

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of	
Department of Enforcement,	<u>DECISION</u>
Complainant,	Complaint No. C3A010045
vs.	Dated: December 15, 2003
Investment Management Corp., Salt Lake City, Utah	
and	
Kevin D. Kunz, Fruit Heights, Utah,	
Respondents.	

**Respondents appealed Hearing Panel decision finding that firm: (1) conducted a securities business while failing to maintain its minimum net capital; (2) maintained inaccurate books and records; (3) filed inaccurate FOCUS reports; (4) submitted an incomplete and materially inaccurate notice of a possible net capital deficiency; (5) failed to file required information concerning an arbitration award and a settlement; (6) allowed an unregistered person to function in a capacity that required registration; and (7) failed to establish adequate written supervisory procedures with respect to the reporting of arbitration awards and settlements. Held, affirm Hearing Panel's findings and sanctions.**

Appearances

For the Complainant: Jacqueline D. Whelan, Esq., NASD Department of Enforcement.

For the Respondents: Donald L. Dalton, Esq., Dalton & Kelley, Salt Lake City, UT.

**DECISION**

Respondents Investment Management Corp. ("IMC" or "the Firm") and Kevin D. Kunz ("Kunz") have appealed a Hearing Panel decision pursuant to NASD Procedural Rule 9311. The Hearing Panel ruled, in a decision dated August 23, 2002, that respondents: (1) conducted a securities business while failing to maintain the required minimum net capital, in violation of the Securities Exchange Act of 1934 ("Exchange Act") Rule 15c3-1 and NASD Rule 2110; (2) maintained inaccurate books and records, in violation of Exchange Act Rule 17a-3 and NASD

Rules 3110 and 2110; (3) filed inaccurate FOCUS reports, in violation of NASD Rule 2110; (4) submitted an incomplete and materially inaccurate notice of a possible net capital deficiency, in violation of NASD Rule 2110; (5) failed to file required information concerning an arbitration award and its subsequent settlement, in violation of NASD Rules 3070 and 2110; (6) allowed an unregistered person to function in a capacity that required registration, in violation of NASD Rules 1120 and 2110; and (7) failed to maintain adequate written supervisory procedures with respect to the reporting of arbitration awards and settlements, in violation of NASD Rules 3010 and 2110.

After reviewing the record in this matter, we affirm the Hearing Panel's findings and impose fines totaling \$28,753, jointly and severally, for respondents' violations and assess costs of \$5,131.82, jointly and severally, on respondents. We also bar Kunz from associating with any NASD member as a financial and operations principal ("FINOP"), suspend Kunz from acting in any principal capacity for six months, and require Kunz to requalify in any principal capacity in which he seeks to be registered.

#### I. Background

IMC has been an NASD member since 1994. Kunz is an owner of IMC and has been associated with IMC since its inception. During the relevant period, he was IMC's president and its sole director, and was registered with IMC as a general securities representative, general securities principal, municipal securities principal and FINOP.<sup>1</sup>

#### II. Procedural History

On November 11, 2001, the Department of Enforcement ("Enforcement") filed a seven-cause complaint against IMC and Kunz. A hearing was held before a Hearing Panel on April 8-9, 2002. On August 23, 2002, the Hearing Panel issued its decision, finding that respondents engaged in the misconduct alleged in all seven causes of the complaint. The Hearing Panel imposed fines totaling \$28,753, jointly and severally, for respondents' violations and assessed costs of \$3,816.28, jointly and severally. The Hearing Panel also: (1) barred Kunz from associating with any member as a FINOP; (2) suspended Kunz from acting in any principal capacity for six months; and (3) required Kunz to requalify in any principal capacity in which he seeks to be registered.

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<sup>1</sup> Kunz entered the securities industry in May 1987.

