

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

VINCENT P. MCCRUDDEN and MANAGED
ACCOUNTS ASSET MANAGEMENT LLC

v.

NATIONAL FUTURES ASSOCIATION

CFTC Docket No. CRAA-02-02

OPINION AND ORDER

OFFICE OF PROCEEDINGS
CLERK

2006 DEC 28 A 8:31

RECEIVED
C.F.T.C.

Managed Accounts Asset Management LLC (“MAAM”) and its principal, Vincent P. McCrudden (“McCrudden”), appeal from a National Futures Association (“NFA”) decision denying their applications for registration as, respectively, a commodity pool operator (“CPO”) and an associated person (“AP”) of the CPO. NFA denied the applications for “good cause” pursuant to Section 8a(3)(M) of the Commodity Exchange Act (“CEA” or “Act”) because ten years ago, McCrudden issued false account statements that overstated the net asset value of a commodity pool he operated.

McCrudden admits the conduct, but argues (1) that it does not constitute good cause for denying registration, and (2) that his mitigation and rehabilitation evidence rebut any presumption of disqualification. He argues particularly that NFA gave too little weight to his acquittal on federal mail fraud charges based on the false account statements. NFA urges the Commission to affirm its decision in all respects.

For the reasons stated below, we affirm NFA’s decision.

BACKGROUND

In August 1995, MAAM became registered as a CPO and McCrudden became registered as a principal and AP of MAAM. In February 1996, McCrudden began trading a pool known as

the Hybrid Fund ("Fund"). The Fund began with approximately \$200,000 and grew to about \$700,000-\$800,000 by June 1996. During that month, the Fund lost about \$350,000 on copper trades. McCrudden Statement at 3.

Around August 1996, McCrudden learned that Sumitomo Bank and other entities were being sued for alleged manipulation of the copper market. McCrudden contacted the law firm representing the plaintiffs in the Sumitomo litigation and told the lawyers about the Fund's losses on copper trades. They told McCrudden that Sumitomo was likely to be found liable and that the Fund reasonably could expect to recover between \$2-\$3 million, whereupon McCrudden became a lead class plaintiff. He claimed that he believed that the litigation would settle quickly. See Criminal Transcript ("Cr. Tr.") at 1086-87, 1098, 1105.

Although the Fund suffered additional trading losses of at least \$900,000 in September and October 1996, McCrudden sent a combined September-October account statement to Fund participants in November 1996 that did not reveal these losses. In order to avoid this disclosure, McCrudden treated his estimate of the Fund's anticipated recovery from the Sumitomo litigation as a Fund asset; accordingly, the Fund's net asset value did not change substantially. Cr. Tr. at 1089-90; Record Tab 9, Transcript of NFA Hearing ("NFA Tr.") at 43. According to McCrudden, he believed that if the Fund ceased to be an operating entity, its investors would lose their right to any award in the Sumitomo litigation so he took this step to protect the Fund's investors. NFA Tr. at 45, 61.

McCrudden also claims that he consulted with both Commission and NFA staff about his situation and they referred him to the concept of notional funding. According to McCrudden, he understood that notional funding permitted a potential receivable, such as the Sumitomo litigation award, to be used in calculating a fund's net asset value. Cr. Tr. at 1098. In ensuing

months, he continued to mask trading losses by adjusting the amount of the anticipated Sumitomo recovery.

By June 1997, McCrudden realized that the Sumitomo litigation would take much longer than he anticipated, and that he could no longer avoid disclosing the Fund's situation. He notified investors in August 1997 that the Fund was unable to continue due to large trading losses. Cr. Tr. at 1105-06, 1159. In January 1998, NFA received an annual financial statement for the Fund prepared by an independent accountant that covered the fiscal year July 1, 1996 through June 30, 1997 and accurately described the Fund's losses. Record Tab 11, NFA Trial Exhibit 4. McCrudden and MAAM withdrew their NFA membership in December 1997 and their registration with the Commission in December 1999.

In May 2002, McCrudden was indicted in the United States District Court for the Eastern District of New York and charged with multiple counts of mail fraud. The conduct underlying the indictment was McCrudden's preparation of monthly statements for Fund customers that falsely inflated the true value of their investment. The same month he was indicted, the Fund was awarded \$756,000 from the Sumitomo litigation. A subsequent additional award raised the recovery to about \$800,000. McCrudden Statement at 5. The funds remained in escrow when McCrudden went to trial a year later. Cr. Tr. at 1108-09.

