup.

74. As reflected in the above chart, in total, the Firm charged approximately \$112,408 in markups for a security which the Firm purchased for a total of about \$548,722 and sold to customers for a total of about \$661,131. Specifically, the Firm charged excessive markups between 14-33% of the relevant market price on each of the five trades, well in excess of the 5% markup permitted by policy.

75. Nothing in the nature of the Firm's or the Brisards' business or the identified purchases of the SBA Interest-Only Security justified the size of the markups on the purchases by the five Firm customers. In particular, (a) the Firm did not provide services warranting extraordinary markups; (b) the Firm's expenses in executing or filling its customers' orders were not extraordinary, and in fact were likely *de minimus* given that the purchases were executed as riskless principal transactions; (c) the transactions were for total dollar amounts with a range that did not justify

<sup>1</sup> On July 16, 2010, the Firm took back into inventory 200 million shares from CS and then re-sold them, along with an additional 800 million shares to another customer at an additional markup of approximately 24%. A portion of the markup originally charged to CS was absorbed by this customer.

extraordinary markups; (d) the securities did not have features that warranted extraordinary markups; (e) the Firm did not make a market in this security; and (f) an exercise of reasonable best judgment would not have allowed the imposition of the extraordinary markups.

76. As a result of the foregoing conduct, the Firm violated NASD Rules 2440, IM-2440-1, IM-2440-2, and FINRA Rule 2010 by charging excessive markups of 14% to 33% on five transactions.

**SIXTH CAUSE OF ACTION**  
(The Firm)

(Fraudulent Failure to Disclose Excessive Markups in the  
Sale of the SBA Interest-Only Security)  
(Section 10(b) of the Exchange Act, Rule 10b-5 thereunder  
and FINRA Rules 2020 and 2010)

77. The Department realleges and incorporates by reference paragraphs 1-76 above.
78. Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder, makes it unlawful for any person directly, or indirectly, by use of any means or instrumentality of interstate commerce to employ devices, schemes, or artifices to defraud; make untrue statements of material fact or omit to state material facts necessary in order to make statements made, in light of the circumstances under which they were made, not misleading; or engage in acts, practices, or courses of business which operate or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of a security.
79. FINRA Rule 2020 prohibits any member from effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.

80. As described above between June 28 and August 4, 2010, the Firm charged excessive markups in each of the five sales to the individual, retail, non QIB customers.
81. The Firm also failed to disclose the excessive markups on the SBA Interest-Only Security to customers NT, CS, PC, SJ and VH in the trade confirmations or otherwise.
82. The trade confirmations state the customers' purchase price, which included the markup from the Firm's acquisition price. They did not disclose to the customers the amount that the Firm paid for the security, or the amount or magnitude of the markups from the Firm's purchase price.
83. The Firm acted with scienter because it knowingly, willfully and/or recklessly failed to disclose the excessive markups to the customers in the trade confirmations or otherwise.
84. The Firm's misrepresentations and omissions were material because a reasonable investor would consider them important in making investment decisions.
85. The Firm utilized the means or instrumentalities of interstate commerce, or of the mails, in connection with the transmittal of the trade confirmations.
86. By charging excessive markups and failing to disclose them to purchasers of the SBA Interest-Only Security, the Firm willfully violated Section 10(b) of the Securities Exchange Act, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010.

**SEVENTH CAUSE OF ACTION**  
**(ALTERNATIVE TO SIXTH CAUSE OF ACTION)**  
**(K. Brisard and P. Brisard)**

**(Negligent Failure to Disclose Excessive Markups)**  
**(FINRA Rule 2010)**

87. The Department realleges and incorporates by reference paragraphs 1-86 above.
88. As an alternative to the allegations in the Sixth Cause of Action, the Firm negligently failed to disclose the excessive markups to the five customers who purchased the SBA Interest-Only Security, as described above.
89. Accordingly, the Firm failed to observe high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010 by failing to comply with Sections 17(a)(2) and (3) of the Securities Act.

**EIGHTH CAUSE OF ACTION**  
**(K. Brisard, P. Brisard and the Firm)**

**(Selling Unregistered Securities in Violation of Section 5 of the Securities Act)**  
**(FINRA Rule 2010)**

90. The Department realleges and incorporates by reference paragraphs 1-89 above.
91. Section 5 of the Securities Act prohibits the sale of unregistered securities. It provides:
- (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
- (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise
92. Rule 144A under the Securities Act is a safe harbor exemption from the registration requirements of Section 5 that allows for the sale of unregistered securities, such as the SBA Interest-Only Security, to QIBs.
93. A Section 5 violation constitutes a violation of FINRA Rule 2010.

