BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Michael L. Vines Charlotte, NC, Respondent.	DECISION Complaint No. 2006005565401 Dated: August 25, 2009

Respondent approved the falsification of documents. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Peter J. Anderson, Esq. and Keith J. Barnett, Esq.

Decision

The review subcommittee of the National Adjudicatory Council ("Review Subcommittee") called this matter for review pursuant to NASD Rule 9312 to examine the sanctions that the Hearing Panel imposed in its amended decision of May 30, 2008.[1] The Hearing Panel found that Michael L. Vines approved the falsification of documents, in violation of NASD Rule 2110. The Hearing Panel fined Vines $10,000, suspended him in all capacities

[1] Following the consolidation of NASD and the member regulation, enforcement and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See FINRA Regulatory Notice 08-57* (Oct. 2008). Because the complaint in this case was filed before December 15, 2008, the procedural rules that apply are the NASD Rule 9000 Series, as it existed on December 14, 2008. The conduct rules that apply are those that existed at the time of the conduct at issue.

for 30 days, suspended him in all principal capacities for six months, required him to attend a training program on ethics, and assessed costs of $1,280. After our independent review of the record, we affirm the Hearing Panel's findings, but modify the sanctions imposed. We affirm the $10,000 fine and the imposition of costs, increase the principal suspension from six months to one year, and eliminate the 30-day suspension in all capacities and the order to attend the ethics training program.

I. Factual and Procedural Background

A. Vines

Vines entered the securities industry in September 1994 with UVEST Financial Services Group, Inc. ("UVEST" or "the Firm") when he registered as a financial and operations principal. During the period relevant to this case, Vines was UVEST's Senior Vice President for Operations and Technology. He was responsible for UVEST's entire operations department and reported directly to the Firm's president. Vines remained registered with UVEST until he voluntarily terminated his association with the Firm in July 2008. Vines has not registered with another FINRA member firm since that time.

B. Falsification of the Individual Retirement Account Adoption Agreements

In November 2004, NASD Rule 3110(f) was amended to require member firms to modify their predispute arbitration agreements with customers to provide enhanced disclosures about the arbitration process. The amendments required that member firms provide copies of predispute arbitration agreements and relevant arbitration forum rules to customers upon request, clarified the use of certain arbitration limiting provisions, and required member firms seeking to compel the arbitration of claims filed in court to arbitrate each claim contained in the complaint if the customer requested it. FINRA required that each member firm use the amended disclosure language in all new customer account agreements containing predispute arbitration agreements as of June 1, 2005.[2]

UVEST's clearing firm, Pershing Investments LLC ("Pershing"), revised each of its forms that contained arbitration clauses, including its individual retirement account ("IRA") adoption agreements, to comply with amended NASD Rule 3110(f). Nevertheless, after the amendment became effective on June 1, 2005, several new UVEST customers executed IRA adoption agreements on outdated forms – forms that did not comply with the enhanced

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[2] The amendment had an original effective date of May 1, 2005, but the effective date was extended to June 1, 2005 to give member firms more time to amend their customer agreements to comply with the changes.

disclosure requirements of the amended rule.[3] When UVEST submitted the outdated forms to Pershing, Pershing rejected them.

Some time after June 1, 2005, Pershing contacted UVEST's new accounts manager about the rejected IRA adoption agreements. Pershing informed the new accounts manager that it would not accept the outdated IRA adoption agreements, and that UVEST should have its customers execute the new, compliant forms. Soon after the conversation with Pershing, the new accounts manager brought the situation involving the rejected forms to the attention of Vines.[4] In a momentary conversation, the new accounts manager explained that the new representatives were "upset" about reexecuting the IRA adoption agreements, and noted that she had a plan to handle the rejected forms. She recommended that she, and others in the new accounts department, copy customer signatures from the outdated, but properly executed, IRA adoption agreements, and paste those customers' signatures onto the new, compliant forms. Vines approved that recommendation. The new accounts department falsified the IRA adoption agreements of 60 customers, cutting those customers' signatures from outdated forms, and pasting the signatures onto compliant forms.

In July 2005, UVEST's compliance department received an anonymous tip about the falsified IRA adoption agreements. On July 26, 2005, a compliance officer approached Vines about the situation, and asked whether Vines had approved the cutting and pasting of the customers' signatures. Vines acknowledged that he had approved the activity. On that same day, Vines went to the new accounts manager and told her that the cut and paste activity must cease immediately.