During McCrudden's six-day trial in September 2003, the prosecutor presented 16 witnesses, including Fund customers and the certified public accountant who prepared the annual financial statement for fiscal year July 1996 to June 1997, and a substantial amount of documentary evidence. McCrudden testified on his own behalf. After deliberating one day, the jury acquitted him.¹ McCrudden Statement at 7.

¹ A copy of the Judgment of Acquittal is filed with McCrudden's Response to the Notice of Intent to Deny. See Record Tab 2.

In August 2004, McCrudden and MAAM again applied for registration with the Commission; NFA responded in February 2005 by issuing a Notice of Intent to Deny the applications (“Notice”). Record Tab 1. The Notice alleged that from November 1996 through at least June 1997, McCrudden distributed periodic statements to Fund participants that he knew overstated the Fund’s net asset value because they did not reflect substantial trading losses. *Id.* at 2. The Notice further alleged that this conduct constituted good cause under Section 8a(3)(M) to deny McCrudden’s registration. *Id.* In addition, the Notice charged that MAAM was disqualified from registration under Section 8a(3)(N) of the Act because its sole principal was disqualified. *Id.*

McCrudden submitted a *pro se* response, in which he challenged the allegation that he knowingly overstated the Fund’s net asset value and emphasized that the United States District Court had acquitted him in a federal criminal action raising the same allegations. Record Tab 2 at 1 (“McCrudden Response”). McCrudden also stated his intent to provide sufficient mitigation and rehabilitation evidence to establish that his registration would pose no substantial risk to the public. *Id.*

During pre-hearing proceedings, McCrudden moved to dismiss the Notice, arguing that NFA’s proceeding violated his Constitutional rights under the double jeopardy clause. Record Tab 6. He also complained that one of NFA’s attorneys had been defaming and libeling his good name to former Fund investors in an effort to get them to testify against him. *Id.* NFA’s attorneys opposed the motion. Record Tab 7. The motion remained pending when a Subcommittee of NFA’s Membership Committee conducted a hearing on April 12, 2005.

At the hearing, NFA introduced into evidence documents relating to MAAM’s and McCrudden’s registration applications, the transcript of McCrudden’s criminal case and the

Fund's financial statement for fiscal year July 1996-June 1997. NFA stated that it had been unable to obtain exhibits from the criminal case from the U.S. Attorney's Office. NFA Tr. at 31-34. Consequently, the key documents supporting NFA's adverse registration action—the false account statements—were not in evidence. NFA attempted to call NFA official Daniel Driscoll and McCrudden as witnesses. McCrudden objected in each instance because he had not received a summary of his own or Driscoll's proposed testimony, as required by NFA rules. NFA proceeded without either man's testimony. *Id.* at 24-29, 35-36.

When McCrudden was asked to present his case, he stated that he would rely on his testimony in the criminal case as well as the written statement he provided during the pre-hearing proceedings and letters submitted by his supporters.² When counsel for NFA sought to cross examine McCrudden, he refused to answer, despite a warning from the Chairman of the Subcommittee that his refusal could lead to adverse consequences. *Id.* at 38-41.

McCrudden did respond to questions asked by the members of the Subcommittee. He acknowledged that the statements he sent to Fund clients did not reflect the large losses suffered in September and October 1996. He insisted, however, that he was acting in the best interests of the investors and in accordance with advice from the Commission and NFA. *Id.* at 43-44. McCrudden admitted that he valued the litigation award differently from month to month to maintain the net asset value at the level prior to the large losses in September and October. He acknowledged that his motivation was to keep investors calm until the Sumitomo award was received. *Id.* at 61.

² McCrudden presented letters from Bruce A Barket, his attorney in the criminal case; Joseph Locasio, a consultant who advised McCrudden during his criminal case; David Gary and Anthony Conroy, friends who worked in the financial industry; Craig Puffenberger and Mike Khorrami, McCrudden's former clients; Donald DiRenzo, an investor in the Fund; and Donald Pupke, McCrudden's attorney for distribution of the Sumitomo litigation award.