94. The PPM for the SBA Interest-Only Security states on the first page that “The Offered Certificates described herein may only be offered in the United States to ‘qualified institutional buyers’ as defined under Rule 144A[] under the Securities Act[.]” Only institutions, not individual retail investors regardless of their net worth or financial sophistication, can qualify as a QIB.
95. There was no registration statement filed with the SEC for the SBA Interest-Only Security.
96. On March 30, 2010, Garber signed a letter in which she certified to Placement Agent 1 that the Firm would “only purchase Rule 144A securities for its own account or for the accounts of others that independently qualify” as QIBs.
97. During the Relevant Period, the Brisards, on behalf of the Firm, sent emails soliciting an investment in the SBA Interest-Only Security to more than 115 potential investors.
98. Because, among other reasons, the email solicitations offering the SBA Interest-Only Security were not limited to persons and institutions with which the Firm had a pre-existing relationship and instead targeted members of the general public, these emails constituted a general solicitation of potential purchasers of the SBA Interest-Only Security.
99. At no time did either the Firm or the Brisards attempt to determine whether any of the investors to whom they sold the SBA Interest-Only Security were QIBs.
100. The five customers (NT, CS, SJ, PC and VH) who purchased the SBA Interest-Only Security were not QIBs and therefore the transactions were not exempt from Section 5 requirements under the safe harbor of Rule 144A.

101. The offers and the sales by the Firm and the Brisards to customers and prospects used interstate facilities. The offers to sell were by email and telephone, and the sales were communicated interstate through email, telephone and fax communications.
102. No other exemption from the registration requirements of Section 5 was available to the Firm or the Brisards.
103. By engaging in these unregistered securities transactions not subject to an exemption from the registration requirements, the Firm and the Brisards acted in contravention of Section 5 of the Securities Act, and thus violated FINRA Rule 2010.

**NINTH CAUSE OF ACTION**  
(The Firm and Garber)

**(Failure to Supervise)**  
(NASD Rules 3010(a) and (b) and FINRA Rule 2010)

104. The Department realleges and incorporates by reference paragraphs 1-103 above.
105. NASD Rule 3010(a), entitled Supervisory System, requires that
- Each member shall establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules.
106. NASD Rule 3010(b), entitled Written Procedures, requires that:
- Each member shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives, registered principals, and other associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable Rules of NASD.
107. During the Relevant Period, the Firm failed to establish and maintain a supervisory system in place related to sales of securities sold pursuant to Rule 144A.

The Firm and Garber failed to enforce written supervisory procedures with respect to the excessive markups and the Section 5 violations described herein.

No Supervisory System for 144A Securities

108. During the Relevant Period, the Firm failed to establish a supervisory system related to the sales of unregistered securities offered solely to QIBs pursuant to Rule 144A. The Firm engaged in the purchase and sale of Rule 144A Securities, but it did not have reasonable policies and procedures to ensure that sales of these securities were restricted to QIBs. Further, despite being engaged in the Rule 144A Securities business, the Firm did not have any written supervisory procedures relating to the sales of Rule 144A Securities, which it should have had.

109. The Firm's failure to have an adequate supervisory system related to the sales of securities offered pursuant to Rule 144A led to the sales of the SBA Interest-Only Security to individual, retail investors who were not QIBs, in violation of Section 5 of the Securities Act. As a result of the failure to have an adequate supervisory system, including procedures, in connection with the sales of securities offered pursuant to Rule 144A, the Firm violated NASD Rules 3010(a) and (b) and FINRA Rule 2010.

Markups Not Properly Supervised

110. During the Relevant Period, according to the Firm's written supervisory procedures (WSPs) and FINRA guidance, markups in principal transactions in excess of 5% were generally presumed to be unfair and unreasonable.

111. The Firm failed to reasonably supervise, or even apply its own WSPs, to the markups of the SBA Interest-Only Security to customers PC, VH, SJ, NT and CS. The Firm charged markups between 14% to 33% on the sale of the SBA Interest-Only

Security to its customers in violation of its own WSPs and FINRA rules providing that anything above 5% was presumably excessive. The Firm obtained the SBA Interest-Only Security from the placement agent in a riskless principal transaction with a corresponding customer order in hand, and it had no justification for charging a markup higher than 5%. The SBA Interest-Only Security was readily available from the placement agent and the Firm incurred minimal risk and minimal expense in purchasing the security.

