



STATE OF MISSOURI  
OFFICE OF SECRETARY OF STATE

IN THE MATTER OF:	)	
	)	
ELITE INVESTMENT ADVISORS, LLC,	)	
CRD No. 118389 and BRIAN T. BINGHAM	)	
CRD No. 4530526,	)	
	)	
<i>Respondents.</i>	)	Case No. AP-16-49
	)	
Serve: Elite Investment Advisors, LLC	)	
Brian T. Bingham	)	
c/o Donald Mehan	)	
Moline & Mehan, LLC	)	
815 Forsyth Blvd.,	)	
St. Louis, MO 63105	)	
And at: <a href="mailto:dmehan@mehanlaw.com">dmehan@mehanlaw.com</a>	)	

**ORDER TO CEASE AND DESIST AND ORDER TO SHOW CAUSE WHY  
RESTITUTION, CIVIL PENALTIES, COSTS, AND OTHER  
ADMINISTRATIVE RELIEF SHOULD NOT BE IMPOSED**

On December 20, 2016, the Enforcement Section of the Missouri Securities Division of the Office of Secretary of State (“Enforcement Section”), through Enforcement Counsel Christina A. Peters, submitted a Petition for Order to Cease and Desist and Order to Show Cause why Civil Penalties, a Censure, Costs and Bars/Conditions Should not be Imposed (“Petition”). After reviewing the Petition, the Acting Commissioner issues the following order:

**I. ALLEGATIONS OF FACT**

The Petition alleges the following facts:

**A. Introduction**

The Petition alleges that, on or about March 25, 2016, the Enforcement Section received notice of a complaint from a Missouri investor stating that in or around December 2014, the Missouri investor and spouse (“MR1 and MR2”) invested an aggregate of \$758,095.24 with Brian T. Bingham (“Bingham”) and Elite Investment Advisors, LLC (“EIA”). The complaint

further claimed that while the accounts were under the discretionary management of Bingham, the account values declined by \$62,560.88 within five months' time. Moreover, MR1 and MR2 were paying Bingham over 1.1% per quarter (more than 4.4% per year) for Bingham's investment advisory services, which only compounded the losses for MR1 and MR2. In April 2015, MR1 and MR2 terminated their relationship with Bingham but have never recovered from the significant losses incurred during Bingham's management of their investments.

## **B. Respondents**

1. EIA is a Missouri-registered investment adviser with a registered address of 362-D Autumn Creek Drive, Manchester, Missouri 63088. EIA is registered in Missouri through the Central Registrations Depository ("CRD") with number 118389.
2. Bingham has been a Missouri-registered investment adviser representative with EIA since July 2001 and maintains an address at 362-D Autumn Creek Drive, Manchester, Missouri 63088. Bingham is registered in Missouri through the CRD with number 4530526.

## **C. Missouri Residents 1 and 2**

3. MR1, a 66-year old Ballwin, Missouri, resident, became acquainted with Bingham in or around October 2014 after attending an investment course entitled "Preserving Capital and Making It Grow," which was taught by Bingham at St. Louis Community College in St. Louis, Missouri. The investment course focused on the *Investor's Business Daily* stock selection model for capital conservation and growth, founded by Bill O'Neill.
4. In December 2014, MR1 transferred \$609,892.69 to an IRA that was to be managed by EIA. MR1's suitability form stated that the investment objectives were growth and income, with a conservative risk tolerance. MR1's anticipated withdrawals were set to begin on or around February 1, 2017.
5. MR2, MR1's 62-year old spouse, transferred \$148,202.55 to an IRA that was also to be managed by EIA. MR2's stated investment objectives were growth and income, also with a conservative risk tolerance. At the time of transfer, MR2 had been retired since August 2013. MR1 and MR2's combined investment totaled \$758,095.24.
6. Bingham's Investment Advisory Agreement indicates that "[f]ees charged by Elite are higher than fees that may be obtained by the client elsewhere." The annual rate is charged on a quarterly basis, depending on account size:
  - a. \$499,999 and below 1.180% per quarter (4.72% annually)
  - b. \$500,000-\$999,999 1.160% per quarter (4.64% annually)
  - c. \$1,000,000 and above 1.140% per quarter (4.56% annually)

