

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

In the Matter of	)	
	)	
Douglas A. Spier,	)	FINDINGS OF FACT
3714 North 95th Street,	)	
Omaha, Nebraska; and	)	CONCLUSIONS OF LAW
	)	
DS Consulting, Inc.,	)	AND
3714 North 95th Street,	)	
Omaha, Nebraska;	)	CONSENT ORDER
	)	
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; LB 205, 2013; LB 214, 2013) (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”). As a result of such investigation, and being fully advised and informed in the matter, the Director and-RESPONDENTS enter into the following-Findings of Fact, Conclusions of Law and Consent Order (“Order”).

**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 the DEPARTMENT 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 31, 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.

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 the DEPARTMENT 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, SPIER 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.

21. On May 1, 2013, the DEPARTMENT issued Findings of Fact, Conclusions of Law and Orders to Show Cause and Orders of Suspension of Registrations (“May Order”) of CONSULTING and SPIER. RESPONDENTS were ordered to appear before the Director to show cause why they 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 the DEPARTMENT staff, should not be imposed upon RESPONDENTS. Further, the investment adviser registration of DS CONSULTING and the investment adviser

representative registration of SPIER were suspended during the pendency of the action, effective May 1, 2013.

22. A hearing on the May Order was scheduled for June 19, 2013. The hearing has been continued indefinitely.

23. CONSULTING and SPIER have provided documents to the DEPARTMENT regarding certain deficiencies noted during the examination and have cooperated fully with the DEPARTMENT and satisfactorily addressed the deficiencies.

24. SPIER has represented to the DEPARTMENT that the conduct of RESPONDENTS described in this Order has not resulted in harm to clients of RESPONDENTS or the general public. The DEPARTMENT has no information to the contrary and has not received any complaints from clients of RESPONDENTS.

#### **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 Nos. 14 and 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, 15, and 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 Finding of Fact No. 13, above, constitute RESPONDENTS entering into contracts for investment advisory services which contracts were not in writing.

19. Neb. Rev. Stat. § 8-1103(9)(a)(ii) (Reissue 2012) provides, in part, that the Director may by order deny, suspend, or revoke the registration of any registrant, or bar, censure, or impose a fine pursuant to Neb. Rev. Stat. § 8-1108.01(4) (Reissue 2012) on a registrant if the Director finds that (a) the order is in the public interest and (b) the registrant, among other things, has willfully violated or willfully failed to comply with any provision of the Act.

20. Under the Act's statutory framework, the Director has legal and equitable authority to fashion significant protective remedies.

21. It is in the best interest of RESPONDENTS, and it is in the public's best interest, for RESPONDENTS and the Director to resolve the issues included herein.

### **CONSENT ORDER**

NOW THEREFORE, the parties to this Order agree as follows:

Stipulations: In connection with this Order, RESPONDENTS and the Director stipulate to the following:

- a. The DEPARTMENT has jurisdiction as to all matters herein.
- b. An Order should be entered in this matter, which shall be in lieu of other proceedings by the DEPARTMENT, except as specifically referenced in this Order.

RESPONDENTS further represent as follows:

1. RESPONDENTS are aware of their right to a hearing on this Order at which they may be represented by counsel, present evidence, and cross-examine witnesses. The right to such a hearing and any related appeal on all matters covered by this Order is irrevocably waived.

2. RESPONDENTS are acting free from any duress or coercion of any kind or nature and voluntarily enter into this Consent Order.

3. This Order is executed to avoid further proceedings. RESPONDENTS admit to the facts set forth herein and neither admits nor denies the Conclusions of Law set forth hereing. These admissions are made solely for the purposes of this Order and for no other purposes.

FURTHER, RESPONDENTS agree to take whatever action is necessary to ensure compliance with all provisions of the Act in the future. If, at any time, the DEPARTMENT determines that RESPONDENTS, either jointly or severally, have committed any other

violations of the Act, the DEPARTMENT may take any action available to it under the Act.

IT IS THEREFORE ORDERED that:

1. DS Consulting, Inc. shall pay a fine in the amount of fifty thousand dollars (\$50,000.00).
2. DS Consulting, Inc. shall reimburse the DEPARTMENT for a portion of the costs of its investigation in the amount of two thousand five hundred dollars (\$2,500.00).
3. DS Consulting, Inc. shall pay the total of the fine and costs assessed to it pursuant to this Order in the amount of fifty-two thousand five hundred dollars (\$52,500.00), by one check payable to the Nebraska Department of Banking and Finance, within thirty (30) days of the effective date of this Order.
4. The registration of DS Consulting, Inc. as an investment adviser is hereby reinstated as of the effective date of this Order.
5. The registration of Douglas A Spier as an investment adviser representative is hereby reinstated as of the effective date of this Order.
6. The hearing on this matter is continued. Upon satisfaction of the requirements of Conditions Nos. 1, 2, and 3 of this Order, the Show Cause Order will be vacated. If any of the requirements of Conditions Nos. 1, 2, and 3 is not satisfied, RESPONDENTS agree to stipulate to FINDINGS OF FACT contained herein and to submit the matter to the hearing officer for a determination of appropriate sanctions based on such facts. Further, RESPONDENTS agrees to be responsible for all costs incurred by the DEPARTMENT as a result of any failure to comply with the conditions of this Order.

For any person or entity not a party to this Order, this Order does not limit or create any private rights or remedies against RESPONDENTS, limit or create liability of RESPONDENTS, or limit or create defenses of RESPONDENTS to any claims.

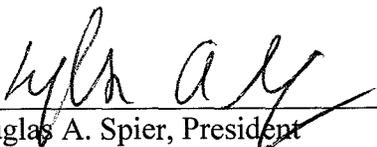
Nothing herein shall preclude the State of Nebraska, its departments, agencies, boards, commissions, authorities, political subdivisions and corporations, other than the DEPARTMENT (collectively, "State Entities") and the officers, agents or employees of State Entities from asserting any claims, causes of action, or applications for compensatory, nominal and/or punitive damages, administrative, civil, criminal, or injunctive relief against RESPONDENTS in connection with the subject matter of this Order.

In the event that RESPONDENTS fail to comply with the provisions of this Order, the DEPARTMENT may commence such action as it deems necessary and appropriate in the public interest.

The effective date of this Order will be the date of the Director's signature.

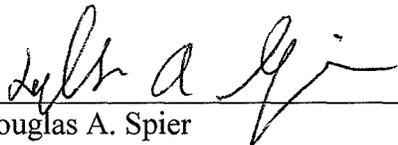
DATED this 4th day of October, 2013.

**DS CONSULTING, INC.,**

By:   
Douglas A. Spier, President  
DS Consulting, Inc.  
3714 North 95th Street  
Omaha, Nebraska  
402-571-9763

DATED this 4<sup>th</sup> day of October, 2013.

**DOUGLAS A. SPIER**

By:   
Douglas A. Spier  
3714 North 95th Street  
Omaha, Nebraska  
402-571-9763

DATED this 15<sup>th</sup> day of October, 2013.

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

By:   
John Munn, Director  
1526 K Street, Suite 300  
Lincoln, Nebraska 68508  
(402) 471-2171

