

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL INSTITUTIONS
SECURITIES DIVISION**

IN THE MATTER OF DETERMINING
whether there has been a violation
of the Securities Act of Washington by:

TD AMERITRADE, INC.,

Respondent.

Order Number S-08-239-09-CO01

CONSENT ORDER

INTRODUCTION

WHEREAS, TD Ameritrade, Inc. (“Respondent” or “TD”) is a broker-dealer registered in the state of Washington; and

WHEREAS, coordinated investigations into Respondent’s activities in connection with certain of its sales practices regarding the marketing and sale of auction rate securities during the period of approximately January 24, 2006, through February 13, 2008, have been conducted by a multistate task force; and

WHEREAS, those coordinated investigations resulted in the simultaneous entry on July 20, 2009 of Orders on consent against Respondent by the U.S. Securities and Exchange Commission, the Office of the Attorney General of the State of New York, and the Commonwealth of Pennsylvania; and

WHEREAS, Respondent has cooperated with the regulators conducting the investigations by responding to inquiries, making witnesses available, providing documentary evidence and other materials, and providing regulators with access to facts relating to the investigation; and

WHEREAS, Respondent, having advised regulators that it desires to settle and resolve the investigations, without admitting or denying the allegations therein, consents to the Securities

1 Division of the Washington State Department of Financial Institutions making findings and
2 conclusions and entering this Administrative Consent Order (the “Order”); and

3 WHEREAS, Respondent elects to permanently waive any right to a hearing and appeal
4 under RCW 21.20.440 and RCW 34.05 with respect to this Order;

5 NOW, THEREFORE, the Securities Division of the Washington State Department of
6 Financial Institutions, as administrator of the Securities Act of Washington, hereby enters this
7 Order:

8 **I.**

9 **RESPONDENT**

10 1. Respondent TD Ameritrade, Inc. (CRD #7870) was, at all times material herein, a
11 New York corporation with its principal place of business at 1005 N. Ameritrade Place, Bellevue,
12 Nebraska 68005.

13 **II.**

14 **FINDINGS OF FACT**

15 2. Paragraph I.1 is incorporated herein by reference as if set forth in its entirety.

16 3. Respondent is in the business of effecting transactions in securities in Washington
17 as a “broker-dealer” within the meaning of RCW 21.20.005 and RCW 21.20.040.

18 4. Respondent maintains branch offices in Washington.

19 5. Respondent has and has had customers (Customers or TD Customers) located across
20 the United States of America, including Washington.

21 6. Prior to February 13, 2008, Respondent solicited and sold to TD Customers
22 financial instruments known as auction rate securities (“ARS”) to at least one resident of
23 Washington.

ARS

1
2 7. ARS are bonds or preferred stocks that have interest rates or dividend yields that are
3 periodically reset through an auction process, typically every seven (7), twenty-eight (28), or thirty-
4 five (35) days.

5 8. ARS are usually issued with thirty (30) year maturities, but ARS maturities can
6 range from five years to perpetuity.

7 9. ARS can be attractive investments to investors because ARS may offer slightly
8 higher yields than various alternative products, including cash alternative products.

9 10. An ARS yield is determined by the periodic auctions (commonly referred to as
10 “Dutch” auctions) during which ARS are auctioned at par.

11 11. ARS typically can only be bought or sold at par at one of these periodic Dutch
12 auctions.

13 12. Under the typical procedures for an ARS auction in effect prior to February 13,
14 2008, an investor, including TD Customers, who wished to purchase ARS at auction, submitted a
15 bid that included the minimum interest or dividend rate that the investor would accept.

16 13. ARS holders could either choose to keep their securities until the next auction or
17 submit offers to sell their ARS.

18 14. An auction agent collected all of the bids and offers for a particular auction.

19 15. The final yield rate at which the ARS were sold was the “clearing rate” and the
20 clearing rate applied to that particular ARS until the next auction.

21 16. Bids with the lowest rate and then successively higher rates were accepted until all
22 ARS sell orders were filled.

23 17. The clearing rate was the lowest rate bid sufficient to cover all ARS offered for sale
24 in the auction.

