NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
	:	Disciplinary Proceeding
Complainant,	:	No. C10000037
	:	
v.	:	
	:	Hearing Officer - DMF
GEORGE M. GORITZ	:	
(CRD #226024),	:	
	:	**HEARING PANEL DECISION**
New York, NY	:	
	:	
	:	January 3, 2001
Respondents	:	

Digest

The Department of Enforcement filed a three-cause Complaint against respondent George M. Goritz. The two causes charged that Goritz violated NASD Rules 3040 and 2110 by participating in private securities transactions without giving written notice to and obtaining written approval from the member firms with which he was associated at the relevant times. The third cause charged that, in connection with the transactions that were the subject of the first two causes, Goritz distributed an Offering Memorandum that misrepresented his experience in the investment banking field, in violation of Section 10(b) of the Securities Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110.

Based on the evidence adduced by the parties at the hearing, the Hearing Panel held that Goritz committed the violations alleged in all three causes of the Complaint. As sanctions, the Hearing Panel suspended Goritz in all capacities for a period of six months and fined him $82,500. The Hearing Panel also ordered him to pay costs in the amount of $2,307.

Appearances

Andrew Reich, Regional Counsel, and Elysse Post, Regional Attorney, New York, NY (Rory Flynn, Esq., Washington, DC, Of Counsel) for the Department of Enforcement.

William R. Kohler, Esq., New York, NY, for respondent.

DECISION

I. Procedural History

On March 17, 2000, the Department of Enforcement filed a three-cause Complaint against respondent George M. Goritz. The first two causes charged that Goritz violated NASD Rules 3040 and 2110 by participating in private securities transactions without giving written notice to and obtaining written approval from the member firms with which he was associated at the relevant times. The third cause charged that, in connection with the transactions that were the subject of the first two causes, Goritz distributed an Offering Memorandum that misrepresented his experience in the investment banking field, in violation of Section 10(b) of the Securities Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110.

Goritz filed an Answer denying the charges and requested a hearing. A hearing was held in New York, NY, on November 14, 2000, before a Hearing Panel composed of a Hearing Officer, a current member of the District Committee for District No. 8 and a current member of the District Committee for District No. 9. At the hearing, the Panel received in evidence seven joint exhibits (JX 1-7), eight Complainant's exhibits (CX 2-4, 6-7, 9, 10 and 11 (pages 256, 258, 260-61, and 262 only)), and one Respondent's exhibit (RX 7), and heard the testimony of seven witnesses: an NASD Regulation special investigator (Richard Peltier); the current compliance officer and corporate secretary (Beate Bolen) at one of Goritz's former firms (Barclay Investments, Inc.); three current or former

principals (Vincent F. Pistone, Thomas F. Concannon, and Raymond C. Holland, Sr.) of another of Goritz's former firms (Highland Capital Group, Inc.); and Goritz's former supervisor at Barclay (John Dale).

II. Facts

Goritz is 74 years old and has been in the securities industry since 1962. (Tr. 286-87.)[1] There is no evidence that he has any prior disciplinary history. During the period June 7, 1993 through September 2, 1994, Goritz was employed by NASD member firm Barclay Investments, Inc. as a registered representative. He was employed by NASD member firm Highland Capital Group Inc. from September 1, 1994 through October 11, 1996. He is currently registered with another NASD member firm. (Tr. 327-29; JX 2.)

Beginning in the Spring of 1994, Goritz had discussions with Joseph Del Valle and Michael Carstens that ultimately led them to form a limited partnership known as Phoenix Partners, L.P. (Phoenix LP). The general partner of Phoenix LP was a Subchapter S corporation known as Phoenix Partners Corporation owned by Goritz, Del Valle and Carstens. (CX 6, p. C0156; JX 3.)

