

1 THE PEOPLE OF THE STATE OF CALIFORNIA
2 BY AND THROUGH THE COMMISSIONER OF CORPORATIONS

3 In the matter of)
4)
5 TD AMERITRADE, INC.)
6 Respondent.)
7)
8)
9)
10 _____)

FINDINGS OF FACT
CONCLUSIONS OF LAW
ADMINISTRATIVE CONSENT ORDER

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

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

17 WHEREAS, those coordinated investigations resulted in the simultaneous entry on July 20,
18 2009 of Orders on consent against Respondent by the U.S. Securities and Exchange Commission, the
19 Office of the Attorney General of the State of New York, and the Commonwealth of Pennsylvania.

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

23 WHEREAS, Respondent, having advised regulators that it desires to settle and resolve the
24 investigations, without admitting or denying the allegations therein, consents to the California
25 Department of Corporations making findings and conclusions and entering this Administrative
26 Consent Order (the “Order”); and

27 WHEREAS, Respondent elects to permanently waive any right to a hearing and appeal under
28 California Corporations Code sections 25532(d) and 25609 with respect to this Order;

1 NOW, THEREFORE, the California Department of Corporations, as administrator of the
2 California Corporate Securities Law, hereby enters this Order:

3 **I.**

4 **RESPONDENT**

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

7 **II.**

8 **FINDINGS OF FACT**

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

10 3. Respondent is in the business of effecting transactions in securities in California as a
11 “broker-dealer” within the meaning of the California Securities Law.

12 4. Respondent maintains branch offices in California.

13 5. Respondent has and has had customers (Customers or TD Customers) located across
14 the United States of America, including California.

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

17 **ARS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28

1 ARS since ARS are highly complex securities that are very different from money market funds or
2 certificates of deposit, as evidenced by, among other things, the dependence of ARS on successful
3 auctions for liquidity.

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

7 37. Respondent's registered representatives did not adequately disclose to TD Customers
8 that the Customer's ability to liquidate the ARS depended on the willingness of other investors to buy
9 the instruments at an auction.

10 38. The information described in Paragraphs 34 through 37 was material to TD
11 Customers.

12 39. Respondent was aware that its registered representatives marketed ARS to customers
13 as liquid and as an alternative to cash, certificates of deposit, or money market funds without
14 adequately disclosing that ARS are complex securities that may become illiquid.

15 **III.**

16 **CONCLUSIONS OF LAW**

17 The California Department of Corporations has jurisdiction over this matter pursuant to the
18 California Corporate Securities Law.

19 By engaging in the acts and conduct set forth in paragraphs II.2 through II.39, Respondent, in
20 connection with the offer, sale or purchase of a security, made untrue statements of material fact or
21 omitted to state a material fact necessary in order to make the statements made, in the light of the
22 circumstances under which they were made, not misleading, in violation of California Corporations
23 Code section 25401.

24 **IV.**

25 **ORDER**

26 On the basis of the Findings of Fact, Conclusions of law, and Respondent's consent to the
27 entry of this Order,
28

1 IT IS HEREBY ORDERED:

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

17 2. This Order is entered into solely for the purpose of resolving the referenced multi-state
18 investigations, and is not intended to be used for any other purpose.

19 **Relief for ARS Investors:**
20 **Purchases from ARS Investors**

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

24 a. "Eligible Auction Rate Securities," for the purposes of this Order, shall mean
25 ARS purchased at Respondent on or before February 13, 2008, and that have failed at auction
26 at least once since February 13, 2008. Notwithstanding the foregoing definition, Eligible
27 Auction Rate Securities shall not include ARS that were purchased at Respondent or entities
28

1 acquired by Respondent's parent companies in accounts owned, managed, or advised by or
2 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 accounts);
10 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 quasi-
20 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 ii. If an account owner described within paragraph IV.3(b)(3)
25 transferred its Eligible Auction Rate Securities away from Respondent prior
26

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

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

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

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

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

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

20 b. Second Offer Period. For those Eligible Investors with assets at
21 Respondent of more than \$250,000 as of March 13, 2009, the Purchase Offer shall
22 remain open until at least March 23, 2010 (“Second Offer Period”), subject to
23 extension pursuant to paragraph IV.7(b) below. To the extent that any Eligible
24 Investor transferred their Eligible Auction Rate Securities away from Respondent
25 before March 13, 2009, then the measurement date for the \$250,000 threshold shall be
26 the date on which the transfer was requested by the Eligible Investor.

27 5. No later than August 10, 2009, Respondent shall undertake its best efforts to identify
28 and provide notice to Eligible Investors of the relevant terms of this Order. Said notice shall explain

1 what Eligible Investors must do to accept, in whole or in part, the Purchase Offer. Respondent shall
2 also provide written notice of the relevant terms of this Order to any subsequently identified Eligible
3 Investors.