### III. Facts

#### A. The Arbitration Award

On December 22, 1999, an NASD arbitration panel issued an award against IMC and Kunz for \$174,610.<sup>2</sup> On January 10, 2000, IMC and Kunz filed a motion to vacate the award in Utah state court, and on January 13, 2000, the award recipients filed an action to confirm the award in Nevada state court. IMC and Kunz subsequently dismissed the Utah proceeding, filed a motion to vacate in the Nevada proceeding, and removed the Nevada proceeding from state court to federal court. In April 2000, through court-ordered mediation, the parties agreed to a settlement, which was subsequently incorporated in a Mutual Release and Settlement Agreement dated May 3, 2000. Under the agreement, IMC agreed to pay \$117,500 on or before May 27, 2000. As part of the settlement, the United States District Court for the District of Nevada ordered NASD to expunge all information about the award from NASD's Central Registration Depository ("CRD") system. NASD's subsequent motion to overturn the court's order was denied. On May 26, 2000, IMC paid the \$117,500 required under the settlement. Respondents, however, failed to notify NASD of either the December 22, 1999 arbitration award or the May 26, 2000 settlement.

#### B. IMC's Net Capital, Books and Records and Financial Reports

IMC did not notify NASD of the arbitration award, but on January 3, 2000, NASD District 3 examination staff learned of the award from other NASD staff. They called Kunz, believing that IMC might be below its required minimum net capital because of the award, and Kunz told them that IMC had not booked the award as a liability. District 3 staff told Kunz that, according to NASD's Guide to Rule Interpretations, a broker-dealer must book an arbitration award as a liability when it is issued, even if the firm has appealed the award to a court of competent jurisdiction. On January 3, 2000, Kunz told the District 3 staff that IMC would book the award as a liability.

On February 29, 2000, IMC submitted to NASD its annual audited financial report for the year ending December 31, 1999. NASD staff reviewed the report in March and noted that in spite of Kunz' representation that IMC would book the December 22 arbitration award, the report's computation of IMC's net capital as of December 31, 1999, did not reflect the award as a liability of the Firm. Instead, the report merely disclosed the award in a footnote. Further, the staff determined that, if the award were included, IMC's year-end capital was not sufficient to meet its net capital requirements as of December 31, 1999.

The staff asked Kunz to forward IMC's month-end balance sheets and net capital computations for January 2000 and February 2000. Kunz sent those materials via facsimile to the staff on March 30, 2000. Although the calculations that Kunz provided indicated that IMC had sufficient net capital as of January 31, 2000 and February 29, 2000, the staff believed Kunz' calculations were incorrect in various respects, including, most significantly, that they did not

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<sup>2</sup> At the time, IMC was known as Kunz and Cline Investment Management, Inc.

reflect the arbitration award as a liability. As recalculated by the staff, IMC's net capital was below its required minimums on both dates.

Under Exchange Act Rule 17a-11, whenever a broker-dealer's net capital falls below the minimum required amount, the broker-dealer must give notice to the Securities and Exchange Commission ("SEC") and NASD of such deficiency within 24 hours.<sup>3</sup> Because respondent's net capital computations were materially inaccurate, respondents failed to timely notify NASD that IMC's net capital had fallen below the required amount.

A staff examiner then attempted to contact Kunz about the staff's concern that IMC was conducting a securities business while failing to maintain the required minimum net capital. The examiner was unable to reach Kunz, and spoke to another registered principal at IMC, Brian Horne ("Horne"). The examiner advised Horne of the staff's concern that IMC had inadequate capital. Horne was not an accountant or a FINOP, and he advised the examiner that he was unable to reach Kunz, who was out of the country. He told the examiner that he would try to bring in a certified public accountant to review IMC's books and determine whether it met its net capital requirement. Horne also stated that if he could not make that determination by April 4, 2000, he would either close down the Firm or infuse additional capital of his own.

On April 4, 2000, Horne sent the staff a letter stating that he had not been able to contact Kunz, but had deposited \$36,000 of his own funds in IMC's checking account as a capital contribution to the Firm. With this contribution, according to Horne, IMC met its net capital requirements. Horne assured the staff that he understood that his funds would have to remain in the Firm for at least 12 months to qualify as a net capital contribution, and that if they were withdrawn before then, his funds would retroactively be considered to have been a loan to IMC, rather than a capital contribution.<sup>4</sup> IMC, however, did not record Horne's funds as a capital contribution on its books.

Later in April 2000, Kunz returned to IMC and sent the staff additional IMC financial records that the staff had requested, including portions of IMC's general ledger, income statements, a balance sheet and net capital computation as of March 31, 2000, and certain notes that IMC had included as allowable capital in its net capital computations. Kunz also submitted revised balance sheets and net capital calculations for IMC as of January 31, 2000 and February

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<sup>3</sup> Exchange Act Rule 17a-11 requires broker-dealers to give notice of a net capital deficiency or other operational problems and to file supplementary reports in certain instances. The purpose of this rule is to give the SEC and NASD advance warning and information about broker-dealers that are experiencing financial or operational difficulties.

