

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR AND ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE REGULATION

Before the Commissioner of the Office of Financial and Insurance Regulation

In the matter of:

Brian B. Smith

Enforcement Case No. 10-7774

Infinity Capital Group, LLC

Respondents.

ORDER TO CEASE AND DESIST

Issued and entered
this 8th day of July 2010
by Stephen R. Hilker
Chief Deputy Commissioner

The Commissioner of the Office of Financial and Insurance Regulation (“OFIR”), pursuant to his statutory authority and responsibility to administer and enforce the Michigan Uniform Securities Act (“MUSA”), 1964 PA 265, MCL 451.501 *et seq.*, as made applicable by 2008 PA 551, MCL 451.2703 and hereby orders **BRIAN B. SMITH AND INFINITY CAPITAL GROUP, LLC** (“Respondents”) to immediately **CEASE AND DESIST** from engaging in the offer and sale of securities without first obtaining a registration of said securities, and to cease and desist from engaging in securities transactions as unregistered agents and/or broker-dealers, and to cease and desist from employing an investment scheme intended to defraud the public. Respondents are also notified of an opportunity to request a hearing on this matter.

I. BACKGROUND AND FINDINGS OF FACT

1. Respondent Infinity Capital Group, LLC (“ICG”) is a Wisconsin limited liability company formed in July 2000 with its principal place of business located in Hazelhurst, WI. ICG has never been registered with OFIR as a broker-dealer or investment advisor firm or as being associated with a broker-dealer firm or investment adviser firm that is registered with OFIR. ICG’s securities are not registered with OFIR, nor were its offerings.

2. Respondent Brian B. Smith ("Smith") is a resident of the State of Wisconsin. From October 1997 through May 2000 he was employed with Firststar Investment Services, Inc. (now known as US Bancorp Investments, Inc.) ("FIS"). He was registered with OFIR from October 1997 to May 2000, as being a securities agent associated with FIS, a broker-dealer firm that is also registered with OFIR. Since May 2000, Smith has not been registered as a securities agent with any securities brokerage firm. He is the managing member of ICG.
3. In October, 2001, Smith through his company ICG, induced or otherwise caused a Michigan Investor to purchase securities in offerings that were not registered with OFIR, provided inadequate disclosures to investors, misrepresented the offering, converted money to his own use and perpetrated a fraud upon this investor who suffered substantial monetary losses.
4. More specifically, OFIR received information that the Michigan Investor is an individual who commenced an investment advisory relationship with Smith in 1998. At the time this relationship commenced Smith served as the representative to Investor's employer administered 401(k) plan.
5. In 2001, Investor sought to invest his 401(k) into safer, lower risk investments. Smith advised Investor on different secure, low-risk investments. In addition, they also discussed Investor's planned retirement in five years (October 2006), when he would turn 65.
6. As a result of those discussions, Smith recommended that Investor invest \$109,000 (his entire retirement savings) with Entrust Administration, Inc.. Investor believed that essentially what was being done with his funds was a roll-over from his existing IRA to Entrust. He also believed his investment would receive a 5% per year return or 25% in 5 years. Smith represented that this new investment was a certificate of deposit (CD).
7. To memorialize the purchase of the CD, Smith went to Investor's home, to execute the necessary paperwork. Investor signed an "Entrust - IRA Transfer or Direct Rollover" form. He also signed a blank "Entrust - Buy Direction Letter" form. Michigan Investor did not understand that Entrust is a third party trustee/custodian for self-directed IRA accounts. Investor did not knowingly authorize his funds to be transferred to a self-directed IRA. Other than the contracts that memorialized the investment, Investor was not given financial statements, risk disclosures, or certain other related disclosures that would have been material to a reasonable investor prior to investing.
8. Smith completed the blanks in the Buy Direction Letter form that authorized Entrust to purchase an unsecured note from ICG in the amount of \$108,000 with 6% interest rate and a 5 year maturity date ending on 10/30/2006. In December 2001, Smith executed and issued, on behalf of ICG, a promissory note to Entrust for the benefit of Investor. Additionally, Smith sent a letter to Entrust with Investor's forged signature that expedited the transfer of funds from the IRA account to ICG.