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

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

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

20 b. Purchases Relating to Eligible Investors to Whom the Second Offer Period
21 Applies. For those Eligible Investors to whom the Second Offer Period applies, and who
22 accept the Purchase Offer within the Second Offer Period, Respondent shall purchase their
23 Eligible Auction Rate Securities as soon as practicable and, in any event, no later than five (5)
24 business days following the expiration of the Second Offer Period (the "Purchase Deadline").
25 Respondent shall use its best efforts to effectuate all purchases under this paragraph by March
26 31, 2010, and in no event shall the purchases extend beyond June 30, 2010. In the event
27 Respondent's purchases under this paragraph extend beyond March 23, 2010, then the Second
28 Offer Period shall be extended from March 23, 2010 until June 23, 2010;

1 c. An Eligible Investor may revoke his/her/its acceptance of Respondent's
2 Purchase Offer at any time up until Respondent purchases such Eligible Investor's Eligible
3 Auction Rate Securities or provides notice of Respondent's intent to purchase such Eligible
4 Auction Rate Securities;

5 d. Respondent's obligation under this paragraph to those Eligible Investors who
6 custodied their Eligible Auction Rate Securities away from Respondent as of the date of this
7 Order shall be contingent on: (1) Respondent receiving reasonably satisfactory assurance from
8 the financial institution currently holding the Eligible Investor's Eligible Auction Rate
9 Securities that the bidding rights associated with such Eligible Auction Rate Securities will be
10 transferred to Respondent and (2) transfer of the Eligible Auction Rate Securities back to
11 Respondent; and

12 e. Respondent shall use its best efforts to identify, contact, and assist any Eligible
13 Investor who has transferred the Eligible Auction Rate Securities out of Respondent's custody
14 in returning such Auction Rate Securities to Respondent's custody, and shall not charge such
15 Eligible Investor any fees relating to or in connection with the return to Respondent or
16 custodianship by Respondent of such Eligible Auction Rate Securities.

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

23 9. By July 22, 2009, Respondent shall have established: (a) a dedicated toll-free
24 telephone assistance line, with appropriate staffing, to provide information and to respond to
25 questions concerning the terms of this Order; and (b) a public Internet page on its corporate
26 Website(s), with a prominent link to that page appearing on Respondent's relevant homepage(s), to
27 provide information concerning the terms of this Order and, via an e-mail address or other reasonable
28 means, to respond to questions concerning the terms of this Order. Respondent shall maintain the

1 telephone assistance line and Internet page through at least the last day of the Purchase Deadline, or
2 any extension thereof.

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

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

10 **Reimbursement for Related Loan Expenses**

11 11. As soon as practicable, but no later than seventy-five (75) days from July 20, 2009,
12 Respondent shall make its best efforts to identify Eligible Investors who took out loans from
13 Respondent after February 13, 2008, that were secured by Eligible Auction Rate Securities that were
14 not successfully auctioning at the time the loan was taken out from Respondent and paid interest
15 associated with the auction rate securities based portion of those loans in excess of the total interest
16 and dividends received on the auction rate securities during the duration of the loan. Respondent
17 shall reimburse such customers promptly for the excess expense, plus reasonable interest thereon.

18 **Arbitration**

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

22 13. Respondent will notify Eligible Investors of the Arbitration process under the
23 following terms:

- 24 a. The Arbitration will be conducted by a single public arbitrator (as defined by
25 Section 12100(u) of the FINRA Code of Arbitration Procedures for Customer Disputes);
26
27
28

Compliance Measures

1
2 17. Respondent is ordered to provide the NASAA representative with a list of Customers,
3 (delineated and separated by state residency and including amounts of Eligible Auction Rate
4 Securities then held at Respondent) who receive notice of the Offer contained in paragraphs IV.3 and
5 IV.4 of this Order promptly after such notice is sent.

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

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

15 20. Pursuant to California Corporations Code section 25532 Respondent is ordered to
16 comply with the California Corporations Code section 25401 and with the regulations adopted by the
17 California Department of Corporations and, in particular, Title 10, Ch. 3, sections 260.218 and
18 260.218.4(a) of the California Code of Regulations.

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

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

1 **CONSENT TO ENTRY OF ADMINISTRATIVE ORDER TD AMERITRADE, INC.**

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

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

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

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

14 Dated this 3rd day of November, 2009.

15
16 TD AMERITRADE, INC.

17
18 By: William J. Gerber
19 Title: EVP & CFO

20 State of _____)
21 _____) ss.
22 County of _____)

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

24 _____
25 Notary Public

26 My commission expires:

27 _____
28