<sup>4</sup> A November 1996 NASD Regulatory & Compliance Alert explains that: (1) an infusion of capital must remain with the broker-dealer for a period of at least 12 months to be considered permanent capital for net capital purposes; and (2) for any length of time less than 12 months, the infusion would be considered a loan unless the firm has received a "No Action" letter from the SEC authorizing the early withdrawal.

29, 2000, which accounted for the arbitration award as a liability and showed that IMC met its net capital requirements on those dates.

In reviewing those materials, the staff concluded that the balance sheets and net capital computations that Kunz had submitted were erroneous, and that IMC did not have the required minimum net capital on the relevant dates. In particular, the staff concluded that IMC had included in its assets several unsecured promissory notes issued to IMC by Kunz that were not allowable for purposes of calculating IMC's net capital.

The staff also recalculated IMC's net capital as of December 31, 1999, making adjustments based on IMC's audited financial statements. The staff's recalculation added the arbitration award as a liability and disallowed an unsecured promissory note that Kunz had issued to IMC. Based on these recalculations, the staff concluded that IMC did not have the required minimum net capital on December 31, 1999. The staff also recalculated Kunz' net capital computation for IMC as of March 31, 2000, concluding, once again, that IMC did not have the minimum net capital required on that date. Moreover, the staff reviewed IMC's FOCUS reports for the periods ending December 31, 1999 and March 31, 2000, and concluded that those reports also contained errors regarding IMC's allowable assets, liabilities and net capital.

In September 2000, the staff conducted a routine examination of IMC. In reviewing IMC's books, the staff determined that, in spite of Horne's representation that his funds would remain with IMC for at least one year, IMC had repaid Horne \$36,000 by the end of May 2000 without advising the staff. When asked, Kunz confirmed the repayments. This led the staff to re-compute IMC's net capital as of April 28, 2000 (the last business day in April), treating Horne's funds as a loan obligation of the Firm. With these adjustments, the staff found that IMC was below its minimum required net capital on that date.

As part of the routine examination, NASD staff also reviewed IMC's Supervisory Policy and Procedures Manual ("Manual"). IMC's Manual expressly required compliance "with the securities laws, regulations, [and] NASD rules" from all IMC employees. The staff found, however, that the Manual did not specifically discuss NASD Rule 3070 and its reporting requirements or identify any procedures for fulfilling these requirements.

### C. Continuing Education

During the September 2000 examination, the staff determined that the registration of Jeffrey Cline ("Cline"), an IMC registered representative, had automatically become inactive on January 4, 2000 because he did not complete a required regulatory element assessment under NASD's Continuing Education Rule 1120.<sup>5</sup> Cline and the respondents were unaware that Cline's registration had become inactive until March 3, 2000. Cline immediately tried to schedule the

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<sup>5</sup> NASD Rule 1120 provides that no member shall permit any registered person to continue to perform duties as a registered person unless such person has completed specific continuing education training prescribed by NASD.

required continuing education, but was unable to do so until March 20, 2000. Cline satisfied his obligation on that date, and NASD reactivated his registration.

When Cline learned his registration was inactive, he consulted with Kunz about how to service his customers. Cline was also a registered investment advisor, but he had never functioned in that capacity at IMC. Kunz allowed Cline to continue servicing his customers on the theory that he would be acting as an investment advisor rather than as a registered representative. Cline continued to contact his customers, make recommendations and take orders, without telling the customers that he was acting in a different capacity. Just as before, Cline entered his customers' orders with IMC's clearing firm using his own IMC registered representative number. At the end of each day, however, Kunz reviewed and approved Cline's trades. IMC subsequently paid Cline his normal commissions for the transactions.

#### IV. Discussion

We have reviewed the evidence and the parties' arguments, and we affirm the Hearing Panel's findings that IMC and Kunz violated the SEC and NASD rules identified in each cause of the complaint. We also find that the sanctions the Hearing Panel imposed are sufficiently remedial under the circumstances, and we affirm them.

