

State of Missouri
Office of Secretary of State

Case No. AP-06-42

IN THE MATTER OF:

AFG CAPITAL MANAGEMENT, INC.;
JAMES A FREESE, CRD #2635569; and
their representatives and agents,

Respondent.

Serve all at:
11020 King Street, Ste. 330
Overland Park, Kansas 66210-1201

**ORDER TO CEASE AND DESIST AND ORDER TO SHOW CAUSE WHY CIVIL
PENALTIES AND COSTS SHOULD NOT BE IMPOSED**

On the 13th day of September, 2006, the Enforcement Section of the Missouri Securities Division (the "Division"), through Nathan Soendker, Chief Registration Counsel, submitted a Petition for Order to Cease and Desist and Order to Show Cause Why Civil Penalties and Costs Should Not Be Imposed. After reviewing the petition, the Commissioner issues the following findings of fact, conclusions of law and order:

I. FINDINGS OF FACT

Respondents AFG and Freese

1. AFG Capital Management, Inc. ("AFG") was a Kansas registered investment adviser and had a business address of 11020 King Street, Ste 330, Overland Park, Kansas 66210-1201. At all times relevant to this order, AFG was not registered as an investment adviser in Missouri.
2. James A. Freese ("Freese"), CRD #2635569, was the President of AFG and had a business address of 11020 King Street, Ste 330, Overland Park, Kansas 66210-1201.
3. On or about February 6, 2004, a Missouri Resident ("MR") was solicited in Missouri by an AFG agent to rollover MR's IRA to AFG. During this solicitation the AFG agent told MR that the IRA rollover would be managed by Charles Schwab ("Schwab"). MR received periodic account statements from AFG that indicated "Charles Schwab" on the statements.
4. For purposes of this Order, "Respondents" refers to AFG, Freese, and their representatives and agents.
5. On or about September 1, 2006, MR visited a Schwab agent and subsequently discovered that Schwab did not have an account established in MR's name or referencing MR's Social Security number. At no time during the relevant period were MR's IRA funds managed by Schwab. MR immediately emailed AFG and asked AFG to prepare a check for MR in the full amount of MR's account balance.
6. During an interview with the Kansas Securities Division, Freese told investigators that he pooled the assets of approximately 20 clients into a pooled account. MR's funds were in this pooled account and according to Freese the funds in the pooled account totaled approximately \$8,000,000.

Additional Findings of Fact

7. A check of the records maintained by the Missouri Commissioner of Securities confirmed the Respondents were not registered to offer and sell securities in the State of Missouri. In addition, the agent who solicited MR was not registered as an investment adviser representative.
8. A check of the records maintained by the Missouri Commissioner of Securities confirmed no registration, granted exemption or notice filing indicating status as a "federal covered security" for any of the securities offered by the Respondents in the State of Missouri.
9. In connection with the offer or sale of securities to MR, Respondents omitted to state the following:
 - a. That Respondents were not registered to sell securities in the State of Missouri;
 - b. That AFG was not registered in the State of Missouri as investment adviser;

- c. That the AFG agent who solicited the Missouri resident was not registered in the State of Missouri;
 - d. The actual use of MR's investment proceeds; and
 - e. Any risks associated with the investment.
10. In connection with the offer and sale of securities to Missouri investors, Respondents made untrue statement of material fact, including, but not limited to, that MR's money would be managed by Schwab.
11. This Order is in the public interest.

II. STATUTORY PROVISIONS

12. Section 409.1-102(26), RSMo. (Cum. Supp. 2005), defines "sale" to include, "every contract of sale, contract to sell, or disposition of, a security or interest in a security for value." That same section defines "offer to sell" as "every attempt or offer to dispose of, or solicitation of an offer to purchase, a security or interest in a security for value."
13. Section 409.1-102(28), RSMo. (Cum. Supp. 2005), includes "notes; stock . . . evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement . . . [and an] investment contract" within the definition of a security.
14. Section 409.3-301, RSMo. (Cum. Supp. 2005), reads as follows:
- "It is unlawful for a person to offer or sell a security in this state unless:
- (1) The security is a federal covered security;
 - (2) The security, transaction, or offer is exempted from registration under sections 409.2-201 to 409.2-203; or
 - (3) The security is registered under this act."
15. Section 409.4-403(a), RSMo. (Cum. Supp. 2005), reads as follows:
- "It is unlawful for a person to transact business in this state as an investment adviser unless the person is registered under this act as an investment adviser or is exempt from registration as an investment adviser under subsection (b)."
16. Section 409.4-403(d), RSMo. (Cum. Supp. 2005), reads as follows:
- "It is unlawful for any investment adviser to employ or associate with an individual required to be registered as an investment adviser representative who transacts business in this state on behalf of the investment adviser unless the individual is registered under §409.4-404(a) or exempt from registration under §409.4-404(b)."
17. Section 409.5-501, RSMo. (Cum. Supp. 2005), reads as follows:
- "It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:
- (1) To employ a device, scheme, or artifice to defraud;
 - (2) To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading; or
 - (3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person."
18. Section 409.6-604(a), RSMo. (Cum. Supp. 2005), reads as follows:
- "If the commissioner determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act, the commissioner may:
- (1) Issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with this act"
19. Section 409.6-604(b), RSMo. (Cum. Supp. 2005), reads as follows:
- "An order under subsection (a) is effective on the date of issuance [I]f a person subject to the order does not request a hearing and none is ordered by the commissioner within thirty days after the date of service of the order, the order becomes final as to that person by operation of law."