7. By comparison to other Missouri-registered investment advisory firms, Bingham's fees exceed the prevailing market rate for investment advisory fees. Based upon a random selection of five Missouri registered investment advisory firms, the highest fees charged did not surpass 1.6% annually. Moreover, the top tier for said fees is inclusive of high net worth client accounts.
8. According to the North American Securities Administrators Association ("NASAA") Model Rule 102(a)(4)-1(10) and the Investment Adviser Exam Module Instructions, an annual fee of 2% or greater shall prompt inquiry as to how an adviser justifies a fee. The following factors should be considered in justifying fees: "(1) the customary fee charged by other advisers for similar services in the geographic area; (2) whether the client could obtain the same services directly without the adviser's assistance and cost; and (3) whether the adviser has a reasonable belief that its services would generate gains in excess of the fee charged."
9. MR1 and MR2 were made aware of Bingham's fee schedule when their accounts were established with EIA and the investment advisory agreements were executed.
10. EIA's Investment Advisory Agreement also required Bingham to have discretionary management of MR1 and MR2's IRA accounts.
11. Not long after MR1 and MR2 transferred funds to EIA, they began to incur significant losses in their IRA accounts. Within five months of the account inceptions, Bingham lost a total of \$62,560.88 in both accounts. Bingham would only invest in six to seven different stocks in MR1 and MR2's portfolios and would trade those stocks excessively, often times selling stock at a loss and subsequently purchasing that same stock at a premium within the same trading day.
12. Part of MR1 and MR2's losses stemmed from Bingham's management fees, which were not waived in spite of the sharp decline in account values. Of the \$62,560.88 lost in the investments, \$13,309.78 was paid to Bingham in the form of management fees.
13. According to information received during the course of the investigation, accounts for MR1 and MR2 were not performing in tandem with the then-current market conditions. In fact, a performance report that tracked the S&P 500 during the period December 31, 2014, through August 2, 2015 ("Relevant Period"), indicated that said index had a stated annual return of 8.97% while Bingham's trading methodologies resulted in an annualized return of -6.83% for MR1. Moreover, the Year-to-Date ("YTD") Return for the S&P 500 was 2.18% while MR1, under the management of Bingham, realized a YTD Return of 0.94%. The Last Quarter Return for the S&P 500 during the Relevant Period was -.23%. However, MR1's account experienced a -3.59% Last Quarter Return under the management and discretion of Bingham. Similarly, the same report evidenced that MR2 realized an annual return of 7.90%. MR2's account experienced a YTD Return of 0.93% and a Last Quarter Return of -3.91%. Had Bingham invested MR1 and MR2 in the S&P 500, or a similar investment vehicle, MR1 and MR2 would have experienced significant gains in their portfolios rather than considerable losses.

14. Prior to making the investment, Bingham failed to disclose to MR, among other things:
  - a. that while his investment course may have indicated a conservative approach to investing, Bingham's trading methodologies consisted of market timing and charting techniques based on buying and selling equities in rapid succession, which were inconsistent with a conservative approach;
  - b. that client funds not invested in equities, and are either in cash or money market funds, would still be charged the assets under management fee - averaging 1.1% per quarter - while generating insignificant income to the value of the portfolio.
  - c. that EIA and Bingham use the same investment strategy with no adjustments to account for suitability, including time horizon, risk tolerance, and investment objectives;
  - d. that losses would be calculated only in percentages instead of dollar value to the investors; and
  - e. that Bingham does not make all financial disclosures for EIA according to generally accepted accounting principles on his financial statements.

**D. On the Record Statement of Bingham**

15. On June 22, 2016, the Enforcement Section conducted an on-the-record ("OTR") statement of Bingham. On that day Bingham testified, among other things, that:
  - a. Bingham attempts to craft his trading methodologies around Bill O'Neill, founder of *Investor's Business Daily*;
  - b. Bingham does not have any active investment accounts of his own;
  - c. Bingham was aware that his management fees only compounded losses for his clients;
  - d. while his investment course is entitled, "Preserving Capital and Making It Grow," Bingham's management approach is to invest strictly in stocks;
  - e. Bingham has occasionally turned away potential clients, as he finds them to be a distraction that he doesn't need;
  - f. Bingham only manages investment accounts on a discretionary basis;
  - g. Bingham does not consider himself a financial planner so he does not have a formal system in place to determine if he is looking at a client's entire financial picture;