##### A. Kunz' Failure to Book the Arbitration Award Caused a Net Capital Violation

Section 15(c) of the Exchange Act is the foundation for Exchange Act Rule 15c3-1 ("the Net Capital Rule") and it prohibits broker-dealers from engaging in a securities business if their net capital falls below certain amounts. The Net Capital Rule is one of the most important tools that the SEC and NASD use to protect investors because it imposes financial responsibility on the securities industry by: (1) establishing minimum net capital requirements for broker-dealers; and (2) defining the process used by broker-dealers to determine their net capital at all times.<sup>6</sup>

The SEC has determined that for purposes of the Net Capital Rule, a broker-dealer must book an adverse arbitration award as a liability at the time that the award is rendered.<sup>7</sup> Respondents acknowledge the SEC's interpretation of the Net Capital Rule, but contend that the Conley decision creates an exception under which a broker-dealer does not have to book an

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<sup>6</sup> See Exchange Act Rule 15c3-1. See also William H. Gerhauser, 53 S.E.C. 933, 937 (1998) (stating that the Net Capital Rule was designed to ensure financial responsibility for brokers and dealers and is one of the most important weapons in the SEC's arsenal to protect investors).

<sup>7</sup> See Wallace G. Conley, 51 S.E.C. 300, 302 (1993) (stating that an adverse award should be booked when rendered rather than when confirmed on appeal). See also NASD Guide to Rule Interpretations at 35 (1996) (stating that "a broker-dealer that is the subject of an adverse award in an arbitration proceeding should book said award as an actual liability at the time the award is made, even though the appeal process has not been exhausted and no judgment has been rendered, because grounds for revision on appeal are very limited").

arbitration award as a liability when the award is rendered if it is not likely that the award will be confirmed in court. Respondents' contention lacks merit.

The respondent in Conley argued that an adverse arbitration award should not be treated as a liability for net capital purposes until it is reduced to a judgment. The SEC rejected this argument, holding that "an award should be booked when it is rendered, not when a court confirms it."<sup>8</sup>

Conley makes it clear that under the Net Capital Rule, arbitration awards should be booked as liabilities when they are issued.<sup>9</sup> We therefore reject respondents' argument that Conley creates an exception to the Net Capital Rule, and we sustain the Hearing Panel's findings that respondents violated the Net Capital Rule.

B. Kunz' Notes Were Inaccurately Booked as Allowable Assets

The purpose of the Net Capital Rule is to ensure that a firm has on hand at all times sufficient liquid assets to cover its indebtedness.<sup>10</sup> Net capital is the net worth of a broker-dealer adjusted by deducting non-allowable assets.<sup>11</sup> The paramount concern of the Net Capital Rule is liquidity.<sup>12</sup> Therefore, for purposes of net capital computations, a broker-dealer must be able to demonstrate that certain assets counted toward its net worth are readily convertible into cash.<sup>13</sup>

The Hearing Panel found that IMC conducted a business while out of compliance with the Net Capital Rule in January, February, and March of 2000. These Net Capital Rule violations were caused in part by Kunz' improper characterization of certain notes as allowable assets. The Net Capital Rule specifies that certain assets that cannot be readily converted into cash should not be treated as assets in net capital computations. These assets include unsecured

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<sup>8</sup> Conley, 51 S.E.C. at 302.

<sup>9</sup> Respondents argue that the Hearing Panel erred because it did not allow them to present the testimony of their accountant regarding the accountant's opinion that under Generally Accepted Accounting Principles ("GAAP"), the arbitration award did not have to be booked as a liability when it was rendered. We do not agree. The Net Capital Rule, to which the Firm is subject, contains a specific requirement regarding the treatment of adverse arbitration awards that renders irrelevant any accountant's opinion that such an award need not be booked as a liability under GAAP.

<sup>10</sup> FundCLEAR, Inc., 51 S.E.C. 1316, 1319 (1994).

<sup>11</sup> Kirk L. Ferguson, 51 S.E.C. 1247, 1249 (1994).

<sup>12</sup> Walter Capital Corp., 50 S.E.C. 176, 177 (1989).