To raise funds, Phoenix LP offered limited partnership interests to investors. According to the Offering Memorandum given to prospective investors, Phoenix LP intended to engage in both merchant banking and investment banking. The Offering Memorandum explained that the investment banking activities of Phoenix LP would involve "agency based assignments" through which Phoenix LP expected to "provide traditional investment banking services to middle market private companies and public companies desiring to go private." More specifically, the Offering Memorandum stated that, among other things, Phoenix LP would offer "capital formation services." According to the Offering

Memorandum, Goritz had "33 years of investment banking experience, notably in institutional sales and capital formation," and his experience included serving as "President of G.M. Goritz & Co., an investment banking firm specializing in international capital formation and institutional sales." (CX 6, at C0175-0178, 0183.)

Beginning in July or August 1994, Goritz, using the Offering Memorandum, solicited a number of wealthy individuals with whom he had pre-existing relationships to purchase limited partnership interests in Phoenix LP. He succeeded in selling units to six individuals, for a total of $425,000. Goritz testified that he contacted all these investors while he was employed at Barclay, and solicited no new investors after he moved to Highland. But the evidence establishes that only one of the six investors completed his purchase before Goritz moved from Barclay to Highland, and Goritz testified he continued to contact the other five investors after he moved to Highland, encouraging them to close their purchases. All five of these investors closed their purchases of Phoenix LP limited partnership units from September 1, 1994 through November 23, 1994, while Goritz was associated with Highland. (JX 5, 6; Tr. 311-16; 329-332, 349.)

Goritz testified that his manager at Barclay, John Dale, was aware of his activities in trying to raise funds for Phoenix LP. (Tr. 293, 318-20.) Dale, on the other hand, testified he did not know that Goritz was soliciting investors for Phoenix LP while he was at Barclay. (Tr. 380-86.) Goritz also testified he gave Barclay written notice of his involvement in Phoenix LP in response to an August 17, 1994, memorandum from Barclay's Chief Compliance Officer to all registered representatives requesting information about outside business activities. Goritz's response, however, although it disclosed that he was "a partner in a newly formed investment bank, Phoenix Parters," did not disclose

[1] The page numbers of the hearing transcript begin at p. 192, rather than at p. 1, and continue to p. 419.

that he was soliciting investors to purchase limited partnership interests. (RX 7; Tr. 317.) Goritz admitted that he gave Barclay no other written notice of his solicitation activities on behalf of Phoenix LP, and that he received no oral or written permission from Barclay to engage in those activities. In fact, Goritz testified that when, in late August, he asked Barclay's management whether Barclay was interested in investing in Phoenix LP, they not only declined, but told him he would have to leave Barclay if he wanted to continue to be involved in Phoenix LP. He left Barclay effective September 2. (Tr. 318, 325-27, 351-53.)

Goritz became associated with Highland effective September 1, 1994. Although he was associated with Highland, Goritz was physically located in Phoenix LP's offices. He testified that he did not solicit any new investors after he joined Highland, but continued to communicate with the five investors who had agreed to purchase Phoenix LP limited partnership units, but had not yet closed their purchases. (Tr. 355.) He also testified he believed Highland was aware of these activities. (Tr. 329-30, 334.)

In contrast, Pistone, who was Highland's president at the time, testified that before joining Highland, Goritz said he had sold all the Phoenix LP units he intended to sell, and had raised $425,000 to $450,000. Pistone said he did not know Goritz was engaging in any sales-related activities for Phoenix LP while he was at Highland, but instead thought Goritz was looking for possible investments for the funds he had already raised. (Tr. 240, 255-58.) Holland, who was Highland's Chairman at the time, also testified that before joining Highland Goritz said he had raised $425,000 to $450,000 for Phoenix LP; that he was not going to raise any more money; and that he was working on projects in which the funds he had raised would be invested. (Tr. 271-72.) According to Pistone, Highland was

unaware that Goritz was engaged in any activities relating to the sale of Phoenix LP units while he was at Highland until the NASD notified Highland it was conducting an investigation. (Tr. 245.)

III. Discussion

1. Laches

Goritz asserted an affirmative defense of laches. "A successful laches defense requires the applicant to show both a lack of diligence by the party against whom the defense is asserted and prejudice to the applicant." In re Larry Ira Klein, 52 S.E.C. 1030 (1996). In this case, Goritz failed to establish either element of the defense.