9. Entrust received Investor's funds and placed \$1,800 with its bank to be used for paying Entrust's net quarterly account fees. Investor was not told this fee would be assessed and deducted from his principal. He was not told that his investment money would be used to pay Smith's personal or business expenses, or that the money would be used to trade in the stock market. He was not told of the fees, commissions, or other charges that would be assessed to his investment accounts.
10. In December 2001, the balance was transferred to ICG's stock trading account. Through a series of transactions and transfers, Smith used Investor's funds for his own personal and business expenses and to trade in the stock market.
11. Sometime in July 2005, Investor received a Statement of Account from ICG indicating that the value of his account was \$133,094.55, as of June 30, 2005. This was not true.
12. In May 2006, Investor retired and subsequently demanded that Smith redeem his securities. He has yet to receive return of his principal investment.
13. Because Smith and ICG lied to Investor and misappropriated funds entrusted to them, Investor has been financially harmed.

II. CONCLUSIONS OF LAW

A. Violations of Section 301, MCL 451.701, of the Securities Act.

1. A security is defined in Section 401(z) of the Act, MCL 451.801(z), to mean any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting-trust certificate; or certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease ...or, any contractual or quasi contractual arrangement pursuant to which (1) a person furnishes capital, other than services, to an issuer; (2) a portion of that capital is subjected to the risks of the issuer's enterprise; (3) the furnishing of that capital is induced by the representations of an issuer, promoter, or their affiliates which give rise to a reasonable understanding that a valuable tangible benefit will accrue to the person furnishing the capital as a result of the operation of the enterprise; (4) the person furnishing the capital does not intend to be actively involved in the management of the enterprise in a meaningful way; and (5) a promoter or its affiliates anticipate, at the time the capital is furnished, that financial gain may be realized as a result thereof.
2. The investments offered by Smith and ICG meet the definition of a security as set forth in Section 401(z). A member of the public invested money in a promissory note.
3. Moreover, Smith was instrumental in inducing a member of the public to invest his monies in the securities ICG offered and sold.

4. OFIR staff conducted a search to locate records of any registration or exemption filings pursuant to the MUSA related to Smith and ICG. No such records were found for the individuals, business entities, or their securities.
5. As a result of the conduct described above, Smith and ICG violated Section 301 of the MUSA, which states it is unlawful for any person to offer or sell any security in this state unless the security is registered or exempt under the Act.

B. Violations of Section 101, MCL 451.501 of the Securities Act.

6. Section 101 of the MUSA provides “it is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly to:
 - employ any device, scheme, or artifice to defraud,
 - 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 are made, not misleading,
 - engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.”
7. Smith, individually and through his business, committed acts and caused events to happen to bring about the sale of securities in a way that defrauded a Michigan resident by taking investment money in exchange for unlawful securities.
8. More specifically, Smith took investment money in exchange for unregistered, nonexempt promissory notes.
9. Smith also made untrue statements of material facts or failed to state material facts necessary in order to keep the statements made, in the light of the circumstances under which they were made, from being misleading and which would have been material to a reasonable investor prior to investing.
10. More specifically, Smith, individually and through his business, in exchange for money, told Investor that his money would be secure in a certificate of deposit. Smith did not tell the Investor that he invested Investor’s money in ICG. Smith also did not provide the Investor with the risks associated with the investments, and fees and commissions assessed.
11. Based on the foregoing, Smith and ICG violated Section 101 of the MUSA where they took money in an investment scheme from a Michigan resident in exchange for unregistered, nonexempt securities without providing the risks associated with the investment, and fees and commissions assessed.

12. Further Smith and ICG violated Section 101 of the MUSA where they did not invest the money as they represented they would, did not keep the investor informed on matters concerning the investment, and falsified investment account statuses, which are all demonstrative of engaging in acts, practices, or a course of business which operated as a fraud upon a Michigan investor.