<sup>13</sup> Id.

advances and loans and other unsecured notes.<sup>14</sup> Similarly, because unsecured notes cannot be readily converted to cash, the Net Capital Rule does not allow a broker-dealer to include them as allowable assets in its net capital computations.<sup>15</sup> Kunz pledged one note to IMC that was secured by "all commissions earned by Kunz until paid in full" and three additional notes secured by "all commissions, and necessary collateral until paid on demand." At no relevant time did the commissions that IMC owed to Kunz equal or exceed the balance of the outstanding notes. In addition, Kunz did not identify any specific collateral securing the notes at the time he pledged the notes to IMC. Consequently, we conclude that the notes were not readily convertible to cash and were improperly included as allowable assets in IMC's net capital computations. We therefore find that respondents violated the Net Capital Rule and NASD Rule 2110.

C. IMC Inaccurately Booked Horne's Loan as a Capital Infusion

NASD issued materials to its membership in 1996 stating that, for the purpose of net capital computations, the SEC considers an infusion of capital into a firm to be a loan unless it remains with the firm for at least 12 months.<sup>16</sup> Based on stipulations agreed to by both parties and other undisputed facts in the record, the Hearing Panel found that Horne's April 4, 2000 deposit of \$36,000 into IMC's checking account did not remain with the Firm for 12 months. In fact, IMC repaid Horne his full \$36,000 within two months. Moreover, IMC did not record Horne's funds as a capital contribution in its books. After discovering that Horne's \$36,000 deposit was a loan rather than paid-in capital, NASD staff determined that IMC was below its minimum required net capital on April 28, 2000. NASD staff also recalculated IMC's net capital as of March 31, 2000, concluding, once again, that IMC did not have the minimum net capital required.

The SEC has repeatedly held that the duties to maintain records and file reports require that such records and reports be true and correct.<sup>17</sup> Because IMC had improperly calculated its net capital, its books and records were inaccurate for several months. In addition, IMC's inaccurate net capital computations caused it to file two inaccurate FOCUS reports. We

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<sup>14</sup> Exchange Act Rule 15c3-1(c)(2)(iv)(B).

<sup>15</sup> See e.g., FundCLEAR, 51 S.E.C. at 317 (1994) (finding that two promissory notes totaling \$22,500 payable to FundCLEAR were improperly included as allowable assets because the collateral securing the notes was not under FundCLEAR's exclusive control); Kirk L. Ferguson, 51 S.E.C. 1247, 1249 (1994) (finding that respondent's \$30,000 promissory note secured by personal checks was not an allowable asset because the checks were not guaranteed but merely linked to various lines of credit that could be drawn against at any time).

<sup>16</sup> See NASD Regulatory and Compliance Alert, Volume 10, Number 3 (November 1996).

<sup>17</sup> Hutchinson Fin. Corp., 51 S.E.C. 398, 399 (1993) (citing David R. Williams, 48 S.E.C. 122, 123 (1985)); see also NASD Rule 3110 (requiring broker-dealers to keep accurate books and records).

therefore affirm the Hearing Panel's finding that because of the accounting errors regarding IMC's allowable assets, liabilities and net capital, respondents violated Exchange Act Rule 17a-3 and NASD Rules 2110 and 3110.<sup>18</sup>

D. IMC and Kunz Failed to Report an Arbitration Award and Settlement

NASD Rule 3070 requires NASD members and associated persons to report certain events, including arbitration awards or settlements, to NASD within a specific time period.<sup>19</sup> It is undisputed that IMC and Kunz reported neither the arbitration award nor the settlement to NASD. Under NASD Rule 3070, respondents were required to notify NASD of the arbitration award and settlement on January 5, 2000 and May 17, 2000, respectively.

Respondents argue that they were excused from reporting the arbitration award because NASD received notice of the award through a court order issued on May 30, 2000 ("Expungement Order").<sup>20</sup> Respondents offer no legal basis for the proposition that an order issued by a judge can excuse an NASD member from its obligation to notify NASD of a reportable event under NASD Rule 3070. Thus, IMC's failure to notify NASD cannot be excused under the facts in the record.<sup>21</sup> Respondents therefore violated NASD Rule 3070 by failing to notify NASD of the arbitration award and its subsequent settlement.

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<sup>18</sup> NASD Rule 3110 states that "[e]ach member shall make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations, and statements of policy promulgated thereunder and with the Rules of this Association and as prescribed by SEC Rule 17a-3."