On June 10, 2005, the Subcommittee issued its Final Order Denying Registration (“NFA Order”) based on its finding that McCrudden knowingly sent out false statements to Fund investors. Record Tab 10 at 9. The Subcommittee concluded that this conduct showed a disregard of or inability to comply with the requirements of the Act and the Commission’s rules and regulations, a lack of honesty, and an inability to deal fairly with the public consistent with just and equitable principles of trade.³ *Id.* It emphasized that McCrudden admitted issuing account statements that failed to reflect trading losses.

The Subcommittee noted that Commission Regulation 4.22 requires registered CPOs periodically to distribute to pool participants an account statement that includes an income (loss) statement and changes in net asset value statement. *Id.* at 10. The income (loss) statement must contain “the total amount of realized net gain or loss on commodity interest positions liquidated during the reporting period.” 17 C.F.R. § 4.22(a)(1)(i).

Finding a lack of credibility, the Subcommittee rejected McCrudden’s justification of his failure to report these losses by claiming that he was using a notional or partial funding accounting methodology. Record Tab 10 at 10-11. It stated that the concept of notional funding relates to the method a commodity trading advisor uses to calculate performance for accounts

³ This language tracks the terms of the Commission’s Interpretative Statement With Respect to Section 8a(2)(C) and (E) and Section 8a(3)(J) and (M) of the Commodity Exchange Act (“Interpretative Statement”). The Interpretative Statement provides in relevant part:

In general, the Commission interprets paragraph (M) to authorize the Commission to affect the registration of any person if, as a result of any act or pattern of conduct attributable to such person, although never the subject of a formal action or proceeding before either a court or governmental agency, such person’s potential disregard of or inability to comply with the requirements of the Act or the rules, regulations or order thereunder, or such person’s moral turpitude, or lack of honesty or financial responsibility is demonstrated to the Commission.

Any inability to deal fairly with the public and consistent with just and equitable principles of trade may render an applicant or registrant unfit for registration, given the high ethical standards which must prevail in the industry.

See 17 C.F.R. Part 3 App. A.

that are partially funded and that it was implausible that an NFA or Commission staff member would have suggested that McCrudden use this methodology to report a potential litigation award of an unknown amount as a Fund asset. *Id.* The Subcommittee stated that even if this portion of McCrudden's testimony was credited, he still would have failed to comply with the reporting requirements of Commission Regulation 4.22, which requires account statements to list the realized net gain or loss whether or not trading losses are offset by other amounts.⁴

The Subcommittee concluded that McCrudden showed the potential litigation award as an asset in order to hide trading losses. *Id.* at 12. It drew this inference from McCrudden's testimony that he initially valued the asset at an amount needed to keep the Fund's net asset value at the level it had reached prior to the significant trading losses of September and October. *Id.* It also emphasized that McCrudden admitted that he adjusted this amount on a monthly basis to keep the net asset value at a steady level. *Id.* The Subcommittee reasoned that if McCrudden were not trying to hide trading losses, he would have reported the losses with an explanation of his rationale for including the potential Sumitomo litigation award in the Fund's assets. *Id.* at 13.

In light of McCrudden's conduct, the Subcommittee determined that good cause existed to deny his registration under Section 8a(3)(M) of the Act, and that McCrudden's disqualification operated to disqualify MAAM under Section 8a(3)(N). *Id.*

The Subcommittee then turned to an analysis of respondents' mitigation and rehabilitation evidence. It concluded that the only possible mitigation evidence was

⁴ The Subcommittee acknowledged that the account statements at issue were not in the record, relying instead on McCrudden's admissions that the statements distributed subsequent to September 1996 did not reflect trading losses. *Id.* at 11-12. The Subcommittee noted that the testimony in the criminal case confirmed that December 1996 statements prepared by McCrudden misstated the net asset value of at least four customers. Several customers testified at McCrudden's criminal trial as to what McCrudden told them their accounts were worth on December 31, 1996. These amounts were compared with account valuations for the same date prepared by the Fund's certified public accountant, who also testified at the criminal trial. The net asset value set forth on the customer statements prepared by McCrudden was in each case approximately ten times greater than the net asset value calculated by the Fund's accountant. *Id.* at 12 n.5.