- h. Bingham is aware of his fiduciary duty to his clients;
- i. Bingham takes mental notes when speaking with clients, rather than written documentation;
- j. Bingham did not ask MR1 and MR2 to change their suitability forms to reflect conversations that addressed how much downside risk Bingham believed MR1 and MR2 were willing to tolerate;
- k. Bingham uses the same investment approach for all investors, regardless of a client's age, investment history, risk tolerance, and station in life;
- l. if a client wants Bingham to manage money, that client must give Bingham complete control of all buy and sell decisions;
- m. Bingham only invests in stocks and will rarely, if ever, offer products from any other asset class;
- n. Bingham will not honor client requests to buy or sell a certain stock, unless it meets Bingham's criteria;
- o. Bingham's strategies all center around market timing;
- p. Bingham considers excessive trading as a way to minimize downside risk;
- q. Bingham considers speculative investing as synonymous with conservative investing;
- r. Bingham only communicates gains and losses to his clients in terms of percentages rather than dollar amounts;
- s. Bingham charges his full fees to clients, even if those clients' portfolios consist entirely of cash;
- t. Bingham feels that his fee structure is comparable to mutual fund fees;
- u. Bingham does not know of anyone in Missouri who charges similar fees to their clients;
- v. Bingham manages an operation, and charges fees similar to management of a hedge fund;
- w. Bingham does not have any performance-based fees;
- x. Bingham's accountants are not independent of EIA;

- y. Bingham’s accountants, at the direction of Bingham, omitted substantially all financial disclosures pertaining to EIA that would normally be prepared in accordance with generally accepted accounting principles;
- z. by including such disclosures in the financial report, they may impact clients’ or prospective clients’ conclusions about the financial health of EIA; and
- aa. Bingham has not filed income tax returns in the last three years.

#### **E. Examinations Section Exam**

- 16. On January 29, 2016 the Examinations Section of the Missouri Securities Division (“Exams Section”) conducted an examination of EIA, in which financial statements were requested for review.
- 17. The Accountants Compilation Report from Favazza & Associates, LLC (“F&A”), Certified Public Accountants and Business Consultants dated January 21, 2016, includes the following statements:
  - a. “We have not audited or reviewed the accompanying financial statement and, accordingly, do not express an opinion or provide any assurance about whether the financial statements are made in accordance with accounting principles generally accepted in the United States of America.
  - b. “Management has elected to omit substantially all of the disclosures ordinarily included in financial statements prepared in accordance with the accounting principles generally accepted in the United States of America. If the omitted disclosures were included in the financial statement, they might influence the user’s conclusions about the Company’s Balance Sheet and Statements of Profit & Loss and Cash Flows.”
  - c. “We are not independent with respect to Elite Investment Advisors, LLC.”
- 18. The Exams Section sent a deficiency letter on July 26, 2016, requesting revised financial statements that are certified by an independent certified accountant in accordance with generally accepted accounting principles.
- 19. On August 29<sup>th</sup>, Bingham responded to the deficiency letter, but has not provided the requested accounting statements as of the date of the Petition.

#### **F. Additional Findings**

- 20. Bingham’s form ADV part 2 states:
  - a. “We are a trading oriented firm, and do not believe in large diversified portfolios.”

- b. “We use various criteria to generate buy and sell decisions, and at some times the accounts may be completely in cash in an effort to avoid downside risk and at other times may be fully invested.”
- c. EIA and Bingham tailor their services only to the extent that clients may choose either a margin account, IRA or other retirement or type of cash account.
- d. Bingham offers Investment Education Services including the “Preserving Capital and Make it Grow Series.”
- e. “Management fees charged by Elite Investment Advisors, LLC are higher than that typically charged by investment advisory firms. Elite believes that the non-traditional, labor-intensive active management style employed in its account management adds more value tha[n] traditional account management services. Of course, no guarantee of any kind may be made regarding the outcome of Elite’s trading and investing efforts.”
- f. Bingham and EIA use the following investment strategies:
  - i. Fundamental Analysis — “gathering and processing data on individual companies which are believed to be indicators of potential growth in stock price.”
  - ii. Charting Analysis — gathering and processing of price and volume information for a particular security, using mathematical equations to analyze the data and applying it to graphic charts to predict future price movements based on patterns and trends.
  - iii. Technical Analysis — studying past price patterns and trends in the financial markets to predict the direction of both the overall market and specific stocks. **“The risk of market timing based on technical analysis is that charts may not accurately predict future price movements...”**  
**“[C]hanges in market prices of securities may follow random patterns and may not be predictable with any reliable degree of accuracy.”**  
 [emphasis added]
- g. “We may use short-term trading (in general, selling securities within 30 days of purchasing the same securities, at times even exiting a position the day it is purchased if market conditions warrant) as an investment strategy when managing your account(s) **when we determine that it is suitable given your stated investment objectives and risk tolerance.** This may include buying and selling securities frequently in an effort to capture significant market gains and avoid significant losses during a volatile market. However, **frequent trading can negatively affect investment performance,** particularly through increased brokerage and other transactional costs and taxes.” [emphasis added]