20. Section 409.6-604(d), RSMo. (Cum. Supp. 2005), reads as follows:

“In a final order . . . the commissioner may impose a civil penalty up to one thousand dollars for a single violation or up to ten thousand dollars for more than one violation.”

21. Section 409.6-604(e), RSMo. (Cum. Supp. 2005), reads as follows:

“In a final order, the commissioner may charge the actual cost of an investigation or proceeding for a violation of this act . . . [T]hese funds may be paid into the investor education and protection fund.”

22. Section 409.6-604(g), RSMo. (Cum. Supp. 2005), reads as follows:

“If a person does not comply with an order under this section, the commissioner may petition a court of competent jurisdiction to enforce the order . . . [i]f the court finds, after service and opportunity for hearing, that the person was not in compliance with the order, the court may adjudge the person in civil contempt of the order. The court may impose a further civil penalty against the person for contempt in an amount not less than five thousand dollars but not greater than one hundred thousand dollars for each violation and may grant any other relief the court determines is just and proper in the circumstance.”

23. The Missouri Commissioner of Securities is empowered to issue such orders as he may deem just pursuant to Section 409.6-604(a), RSMo. (Cum. Supp. 2005).

III. CONCLUSIONS OF LAW

Offering or Selling Nonexempt, Unregistered Securities

24. The Commissioner incorporates by reference paragraphs 1 through 23 as though fully set forth herein.

25. Respondents' pooled account investments as described in paragraph 6, above, qualify as “securities” under Section 409.1-102(28), RSMo. (Cum. Supp. 2005).

26. At all times relevant to this Order, the records maintained by the Missouri Commissioner of Securities contained no registration, granted exemption or notice filing indicating status as a “federal covered security” for any of the pooled-account securities issued, offered or sold by Respondents in Missouri.

27. Respondents violated Section 409.3-301, RSMo. (Cum. Supp. 2005), when they offered or sold securities in Missouri without those securities being: (1) federal-covered securities; (2) exempt from registration under Sections 409.2-201 or 409.2-202, RSMo. (Cum. Supp. 2005); or (3) registered under the Missouri Securities Act of 2003.

Multiple Violations of Transacting Business as an Unregistered Investment Adviser

28. The Commissioner incorporates by reference paragraphs 1 through 23 as though fully set forth herein.

29. Respondent AFG transacted business in Missouri at a time when it were not registered as an investment adviser, as described in paragraphs 1, 3 and 6, above.

30. Respondent AFG repeatedly violated or materially aiding in the violation of Section 409.4-403(a), RSMo. (Cum. Supp. 2005), by transacting business as an investment adviser without an effective registration.

Multiple Violations of Employing an Unregistered Investment Adviser Representative

31. The Commissioner incorporates by reference paragraphs 1 through 23 as though fully set forth herein.

32. Respondent AFG employed or associated with an individual required to be registered as an investment adviser representative in this State when the individual was not so registered, as described in paragraphs 3 and 7, above.

33. Respondent AFG repeatedly violated Section 409.4-403(d), RSMo. (Cum. Supp. 2005), when it employed or associated with an individual required to be registered as an investment adviser representative who transacted business in this State on behalf of the investment adviser when the individual was not registered under Section 409.4-404(a), RSMo. (Cum. Supp. 2005), or exempt from registration under Section 409.4-404(b), RSMo. (Cum. Supp. 2005).

Multiple Violations of Omitting to State Material Facts in Connection with the Sale of a Security

33. The Commissioner incorporates by reference paragraphs 1 through 23 as though fully set forth herein.

34. Respondents repeatedly violated Section 409.5-501(2), RSMo. (Cum. Supp. 2005), when, in connection with the offer and sale of securities, they omitted to state to at least one Missouri resident the following material facts necessary in order to make certain statements that were made, in light of the circumstances under which they were made, not misleading, including, but not

limited to:

- a. That the securities offered and sold by Respondents were not registered in the State of Missouri;
- b. That Respondents were not registered to sell securities in Missouri;
- c. That AFG was not registered as an investment adviser in the state of Missouri;
- d. That the AFG agent that solicited the Missouri resident was not registered in the state of Missouri;
- e. The actual use of the investment proceeds; and
- f. Any risks associated with the investment.

Making an Untrue Statement of a Material Fact in Connection with the Sale of a Security

35. The Commissioner incorporates by reference paragraphs 1 through 23 as though fully set forth herein.
36. Respondents violated Section 409.5-501(2), RSMo. (Cum. Supp. 2005), when, in connection with the offer and sale of securities to Missouri residents, they made untrue statements of material fact, including, but not limited to, the statement that MR's accounts would be managed by Schwab when in fact this was not true.

