TOWN OF HOOKSETT

TRUSTEES OF THE TRUST FUNDS

MEETING MINUTES

NOVEMBER 9TH 2015

ATTENDEES: CLAIRE LYONS,PAUL LOISELLE,HENRY ROY AND CHRISTINE SOUCIE

CALL TO ORDER AT 9:05

PURPOSE OF THIS MEETING...REVIEW SEC (SECURITIES AND EXCHANGE COMMISSION),
IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND DESIST ORDER AGAINST MACKENSEN&COMPANY.....RELEASE NO.4188 / SEPTEMBER 3,2015

UPON REVIEW OF THE 6 PAGE ORDER INSTITUTED BY (SEC) (SEE ATTACH).
IT IS THE BOARD OF TRUSTEES OPINON THAT THE ACTION TAKEN BY THE SEC WAS DIRECTED AT MACKENSEN&COMPANYS MARKETING PROCEEDURES ONLY.

CLAIRE LYONS RECALLED WARREN MACKENSEN'S INTIAL PRESENTATION TO THE OF TRUSTEES AND DID NOT RECALL ANY ISSUES OF MISSREPRESENTATION REGARDING MCI FINANCIAL INVESTMENT OBJECTIVES.
NEITHER DID I (PAUL LOISELLE)

THEREFORE IT IS THE BOARDS OPINON THAT NO ACTION IS REQUIRED.

MOTION TO ADJOURN 9:30AM

RESPECTFULLY SUBMITTED,

PAUL LOISELLE

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

INVESTMENT ADVISERS ACT OF 1940
Release No. 4188 / September 3, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16780

In the Matter of **MACKENSEN & COMPANY, INC. AND WARREN J. MACKENSEN** **Respondents.**	**ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND DESIST PROCEEDINGS PURSUANT TO SECTIONS 203(e), 203(f) AND 203(k) OF THE INVESTMENT ADVISERS ACT OF 1940, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission" or "SEC") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 ("Advisers Act") against Mackensen & Company, Inc. ("MCI"), and Warren J. Mackensen ("Mackensen") (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have each submitted an Offer of Settlement (the "Offers") 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, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds[1]

A. Summary

1. This matter concerns misleading advertisements created by MCI, a New Hampshire-based registered investment adviser, and distributed by MCI and its then principal Mackensen in connection with MCI's solicitation of potential municipal clients. From late 2010 into 2012, MCI and Mackensen sent hundreds of form letters to the trustees of trust funds held by New Hampshire's municipalities. The form letter and its attachments presented what purported to be actual historical performance for MCI's model portfolios. The letters also claimed that each municipality could have earned more money by investing in MCI's model portfolio than it actually earned in its existing investments. However, the performance claimed for MCI's model portfolios in these advertisements did not represent actual past performance of any MCI model portfolio. Instead, the performance was generated by back-testing MCI's models based on their current holdings at the time each letter was sent. In reality, the model did not even exist throughout the entire time period claimed in the letters. MCI and Mackensen were responsible for distributing the letters to hundreds of municipal trustees.

2. In addition, from 2010 to May 2012, MCI failed to adopt and implement written compliance policies and procedures reasonably designed to prevent its employees from presenting performance information to clients or prospective clients in violation of the Advisers Act and its rules.

B. Respondents

3. **MCI** (SEC File No. 801-55188), is a New Hampshire corporation headquartered in Hampton, New Hampshire. MCI has been registered with the Commission as an investment adviser since 1998. MCI has 526 accounts and approximately $165 million in assets under management.

4. **Warren J. Mackensen,** age 66, is a resident of Hampton, New Hampshire. Mackensen was certified as a financial planner in 1989. From 1998 through 2012, Mackensen and his family were the sole owners of MCI and he was its President, and beginning in 2004, its Chief Compliance Officer. In 2012, Mackensen sold MCI and ceased to be its President. He ceased to be its Chief Compliance Officer in July 2014 and ceased to be an MCI employee in 2015. Mackensen has no disciplinary history.

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[1] The findings herein are made pursuant to Respondents' Offers and are not binding on any other person or entity in this or any other proceeding.

C. Facts

5. The municipalities of New Hampshire generally each have trusts to manage funds for municipal purposes such as maintaining cemeteries. Mackensen attempted to expand MCI's business by offering to provide investment advice to the trustees of municipal trust funds across New Hampshire. Beginning in late 2010, MCI began sending out letters to trustees of trust funds for most of the towns in New Hampshire. MCI sent approximately 500 such letters starting in late 2010 and continuing into 2012. Mackensen personally signed each of those letters.

6. The first page of the letters that MCI and Mackensen sent out typically claimed that the trust funds would have earned additional investment gains if it had invested with MCI. The second page of the letter typically was entitled "Comparative Performance Report" and compared the performance of the town's current trust fund portfolio with the MCI model portfolios and computed the gain that purportedly would have been achieved if the trust had invested with MCI. It was not disclosed in the letter that the described performance was both hypothetical and back-tested. MCI generated the hypothetical and back-tested performance by inputting the investments held at that time in MCI's model municipal portfolio into Morningstar® Principia® software to create a "snapshot." The snapshot calculated how MCI's then current portfolio would have performed over the reported time period had that portfolio of investments been assembled at the earlier date, and had the balance of investments been held constant throughout the time period reflected in the report. Many of the letters offered performance comparisons for periods that included dates during 2010 and early 2011, even though the MCI model portfolio was not assembled until May 2011. In addition, while some of the letters stated that the model portfolios "do not represent actual results of investing for your town or city," this sentence did not disclose that the portfolios did not actually exist.

