

WEST VIRGINIA SECURITIES COMMISSION

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In the matter of)
TD AMERITRADE, INC.)
Respondent.)

ORDER NO.: 81-5633
ADMINISTRATIVE CONSENT ORDER

WHEREAS, TD Ameritrade, Inc. ("Respondent" or "TD") is a broker-dealer registered in the state of West Virginia; 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 1, 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.

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 West Virginia Securities Commission making findings and conclusions and entering this Administrative Consent Order (the "Order"); and

WHEREAS, Respondent elects to permanently waive any right to a hearing and appeal under West Virginia Code § 32-4-411 with respect to this Order;

1 NOW, THEREFORE, the West Virginia Securities Commission, as administrator of
2 the West Virginia Uniform Securities Act, hereby enters this Order:

3 I.

4 **RESPONDENT**

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

8 II.

9 **FINDINGS OF FACT**

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

12 3. Respondent is in the business of effecting transactions in securities in West
13 Virginia as a “broker-dealer” within the meaning of West Virginia Code § 32-2-201.

14 4. Respondent maintains branch offices in West Virginia.

15 5. Respondent has and has had customers (Customers or TD Customers)
16 located across the United States of America, including West Virginia.

17 6. Prior to February 13, 2008, Respondent solicited and sold to TD Customers
18 financial instruments known as auction rate securities (“ARS”) to at least one resident of
19 West Virginia.

20 **ARS**

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

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

1 9. ARS can be attractive investments to investors because ARS may offer
2 slightly higher yields than various alternative products, including forms of cash alternative
3 products.

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

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

8 12. Under the typical procedures for an ARS auction in effect prior to February
9 13, 2008, an investor, including TD Customers, who wished to purchase ARS at auction,
10 submitted a bid that included the minimum interest or dividend rate that the investor would
11 accept.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 34. In soliciting TD Customers to purchase ARS prior to the middle of February
11 2008, Respondent’s registered representatives made inaccurate comparisons between
12 ARS and other investments, such as certificates of deposit or money market accounts,
13 telling customers that ARS were similar investments but with a slightly higher yield.

14 35. In soliciting TD Customers to purchase ARS prior to the middle of February
15 2008, Respondent’s registered representatives also did not accurately characterize the
16 investment nature of ARS since ARS are highly complex securities that are very different
17 from money market funds or certificates of deposit, as evidenced by, among other things,
18 the dependence of ARS on successful auctions for liquidity.

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

23 37. Respondent’s registered representatives did not adequately disclose to TD
24 Customers that the Customer’s ability to liquidate the ARS depended on the willingness of
25 other investors to buy the instruments at an auction.

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1 this Order. The West Virginia Securities Commission reserves the right to investigate and
2 commence any proceeding it deems appropriate, in its sole discretion, relating in any way
3 to (a) any Customer who requests a purchase from Respondent and who purchased
4 Eligible Auction Rate Securities at Respondent prior to February 13, 2008, but transferred
5 such Eligible Auction Rate Securities away prior to January 24, 2006; (b) any account
6 owner described in paragraph IV.3(b)(3) of this Order that was excluded from the
7 definition of Eligible Investor because it had over \$10 million in assets at Respondent or
8 total assets greater than \$50 million; or (c) any account owner who holds or held Eligible
9 Auction Rate Securities that were purchased at Respondent or entities acquired by
10 Respondent's parent companies in an account owned, managed, or advised by or through
11 an independent registered investment adviser.

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

14
15 **Relief for ARS Investors:
Purchases from ARS Investors**

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

19 a. "Eligible Auction Rate Securities," for the purposes of this Order, shall
20 mean ARS purchased at Respondent on or before February 13, 2008, and that
21 have failed at auction at least once since February 13, 2008. Notwithstanding the
22 foregoing definition, Eligible Auction Rate Securities shall not include ARS that
23 were purchased at Respondent or entities acquired by Respondent's parent
24 companies in accounts owned, managed, or advised by or through independent
25 registered investment advisers; and
26

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

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

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

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

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

23 ii. If an account owner described within paragraph
24 IV.3(b)(3) transferred its Eligible Auction Rate Securities away from
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26 ¹ Respondent was formed as a result of the consolidation of retail brokerage operations of Ameritrade, Inc. and TD Waterhouse Investors Services, Inc. following Ameritrade Holding Corporation’s acquisition of TD Waterhouse Group, Inc. on January 24, 2006.

1 Respondent prior to March 13, 2009, then the date of the account
2 owner's request to transfer its Eligible Auction Rate Securities shall
3 be used for determining whether the account owner had \$10 million
4 or less in assets at Respondent;

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

9 iv. In no event shall Respondent be required by this Order
10 to purchase more than \$10 million of ARS from any Small Business
11 or 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
14 "Purchase Offer"). The Purchase Offer shall remain open as follows:

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

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

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

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

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

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

19 The purchases will be conducted as follows:

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

25 b. Purchases Relating to Eligible Investors to Whom the Second Offer
26 Period Applies. For those Eligible Investors to whom the Second Offer Period

1 applies, and who accept the Purchase Offer within the Second Offer Period,
2 Respondent shall purchase their Eligible Auction Rate Securities as soon as
3 practicable and, in any event, no later than five (5) business days following the
4 expiration of the Second Offer Period (the "Purchase Deadline"). Respondent shall
5 use its best efforts to effectuate all purchases under this paragraph by March 31,
6 2010, and in no event shall the purchases extend beyond June 30, 2010. In the
7 event Respondent's purchases under this paragraph extend beyond March 23,
8 2010, then the Second Offer Period shall be extended from March 23, 2010 until
9 June 23, 2010;

10 c. An Eligible Investor may revoke his/her/its acceptance of
11 Respondent's Purchase Offer at any time up until Respondent purchases such
12 Eligible Investor's Eligible Auction Rate Securities or provides notice of
13 Respondent's intent to purchase such Eligible Auction Rate Securities.