McCrudden's alleged reliance on NFA and Commission advice to count the potential Sumitomo award as an asset. The Subcommittee found this testimony incredible and gave it no weight. *Id.* at 14. As for rehabilitation, the Subcommittee held that letters from McCrudden's current and former business colleagues—offering varying positive opinions on McCrudden's trustworthiness and business abilities—deserved little weight because they were unsworn hearsay statements. *Id.* at 15. It also noted that the letters provided little insight as to how McCrudden had changed. *Id.* The Subcommittee went on to note that, as a general rule, a witness's character testimony will not be accorded significant weight unless the witness was qualified as an expert, and that none of McCrudden's character references provided any evidence that would qualify them as experts on rehabilitation. *Id.*

The Subcommittee acknowledged McCrudden's written personal statement, which lists his current securities licenses and his current employment as the Chief Compliance Officer of a broker-dealer. It nevertheless gave these facts little weight because McCrudden provided no specifics of his day-to-day duties, nor offered testimony from his colleagues. *Id.* at 16.

Finally, the Subcommittee held that McCrudden's own testimony showed that he has not been rehabilitated, emphasizing that he took no responsibility for his past misconduct. *Id.* In light of this failure to acknowledge any errors, the Subcommittee expressed grave concern regarding McCrudden's ability to act properly in the future. *Id.* Based on the foregoing, the Subcommittee concluded that McCrudden and MAAM had not shown by the weight of the evidence that granting their registrations would pose no substantial risk to the public, and denied their applications.⁵ *Id.*

⁵ The Subcommittee also denied McCrudden's motion to dismiss, holding that the double jeopardy clause of the Constitution does not preclude a subsequent civil proceeding involving the same conduct as an earlier criminal case. NFA Order at 3-4. As for McCrudden's claim of misconduct by NFA attorneys, the Subcommittee noted that McCrudden did not provide evidence supporting his allegations. It emphasized that the alleged misconduct involved

On appeal, McCrudden argues that NFA's decision rests on an unprecedented and unduly expansive interpretation of the statutory language "other good cause." He also claims that NFA denied him fundamental fairness by failing to grant him the procedural protections available in a criminal proceeding; that the record does not support NFA's findings; and that NFA failed to consider his mitigation and rehabilitation evidence. Finally, he claims that denial of the applications is an excessive and oppressive sanction for the conduct established on the record.

In opposing the appeal, NFA argues that its application of Section 8a(3)(M) of the Act is consistent with both the statutory language and the Commission's longstanding Interpretative Statement. *See supra* note 3 (quoting the Interpretative Statement). It insists that it conducted the proceedings in a manner consistent with NFA rules and principles of fundamental fairness. NFA contends that the Subcommittee considered all mitigation and rehabilitation evidence contained in the record. Finally, it claims that the weight of the evidence supports the Subcommittee's conclusion that McCrudden's and MAAM's registration applications should be denied.

DISCUSSION

The standard of review applicable to NFA decisions is set forth at Commission Regulation 171.34, which provides:

In reviewing a final decision of the National Futures Association in a registration action, the Commission shall affirm the order of the National Futures Association unless the Commission finds that:

- (1) The proceedings were not conducted in a manner consistent with fundamental fairness;
- (2) The proceedings were not conducted in a manner consistent with the rules of the National Futures Association;

efforts by NFA lawyers to persuade McCrudden's former customers to testify against him, and that NFA presented no customer testimony. *Id.* at 4.

(3) The weight of the evidence does not support the findings made or adopted in the final decision;

(4) The conclusion of the National Futures Association is not consistent with the purposes of the Act.

McCrudden's argument that NFA's decision reflects an impermissibly broad reading of Section 8a(3)(M) rests on his erroneous interpretation of Section 8a(3) of the Act. McCrudden argues that the statutory construction principle, "*expressio unius est alterius exclusio*" (the expression of one thing is the exclusion of others) dictates that only felony convictions and related misdemeanor convictions can serve as a basis for denying registration under Section 8a(3)(M). He contends that because Sections 8a(3)(A)-(L)—setting forth other bases on which registration may be denied or conditioned after notice and a hearing—all concern criminal violations, Section 8a(3)(M) is similarly limited.