Later that month, around July 29, 2005, Vines initiated a meeting with five of UVEST's compliance and operations officers to discuss how to handle the falsified forms. At that meeting, Vines recommended that UVEST not repaper the customers' files, i.e., that the Firm leave the falsified IRA adoption agreements in the files. The UVEST compliance officer that had originally approached Vines about the activity disagreed with Vines's recommendation. He explained that he had significant reservations about leaving falsified forms in customers' files and further suggested that the Firm obtain properly executed IRA adoption agreements from each of the affected customers. The other UVEST officers at the meeting, including Vines, rejected the compliance officer's suggestion. By the end of the meeting, the group decided not to repaper the customers' files.

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[3] Several new representatives associated with UVEST before UVEST disseminated the new forms. Those new representatives continued to use the outdated forms even after June 1, 2005.

[4] The new accounts manager did not report directly to Vines. She reported to UVEST's vice president of operations, who in turn, reported directly to Vines. Vines testified that the new accounts manager approached him because the vice president of operations was not available when the situation involving the rejected forms arose.

Vines, with the dissenting compliance officer and an additional compliance officer, met with UVEST's president soon after the meeting on July 29, 2005. Vines explained the situation involving the falsified IRA adoption agreements, including the decision not to obtain properly executed forms from the customers. The president formally reprimanded Vines for the misconduct and warned him that another incident of this magnitude would result in immediate termination. UVEST's president also demoted Vines, removing all responsibilities for operations and customer accounts.

On June 16, 2006, approximately one year after Vines's meeting with UVEST's president, FINRA received an anonymous tip about the falsified IRA adoption agreements. FINRA contacted UVEST about the tip. The Firm admitted the misconduct, specifically, that the IRA adoption agreements of 60 customers were falsified. Around July 2006, soon after FINRA initiated its investigation, UVEST began repapering the customers' files with properly executed IRA adoption agreements. Of the 60 affected customers, 53 signed and returned the compliant forms, four individuals were no longer customers of UVEST, and three customers did not return the forms at all. No customer filed a lawsuit or arbitration against UVEST during the relevant period, i.e., between June 1, 2005, the effective date of NASD Rule 3110(f), and July 2006, when UVEST repapered the customers' files with properly executed IRA adoption agreements.

C. Procedural Background

FINRA initiated the investigation that led to the complaint in this matter as a result of the tip received on June 16, 2006. FINRA's Department of Enforcement ("Enforcement") filed a one-cause complaint against Vines on November 6, 2007, alleging that Vines authorized the falsification of UVEST's books and records, in violation of FINRA's rules. Vines filed an answer to the complaint on December 3, 2007. Vines admitted that he approved the falsification of the IRA adoption agreements, and requested a hearing. The hearing took place on March 11, 2008. The Hearing Panel heard testimony from Vines, in addition to a FINRA examiner.

The Hearing Panel issued its amended decision on May 30, 2008, finding that Vines's approval of the falsified forms violated NASD Rule 2110. The Hearing Panel fined Vines $10,000, suspended him in all capacities for 30 days, suspended him in all principal capacities for six months, and required him to attend a training program on ethics. The Review Subcommittee called this matter for review on July 10, 2008 to examine the sanctions that the Hearing Panel imposed.

II. Discussion

A. Vines's Approval of the Falsified Forms Violated NASD Rule 2110

Vines admits that he approved the falsification of the IRA adoption agreements. Vines's authorization of the falsification was unethical and contrary to NASD Rule 2110. NASD Rule 2110 requires that member firms observe high standards of commercial honor and just and equitable principles of trade. *See Geoffrey Ortiz*, Exchange Act Rel. No. 58416, 2008 SEC

LEXIS 2401, at *2 n.2 (Aug. 22, 2008).[5] The scope of NASD Rule 2110 is broad – the rule's ethical and legal obligations are not limited to the sale of securities, but encompass a wide variety of unethical business-related conduct. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002). Vines's approval of the falsified IRA adoption agreements violated NASD Rule 2110.

B. Sanctions

This case involves the *approval* of falsified forms because Vines himself did not falsify the IRA adoption agreements.[6] Nevertheless, we conclude that the FINRA Sanction Guidelines ("Guidelines") for the forgery and falsification of documents are sufficiently applicable to Vines's misconduct to guide our analysis in this case. The Guidelines for the forgery and falsification of records recommend a fine of $5,000 to $100,000.[7] The Guidelines also recommend that we consider a suspension in any and all capacities for up to two years, when mitigating factors exist.[8] In egregious cases, the Guidelines recommend considering a bar.[9] The specific principal considerations to determine sanctions for this violation are the nature of the documents forged or falsified, and whether the respondent had a good-faith, but mistaken, belief of express or implied authority.[10] These specific considerations are in addition to the Principal Considerations in Determining Sanctions that must be considered in every disciplinary case.[11]

Based on Vines's entire course of conduct, we conclude that his violation was egregious. Although Vines's stand alone approval of the falsification may not have risen to the level of egregious misconduct, his attempted concealment of the misconduct, coupled with his outright

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5 NASD Rule 0115 subjects associated persons to the same duties and obligations as FINRA member firms.

