

**STATE OF NEBRASKA**  
**Department of Banking & Finance**

In the Matter of	)	
	)	
Douglas A. Spier,	)	FINDINGS OF FACT
3714 North 95th Street,	)	CONCLUSIONS OF LAW
Omaha, Nebraska; and	)	AND
	)	ORDERS TO SHOW CAUSE
DS Consulting, Inc.,	)	AND
3714 North 95th Street,	)	ORDERS OF SUSPENSION
Omaha, Nebraska;	)	OF REGISTRATION
	)	
RESPONDENTS.	)	

THIS MATTER comes before the Nebraska Department of Banking and Finance (“DEPARTMENT”), by and through its Director, pursuant to its authority under the Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 to 8-1123 (Reissue 2012) (the “Act”). Pursuant to Neb. Rev. Stat. § 8-1115 (Reissue 2012), the DEPARTMENT has investigated the acts of Douglas A. Spier, 3714 North 95th Street, Omaha, Nebraska, and DS Consulting, Inc., 3714 North 95th Street, Omaha, Nebraska (collectively “RESPONDENTS”). Based upon its investigation, the DEPARTMENT hereby finds as follows:

**FINDINGS OF FACT**

1. DS Consulting, Inc. (“CONSULTING”), is a corporation organized under the laws of the state of Nebraska on or about September 20, 2011. CONSULTING has its principal place of business at 3714 North 95th Street, Omaha, Nebraska.
2. On or about October 28, 2011, CONSULTING became registered under the Act to conduct business as an investment adviser in Nebraska.

3. Douglas A. Spier (“SPIER”) is identified as the President of CONSULTING in filings with the DEPARTMENT. On or about October 18, 2011, SPIER submitted an application for registration as an investment adviser representative of CONSULTING. The registration of SPIER as an investment adviser representative in Nebraska became effective on or about October 31, 2011.

4. SPIER had previously been registered with TD Ameritrade Clearing, Inc. (“Ameritrade”), at the time known as Ameritrade, Inc., and its affiliates as an agent of broker-dealer. During on-site visits to CONSULTING’s office on February 28 and March 5, 2013, SPIER represented to a DEPARTMENT examiner that he had worked in compliance at Ameritrade.

5. SPIER was not registered in any capacity under the Act between March 3, 2004 and October 18, 2011.

6. Every investment adviser registered to transact advisory business in Nebraska is required to submit a Uniform Application for Investment Adviser Registration (“Form ADV”) to the DEPARTMENT at the time of the initial application and at the time of the annual renewal. If the information contained in the Form ADV filed with the DEPARTMENT is or becomes inaccurate or incomplete in any material respect, the investment adviser is required to file promptly a correcting amendment.

7. On or about October 18, 2011, CONSULTING submitted its Form ADV for registration under the Act through the Investment Adviser Registration Depository (“IARD”). The Form ADV submitted by CONSULTING stated in part:

a. CONSULTING had zero (0) clients and zero dollars (\$0.00) of assets under management;

b. CONSULTING received compensation based on a percentage of assets under management, hourly charges and fixed fees and did not receive compensation based on subscription fees, commissions or performance based fees; and

c. CONSULTING did not have custody of client cash, bank accounts or securities.

8. CONSULTING did not submit a revised Form ADV in connection with the renewal of its registrations for 2012 and 2013. The Form ADV submitted by CONSULTING incorrectly stated:

a. CONSULTING had zero (0) clients and zero dollars (\$0.00) of assets under management;

b. CONSULTING did not receive performance based fees; and

c. CONSULTING did not have custody of client cash, bank accounts or securities.

9. In connection with its application, CONSULTING submitted its Balance Sheet dated October 19, 2011, showing a net worth of twenty-five thousand dollars (\$25,000.00). The Balance Sheet was signed by SPIER as President and was not audited.

10. In connection with the renewal of its registration for 2012, CONSULTING submitted its Balance Sheet dated December 31, 2011, showing a net worth of twenty-five thousand three hundred dollars (\$25,300.00). The Balance Sheet was signed by SPIER as President and was not audited.

11. On or about February 28, 2013, the DEPARTMENT commenced a routine examination of CONSULTING, pursuant to Neb. Rev. Stat. § 8-1103 (7)(b) (Reissue

2012). In connection with the examination, the DEPARTMENT reviewed records of RESPONDENTS, including financial records and client files.

12. According to an update to its Form ADV filed by CONSULTING on March 2, 2013, CONSULTING had between eleven (11) and twenty-five (25) clients.