This argument fails on several grounds. First, McCrudden has cited the wrong construction canon. The *expressio unius* principle applies when a provision is included in one part of a statute, and omitted in another part where it would be logical to include it. These circumstances may give rise to a rebuttable presumption that Congress affirmatively intended to exclude the omitted provision. *See, e.g., Bailey v. Federal Intermediate Credit Bank*, 788 F.2d 498, 500 (8th Cir.), *cert. denied*, 479 U.S. 915 (1986) (the *expressio unius* canon embodies a "presumption that . . . Congress intended to deny all powers not *expressly* enumerated") (emphasis added). The canon provides guidance on how to interpret the *absence* of statutory language in a place where one would expect to find it, and clearly has no applicability to a catchall provision such as "other good cause."

McCrudden presumably has in mind the *ejusdem generis* rule of statutory construction, which provides that "a general statutory term should be understood in light of the specific terms

around it.” *Hughey v. United States*, 495 U.S. 411, 419 (1990); *see also Black’s Law Dictionary* (8th ed. 2004)(*Ejusdem generis* means “that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed.”).

McCrudden contends that the general term “other good cause” should be interpreted in light of the list of specific statutory disqualifications contained in Sections 8a(3)(A)-(L). He errs in asserting that doing so limits 8a(3)(M) to instances where registrants or applicants were found either to have violated the Act or Commission rules; or to have engaged in criminal conduct. For example, subsection 8a(3)(C) disqualifies those who have failed reasonably to supervise another person subject to their supervision. Subsection 8a(3)(F) disqualifies those debarred from contracting with the United States. Subsection 8a(3)(G) disqualifies those who willfully make a materially false or misleading statement or willfully omit a material fact in an application for registration or a report required to be filed with the Commission, in any proceeding before the Commission or in any registration disqualification proceeding. Subsection 8a(3)(J) disqualifies those subject to an outstanding order denying, suspending, or expelling such person from membership in a registered entity, a registered futures association or any other self regulatory organization.

Section 8a(3)(M) is an express catchall provision that authorizes the Commission to consider conduct not covered in the other listed disqualifications. Other cases finding a disqualification under Section 8a(3)(M) demonstrate the breadth of conduct to which it applies. *See, e.g., In re Anderson*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶ 23,085 (CFTC May 30, 1986)(significant margin violations and unauthorized trading); *In re Castellano*,

[1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,920 (CFTC Dec. 10, 1996)(three exchange disciplinary actions for prearranged trading); *In re Clark*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,032 (CFTC Apr. 22, 1997)(a pattern of exchange disciplinary actions alleging serious rule violations and resulting in the imposition of significant sanctions); *In re Riley*, [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,611 (CFTC Aug. 9, 2001)(an exchange disciplinary action involving prearranged trading where one customer received an advantageous price and the other received a disadvantageous price). McCrudden's acquittal in a criminal proceeding in no way limits NFA's authority to examine his admitted underlying conduct. *Cf. Hirschberg v. CFTC*, 414 F.3d 679 (7th Cir. 2005)(presidential pardon of mail fraud conviction did not preclude consideration of underlying conduct in denying application for registration).

The Commission's precedent is buttressed by its longstanding Interpretative Statement regarding Section 8a(3)(M), which provides further support for NFA's application of that provision to McCrudden's misconduct.⁶ McCrudden's assertion that "CFTC Interpretative Statements do not have the force of law" misses the point. App. Br. at 15. The Interpretative Statement, among other purposes, provides guidance to NFA in discharging its delegated duties on behalf of the Commission. NFA properly applied that guidance. Because Congress has amended the Act substantially twice since the Interpretative Statement was issued, without disturbing Section 8a(3)(M) or mentioning the Interpretative Statement, we have no reason to

⁶ McCrudden's reliance on CFTC Staff Letter No. 00-56, Use of Exchange Disciplinary Actions as "Other Good Cause" to Affect Floor Broker/Floor Trader Registration, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,130 (CFTC Apr. 13, 2000), is misplaced. That letter addressed circumstances that are not at issue in this case and did not purport to limit the Commission's Interpretative Statement. *Id.* at 49,899.

think that our interpretation is inconsistent with Congress's intent.⁷ *Cf. CFTC v. Schor*, 478 U.S. 833, 846 (1986)(when Congress is aware of an agency's interpretation of a statute and takes no action to correct it while amending other portions of the statute, it may be inferred that the agency's interpretation is consistent with Congressional intent).⁸

McCrudden's argument that Section 8a(3)(M) may be applied only to other self-regulatory organizations' ("SRO") adjudications and felony or misdemeanor convictions fails. NFA is an SRO. NFA did not rely on another governing body; it held its own hearing, which it has a mandate to do. It found that, although McCrudden may not have been criminally liable, he admittedly sent statements to his customers that did not reflect their losses. NFA Dec. at 10, NFA Tr. at 62. NFA did not find McCrudden's explanation for his wrongdoing credible.