1 18. If there were not enough bids to cover the ARS offered for sale in an auction, then
2 an auction would fail.

3 19. In a failed auction, investors, including TD Customers, who want to sell, are not
4 able to do so and such investors must hold their ARS until at least the next auction.

5 20. In the event of a failed auction, an ARS issuer pays the holders a maximum rate or
6 “penalty” rate, which is either a flat rate or a rate based on a formula set forth in the ARS offering
7 documents.

8 21. Penalty rates might be higher or lower than the prior clearing rate or market rates on
9 similar products.

10 22. Due to various market conditions in the early part of 2008, many of the broker-
11 dealers that acted as underwriters of the ARS offerings or as lead managers for the ARS auctions
12 stopped submitting their own bids in support of the ARS auctions.

13 23. As a result, by February 13, 2008, the ARS market began to experience widespread
14 auction failures, leaving ARS investors, including TD Customers throughout the United States of
15 America, unable to sell their ARS holdings.

16 24. On February 13, 2008, through the date of this Order, the ARS market has
17 continued to experience widespread failures, making ARS holdings illiquid.

18 25. Some ARS have been redeemed by their issuers since February 13, 2008, however,
19 thousands of ARS investors, including TD Customers, who currently hold ARS have been unable
20 to sell through the auction process.

21 26. TD Customers currently hold hundreds of millions of dollars in illiquid ARS that
22 they are unable to sell through the auction process.

23 **Respondent’s Role in the ARS Market**

24 27. To facilitate the auction process, issuers of ARS selected one or more broker-dealers
25 to underwrite an offering and/or manage an auction process.

1 28. In many instances, these chosen broker-dealers submitted their own bids to support
2 the ARS auctions and to prevent the auctions from failing.

3 29. Respondent did not act as an underwriter, manager, or agent for any issuer of ARS.

4 30. As a distributing or “downstream” broker-dealer, Respondent did not submit bids in
5 an effort to support any of the ARS auctions or to prevent them from failing.

6 31. Respondent also did not hold any significant inventory of ARS in its broker-dealer
7 house account(s).

8 32. Respondent acted solely as an agent, both on a solicited and unsolicited basis, for
9 TD Customers by submitting their bids to purchase and orders to sell ARS.

10 33. Respondent received revenue, including fees for acting as an agent for customers in
11 connection with ARS.

12 **Respondent’s ARS Sales to TD Customers**

13 34. In soliciting TD Customers to purchase ARS prior to the middle of February 2008,
14 Respondent’s registered representatives made inaccurate comparisons between ARS and other
15 investments, such as certificates of deposit or money market accounts, telling customers that ARS
16 were similar investments but with a slightly higher yield.

17 35. In soliciting TD Customers to purchase ARS prior to the middle of February 2008,
18 Respondent’s registered representatives also did not accurately characterize the investment nature
19 of ARS since ARS are highly complex securities that are very different from money market funds
20 or certificates of deposit, as evidenced by, among other things, the dependence of ARS on
21 successful auctions for liquidity.

22 36. Respondent’s registered representatives also did not provide customers with
23 adequate and complete disclosures regarding the complexity of the auction process and the risks
24 associated with ARS, including the circumstances under which an auction could fail.

1 sales of ARS by Respondent, provided, however, that excluded from and not covered by this
2 paragraph are any claims by the Securities Division of the Washington State Department of
3 Financial Institutions arising from or relating to the enforcement of this Order. The Securities
4 Division of the Washington State Department of Financial Institutions reserves the right to
5 investigate and commence any proceeding it deems appropriate, in its sole discretion, relating in
6 any way to (a) any Customer who requests a purchase from Respondent and who purchased
7 Eligible Auction Rate Securities at Respondent prior to February 13, 2008, but transferred such
8 Eligible Auction Rate Securities away prior to January 24, 2006; (b) any account owner described
9 in paragraph IV.3(b)(3) of this Order that was excluded from the definition of Eligible Investor
10 because it had over \$10 million in assets at Respondent or total assets greater than \$50 million; or
11 (c) any account owner who holds or held Eligible Auction Rate Securities that were purchased at
12 Respondent or entities acquired by Respondent's parent companies in an account owned, managed,
13 or advised by or through an independent registered investment adviser.