- h. “[W]e believe we are able to achieve better results than a simple buy-and-hold-approach. We believe that while less-time consuming, a buy and hold approach is far riskier for most to employ.”
- i. “In general, the longer your time horizon, the better chances for success.”

## **II. COMMISSIONER’S DETERMINATIONS AND FINDINGS**

### **Violation of Failing to File Financial Reports as Required by Section 409.4-411(b), 15 CSR 30-51.040(1) and 15 CSR 30-50.010(1)(F) as to Respondent EIA**

- 21. **THE COMMISSIONER DETERMINES** that Respondent EIA failed to file financial reports with the Division in violation of Section 409.4-411(b), RSMo. (Cum. Supp. 2013),<sup>1</sup> 15 CSR 30-51.040(1) and 15 CSR 30-50.010(1)(F).
- 22. EIA was the subject of an exam on January 29, 2016, and the Exams Section discovered EIA’s financial reports were not prepared in compliance with Missouri’s regulations.
- 23. The compilation report of F&A, dated January 21, 2016, stated that “[m]anagement has elected to omit substantially all of the disclosures ordinarily included in financial statements prepared in accordance with the accounting principles generally accepted in the United States of America.” The scope of F&A’s services was limited in such a way that F&A did not audit or review any financial statements and did not express an opinion or provide assurance whether the statements are in accordance with generally accepted accounting principles. F&A also did not assert to be independent of EIA.
- 24. Despite the limitation of F&A’s engagement, EIA submitted these financial reports to the Securities Division.
- 25. Despite the Exams Section’s request for financial statements that are certified by an independent certified accountant in accordance with generally accepted accounting principles, EIA has not submitted to the Division certified accounting statements as of the date of the Petition.
- 26. Section 409.4-411(b) imposes a duty on EIA to file financial reports as required by rules adopted or order issued under the Missouri Securities Act.
- 27. 15 CSR 30-50.010(1)(F), and 30-51.040 further explain the types of financial reports EIA was required to file under Section 409.4-411(b). These provisions required that EIA keep financial statements that are certified by an independent certified public accountant in accordance with generally accepted accounting principles.

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<sup>1</sup> Unless otherwise specified, all statutory references are to the 2013 cumulative supplement to the Revised Statutes of Missouri.

28. EIA's failure to file financial statements, certified by an independent certified public account in accordance with generally accepted accounting principles in violation of 409.4-411(b) constitutes an illegal act, practice, or course of business and such conduct is, therefore, subject to the Commissioner's authority under Section 409.6-604.

**Several Violations of Engaging in Dishonest and Unethical Practices in Violation of Section 409.4-412(d)(13); 15 CSR 30-51.172(1)(A), (J), (N), and (U) as to EIA and Bingham**

