

**UNITED STATES OF AMERICA  
BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934  
Release No. 70449 / September 18, 2013**

**ACCOUNTING AND AUDITING ENFORCEMENT  
Release No. 3488 / September 18, 2013**

**ADMINISTRATIVE PROCEEDING  
File No. 3-15503**

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	:	<b>ORDER INSTITUTING PUBLIC</b>	
	:	<b>ADMINISTRATIVE PROCEEDINGS</b>	
<b>In the Matter of</b>	:	<b>PURSUANT TO SECTION 4C OF THE</b>	
	:	<b>SECURITIES EXCHANGE ACT OF</b>	
<b>Marc G. Nochimson, CPA</b>	:	<b>1934 AND RULE 102(e) OF THE</b>	
	:	<b>COMMISSION'S RULES OF</b>	
<b>Respondent.</b>	:	<b>PRACTICE, MAKING FINDINGS, AND</b>	
	:	<b>IMPOSING REMEDIAL SANCTIONS</b>	
	:		

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate that public administrative proceedings be, and hereby are, instituted against Marc G.Nochimson (“Respondent” or “Nochimson”) pursuant to Section 4C of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 102(e)(1)(ii) of the Commission’s Rules of Practice.<sup>1</sup>

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<sup>1</sup> Section 4C provides that:

The Commission may . . . deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found . . . to have engaged in . . . improper professional conduct. . . .

Rule 102(e)(1)(ii) provides that:

The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it . . . to any person who is found . . . to have engaged in . . . improper professional conduct. . . .

## II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Public Administrative Proceedings Pursuant to Section 4C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission’s Rules of Practice, Making Findings, and Imposing Remedial Sanctions (“Order”), as set forth below.

## III.

On the basis of this Order and Respondent’s Offer, the Commission finds<sup>2</sup> that:

### A. SUMMARY

1. This matter concerns Respondent Marc Nochimson’s improper professional conduct in connection with annual audits of the financial statements of Medifast, Inc. (“Medifast” or “the Company”) from 2006 to 2008. As engagement partner with a now-defunct accounting firm, Nochimson supervised Medifast’s audits and the firm issued unqualified opinions on the Company’s December 31, 2006, December 31, 2007, and December 31, 2008 financial statements. Each of these audit reports stated that the underlying audit was conducted in accordance with the standards of the Public Company Accounting Oversight Board (“PCAOB Standards”),<sup>3</sup> and that the Company’s financial statements were presented fairly in conformity with U.S. generally accepted accounting principles (“GAAP”). In reality, Medifast’s financial statements were not presented fairly in conformity with GAAP due to material errors resulting from Medifast’s failure to properly account for its income tax provision and resulting income tax expense during the affected years, and Nochimson did not conduct Medifast’s audits in accordance with PCAOB Standards.

2. As the auditor with final responsibility for the Medifast audits, Nochimson did not comply with PCAOB Standards when, in connection with deferred taxes and the income tax provision, he failed to exercise due professional care and professional

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<sup>2</sup> The findings herein are made pursuant to Respondent’s Offer and are not binding on any other person or entity in this or any other proceeding.

<sup>3</sup> References to the PCAOB Standards are cited as “AU [section]” and refer to the specific sections of the codification of the American Institute of Certified Public Accountants (“AICPA”) professional standards, known as the Statements on Auditing Standards, as issued by the Auditing Standards Board of the AICPA. These standards were adopted by the PCAOB following passage of the Sarbanes-Oxley Act of 2002 (the “SOX Act”) and include generally accepted auditing standards (“GAAS”) in place at the time of the SOX Act’s passage. References in this order are to standards in effect at the time of the relevant conduct.

skepticism, failed to obtain the necessary training and proficiency in the area of income taxes, failed to adequately plan and supervise the audits, failed to obtain sufficient competent evidential matter, and failed to prepare and retain adequate work paper documentation. Nochimson thereby engaged in improper professional conduct in connection with the audits of Medifast's financial statements from 2006 through 2008 within the meaning of Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

**B. RESPONDENT**

3. **Nochimson**, 55, resides in Marlton, New Jersey. Until late 2009, Nochimson was an audit partner at a now-defunct accounting firm. Nochimson served as the engagement partner for the audits of Medifast's financial statements from fiscal years 2006 to 2009. He was the concurring partner on the 2005 Medifast audit and served as audit manager on the 2003 and 2004 Medifast audits. In 2010, Nochimson became a partner at another accounting firm. Nochimson is a certified public accountant licensed to practice in the states of New Jersey, New York, Delaware, and Maryland.

**C. RELEVANT ENTITY**

4. **Medifast** is a Delaware corporation headquartered in Owings Mills, Maryland. Medifast manufactures, distributes, and sells weight management and other health and diet products. The Company's common stock is registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act of 1934 and trades on the New York Stock Exchange.