C. Violations of Section 201, MCL 451.601, of the Securities Act.

13. Section 201(c) provides that a person shall not transact business in this state as an investment adviser unless registered under the MUSA. Section 401(l) of the MUSA defines an investment adviser to mean any person who, for consideration engages in the business of advising others, either directly or indirectly or through publications or writings, as to the value of securities, or as to the advisability of investing in, purchasing, or selling securities, who, for consideration and as a part of regular business, issues or promulgates analyses or reports concerning securities, or who acts as a finder in conjunction with the offer, sale or purchase of a security. Section 401(s) defines a person to include an individual and a corporation.
14. From at least 2001 through the present, Smith and ICG, directly or indirectly, singly or in concert, engaged in the business of advising another in transactions involving securities by advising a member of the public to invest in such investments. ICG through Smith, directly or indirectly, issued reports and analyses in the form of account statements concerning securities and delivered said reports and analyses to investors via email or regular U.S. mail.
15. Smith and ICG, directly or indirectly, singly or in concert, substantially engaged in investment advising when it made valuations as to the merits of investments and/or gave advice regarding investment returns.
16. Smith and ICG, directly or indirectly, singly or in concert received direct or indirect compensation from Investor that was used to pay personal and business expenses.
17. OFIR staff conducted a search to locate records of any investment adviser registrations in the matter of Smith and ICG. No such records were found.
18. Based on the foregoing, Smith and ICG violated Section 201(c) of the MUSA, where for consideration they engaged in the business of advising others, either directly or indirectly or through publications or writings, as to the value of securities, or as to the advisability of investing in, purchasing, or selling securities for consideration and as a part of regular business, issued or promulgated analyses or reports concerning securities, or who acted as a finder in conjunction with the offer, sale or purchase of a security; and, did so without being registered as an investment advisor.

C. Violations of Section 201, MCL 451.601, of the Securities Act.

19. Section 201(a) provides a person shall not transact business in this state as a broker dealer or agent unless registered under the MUSA. Section 401(d) of the MUSA defines a broker-dealer to mean any person engaged in the business of effecting transaction in securities for the account of others or for his own account. Section 401(s) defines a person to include an individual and a corporation. Section 401(c) defines an agent to mean any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities.
20. ICG engaged in the business of effecting transactions in securities by facilitating the receipt, transfer and disbursement of investment proceeds in securities with the general public via their unregistered agent, Smith.
21. Smith played an active part in the sales process of ICG's promissory note by directly or indirectly receiving compensation for the purpose of soliciting the promissory note to the Michigan investor.
22. Smith as an unregistered agent participated directly in the negotiations between the issuer and the investor when it made valuations as to the merits of the investment.
23. OFIR staff conducted a search to locate records of any broker dealer registrations relating to ICG. No such records were found.
24. Based on the foregoing, Smith violated the Section 201(a) of the MUSA where he was engaged in the business of effecting transactions for others in securities where he played an active role in the promoting, marketing, subscribing and collection of investment proceeds with respect to the alleged investments and did so without being registered as an agent.
25. OFIR staff conducted a search to locate records of any active agent registrations for Smith. No such records were found.
26. Based on the foregoing, ICG violated Section 201(a) of the MUSA where it was engaged in the business of effecting transactions for others in securities where each played an active role in the promoting, marketing, subscribing and collection of investment proceeds with respect to the alleged investment and did so without being registered a broker-dealer.