29. **THE COMMISSIONER FURTHER DETERMINES** that Respondents Bingham and EIA engaged in dishonest and unethical practices in the securities business within the previous ten years, in violation of 409.4-412(d)(13) by, among other things, the following:
- a. making unsuitable recommendations to MR1 and MR2 in light of their conservative investment objectives, risk tolerance, and time horizon in violation of 15 CSR 30-172(1)(A);
  - b. making misrepresentations to MR1 and MR2 of the advisory services being offered or fees to be charged for such services, and/or omitting to state material facts necessary to make statements made regarding qualifications, services, or fees in light of the circumstances under which they are made, not misleading in violation of 15 CSR 30-172(1)(J);
  - c. charging assets under management fees averaging 1.1% per quarter although Bingham does not know of any investment advisers in Missouri charging similar fees for like services in violation of 15 CSR 30-172(1)(N); and
  - d. breaching their fiduciary duties when, among other things, Bingham:
    - i. invested MR1 and MR2's assets in a speculative manner while aware that MR1 and MR2 have conservative risk tolerances;
    - ii. charged excessive management fees to MR1 and MR2 for assets sitting in a cash position; and
    - iii. invested all client assets in the same or similar investments regardless of a particular client's investment profile or risk tolerance; and
  - e. The above breaches in EIA and Bingham's fiduciary responsibilities constitute violations by EIA and Bingham of fair, practical or ethical standards established by state or federal laws in violation of 15 CSR 30-172(1)(U).
30. Respondent Bingham was registered as an investment adviser representative in the State of Missouri at the time these activities occurred. Respondent EIA was registered as an investment adviser in the State of Missouri at the time these activities occurred.

31. Respondents Bingham and EIA committed several violations of Section 409.4-412(d)(13) by making unsuitable recommendations; omitting material facts regarding services or fees; charging unreasonable and inequitable advisory fees; and engaging in conduct that violates fair, practical or ethical standards established by state or federal laws.
32. Respondents' conduct in violation of Section 409.4-412(d)(13) constitutes grounds to discipline Respondents and such conduct is, therefore, subject to the Commissioner's authority under Section 409.4-412.

**Multiple Violations of Engaging in Prohibited Conduct in Providing Investment Advice  
in Violation of Section 409.5-502 as to EIA and Bingham**

33. **THE COMMISSIONER FURTHER DETERMINES** in connection with providing investment advice, Respondents EIA and Bingham employed a device, scheme or artifice to defraud another person in connection with providing investment advice for compensation, or engaged in an act, practice, or course of business that operates or would operate as fraud or deceit upon another person in violation of 409.5-502(a) by, among other things:
  - a. targeting conservative investors to become clients, including MR1 and MR2, through the "Preserving Capital and Making It Grow" course, while using techniques to invest those client assets that do not provide any degree of reliability or preservation;
  - b. using market timing and excessive trading as a way to minimize downside risk;
  - c. not tailoring services to investors' risk tolerance, time horizon or investment objectives; and
  - d. compounding losses by charging fees in excess of 1.1% per quarter even when investors are mostly or solely invested in cash.
34. At the time Respondents engaged in this conduct, both MR1 and MR2 were over 60-years old and "elderly persons" as that term is defined under Section 409.6-604(d)(3)(B).
35. Respondents' conduct in violation of 409.5-502 constitutes engaging in an illegal act, practice, or course of business, and such conduct is, therefore, subject to the Commissioner's authority under Section 409.6-604.
36. This order is in the public interest and is consistent with the purposes of the Missouri Securities Act of 2003. See Section 409.6-605(b).

**IV. ORDER**

**NOW, THEREFORE,** it is hereby ordered that Respondents, their agents, employees and servants, and all other persons participating in or about to participate in the above-described

violations with knowledge of this order be prohibited from violating or materially aiding in any violation of:

- A. Section 409.4-411(b) by failing to file financial reports as required by Section 409.4-411(b), 15 CSR 30-51.040(1) and 15 CSR 30-50.010(1)(F); and
- B. Section 409.5-502(a) by employing a device, scheme or artifice to defraud another person in connection with providing investment advice for compensation, or engaging in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

#### **V. STATEMENT**

Pursuant to Section 409.4-412, the Commissioner hereby states that he will determine whether to grant the Enforcement Section's requests for:

- A. \$50,000 civil penalty against each Respondent for several violations of Section 409.4-412(d)(13);
- B. an order censuring Respondents for several violations of Section 409.4-412(d)(13); and
- C. an order conditioning or limiting the registrations of Respondents for several violations of Section 409.4-412(d)(13).