14 2. This Order is entered into solely for the purpose of resolving the referenced
15 multistate investigations and is not intended to be used for any other purpose.

16
17 **Relief for ARS Investors:
Purchases from ARS Investors**

18 3. Respondent will provide liquidity to Eligible Investors, as defined below, by
19 purchasing Eligible Auction Rate Securities, as defined below, that have failed at auction at least
20 once since February 13, 2008, at par, in the manner described below.

21 a. "Eligible Auction Rate Securities," for the purposes of this Order, shall
22 mean ARS purchased at Respondent on or before February 13, 2008, and that have failed at
23 auction at least once since February 13, 2008. Notwithstanding the foregoing definition,
24 Eligible Auction Rate Securities shall not include ARS that were purchased at Respondent
25

1 or entities acquired by Respondent's parent companies in accounts owned, managed, or
2 advised by or through independent registered investment advisers; and

3 b. "Eligible Investors," for the purposes of this Order, shall mean the following
4 current and former account owners who purchased Eligible Auction Rate Securities at
5 Respondent on or before February 13, 2008, did not transfer such Eligible Auction Rate
6 Securities away from Respondent prior to January 24, 2006 (Merger Date)¹, and held those
7 securities on February 13, 2008:

8 1. Natural persons (including their IRA accounts, testamentary trust and
9 estate accounts, custodian UGMA and UTMA accounts, and guardianship
10 accounts); or

11 2. Charities, endowments, or foundations with Internal Revenue Code
12 Section 501(c)(3) status; or

13 3. Small Businesses and Institutions. For purposes of this provision,
14 "Small Businesses and Institutions" shall mean the following account owners with
15 total assets at Respondent of \$10 million or less as of March 13, 2009: trusts;
16 corporate trusts; corporations; employee pension plans/ERISA and Taft Hartley Act
17 plans; educational institutions; incorporated not-for-profit organizations; limited
18 liability companies; limited partnerships; non-public companies; partnerships;
19 personal holding companies; unincorporated associations; and government and
20 quasi-government entities:

21 i. In calculating total assets at Respondent for the purposes of
22 paragraph IV.3(b)(3) of this Order, Respondent may include household
23 accounts;

24 _____
25 ¹ Respondent was formed as a result of the consolidation of retail brokerage operations of Ameritrade, Inc. and TD
26 Waterhouse Investors Services, Inc. following Ameritrade Holding Corporation's acquisition of TD Waterhouse
Group, Inc. on January 24, 2006.

1 ii. If an account owner described within paragraph IV.3(b)(3)
2 transferred its Eligible Auction Rate Securities away from Respondent prior
3 to March 13, 2009, then the date of the account owner's request to transfer
4 its Eligible Auction Rate Securities shall be used for determining whether
5 the account owner had \$10 million or less in assets at Respondent;

6 iii. "Small Businesses and Institutions" shall not include broker-
7 dealers or banks acting as conduits for their customers, or customers that had
8 total assets of greater than \$50 million as of the date of this Order; and

9 iv. In no event shall Respondent be required by this Order to
10 purchase more than \$10 million of ARS from any Small Business or
11 Institution.

12 4. Respondent shall offer to purchase, at par plus accrued and unpaid
13 dividends/interest, from Eligible Investors their Eligible Auction Rate Securities (the "Purchase
14 Offer"). The Purchase Offer shall remain open as follows:

15 a. First Offer Period. For those Eligible Investors with assets at Respondent of
16 \$250,000 or less as of March 13, 2009, the Purchase Offer shall remain open for a period of
17 seventy-five (75) days from the date on which the Purchase Offer was sent ("First Offer
18 Period"). To the extent that any Eligible Investor transferred their Eligible Auction Rate
19 Securities away from Respondent before March 13, 2009, then the measurement date for
20 the \$250,000 threshold shall be the date on which the transfer was requested by the Eligible
21 Investor; and

22 b. Second Offer Period. For those Eligible Investors with assets at Respondent
23 of more than \$250,000 as of March 13, 2009, the Purchase Offer shall remain open until at
24 least March 23, 2010 ("Second Offer Period"), subject to extension pursuant to paragraph
25 IV.7(b) below. To the extent that any Eligible Investor transferred their Eligible Auction

1 Rate Securities away from Respondent before March 13, 2009, then the measurement date
2 for the \$250,000 threshold shall be the date on which the transfer was requested by the
3 Eligible Investor.