McCrudden complains that NFA's proceeding violated fundamental fairness and NFA's own rules. He emphasizes that NFA did not provide him with Constitutionally required procedures for state or federal criminal proceedings. He also criticizes NFA for relying on excerpts of testimony from his criminal proceeding and not calling any of the witnesses that testified in the criminal proceeding.

NFA's focus on conduct that was once at issue in a criminal proceeding did not transform this administrative proceeding into a criminal proceeding. McCrudden received the procedure that he was due under NFA rules and principles of fundamental fairness. *See generally*

Presidential Futures Inc. v. NFA, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH)

¶ 25,228 (CFTC Jan. 23, 1992)(as a general rule, the process required by fundamental fairness

⁷ Substantial amendments were enacted via the Futures Trading Practices Act of 1992 ("FTPA"), Pub. L. No. 102-546, 106 Stat. 3590 (1992), and the Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000).

⁸ As a general rule, an agency's interpretation of its statute is entitled to substantial deference. *Gonzales v. Oregon*, ___ U.S. ___, 126 S. Ct. 904, 914 (2006), *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). Deference is particularly appropriate when "Congress has explicitly left a gap for the agency to fill." *Chevron*, 467 U.S. at 843-44. The "other good cause" language constitutes such a gap.

will be consistent with the results federal courts have reached in applying the general due process balancing formula to comparable facts and circumstances). NFA did not err in relying on testimony from the criminal proceeding, and McCrudden failed to object when NFA introduced the testimony. Moreover, his testimony in the criminal case amounts to admissions that are not considered hearsay. Finally, McCrudden was represented by counsel during the criminal proceeding who had an opportunity to cross-examine all the prosecution's witnesses. This provides an additional safeguard as to the reliability of the testimony.

McCrudden argues that the weight of the evidence does not support the Subcommittee's finding that he engaged in a pattern of conduct demonstrating dishonesty so as to constitute "other good cause" for denying his registration. According to McCrudden, at best the record establishes that his conduct amounted to an inadvertent rule violation with no financial loss to investors. He emphasizes that none of the actual Fund account statements were presented as evidence during the NFA hearing.

At the hearing, however, McCrudden admitted that he had sent statements in November 1996 to his commodity pool customers that did not reflect the trading losses that the pool had sustained. Instead, the net asset value disclosed by the statement was augmented by McCrudden's estimate of the recovery he expected to receive from the Sumitomo litigation. During the criminal proceeding, he acknowledged doing the same thing for statements for the year ending on December 31, 1996 that he sent to customers in January 1997. Cr. Tr. at 1155. Finally, he admitted that he did not value the potential Sumitomo litigation recovery at the same amount each time he calculated the pool's net asset value. Indeed, he stated that he changed the value each time he sent out a statement in order to keep the pool's net asset value approximately the same from month to month.

McCrudden insists that the Subcommittee erred in finding that he acted with *scienter*.

The Subcommittee refused to credit McCrudden's claim that he was acting on the advice of NFA or Commission staff, and McCrudden has not established any error in this determination. Nor does his insistence that he was acting in the best interests of his customers negate the evidence that he intentionally misled those customers about the pool's net asset value. As NFA argues, his deceptive conduct usurped his customers' right to make a fully informed decision about whether or not to continue as pool participants. That the customers ultimately benefited from a recovery in the Sumitomo litigation does not alter the nature of McCrudden's conduct. Instead of explaining the true situation to his customers and allowing them to exercise their judgment, he chose to deceive them repeatedly over a number of months. Given these circumstances, the Subcommittee did not err in finding that McCrudden acted with *scienter*.