14 d. Respondent's obligation under this paragraph to those Eligible
15 Investors who custodied their Eligible Auction Rate Securities away from
16 Respondent as of the date of this Order shall be contingent on: (1) Respondent
17 receiving reasonably satisfactory assurance from the financial institution currently
18 holding the Eligible Investor's Eligible Auction Rate Securities that the bidding
19 rights associated with such Eligible Auction Rate Securities will be transferred to
20 Respondent and (2) transfer of the Eligible Auction Rate Securities back to
21 Respondent; and

22 e. Respondent shall use its best efforts to identify, contact, and assist
23 any Eligible Investor who has transferred the Eligible Auction Rate Securities out of
24 Respondent's custody in returning such Auction Rate Securities to Respondent's
25 custody, and shall not charge such Eligible Investor any fees relating to or in
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1 connection with the return to Respondent or custodianship by Respondent of such
2 Eligible Auction Rate Securities.

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

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

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

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

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1 **Reimbursement for Related Loan Expenses**

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

10 **Arbitration**

11 12. Respondent consents to participate in a special arbitration (Arbitration) for
12 the exclusive purpose of arbitrating any Eligible Investor's consequential damages claim
13 arising from 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
17 defined by Section 12100(u) of the FINRA Code of Arbitration Procedures for
18 Customer Disputes);

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

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

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1 d. In the Arbitration, Respondent shall be able to defend itself against
2 such claims, provided, however, that Respondent shall not contest liability for the
3 illiquidity of the underlying ARS or use as part of its defense any decision by an
4 Eligible Investor not to borrow money from Respondent;

5 e. All customers, including but not limited to Eligible Investors who avail
6 themselves of the relief provided pursuant to this Order, may pursue any remedies
7 against Respondent available under the law. However, Eligible Investors that elect
8 to utilize the Arbitration process set forth above are limited to the remedies
9 available in that process and may not bring or pursue a claim relating to Eligible
10 Auction Rate Securities in another forum.

11 f. All terms used but not defined herein shall have the meaning
12 assigned to them by the West Virginia Securities Act.

13 **Reporting and Meetings**

14 14. Within forty-five (45) days of the end of each month beginning with a report
15 covering the month ended after the date of this Order and continuing through and
16 including a report detailing the month ended March 31, 2010, Respondent will submit a
17 monthly written report to the NASAA representative detailing its progress with respect to
18 its obligations pursuant to this Order.

19 15. Respondent will confer with the NASAA representative on a quarterly basis
20 to discuss Respondent's progress to date. Such quarterly discussions will continue
21 through the first quarter of 2010.

22 16. The reporting or meeting deadlines set forth above may be amended with
23 written permission from the NASAA representative.

24 **Compliance Measures**

25 17. Respondent is ordered to provide the NASAA representative with a list of
26 Customers, (delineated and separated by state residency and including amounts of

1 Eligible Auction Rate Securities then held at Respondent) who receive notice of the Offer
2 contained in paragraphs 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
4 Below Par Sellers (delineated and separated by state residency and including amounts of
5 Eligible Auction Rate Securities) who are eligible for relief pursuant to paragraph IV.10 of
6 this Order promptly after 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
10 Rate Securities and original loan amounts) who are entitled to relief under paragraph
11 IV.11 of this Order promptly after the First Offer Period ends.

12 20. Respondent is ordered to comply with the West Virginia Uniform Securities
13 Act and with the regulations adopted by the West Virginia Securities Commission and, in
14 particular, West Virginia Code § 32-1-101(2).

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

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

26 23. This Order is binding in West Virginia.

1 24. Should Respondent fail to comply with any or all provisions of this Order, the
2 West Virginia Securities Commission may impose sanctions and costs and seek other
3 appropriate relief subject to the Respondent's rights to notice and a hearing pursuant to
4 the West Virginia Code § 32-4-407a (b).

5 25. This Order and any dispute related thereto shall be construed and enforced
6 in accordance with, and governed by, the laws of West Virginia without regard to any
7 choice of law principles.

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

12 DATED this ____ day of September, 2009.

13
14 BY ORDER OF THE WEST VIRGINIA
15 COMMISSIONER OF SECURITIES

16 _____
17 By: Lisa A. Hopkins, Senior Deputy Commissioner
18 of Securities
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1 **CONSENT TO ENTRY OF ADMINISTRATIVE ORDER TD AMERITRADE, INC.**

2 TD Ameritrade, Inc. ("Respondent") hereby acknowledges that it has been served
3 with a copy of this Administrative Consent Order ("Order"), has read the foregoing Order,
4 is aware of its right to a hearing and appeal in this matter, and has waived the same.

5 Respondent admits the jurisdiction of the West Virginia Securities Commission,
6 neither admits nor denies the Findings of Fact and Conclusions of Law contained in this
7 Order, and consents to entry of this Order by the West Virginia Securities Commission as
8 settlement of the issues contained in this Order.

9 Respondent states that no promise of any kind or nature whatsoever was made to
10 it to induce it to enter into this Order and that it has entered into this Order voluntarily.

11 _____ represents that he/she is _____ of
12 Respondent, and that, as such, has been authorized by Respondent to enter into this
13 Order for and on behalf of Respondent.

14 Dated this ____ day of September, 2009_.

15 TD AMERITRADE, INC.

16 By: _____

17 Title: _____

18
19 State of _____)
20) ss.
County of _____)

21 SUBSCRIBED AND SWORN TO before me this ____ day of _____ 20__.

22
23 _____
Notary Public

24 My commission expires:

25 _____