**D. FACTS**

***Medifast Improperly Accounted for its Income Tax Provision***

5. On March 31, 2010, Medifast filed its 10-K for the year ended December 31, 2009 and restated its financial statements for the years ended December 31, 2006, 2007, and 2008 ("2010 Restatement"). This restatement was required to correct material errors in the Company's reported income tax expense that were caused by the Company's failure to account for its income tax provision in conformity with FASB Statement 109, *Accounting for Income Taxes* ("FAS 109").<sup>4</sup> Medifast's income tax accounting for the years 2006 through 2008 did not comply with FAS 109 because,

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<sup>4</sup> FAS 109 establishes standards for companies to account for and report the effects of income taxes. Due to differences between tax laws and accounting standards for financial statements, some events are recognized for financial reporting purposes and for tax purposes in different years. This can give rise to temporary differences between the tax bases of assets or liabilities and their reported amounts in financial statements. These temporary differences, or deferred taxes, are accounted for under FAS 109 using an asset and liability approach. Under FAS 109, a company must recognize both a current tax liability or asset for the amount of taxes payable or refundable for the current year, and a deferred tax liability or asset for the estimated future tax effects attributable to temporary differences. The current and deferred portions are then combined to calculate the company's total income tax provision (also referred to as its income tax expense) for the reporting period. Upon the codification of GAAP, which became effective for periods ending after September 15, 2009, FAS 109 is now part of Accounting Standards Codification (ASC) 740.

among other things, the Company did not calculate a deferred tax liability to account for certain fixed assets that were being depreciated faster for tax purposes than for financial statement purposes. This failure caused Medifast's net income after tax to be materially overstated over the three affected years by an average of 12.4% per year.

6. Moreover, Medifast's reported income tax provisions in its Form 10-Ks were not properly supported by Medifast's internal income tax provision worksheets, nor by the audit work papers. The Company's worksheets were used to calculate its current and deferred taxes at year-end for financial statement purposes. In 2008, for example, the "current income tax provision" on Medifast's internal worksheet was calculated as \$2,578,107 and a "total deferred tax asset" was calculated as \$1,321,072. But Medifast reported in its Form 10-K a current income tax provision of \$1,711,000 and a deferred tax expense of \$704,000. In 2007, Medifast's "current income tax provision" was calculated on its internal worksheet as \$1,805,708 and a "total deferred tax asset" was calculated as \$1,079,321. But in its Form 10-K for 2007, Medifast reported a current income tax provision of \$1,233,000 and a deferred tax expense of \$473,000.

7. In its 2010 Restatement, Medifast acknowledged that it had a material weakness in its internal control over financial reporting because the preparation and review process for the calculation of Medifast's tax provision was inadequate, which led to errors in the computation of deferred tax assets, deferred tax liabilities, and the income tax provision.

#### ***Nochimson Engaged in Improper Professional Conduct***

8. Nochimson was the engagement partner responsible for planning and conducting the audits of Medifast's financial statements for the years ended 2006 through 2008. Medifast's financial statements for those years, as filed with the Commission, contained audit reports with unqualified opinions. Those audit reports represented that Medifast's audits had been conducted in accordance with the standards of the PCAOB, and that Medifast's financial statements were presented fairly in conformity with GAAP. In fact, Nochimson did not conduct the audits of Medifast's financial statements in accordance with the Auditing Standards and Medifast's financial statements were not presented fairly in conformity with GAAP.

9. Nochimson engaged in improper professional conduct pursuant to Rule 102(e)(1) by failing, in several instances, to comply with the PCAOB Standards in conducting Medifast's 2006, 2007 and 2008 financial statement audits, as discussed below.

#### ***Nochimson Failed to Exercise Due Professional Care and Skepticism***

10. The PCAOB Standards require that "[d]ue professional care is to be exercised in the planning and performance of the audit and the preparation of the report." AU § 230.01. Among other things, due professional care requires that "[a]uditors should be assigned to tasks and supervised commensurate with their level

of knowledge, skill and ability so that they can evaluate the audit evidence they are examining. The auditor with final responsibility for the engagement should know, at a minimum, the relevant professional accounting and auditing standards and should be knowledgeable about the client. The auditor with final responsibility is responsible for the assignment of tasks to, and supervision of, assistants.” AU § 230.06. In addition, “[d]ue professional care requires the auditor to exercise professional skepticism. Professional skepticism is an attitude that includes a questioning mind and a critical assessment of audit evidence.” AU § 230.07.

11. Nochimson had only a limited understanding of FAS 109, and did not sufficiently understand Medifast’s tax provision. In addition, by the 2008 audit, Nochimson knew that there was a problem with Medifast’s tax provision because he could not reconcile the Company’s internal calculations with the tax provision disclosures that the Company included in its Form 10-K for that year. Despite this awareness, Nochimson did not reconcile the differences. Instead, he dismissed the discrepancies as immaterial without conducting a proper materiality analysis. His firm then issued an unqualified opinion on Medifast’s 2008 audited financial statements. Based on the foregoing, Nochimson therefore failed to exercise the due care and professional skepticism required of him under the PCAOB Standards.