6 Vines requests that we aggregate the 60 individual falsifications into a single act to determine the applicable sanctions. *See generally FINRA Sanction Guidelines* 4 (2007) (General Principles Applicable to All Sanction Determinations, No. 4) (considering whether it is appropriate to aggregate or batch violations), http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf [hereinafter *Guidelines*]. Aggregation of the falsifications is unnecessary in this case, however, because the case involves Vines's approval of the falsification of the agreements. His approval of the falsification was a single event and will be weighed as such in this sanctions analysis.

7 *See id.* at 39.

8 *See id.*

9 *See id.*

10 *See id.* Vines admits that he did not have express or implied authority to approve the falsification of the IRA adoption agreements.

11 *See id.* at 6-7.

disregard of the compliance officer's advice, push his actions into what is egregious under the circumstances presented. Accordingly, we increase the duration of Vines's suspension as a principal from six months to one year.

The Hearing Panel, however, concluded that Vines's misconduct was merely serious. In reaching this conclusion, the Hearing Panel emphasized that the concealment of the falsification was attributable to several UVEST officers, not only Vines, that Vines's misconduct was negligent, not reckless or intentional, and that the nature of the documents supported lower sanctions. We will discuss each of these points in turn.

First, Vines's decision to leave the falsified forms in the customers' files was concealment.[12] Upon learning that UVEST's compliance officer had detected his approval of the falsified signatures, Vines called a meeting of five of UVEST's compliance and operations personnel to determine how to handle the situation. Instead of mitigating the situation by having the customers actually sign compliant forms, Vines recommended that UVEST do nothing about the falsification. The Hearing Panel labels the decision to leave the falsified forms in the files a "collective act of concealment," because the decision "was made in collaboration with other senior employees [at UVEST]." The Hearing Panel erred in minimizing Vines's responsibility. The evidence demonstrates that Vines was the primary actor in the decision to conceal the falsification, which he had authorized earlier. He called the meeting, made the initial suggestion to do nothing, and rejected the compliance officer's opposing, but appropriate, recommendation on how to handle the situation. Vines's concealment of the falsification does not become acceptable merely because the decision was made in collaboration with others. The decision to leave the falsified agreements in the files is concealment and is an aggravating factor that squarely falls upon Vines's shoulders in this case.

Second, Vines's rejection of the compliance officer's advice similarly aggravates his approval of the falsified forms. Although UVEST's compliance officer did not have the authority to overrule Vines, he offered his advice that the customers should sign new forms. Here, the compliance officer's advice sought to correct UVEST's violations and align the Firm's practices with legal prerequisites. It was incumbent upon Vines to adopt the compliance officer's advice. His failure to do so, and his rallying for an ill-advised plan to the contrary, renders his misconduct egregious.

Third, we consider it aggravating that Vines's misconduct was reckless.[13] In so holding, we reject the Hearing Panel's conclusion that Vines's misconduct was negligent. The Hearing Panel determined that Vines's misconduct was negligent because it "was the result of making a decision in haste while preoccupied with other matters." Vines, however, understood that the

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12 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 10) (considering whether the respondent attempted to conceal his misconduct).

13 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13) (considering whether the misconduct was intentional, reckless, or negligent).

new accounts manager proposed cutting and pasting customer signatures and authorized her to do it. While we agree that Vines may not have appreciated at that moment that the recommendation amounted to the falsification of documents, his misconduct nevertheless was reckless. *See Alvin W. Gebhart, Jr.*, Exchange Act Rel. No. 58951, 2008 SEC LEXIS 3142, at *25-35 (Nov. 14, 2008), *petition for review*, No. 08-74943 (9th Cir. filed Dec. 3, 2008).