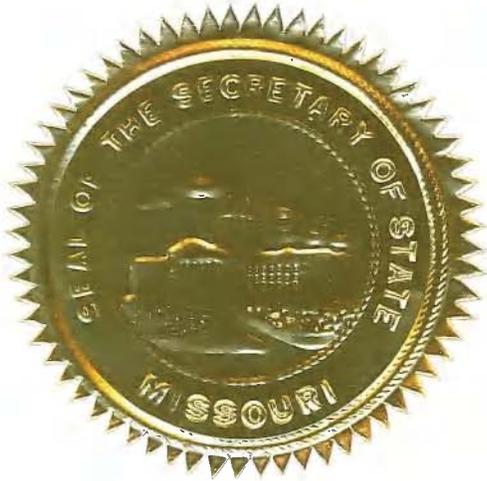
Pursuant to Section 409.6-604, the Commissioner hereby states that he will determine whether to grant the Enforcement Section's requests for:

- A. \$1,000 civil penalty against Respondent EIA for violating Section 409.4-411;
- B. \$20,000 civil penalty against each Respondent for more than one violation of Section 409.5-502 when those violations were committed against two elderly persons;
- C. an order against Respondents to pay restitution for any loss, including the amount of any actual damages that may have been caused by their conduct, and interest at the rate of 8% per year from the date of the violation causing the loss or disgorge any profits arising from the violation of Section 409.5-502; and
- D. an order against Respondents to pay the costs of the investigation in this proceeding, after a review of evidence submitted by the Enforcement Section.

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**SO ORDERED:**

WITNESS MY HAND AND OFFICIAL SEAL OF MY OFFICE AT JEFFERSON CITY,  
MISSOURI THIS TWENTY-SECOND DAY OF DECEMBER, 2016.



JASON KANDER  
SECRETARY OF STATE

A handwritten signature in blue ink, appearing to read "José S. Caldera", written over a horizontal line.

JOSE S. CALDERA  
ACTING COMMISSIONER OF SECURITIES



STATE OF MISSOURI  
OFFICE OF SECRETARY OF STATE

IN THE MATTER OF:	)	
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ELITE INVESTMENT ADVISORS, LLC,	)	
CRD No. 118389; and BRIAN T. BINGHAM	)	
CRD No. 4530526,	)	
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<i>Respondents.</i>	)	Case No. AP-16-49
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Serve: Elite Investment Advisors, LLC	)	
Brian T. Bingham	)	
c/o Donald Mehan	)	
Moline & Mehan, LLC	)	
815 Forsyth Blvd.,	)	
St. Louis, MO 63105	)	
And at: <a href="mailto:dmehan@mehanlaw.com">dmehan@mehanlaw.com</a>	)	

**NOTICE**

**TO: Respondents and any unnamed representatives aggrieved by this Order:**

You may request a hearing in this matter within thirty (30) days of the receipt of this Order pursuant to Sections 409.6-604(b), 409.4-412(f), RSMo. (Cum. Supp. 2013), and 15 CSR 30-55.020.

Within fifteen (15) days after receipt of a request in a record from a person or persons subject to this order, the Commissioner will schedule this matter for a hearing.

A request for a hearing must be mailed or delivered, in writing, to:

**José S. Caldera, Acting Commissioner of Securities**  
**Office of the Secretary of State, Missouri**  
**600 West Main Street, Room 229**  
**Jefferson City, Missouri, 65102**

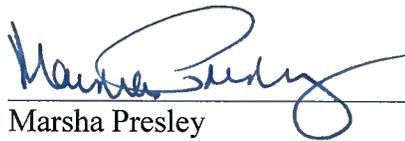
CERTIFICATE OF SERVICE

I hereby certify that on this 23<sup>rd</sup> day of December, 2016, a copy of the foregoing Order to Cease and Desist and Order to Show Cause why Restitution, Civil Penalties, Costs, and Other Administrative Relief Should not be Imposed in the above styled case was **mailed by certified U.S. mail and email to:**

Elite Investment Advisors, LLC  
Brian T. Bingham  
c/o Donald Mehan  
Moline & Mehan, LLC  
815 Forsyth Blvd.  
St. Louis, MO 63105  
[dmehan@mehanlaw.com](mailto:dmehan@mehanlaw.com)

**and hand delivered to:**

Christina A. Peters, Enforcement Counsel  
Securities Division  
Missouri Secretary of State's Office  
600 West Main Street, Room 229  
Jefferson City, Missouri 65101

  
\_\_\_\_\_  
Marsha Presley  
Securities Office Manager