#### ***Lack of Training and Proficiency***

12. The PCAOB Standards require that the audit be performed by "a person or persons having adequate technical training and proficiency as an auditor." AU § 210.01. Nochimson lacked the necessary training and proficiency as an auditor to properly interpret the professional guidance under GAAP in FAS 109 related to deferred taxes. In addition, the staff auditor responsible for performing the audit steps related to Medifast’s 2007 income tax provision told Nochimson on several occasions that tax accounting was his weakest area, and that he did not feel entirely comfortable auditing the Company’s deferred taxes. Nevertheless, Nochimson allowed the staff auditor to remain on the engagement. Instead of continuing with the audit of Medifast’s financial statements, Nochimson had a professional obligation to acquire the necessary knowledge and skills in this area, suggest someone else qualified to perform the work, or decline the engagement.

#### ***Nochimson Failed to Adequately Plan and Supervise the Audits***

13. As the engagement partner, Nochimson was responsible for Medifast’s audit planning and supervision. Proper audit planning and supervision under the PCAOB Standards requires that “the work is to be adequately planned and assistants, if any, are to be properly supervised.” AU § 311.01. The PCAOB Standards further state that “[t]he extent of supervision appropriate in a given instance depends on many factors, including the complexity of the subject matter and the qualifications of persons performing the work.” AU § 311.11.

14. Nochimson’s supervision of Medifast’s audits did not comply with these

PCAOB Standards. For example, the staff auditor responsible for performing the audit steps for Medifast related to its 2007 income tax provision told Nochimson that he did not feel entirely comfortable auditing the Company's deferred taxes. Instead of replacing the staff auditor with another professional who understood FAS 109, Nochimson proceeded with the audit and did not adjust his supervision of the audit accordingly.

***Nochimson Did Not Maintain Adequate Work Paper Documentation and Did Not Obtain Sufficient Evidential Matter***

15. The PCAOB Standards establish general requirements for documentation that an auditor should prepare and retain in connection with audits of financial statements. PCAOB Auditing Standard No. 3.1. Because it is the written record supporting the auditor's representations, audit documentation should, among other things, "[s]upport the basis for the auditor's conclusions concerning every relevant financial statement assertion, and ... [d]emonstrate that the underlying accounting records agreed or reconciled with the financial statements." PCAOB Auditing Standard No. 3.5. The PCAOB Standards also require an auditor to obtain sufficient competent evidential matter concerning the assertions in an issuer's financial statements, and state that an auditor's substantive procedures "must include reconciling the financial statements to the [underlying] accounting records." AU § 326.19.

16. Nochimson did not maintain adequate documentation in connection with the audits of Medifast's income tax provision, and did not obtain sufficient evidential matter concerning the assertions in Medifast's financial statements with regard to its income tax provision, in violation of the PCAOB Standards. For example, there was inadequate documentation in the audit work papers to support Medifast's deferred tax expense amount, deferred tax asset amount, or tax basis depreciation for the years 2006 through 2008. Nochimson also did not properly reconcile the tax provision work papers with the amounts contained in the Company's Form 10-K for the years 2007 and 2008, and the tax provision amounts in Medifast's work papers were materially different from the tax provision amounts that were ultimately reported in Medifast's Form 10-Ks.

**E. VIOLATIONS**

17. Rule 102(e)(1)(ii) provides that the Commission may temporarily or permanently deny an accountant the privilege of appearing or practicing before it if it finds, after notice and opportunity for hearing, that the accountant engaged in "improper professional conduct." Such improper professional conduct includes, as applicable here, "repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards that indicate a lack of competence to practice before the Commission." Rule 102(e)(1)(iv)(B).

18. As a result of his actions detailed above, Nochimson engaged in improper professional conduct with respect to the audits of Medifast's 2006, 2007 and 2008 financial statements.

**F. FINDINGS**

19. Based on the foregoing, the Commission finds that Respondent engaged in improper professional conduct pursuant to Rule 102(e)(1)(ii) of the Commission's Rules of Practice.

**IV.**

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED that, effective immediately:

A. Respondent Nochimson is denied the privilege of appearing or practicing before the Commission as an accountant.

B. After one year from the date of this order, Respondent may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:

1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Respondent's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or

2. an independent accountant. Such an application must satisfy the Commission that:

(a) Respondent, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;

(b) Respondent, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the Respondent's or the firm's quality control system that would indicate that the Respondent will not receive appropriate supervision;

(c) Respondent has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and

(d) Respondent acknowledges his responsibility, as long as Respondent appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

C. The Commission will consider an application by Respondent to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits.

The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Respondent's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

By the Commission.

Elizabeth M. Murphy  
Secretary