<sup>19</sup> NASD Rule 3070 requires that each member shall promptly report to NASD when such member or a person associated with the member is a defendant or respondent in any securities or commodities-related civil litigation or arbitration which has been disposed of by judgment, award or settlement for an amount exceeding \$25,000. Rule 3070 also provides that a member must file this report within 10 business days.

<sup>20</sup> The Expungement Order arose out of the dismissal of the respondents' motion to vacate the arbitration award after respondents reached a settlement with the claimants. As part of the settlement, the respondents and the claimants agreed that the arbitration award would be rescinded. Consequently, the Expungement Order directed NASD to remove all references to the arbitration complaint and award from the CRD.

<sup>21</sup> Respondents argue that the Expungement Order states that NASD was aware of the arbitration award prior to May 30, 2000. The Expungement Order, however, arose from an action filed by Florence and Harold Friedman on January 15, 2000 in the United States District Court for the District of Nevada. Thus, even if the Friedmans' action notified NASD of the arbitration award, such notification would have only occurred after the January 5, 2000 deadline imposed by Rule 3070. In any event, even if NASD had received notice through the Expungement Order in a timely manner, that does not excuse the respondents from their obligation to notify NASD under Rule 3070.

E. IMC Failed to Maintain Adequate Written Supervisory Procedures

NASD Rule 3010 requires broker-dealers to establish, maintain and enforce written procedures to supervise associated persons and conduct the firm's securities business in a manner reasonably designed to achieve compliance with applicable NASD rules.<sup>22</sup> The Hearing Panel found that IMC's Manual did not specifically discuss NASD's reporting requirements regarding arbitration awards and settlements or offer any instructions for fulfilling these requirements. IMC's Manual contained only the general provision that all employees comply "with the securities laws, regulations, NASD rules [and] the [firm's] policies and procedures." Thus, the Hearing Panel concluded and we affirm that IMC failed to maintain adequate written supervisory procedures in violation of NASD Rule 3010.<sup>23</sup>

F. IMC Allowed Cline to Violate Registration Requirements

NASD's rules prohibit NASD members from allowing a registered person to perform certain duties if he or she has not fulfilled NASD's continuing education requirements.<sup>24</sup> During a September 2000 examination, NASD staff determined that Cline's registration had automatically become inactive on January 4, 2000. Cline and Kunz, however, learned that Cline's registration was inactive on March 3, 2000. The record indicates that from March 3 until March 20, 2000, Kunz allowed Cline to continue to solicit and accept orders, enter the orders with IMC's clearing firm, and receive commissions even though Cline's registration was inactive.<sup>25</sup> We therefore affirm the Hearing Panel's finding that respondents violated NASD Rules 1120 and 2110.

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<sup>22</sup> NASD Rule 3010's purpose is to promote self-regulation and reduce the risk of disciplinary actions by enabling members to identify and respond to regulatory concerns. Requiring NASD members to have written supervisory procedures also serves to protect investors from fraudulent trading practices by encouraging members and associated persons to comply with NASD policies.

<sup>23</sup> See DBCC v. L. H. Alton & Co., 1997 NASD Discip. LEXIS 60 at \*20 (Dec. 17, 1997) (finding that firm's manual violated Rule 3070 because it failed to instruct firm to notify NASD if the firm, among other things, became the subject of a written customer complaint or connected to other disciplined entities), aff'd, L.H. Alton & Co., 53 S.E.C. 1118 (1999).

<sup>24</sup> See NASD Rule 1120.

<sup>25</sup> Respondents suggest that because of "intense and unprecedented market volatility" occurring from March 3 to March 20, 2000, and the fact that Cline had a period of long-term service with his clients, respondents should not be disciplined for allowing Cline to act as a registered representative during a period when his registration was inactive. NASD's rules do not provide for an exception to Rule 1120 that excuses members from complying with registration requirements under such circumstances, and we decline to create such an exception in this case.