ORDER

NOW, THEREFORE, it is hereby ordered that Respondents, and all other persons participating in or about to participate in the above-described violations with knowledge of this order, are prohibited from:

- A. offering or selling securities, including pooled account investment contracts or any other securities as defined by Section 409.1-102(28), RSMo. (Cum. Supp. 2005), in the State of Missouri unless those securities are registered with the Securities Division of the Office of the Secretary of State in accordance with the provisions of Section 409.3-304, RSMo. (Cum. Supp. 2005); and
- B. violating or materially aiding in any violation of Section 409.5-501, RSMo (Cum. Supp. 2005), by, in connection with the offer or sale of securities, including stocks or any other securities as defined by Section 400.9-102(28), RSMo. (Cum. Supp. 2005), making an untrue statement of a material fact or omitting to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading.
- C. violating or materially aiding in any violation of Section 409.4-403(a), RSMo. (Cum. Supp. 2005), by transacting business in this state as an investment adviser unless registered under the Missouri Securities Act or is exempt from registration as an investment adviser.
- D. violating or materially aiding in any violation of Section 409.4-403(d), RSMo. (Cum. Supp. 2005), by employing or associating with an individual required to be registered as an investment adviser representative who transacts business in this state on behalf of the investment adviser when the individual is not registered under Section 409.4-404(a), RSMo. (Cum. Supp. 2005), or exempt from registration under Section 409.4-404(b), RSMo. (Cum. Supp. 2005).

IT IS FURTHER ORDERED that, pursuant to Section 409.6-604(d), RSMo. (Cum. Supp. 2005), the Commissioner will determine whether to grant the Enforcement Division's petition for an imposition of a civil penalty of up to one thousand dollars (\$1,000) against each Respondent for violation of Section 409.3-301, RSMo. (Cum. Supp. 2005), in a final order, unless Respondents request a hearing and show cause why the penalty should not be imposed.

IT IS FURTHER ORDERED that, pursuant to Section 409.6-604(d), RSMo. (Cum. Supp. 2005), the Commissioner will determine whether to grant the Enforcement Division's petition for an imposition of a civil penalty of up to ten thousand dollars (\$10,000) against Respondent AFG for multiple violations of Section 409.4-403(a), RSMo. (Cum. Supp. 2005), in a final order, unless Respondent requests a hearing and shows cause why the penalty should not be imposed.

IT IS FURTHER ORDERED that, pursuant to Section 409.6-604(d), RSMo. (Cum. Supp. 2005), the Commissioner will determine whether to grant the Enforcement Division's petition for an imposition of a civil penalty of up to ten thousand dollars (\$10,000) against Respondent AFG for multiple violations of Section 409.4-403(d), RSMo. (Cum. Supp. 2005), in a final order, unless Respondent requests a hearing and shows cause why the penalty should not be imposed.

IT IS FURTHER ORDERED that, pursuant to Section 409.6-604(d), RSMo. (Cum. Supp. 2005), the Commissioner will

determine whether to grant the Enforcement Division's petition for an imposition of a civil penalty of up to ten thousand dollars (\$10,000) against each Respondent for multiple violations of Section 409.5-501(2), RSMo. (Cum. Supp. 2005), in a final order, unless Respondents request a hearing and show cause why the penalty should not be imposed.

IT IS FURTHER ORDERED that as the Enforcement Section has petitioned for an award for costs of the investigation against Respondents in this proceeding, the Commissioner will issue a final order awarding an amount to be determined after review of evidence submitted by the Enforcement Section, as provided under Section 409.6-604(e), RSMo. (Cum. Supp. 2005) unless Respondents request a hearing and show cause why an award should not be made.

SO ORDERED:

WITNESS MY HAND AND OFFICIAL SEAL OF MY OFFICE AT JEFFERSON CITY, MISSOURI THIS 13TH DAY OF SEPTEMBER, 2006.

ROBIN CARNAHAN
SECRETARY OF STATE

(Signed/Sealed)
MATTHEW D. KITZI
COMMISSIONER OF SECURITIES

State of Missouri
Office of Secretary of State

Case No. AP-06-42

IN THE MATTER OF:

AFG CAPITAL MANAGEMENT, INC.;
JAMES A FREESE, CRD #2635569;
and their representatives and agents,

Respondents.

Serve all at:
11020 King Street, Ste. 330
Overland Park, Kansas 66210-1201

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 § 409.6-604(b), RSMo Supp. 2005, and 15 CSR 30-55.020.

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

**Matthew Kitzi, Commissioner of Securities
Office of the Secretary of State, Missouri
Kirkpatrick State Information Center
600 West Main Street, Jefferson, Room 229
Jefferson City, Missouri, 65102**

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2006, a copy of the foregoing Notice, Order and Petition filed the above styled case was mailed by certified U.S. Mail, postage prepaid to Respondent at the above listed addresses.

Beth Perkins
Administrative Aide