The new accounts manager's request itself – made only because Pershing expressly had rejected the outdated agreements that the customers had actually signed – presented a glaring red flag of a possible violation and the obvious risk that substantively different disclosure provisions would never pass before the customers' eyes. These circumstances demanded Vines's further attention and inquiry. Being "preoccupied" in that single moment does not excuse Vines's unquestioning approval of the falsification of documents; explain why a 10-year veteran of the industry failed to retract his approval in the months that followed; or address why, with full awareness of the falsified documents that his approval had caused, he lobbied against obtaining the customers' actual signatures on the compliant agreements. Vines's approval of the cut and paste activity was an extreme departure from the standard of ordinary care. *See Gebhart*, 2008 SEC LEXIS 3142, at *26 (defining reckless as "an extreme departure from the standards of ordinary care").

Vines urges us not to disturb the Hearing Panel's finding of negligence because it is based upon a "credibility determination", and Enforcement failed to present "substantial evidence" to overturn that determination. *See generally Jon R. Butzen*, 52 S.E.C. 512, 514 n.7 (1995) (explaining that "the credibility determination of the initial decision maker is entitled to considerable weight and deference") (citation omitted). We acknowledge that the Hearing Panel credited Vines's testimony that he was preoccupied when he initially approved the falsification. There is a significant distinction, however, between crediting Vines's testimony and drawing a legal conclusion as a result of that testimony. *See Michael F. Siegel*, Exchange Act Rel. No. 58737, 2008 SEC LEXIS 2459, at *40 (Oct. 6, 2008), *petition for review*, No. 08-1379 (D.C. Cir. filed Dec. 3, 2008). We overturn only the Hearing Panel's legal determination that Vines acted negligently, not the Hearing Panel's determination that Vines testified credibly that he was absorbed in other matters when he approved the falsification of documents.

Contrary to the Hearing Panel, we find that the nature of the documents in this case does not support a reduction in the sanctions. The documents at issue here were important. FINRA modified NASD Rule 3110(f) to address concerns about the inadequacy of the disclosure requirements of the prior iteration of the rule. *See NASD Notice to Members 05-09* (Jan. 2005). FINRA explained that several investor groups expressed concerns that the disclosure requirements of the previous rule were "inadequate . . . and . . . not written in plain English." *Id.* FINRA amended NASD Rule 3110(f) in direct response to those concerns. *See id.* The revised rule clarified the use of certain arbitration provisions to make them easier to understand and informed customers of several arbitration alternatives and limitations. *See id.* The enhanced disclosures codified in NASD Rule 3110(f), and implemented in UVEST's IRA adoption agreements, were important, and squarely aligned with FINRA's mission of protecting investors.

The Hearing Panel incorrectly diminishes the importance of these disclosures. The Hearing Panel states that the amendments to NASD Rule 3110(f) were insignificant because "the

[rule's] revisions . . . did not alter the customers' rights," and because enactment of the revised rule was postponed from May 1, 2005 to June 1, 2005. The Hearing Panel explains that the substance of the modifications, and the delayed implementation of the revised rule, "suggest[] that the [changes to the rule] were incremental, not fundamental." The Hearing Panel underestimates the reach of amended NASD Rule 3110(f). The rule's modifications were significant and served important disclosure purposes. Accordingly, the nature of the falsified agreements supports a longer suspension for Vines.

Vines suggests that there are several factors that mitigate his misconduct. But none of these proposed factors lessen the impact of his actions in this case. We reject Vines's suggestion that we consider his lack of disciplinary history, and his official reprimand and demotion, as evidence of mitigation in this case. "[L]ack of disciplinary history is not a mitigating factor." *See Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006). As for discipline meted out by a firm, in limited circumstances a respondent may be entitled to credit for serving a firm-imposed suspension. *See Dep't of Enforcement v. Prout*, Complaint No. C01990014, 2000 NASD Discip. LEXIS 51, at *9 (NASD NAC Dec. 18, 2000) (analyzing the weight to give to a firm's suspension). UVEST, however, did not suspend Vines. It reprimanded him and withdrew his responsibilities for operations and customer accounts. We are not aware of any cases finding such limited forms of discipline to constitute mitigation, and we see no reason to find so here.

We reject Vines's request to have the time since his voluntary termination credited toward any suspension that we impose. "[W]e give no weight to the fact that a respondent was terminated by a firm when determining the appropriate sanction in a disciplinary case. We consider the disciplinary sanctions we impose to be independent of a firm's decision to terminate or retain an employee." *Prout*, 2000 NASD Discip. LEXIS 18, at *11-12. Thus, Vines's voluntary termination from UVEST has no bearing on the sanctions that we impose, and he receives no credit toward his suspension for the time spent out of the industry since his termination.