4 5. No later than August 10, 2009, Respondent shall undertake its best efforts to
5 identify and provide notice to Eligible Investors of the relevant terms of this Order. Said notice
6 shall explain what Eligible Investors must do to accept, in whole or in part, the Purchase Offer.
7 Respondent shall also provide written notice of the relevant terms of this Order to any subsequently
8 identified Eligible Investors.

9 6. To the extent that any Eligible Investors have not responded to the Purchase Offer
10 on or before forty-five (45) days before the end of the applicable offer period (defined in
11 paragraphs IV.4(a) and (b) above), Respondent shall provide any such Eligible Investor with a
12 second written notice informing them again of the Purchase Offer, including the date by which the
13 applicable offer period will end. Respondent shall also inform them of the relevant terms of this
14 Order and any other material issues regarding the Eligible Investors' rights.

15 7. Eligible Investors may accept the Purchase Offer by notifying Respondent, as
16 described in the Purchase Offer, at any time before midnight, Eastern Time, on the last day of the
17 applicable offer period. An acceptance must be received by Respondent prior to the expiration of
18 the applicable offer period, or any extension thereof, to be effective. The purchases will be
19 conducted as follows:

20 a. Purchases Relating to Eligible Investors to Whom the First Offer Period
21 Applies. For those Eligible Investors to whom the First Offer Period applies, and who
22 accept the Purchase Offer within the First Offer Period, Respondent shall purchase their
23 Eligible Auction Rate Securities no later than five (5) business days following the
24 expiration of the First Offer Period;

1 return to Respondent or custodianship by Respondent of such Eligible Auction Rate
2 Securities.

3 8. In the event that Respondent receives a purchase request from a customer who
4 purchased Eligible Auction Rate Securities at Respondent prior to February 13, 2008, but who
5 transferred such Eligible Auction Rate Securities away from Respondent prior to the Merger Date,
6 Respondent shall engage in good faith negotiations with such customer in an attempt to resolve the
7 customer's request. Respondent shall promptly notify a representative specified by the North
8 American Securities Administrators Association ("NASAA representative") of all such requests.

9 9. By July 22, 2009, Respondent shall have established: (a) a dedicated toll-free
10 telephone assistance line, with appropriate staffing, to provide information and to respond to
11 questions concerning the terms of this Order; and (b) a public Internet page on its corporate
12 Website(s), with a prominent link to that page appearing on Respondent's relevant homepage(s), to
13 provide information concerning the terms of this Order and, via an e-mail address or other
14 reasonable means, to respond to questions concerning the terms of this Order. Respondent shall
15 maintain the telephone assistance line and Internet page through at least the last day of the
16 Purchase Deadline, or any extension thereof.

17 **Relief for Eligible Investors Who Sold Below Par**

18 10. No later than seventy-five (75) days from July 20, 2009, Respondent shall undertake
19 its best efforts to identify any Eligible Investor who sold Eligible Auction Rate Securities below
20 par between February 13, 2008, and the date of this Order ("Below Par Seller") and pay them the
21 difference between par and the price at which the Eligible Investor sold the Eligible Auction Rate
22 Securities, plus reasonable interest thereon. Respondent shall promptly pay any such Below Par
23 Seller identified thereafter.

24

25

26

1 **Reimbursement for Related Loan Expenses**

2 11. As soon as practicable, but not later than seventy-five (75) days from July 20, 2009,
3 Respondent shall make best efforts to identify Eligible Investors who took out loans from
4 Respondent after February 13, 2008, that were secured by Eligible Auction Rate Securities that
5 were not successfully auctioning at the time the loan was taken out from Respondent and paid
6 interest associated with the auction rate securities based portion of those loans in excess of the total
7 interest and dividends received on the auction rate securities during the duration of the loan.
8 Respondent shall reimburse such customers promptly for the excess expense, plus reasonable
9 interest thereon.