13. The review of client files during the examination revealed that CONSULTING had written contracts with only four (4) clients. Other client files contained an investment advisory contract between the client and SPIER; such contracts were dated prior to the registrations of CONSULTING as an investment adviser and of SPIER as an investment adviser representative. Some client files did not contain any investment advisory contract.

14. The review of client files also showed that SPIER had been given full power of attorney over the account of at least one (1) client and had the password to access the account of at least one (1) client.

15. CONSULTING did not have audited financial statements at the time of examination.

16. In connection with the examination, SPIER provided a list of "Business Income" for the years 2008 – 2011. The report showed that between January 1, 2008 and October 27, 2011, SPIER received:

- a. \$101,565.69 for "Account Management" services from more than ten (10) clients;
- b. \$3,914.45 for "Consultation" services; and
- c. \$58,801.50 in "Option Shares" and "Option Gains."

17. Based on the contracts reviewed between SPIER and certain clients, as of October 27, 2011, SPIER managed approximately four million dollars (\$4,000,000.00) in client assets.

18. In a letter to the DEPARTMENT dated March 18, 2013, SPEIR stated that:

- a. His business began when clients contacted him for assistance with their financial lives, including management of investment portfolios;
- b. All client accounts were held at TD Ameritrade;
- c. He was authorized to manage accounts through a TD Ameritrade Limited Power of Attorney;
- d. His charges were based on the value of the accounts managed, which covered additional consulting other than income tax preparation; and
- e. Payments identified as "Options Share" and "Option Gains" were paid based on an informal profit sharing agreement with one client.

19. SPIER is the sole executive officer identified by CONSULTING on its Form ADV filed with the DEPARTMENT on October 18, 2011, and on March 3, 2013.

20. SPIER is the sole investment adviser representative identified by CONSULTING on its Form IAR filed with the DEPARTMENT in connection with its initial registration and its registration renewal for 2012.

#### **CONCLUSIONS OF LAW**

1. The DEPARTMENT has jurisdiction over this matter pursuant to the Act.
2. Based on Findings of Fact Nos. 19 and 20, clients who entered into contracts with SPIER before the creation and registration of CONSULTING and who

have continued a relationship with SPIER are deemed to have been clients of CONSULTING since October 28, 2011.

3. Based on Findings of Fact Nos. 19 and 20, actions taken by SPIER under the agreements, including actions taken pursuant to the Ameritrade Limited Powers of Attorney, since October 28, 2011, are deemed to be actions of CONSULTING.

4. Based on Findings of Fact Nos. 19 and 20, CONSULTING is deemed to have had authority under the Ameritrade Limited Powers of Attorney to access client accounts since October 28, 2011.

5. Neb. Rev. Stat. § 8-1103(9)(a) (Reissue 2012) provides, in part, that the Director may by order deny, suspend, or revoke the registration of any registrant if the Director finds that (a) the order is in the public interest and (b) the registrant or, in the case of an investment adviser, any officer of the registrant has (i) willfully violated or willfully failed to comply with any provision of the Act or any rule, regulation, or order adopted and promulgated pursuant to the Act or (ii) engaged in dishonest or unethical practices in the securities business.

6. Neb. Rev. Stat. § 8-1103(2)(a) (Reissue 2012) provides that it shall be unlawful for any person to transact business in Nebraska as an investment adviser or as an investment adviser representative unless such person is registered under the Act. Neb. Rev. Stat. § 8-1101(7) (Reissue 2012) defines investment adviser as a person who for compensation engages in the business of advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.

7. The facts set forth in Findings of Fact Nos. 3, 5, 13, 14, 16, 17 and 18, above, constitute SPIER acting as an investment adviser without registration prior to

October 28, 2011, in that SPIER managed investment accounts for others pursuant to investment advisory agreements and received compensation for managing investment accounts without having been registered as an investment adviser under the Act.

8. Neb. Rev. Stat. § 8-1103(7)(d) (Reissue 2012) provides that, if information contained in any document filed with the Director becomes inaccurate in any material respect, an investment adviser shall promptly file a correcting amendment.

9. The facts set forth in Findings of Fact Nos. 2, 6, 7, 8, 12, 13, 14, and 16 through 20, above, constitute failing to file a correcting amendment to a document filed with the DEPARTMENT, specifically the Form ADV for CONSULTING, when the information contained therein became materially false and misleading. Specifically CONSULTING failed to update its Form ADV to:

- a. accurately reflect the number of clients and assets under management;
- b. disclose that CONSULTING charged performance based fees to at least one (1) client; and
- c. disclose that CONSULTING had custody of client cash, bank accounts or securities.