Finally, we reject Vines's recommendation that we rely upon two prior FINRA Hearing Panel decisions to gauge his misconduct, *Dep't of Enforcement v. Ritchey*, Complaint No. 2006004493301, 2007 NASD Discip. LEXIS 19, at *1 (NASD Hearing Panel Apr. 9, 2007), and *Dep't of Enforcement v. Wilson*, Complaint No. C07040086, 2005 NASD Discip. LEXIS 20, at *1 (NASD Hearing Panel July 7, 2005). We have consistently found that, "'appropriate remedial action depends upon the facts and circumstances of each particular case, and cannot be precisely determined by comparison with action taken in other cases'." *Dep't of Enforcement v. Bukovcik*, Complaint No. C8A050055, 2007 NASD Discip. LEXIS 21, at *17 n.10 (NASD NAC July 25, 2007) (citation omitted).[14]

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[14] The two cases also are inapposite and do not apply here. In *Ritchey*, the respondent forged the customer's signature on a distribution request form to expedite an annuity funds payment to the customer. *See Ritchey*, 2007 NASD Discip. LEXIS 19, at *2-3. In *Wilson*, the respondent forged a notary public's signature and seal to finalize execution of the customer's signed trustee certification form. *See Wilson*, 2005 NASD Discip. LEXIS 20, at *4-5. In both cases, the respondents forged the documents to fulfill the customers' expressed wishes. In this

[Footnote continued on next page]

Based on the relevant facts, and the evidence of aggravation and mitigation in this case, we conclude that Vines's misconduct was egregious. Nevertheless, we do not impose even higher sanctions in this case based on a balancing of all the factors. We note that none of the 60 affected customers filed a lawsuit or arbitration against UVEST while the falsified IRA adoption agreements were in the files. We also place some weight on the fact that the overwhelming majority of the affected customers – 53 out of 60 – signed and returned compliant forms when UVEST repapered the files in July 2006.[15]

After weighing each of the pertinent factors for sanctions, we determined that the $10,000 fine that the Hearing Panel imposed was appropriate, but that an increased principal suspension is needed. Vines's misconduct emanated from his failings as a supervisor, and his supervisory dereliction was significant. We therefore increase the principal suspension from six months to one year.[16] We, however, eliminate the Hearing Panel's order that Vines attend the FINRA Institute at Wharton's Certified Regulatory and Compliance Professional Program, a FINRA-sponsored program which offers an ethics course as part of its requirements. We have no desire to use our power to impose disciplinary sanctions to increase attendance at this program. Moreover, the majority of ethics programs are voluntary courses, an environment that is at odds with the spirit of the Hearing Panel's mandatory attendance requirement. We eliminate this requirement of the sanctions, emphasizing that, when Vines is associated with a firm, he must periodically complete both regulatory and firm element continuing education as either a principal or a representative. *See* NASD Rule 1120; *FINRA Regulatory Notice* 09-26 (May 2009).

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case, however, Vines's approval of the falsification of the IRA adoption agreements did not respond to the customers' wishes. To the contrary, the falsification of the agreements deprived the customers of their opportunity to express their preferences about UVEST's and Pershing's arbitration process or to opt out of that process entirely.

[15] *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 11) (considering whether there is injury to the investing public). We reject Vines's argument that his sanctions should be less because there was no potential or actual benefit to him, UVEST, or Pershing. *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 17) (considering whether the respondent's misconduct resulted in potential or actual gain). The absence of this factor is not surprising in this case because the goal of the falsification was not to benefit Vines, UVEST, or Pershing monetarily. Vines's violation struck at a disclosure rule, thus, his claimed lack of benefit does not qualify for mitigation.

[16] We eliminate the 30-day suspension in all capacities because we find that Vines's violation primarily was limited to his principal failure and that the sanctions imposed should be tailored to address that specific area. *See id.* at 3 (General Principles Applicable to All Sanction Determinations, No. 3) (considering whether it is appropriate to limit the respondent's business activities, functions, and operations).

III. Conclusion

Vines approved the falsification of documents, in violation of NASD Rule 2110. For this misconduct, we fine him $10,000, suspend him in all principal capacities for one year, and order him to pay hearing costs of $1,280. We eliminate the Hearing Panel's 30-day suspension in all capacities and the order to attend an ethics training program. We have considered and reject without discussion all other arguments of the parties.[17]

On behalf of the National Adjudicatory Council,

Marcia E. Asquith

Marcia E. Asquith,
Senior Vice President and Corporate Secretary

[17] Pursuant to FINRA 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.