10 **Arbitration**

11 12. Respondent consents to participate in a special arbitration (Arbitration) for the
12 exclusive purpose of arbitrating any Eligible Investor's consequential damages claim arising from
13 their inability to sell Eligible Auction Rate Securities.

14 13. Respondent will notify Eligible Investors of the Arbitration process under the
15 following terms:

16 a. The Arbitration will be conducted by a single public arbitrator (as defined by
17 Section 12100(u) of the FINRA Code of Arbitration Procedures for Customer Disputes);

18 b. Respondent will pay all applicable forum and filing fees. Eligible Investors
19 may seek recovery for their attorneys' fees to the same extent that they may under standard
20 arbitration procedures;

21 c. Any Eligible Investor who chooses to pursue such claims in the Arbitration
22 shall bear the burden of proving that they suffered consequential damages and that such
23 damages were caused by their inability to access funds invested in Eligible Auction Rate
24 Securities;

1 Rate Securities then held at Respondent) who receive notice of the Offer contained in paragraphs
2 IV.3 and IV.4 of this Order promptly after such notice is sent.

3 18. Respondent is ordered to provide the NASAA representative with a list of Below
4 Par Sellers (delineated and separated by state residency and including amounts of Eligible Auction
5 Rate Securities) who are eligible for relief pursuant to paragraph IV.10 of this Order promptly after
6 the First Offer Period ends.

7 19. Respondent is ordered to provide the NASAA representative with a list of
8 Customers who took loans from Respondent secured by Eligible Auction Rate Securities
9 (delineated and separated by state residency and including amounts of Eligible Auction Rate
10 Securities and original loan amounts) who are entitled to relief under paragraph IV.11 of this Order
11 promptly after the First Offer Period ends.

12 20. Respondent is ordered to comply with the Securities Act of Washington and with
13 the regulations adopted by the Securities Division of the Washington State Department of Financial
14 Institutions and, in particular, RCW 21.20.010.

15 21. For any person or entity not a party to this Order, unless expressly stated herein, this
16 Order does not limit or create any private rights or remedies against Respondent, limit or create
17 liability of Respondent, or limit or create defenses of Respondent to any claims.

18 22. Nothing herein shall preclude the State of Washington, its departments, agencies,
19 boards commissions, authorities, political subdivisions, and corporation (collectively “State
20 Entities”), other than the Securities Division of the Washington State Department of Financial
21 Institutions and only to the extent set forth in paragraph IV.1, and the officers, agents, or
22 employees of State Entities from asserting any claims, causes of action, or applications for
23 compensatory, nominal and/or punitive damages, administrative, civil, criminal, or injunctive relief
24 against Respondent in connection with the marketing and sale of ARS at Respondent.

1 23. The Securities Division of the Washington State Department of Financial
2 Institutions has jurisdiction to enter this Order.

3 24. Should Respondent fail to comply with any or all provisions of this Order, the
4 Securities Division of the Washington State Department of Financial Institutions may impose
5 sanctions and costs and seek other appropriate relief subject to the Respondent's rights to notice
6 and a hearing pursuant to the Securities Act of Washington.

7 25. This Order and any dispute related thereto shall be construed and enforced in
8 accordance with, and governed by, the laws of the State of Washington without regard to any
9 choice of law principles.

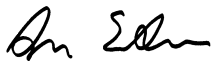
10 26. This Order shall be binding upon Respondent and its successors and assigns as well
11 as on successors and assigns of relevant affiliates with respect to all conduct subject to the
12 provisions above and all future obligations, responsibilities, undertakings, commitments,
13 limitations, restrictions, events, and conditions.

14 SIGNED and ENTERED this 21st day of December, 2009.

15
16 

17
18 _____
19 MICHAEL E. STEVENSON
20 Securities Administrator

21 Approved by:

22 

23 _____
24 SUZANNE SARASON
25 Chief of Enforcement

26 Presented by:



JILL M. VALLEY
Enforcement Attorney