10. 48 NAC 7.003.02 provides in part that an investment adviser shall file an annual application for renewal of registration which shall include a complete, current and accurate copy of the Form ADV, together with all applicable schedules and exhibits.

11. The facts set forth in Finding of Fact No. 8 constitute a failure by CONSULTING to file the required information in connection with its registrations for 2012 and 2013.

12. SPIER signed the Form ADV as President of CONSULTING and is responsible for the content of the filings, including the failure to file correcting amendments promptly.

13. The Instructions for FORM ADV define custody as holding, directly or indirectly, client funds or securities, or having any authority to obtain possession of them.

14. The facts set forth in Findings of Fact No. 14 and Nos. 18 through 20 constitute custody of client funds by SPIER before October 28, 2011, and by RESPONDENTS after October 28, 2011.

15. 48 NAC 7.009.01 requires an investment adviser with custody of client funds to file audited financial statements showing the assets, liabilities and net capital of the adviser with the DEPARTMENT. Such financial statements are to be filed with the annual renewal application.

16. The facts set forth in Findings of Fact Nos. 9, 10, and 15, and Nos. 18 through 20, above, constitute failing to file audited financial statements by CONSULTING when it had custody of clients' cash, bank accounts or securities through limited powers of attorney and password access to client accounts since October 28, 2011.

17. 48 NAC 12.005.16 provides that it is a dishonest and unethical business practice for an investment adviser to enter into, renew or extend a contract for investment advisory services unless such contract is in writing.

18. The facts set forth in Findings of Fact No. 13, above, constitute RESPONDENTS entering into contracts for investment advisory services which contracts were not in writing.

19. These Orders to Show Cause are necessary and appropriate in the public interest and for the protection of investors, and are consistent with the purposes fairly intended by the policy and the provisions of the Act.

20. These Orders of Suspension are necessary and appropriate in the public interest and for the protection of investors, and are consistent with the purposes fairly intended by the policy and the provisions of the Act.

### **ORDER TO SHOW CAUSE**

IT IS THEREFORE ORDERED that DS Consulting, Inc., 3714 North 95th Street, Omaha, Nebraska, shall appear before the Director, or his designated representative, to show cause why its registration as an investment adviser in Nebraska should not be revoked; why DS Consulting, Inc., should not be permanently barred from conducting securities business in Nebraska under the Act; and/or why a fine, not to exceed twenty-five thousand dollars (\$25,000.00) per violation, and/or the costs of the investigation incurred by the DEPARTMENT, including a reasonable amount for the time incurred by DEPARTMENT staff, should not be imposed upon DS Consulting, Inc., for violations of the Act or any rule, regulation, or order adopted and promulgated pursuant to the Act.

IT IS FURTHER ORDERED that the investment adviser registration of DS Consulting, Inc., be, and hereby is, suspended until further order of the DEPARTMENT.

IT IS FURTHER ORDERED that Douglas A. Spier, 3714 North 95th Street, Omaha, Nebraska, shall appear before the Director, or his designated representative, to show cause why his registration as investment adviser representative in Nebraska should not be revoked; why Douglas A. Spier should not be permanently barred from conducting securities business in Nebraska under the Act; and/or why a fine, not to exceed twenty-

five thousand dollars (\$25,000.00) per violation; and/or the costs of the investigation incurred by the DEPARTMENT, including a reasonable amount for the time incurred by DEPARTMENT staff, should not be imposed upon Douglas A. Spier for violations of the Act or any rule, regulation, or order adopted and promulgated pursuant to the Act.

IT IS FURTHER ORDERED that the investment adviser representative registration of Douglas A. Spier be, and hereby is, suspended until further order of the DEPARTMENT.

A hearing on this matter will be held at the office of the Department of Banking and Finance, Commerce Court, Suite 400, 1230 "O" Street, Lincoln, Nebraska, or at such other location as the Director may determine, on the 19th day of June, 2013, at 9:00 a.m. CDT. Failure to appear at such time and place may result in a final order of revocation, a permanent bar from the securities industry in Nebraska, and/or the imposition of a fine and/or costs of investigation in this matter, against DS Consulting, Inc. and/or Douglas A Spier.

The Director further orders that Michael W. Cameron, Consumer Finance Legal Counsel, Department of Banking and Finance, shall be the designated hearing officer in this matter.

DATED this 1st day of May, 2013.

**STATE OF NEBRASKA  
DEPARTMENT OF BANKING AND FINANCE**

By: \_\_\_\_\_

John Munn, Director

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