112. Garber was the Firm's designated supervisor responsible for reviewing the reasonableness of all markups. Garber signed trade tickets approving the markups on the sales of the SBA Interest-Only Security to the five customers. She reviewed at the same time two trade tickets, one for the purchase of the shares into the Firm's inventory, and one for the sale of the shares from the Firm's inventory to the customers. Therefore, she could see the price the Firm and the customer paid for the SBA Interest-Only Security simultaneously during her review. The markups were excessive on their face. For example, the Firm paid approximately \$75,000 for the SBA Interest-Only Security that VH purchased but then charged her approximately \$100,000. The other sales were similarly handled and plainly excessive, as described above.

113. The Firm through Garber reviewed the trade tickets for all five customers showing the markups exceeded 5% but she did not have any reasonable justification to approve them. Garber, therefore, did not reasonably evaluate the propriety of the markups and failed to engage in appropriate supervision of the markups.

114. Consequently, the Firm and Garber failed to reasonably supervise the markups and failed to enforce the Firm's WSPs, in violation of NASD Rules 3010 (a) and (b) and FINRA Rule 2010.

Sales of Unregistered Securities Not Properly Supervised

115. The Firm and Garber also failed to reasonably supervise its representatives to ensure that they did not violate Section 5 of the Securities Act by general solicitation of potential investors in the SBA Interest-Only Security. As discussed above, the Firm's and the Brisards' sale of the SBA Interest-Only Security to five unqualified customers violated Section 5.

116. The Firm's WSPs include a section entitled "Investment Banking," which covers private offerings. During the Relevant Period, Garber was the designated supervisor for private placements. The WSPs required Garber to review all documents related to offerings and supervise sales activities, among other duties, to ensure that the offering proceeded in accordance with the Securities Act and related regulations. The WSPs specifically provided that private offerings could not be sold by means of general advertising or solicitation.

117. As set out above, the Brisards used email to generally solicit retail investors to purchase the SBA Interest-Only Security. They took no steps to consider the eligibility of the recipients of their soliciting emails to purchase the SBA Interest-Only Security.

118. The Firm and Garber knew that the SBA Interest-Only Security was an unregistered security being sold by the placement agent pursuant to a Rule 144A exemption requiring QIB only sales. Garber signed a letter acknowledging that the

Firm would only sell the security only to QIBs. Garber then reviewed and approved the sales despite the fact that they were to individual, retail investors, who did not qualify to invest in the security. Garber failed to reasonably respond to the red flags indicating that the Brisards were marketing and selling the SBA Interest-Only Security to customers who were not qualified to purchase the product under Section 5.

119. Despite signing a letter to the placement agent acknowledging that the SBA Interest-Only Security could only be sold to QIBs, Garber allowed K. Brisard to sell the SBA Interest-Only Security to individual retail customers.

120. The WSPs required Garber to review correspondence and contacts with customers to ensure that an offering proceeds without general solicitation. However, Garber failed to do that in connection with the SBA Interest-Only Security.

121. The Firm's and Garber's failure to supervise the Brisards' activities in soliciting the SBA Interest-Only Security by sending emails to prospective customers resulted in the general solicitation of investors, the sales to non-QIBs, and the Section 5 violation, and in violation of NASD Rules 3010 (a) and (b) and FINRA Rule 2010.

## RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. make findings of fact and conclusions of law that Respondent(s) committed the violations charged and alleged herein;
- B. order that one or more of the sanctions provided under FINRA Rule 8310(a), including monetary sanctions, be imposed, including that Respondents be required to disgorge fully any and all ill-gotten gains together with interest;
- C. order that Respondent(s) bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330; and
- D. make specific findings that Respondents the Firm, K. Brisard and P. Brisard willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

## FINRA DEPARTMENT OF ENFORCEMENT

Date: 1/12/16



Richard Chin, Chief Counsel  
Eric Hansen, Director  
Jason Mogel, Senior Counsel  
Danielle I. Schanz, Senior Litigation Counsel  
FINRA Department of Enforcement  
One World Financial Center  
200 Liberty Street  
New York, NY 10281  
Phone: 646.315.7322  
e-mail: Richard.Chin@finra.org