Nor did the Subcommittee err in determining that McCrudden's knowingly deceptive conduct represented a pattern of misconduct establishing a disregard of or inability to comply with the requirements of the Act and the Commission's rules and regulations, a lack of honesty, and an inability to deal fairly with the public consistent with just and equitable principles of trade. Consequently, we find that NFA's determination that he violated NFA and Commission rules is supported by the weight of the evidence. The record therefore supports the conclusion that there is good cause for denying McCrudden's registration under Section 8a(3)(M) of the Act. Because McCrudden was MAAM's principal, the record also supports the conclusion that MAAM is subject to a statutory disqualification under Section 8a(3)(N) of the Act.

McCrudden claims that the Subcommittee erred by failing to consider his mitigation and rehabilitation evidence. Mitigation evidence establishes the presence of circumstances that lessen the seriousness of the wrongdoing. *Marzano v. NFA*, [Current Transfer Binder] Comm.

Fut. L. Rep. (CCH) ¶ 30,163 at 57,641 (CFTC Jan. 4, 2006) *citing In re Ashman*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,336 (CFTC Apr. 22, 1998). McCrudden claims that his lack of intent to harm his customers should be counted as mitigation evidence. In taking this view, McCrudden simply ignores the evidence that he knowingly deceived his customers. That he might have had a good end in mind when he chose to use an unlawful means does not lessen the seriousness of depriving his customers of the ability to make their own informed decisions.

Rehabilitation evidence is evidence showing that an applicant has changed the direction of his or her activities since the time of the wrongful conduct. *In re Horn*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,836 at 36,940 (CFTC Apr. 18, 1990). The first step in rehabilitation is taking responsibility for past actions. *In re Ryan*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,049 at 44,982 (CFTC Apr. 25, 1997). McCrudden's insistence that what he did was for the good of his customers, and his failure to acknowledge the nature of his wrongdoing, shows that he has not taken that important first step. *In re Fetchenhier*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,055 at 45,014-15 (CFTC May 8, 1997); *In re Hirschberg*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,573 at 43,523 (CFTC Dec. 27, 1995).

With regard to rehabilitation, we disagree with the Subcommittee's statement that, as a general rule, only expert testimony on rehabilitation is given significant weight. While expert status may be helpful, the Commission has expressly stated that expert evidence is *not* a prerequisite for proving rehabilitation. As the Commission stated in *Marzano*, *supra*, at 57,641 n.6:

[A]n expert's views may be entitled to greater deference in some circumstances, but may prove to be of little or no value in others. . . . [F]here may be situations

in which the opinions of a lay witness may significantly aid the decisionmaker, depending on the particular facts of the case. . . . [L]ay testimony may be used to establish rehabilitation because the focus of our analysis is on the basis for the witness's opinion, not whether the witness is an expert. *In re Zuccarelli*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,597 at 47,834 (CFTC Apr. 15, 1999).

Nonetheless, based on our independent review of the record, we agree with NFA that McCrudden's rehabilitation evidence does not establish that he poses no risk to the public. The statements are unsworn, which leaves their reliability open to question, and do not explain how McCrudden has changed since he ceased operating the Fund. Also, as noted by the Subcommittee, while a number of the references had significant financial services industry experience, none indicated that they had supervised McCrudden or explained what their day-to-day dealings with McCrudden included.

In his written statement, McCrudden proposed a plan to ensure future compliance with regulatory requirements. As NFA notes in its brief, this may be viewed as a proposal to grant McCrudden conditional registration. Such conditions, however, cannot substitute for persuasive evidence of mitigation and rehabilitation. *In re Crouch*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,114 at 45,251 (CFTC July 14, 1997).

CONCLUSION

The Subcommittee correctly ruled that McCrudden was subject to a statutory disqualification under Section 8a(3)(M) and that MAAM was subject to a disqualification under Section 8a(3)(N) of the Act. McCrudden's mitigation and rehabilitation evidence did not

establish that he poses no substantial risk to the public. In these circumstances, we affirm the denial of McCrudden's and MAAM's registration applications.

IT IS SO ORDERED.

By the Commission (Chairman JEFFERY and Commissioners LUKKEN and DUNN;
Commissioner HATFIELD not participating).



Catherine D. Daniels
Assistant Secretary of the Commission
Commodity Futures Trading Commission

Dated: December 28, 2006