## V. Sanctions

The Hearing Panel imposed fines totaling \$28,753 and assessed costs of \$3,816.28, jointly and severally, on IMC and Kunz. The Hearing Panel also (1) barred Kunz from associating with any member as a FINOP; (2) suspended Kunz from acting in any principal capacity for six months; and (3) required Kunz to requalify in any principal capacity in which he seeks to be registered. We affirm these sanctions noting that a single set of sanctions for causes one through five and seven is appropriate in this case.<sup>26</sup>

### A. Accounting, Reporting and Supervisory Procedures Sanctions

Although SEC case law and NASD practice strongly suggest that sanctions generally be assessed per cause, where multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate to achieve NASD's remedial goals.<sup>27</sup> The Hearing Panel found the violations alleged in causes one through five and seven to be closely related and cited Kunz' failure to follow basic instructions provided by Exchange Act Rule 15c3-1 in determining IMC's net capital position as the primary cause of these violations. The Hearing Panel, therefore, imposed one set of sanctions for these violations.<sup>28</sup>

We also considered the Principal Considerations for Determining Sanctions listed in NASD's Sanctions Guidelines ("Guidelines")<sup>29</sup> and find that Kunz' violations are serious enough to bar him from serving as a FINOP for any member firm. We find that Kunz' misconduct was serious and that the sanctions imposed are appropriate under the circumstances. We therefore affirm the Hearing Panel's sanctions without modification.

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<sup>26</sup> When a single set of sanctions is applied, this sanction is within the range recommended in the applicable Sanction Guidelines. See Guidelines at 33 (Net Capital Violations); Guidelines at 109 (Supervisory Procedures – Deficient Written Supervisory Procedures); Guidelines at 82 (Reportable Conduct Under Conduct Rule 3070 – Late Reporting; Failing to Report; Filing False, Inaccurate, or Misleading Reports); Guidelines at 76 (FOCUS Reports – Late Filing; Failure to File; Filing False or Misleading Reports); Guidelines at 34 (Recordkeeping Violations).

<sup>27</sup> Dep't. of Enforcement v. Respondent Firm 1, 2001 NASD Discip. LEXIS 6, at \*30-31 (April 19, 2001).

<sup>28</sup> For causes one through five and seven, the Hearing Panel fined IMC and Kunz \$25,000, jointly and severally, and barred Kunz as a FINOP.

<sup>29</sup> In imposing sanctions, we considered that Kunz (1) never accepted responsibility for his misconduct; (2) engaged in a pattern of misconduct over a period of months; and (3) ignored advice given to him by NASD staff.

B. Registration Violation

The Guidelines recommend a fine of \$2,500 to \$20,000, plus any financial benefit to the respondent for NASD Rule 1120 violations.<sup>30</sup> In egregious cases, these Guidelines also suggest a suspension of up to two years, or an expulsion or bar.<sup>31</sup> The Hearing Panel concluded that respondents should be fined \$2,500, plus the \$1,253 in commissions earned by IMC, for a total fine of \$3,753. The Hearing Panel also ordered that Kunz be suspended in all principal capacities for six months and be required to requalify in any principal capacity in which he seeks to be registered. In affirming the Hearing Panel's sanctions, we note that respondents sought to satisfy the continuing education requirement leading to the violation as soon as possible, but also showed a willingness to ignore or evade established NASD rules. We find the Hearing Panel's conclusions supported by the facts in the record and therefore affirm the sanctions imposed for respondents' registration violation.

VI. Conclusion

After reviewing the record in this matter and considering the parties' arguments, we uphold the Hearing Panel's findings that IMC and Kunz violated Exchange Act Rules 15c3-1 and 17a-3 as well as NASD Rules 1120, 2110, 3010 and 3070. We reject respondents' claim that there is an exception to the Net Capital Rule that excuses a broker-dealer from booking an arbitration award as a liability when it is rendered.<sup>32</sup> We affirm the sanctions imposed on IMC and Kunz by the Hearing Panel without modification.

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<sup>30</sup> See Guidelines at 49 (Continuing Education (Regulatory Element) – Failure to Comply with Rule Requirements).

<sup>31</sup> Id.

<sup>32</sup> We have also considered and reject without discussion all other arguments advanced by respondents and Enforcement.

Pursuant to NASD Procedural Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

Accordingly, Kunz is barred<sup>33</sup> from associating with any NASD member as a FINOP, suspended from acting in any principal capacity for six months, and thereafter required to requalify in any principal capacity in which he seeks to be registered. In addition, IMC and Kunz are fined \$28,753 jointly and severally and assessed costs of \$5,131.82, jointly and severally.

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President and  
Corporate Secretary

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<sup>33</sup> The bar will be effective as of the date of this decision.