WHEREAS, Section 408 of the MUSA, MCL 451.808, states that whenever it appears to the Administrator (Commissioner of the Office of Financial and Insurance Regulation) that any person has engaged or is about to engage in any Act or practice constituting a violation of any provision of this Act or any rule or order hereunder, it may in its discretion issue a cease and desist order or bring an action in a circuit court to enjoin the Act or practices and to enforce compliance with this Act or any rule or order hereunder; and

WHEREAS, the Administrator finds this Order necessary and appropriate in the public interest, for the protection of investors, and consistent with the purposes fairly intended by the policy and provisions of the MUSA; and

WHEREAS, the Administrator retains the right to pursue further administrative action against Respondents should the Administrator determine that such action is necessary and appropriate in the public interest, for the protection of investors, and consistent with the purposes fairly intended by the policy and provisions of the MUSA, and may include but not be limited to bringing an action in circuit court to enjoin the acts and practices of the Respondents and upon proper showing seek an order to require an accounting or disgorgement of ill-gotten gains; and

WHEREAS, based on the foregoing, OFIR Staff recommends that the Administrator find that Respondents have engaged in acts and practices that violate Sections 101, 201 and 301 of the MUSA.

III. ORDER

IT IS THEREFORE ORDERED, pursuant to Section 408 of the Act, MCL 451.808, and Section 409 of the Act, MCL 451.809, that:

1. Respondents shall immediately **CEASE AND DESIST** from violating Sections 101, 201 and 301 of the MUSA.
2. Based upon Respondents' violations of the MUSA and because the Administrator finds that it would be in the public interest, that any exemptions under Section 402(a)(1), (6), (7), (8), (9), (10), and 402(b) of the MUSA, MCL 451.802(a)(1), (6), (7), (8), (9), (10), and 451.802(b) for which Respondents might qualify, are hereby **SUMMARILY DENIED AND REVOKED** for all purposes provided under Section 408(c) of the MUSA, MCL 451.808(c), including but not limited to Respondents' right to engage in transactions otherwise exempt under Section 402(b) of the Act, MCL 451.802(b) in the future absent compliance with the registration provisions of the Act.
3. Similarly, the Administrator finds that it would be in the public interest, that any exemptions for which Respondents might qualify for pursuant to the Michigan Uniform Securities Act (2002), 2008 PA 551, MCL 451.2101, *et seq.*, effective October 1, 2009, are hereby **SUMMARILY DENIED AND REVOKED**.

Failure to comply with this **ORDER** may subject the Respondents to a criminal penalty of not more than \$25,000 for each violation, or imprisonment of not more than 10 years, or both.

IV. NOTICE OF OPPORTUNITY FOR HEARING

Section 408(b) of the MUSA, MCL 451.808, provides:

A person who has been ordered to cease and desist may file with the administrator within **15 days** after service on him or her of the order a written request for a hearing. The administrator within 15 days after the filing shall issue a notice of hearing and set a date for the hearing. If a hearing is not requested by the person or is not ordered by the administrator within 15 days, the order will stand as entered. The administrator shall hold the hearing in accordance with the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.328 of the Michigan Compiled Laws, and shall have all the powers granted thereunder. The administrator shall issue a decision sustaining, modifying, or dismissing the original order.

Should Respondents wish to request a hearing relating to the Commissioner's Order to Cease and Desist, a hearing must be requested in writing within 15 days of the issuance of this Order. The request for a hearing must be addressed to:

Dawn Kobus, Hearings Coordinator
Office of Financial and Insurance Regulation
Ottawa State Office Building, Third Floor
611 West Ottawa Street
Lansing, Michigan 48933

Please be advised that any statements made are voluntary and may be used in any proceeding that may be held. If a hearing is requested, Respondents have the right at its expense to legal representation at the hearing. A licensed attorney must represent Respondents that are corporations or limited liability companies.

The Commissioner retains the right to pursue further administrative action against the Respondents should the Commissioner determine that such action is necessary and appropriate in the public interest, for the protection of consumers, and consistent with the purposes fairly intended by the policy and provisions of the Act.

Any other communication regarding this Order should be addressed to the Office of Financial and Insurance Regulation, Attention: Elizabeth V. Bolden, P.O. Box 30220, Lansing, Michigan 48909, Telephone: 877-999-6442.

**OFFICE OF FINANCIAL AND
INSURANCE REGULATION**



Stephen R. Hilker
Chief Deputy Commissioner