7. MCI received about 60 calls in response to the letters that it sent out, which ultimately resulted in an additional 20 municipal clients for the firm. When Mackensen met with potential municipal clients he typically carried with him disclosures generated by the Morningstar software that he used to calculate his performance computations. However, Mackensen failed to provide those disclosures to the trustees who were his actual or potential clients, and did not discuss with them how he calculated the purported additional gain the municipality could have received by investing with MCI.

8. Mackensen was the control person at MCI during the time of the conduct. He reviewed and signed every letter that MCI sent out to municipalities soliciting business. Mackensen failed, however, to review the Commission's rule related to advertising before the letters were sent out. He admitted that he was not familiar with the Commission's rule relating to investment adviser advertising.

9. MCI had no written policies and procedures related to performance advertising. MCI's compliance manual contained no substantive information on performance advertising, except to note that it was not used, which was not correct. Mackensen was responsible for MCI's failure to create and implement procedures designed so that its performance advertisements complied with the rules governing investment adviser advertising. Portions of MCI's compliance

manual specify that Mackensen was "solely responsible for regulatory supervision," and state that Mackensen "created Written Supervisory Procedures (WSPs) for all areas of [MCI]," trained other members of the firm on those WSPs annually, and that it was his obligation to "formally review all of the firm's compliance programs and update them to reflect new rules and regulations." Mackensen knew or was reckless in not knowing that the firm had not created or implemented procedures to comply with the performance advertising rules. *See Compliance Programs of Investment Companies and Investment Advisers* ("Compliance Rule Release") Advisers Act Rel. No. 2204 (Dec. 17, 2003).

D. Violations

10. As a result of the conduct described above, MCI and Mackensen willfully violated[2] Section 206(2) of the Advisers Act, and MCI willfully violated 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) promulgated thereunder. Section 206(2) of the Advisers Act prohibits an investment adviser from engaging "in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." Section 206(4) of the Advisers Act prohibits any investment adviser from engaging in "any act, practice, or course of business which is fraudulent, deceptive, or manipulative," and authorizes the Commission to prescribe rules designed to prevent such conduct. Rule 206(4)-1(a)(5) makes it a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of Section 206(4) of the Advisers Act for a registered investment adviser to publish, circulate, or distribute any advertisement which contains any untrue statement of a material fact, or which is otherwise false or misleading. By circulating or distributing misleading performance advertisements to prospective clients, MCI and Mackensen willfully violated Section 206(2) and MCI willfully violated 206(4) of the Advisers Act and Rule 206(4)-1(a)(5) thereunder.

11. As a result of the conduct described above, MCI also willfully violated Rule 206(4)-7 promulgated under the Advisers Act, which requires that registered advisers adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act and the rules that the Commission has adopted under the Act. By failing to adopt and implement such written policies or procedures reasonably designed to prevent violation of the Advisers Act and its rules in connection with the performance advertisements it sent to prospective clients, MCI willfully violated Rule 206(4)-7.

12. By sending misleading advertisements to prospective clients, Mackensen willfully aided and abetted and caused MCI to violate Section 206(4) of the Advisers Act and Rule 206(4)-1(a)(5). Also, Mackensen willfully aided and abetted and caused MCI to violate Section 206(4) of the Advisers Act and Rule 206(4)-7 by failing to adopt and implement written policies and

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[2] A willful violation of the securities laws means merely "'that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "'also be aware that he is violating one of the Rules or Acts.'" *Id.* (quoting *Gearhart & Otis, Inc. v SEC,* 348 F.2d 798, 803 (D.C. Cir. 1965)).

procedures reasonably designed to prevent violation of the Advisers Act and the rules promulgated thereunder regarding performance presentations to prospective clients.

E. Undertakings

13. Order Notification

a. Within thirty days of the issuance of this Order, MCI undertakes to mail to each of its existing clients a copy of the Form ADV which incorporates the paragraphs contained in Section III of this Order, and which specifies that the entire Order will be posted on the homepage of MCI's website.

b. Within thirty days of the issuance of this Order, MCI also undertakes to post a copy of this Order on the homepage of MCI's website and to maintain this copy of the Order on the homepage of MCI's website for a period of six months.

14. MCI shall certify, in writing, compliance with the undertakings set forth above. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative and be supported by exhibits sufficient to demonstrate compliance. The Commission's staff may make reasonable requests for further evidence of compliance, and MCI agrees to provide such evidence. The evidence and certification material shall be submitted to Robert Baker, Assistant Director, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, Suite 2300, Boston, MA 02110.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Sections 203(e), 203(f) and 203(k) of the Advisers Act, it is hereby ORDERED that:

A. Respondents MCI and Mackensen shall cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rules 206(4)-1 and 206(4)-7 promulgated thereunder.

B. Respondent MCI is censured.

C. Respondent Mackensen is censured.

D. Respondents MCI and Mackensen shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of $100,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury in accordance with Exchange Act Section 21F(g)(3). Payment shall be made in the following installments: $25,000 on September

11, 2015, $25,000 on September 30, 2015, $25,000 on December 30, 2015, and $25,000 on March 30, 2016.

If any payment is not made by the date the payment is required by this Order, the entire outstanding balance of civil penalties, plus any additional interest accrued pursuant to 31 U.S.C. 3717, shall be due and payable immediately, without further application. MCI and Mackensen are jointly and severally liable for all payments required to be made by this paragraph. Payment must be made in one of the following ways:

(1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying MCI and Warren J. Mackensen as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Robert Baker, Assistant Director, Boston Regional Office, Securities and Exchange Commission, 33 Arch Street, Suite 2300, Boston, MA 02110.

E. Respondent MCI shall comply with the undertakings enumerated in Section III, paragraph 13 above.

By the Commission.

Brent J. Fields
Secretary