Goritz's activities that form the basis for the charges took place from August through November 1994, and the Complaint was not filed until March 2000. Goritz did not offer or attempt to elicit any testimony or other evidence to establish that this delay was due to lack of diligence by NASD Regulation. In response to a question from the Panel, however, the NASD Regulation investigator who was in charge of the investigation testified he finished his work in November 1996. He also testified, however, that he understood that, subsequently, Goritz changed counsel, as did Enforcement, and that there had been settlement negotiations between the parties. (Tr. 223-24.) Thus, while the delay is troubling, the evidence is insufficient to establish that NASD Regulation was not reasonably diligent in pursuing this matter.

Goritz also failed to establish that he was prejudiced by the delay. His testimony was taken and preserved by NASD Regulation in 1996 during the investigation, and at the hearing he testified that he still had a good recollection of the relevant events. (Tr. 311.) During the hearing, a witness testified that Barclay's Chief Compliance Officer at the relevant time died in 1999, and that his successor left Barclay some time ago. Goritz argued that the unavailability of these witnesses was prejudicial, but he did not

even suggest any topic on which they might conceivably have offered relevant, probative testimony. Without a showing that their absence precluded Goritz from presenting relevant evidence, the mere fact that persons who had some tangential connection to the events in question may no longer be available is not enough to establish prejudice. See In re Raphael Pinchas, Exchange Act Release No. 41,816 (Sept. 1, 1999).

2. Private Securities Transactions

The first two causes of the Complaint charge that Goritz participated in private securities transactions in violation of Rule 3040 while he was associated with both Barclay and Highland. Pursuant to Rule 3040, "[n]o person associated with a member shall participate in any manner in a private securities transaction except in accordance with the requirements of this Rule." A "private securities transaction" is "any securities transaction outside the regular course or scope of an associated person's employment with a member …." Rule 3040 requires that "[p]rior to participating in any private securities transaction, an associated person shall provide written notice to the member with which he is associated describing in detail the proposed transaction and the person's proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction …." "Selling compensation" includes "any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security …." If selling compensation will be paid, the firm must approve or disapprove the associated person's participation in the transaction in writing, and if the firm approves participation, "the transaction shall be recorded on the books and records of the member and the member shall supervise the person's participation in the transaction as if the transaction were executed on behalf of the member."

Although Goritz's counsel suggested during the hearing that Rule 3040 is intended to guard against conflicts of interest (Tr. 221-22, 413), in fact the purposes of the Rule are quite different. As the SEC has explained:

> The regulatory scheme under the Exchange Act, in which the NASD is assigned a vital role, imposes on broker/dealer entities and NASD member firms the responsibility to exercise appropriate supervision over their personnel for the protection of investors. Where employees effect transactions for customers outside of the normal channels and without disclosure to the employer, the public is deprived of protection which it is entitled to expect. Moreover, the employer may also thus be exposed to risks to which it should not be exposed. Thus, such conduct is not only potentially harmful to public investors, but inconsistent with the obligation of an employee to serve his employer faithfully . . . . There is always a possibility in these situations that some improper conduct may be involved or that the employer's interests may be adversely affected. At the least, the employer should be enabled to make that determination.

In re Anthony J. Amato, 45 S.E.C. 282, 285 (1973) (footnotes omitted). In this case, Goritz both deprived the purchasers of the Phoenix LP units of protection, and exposed Barclay and Highland to a risk of liability to those purchasers.

The Panel finds, first, that Rule 3040 applied to Goritz's activities in connection with the sales of the Phoenix LP units. There is no dispute that these limited partnership units were securities.[2] And there is no dispute that Goritz's activities in soliciting purchasers for these units were outside the regular course or scope of his employment with Barclay and Highland.

It is also clear from the evidence that Goritz "participated in any manner" in the sale of the units at Hanover, as well as at Barclay. The SEC has held: "The reach of Conduct Rule 3040 is very broad, encompassing the activities of 'an associated person who not only makes a sale but who participates "in any manner" in the transaction.'" In re Stephen J. Gluckman, Exchange Act Release No. 41,628 (July

[2] The Offering Memorandum acknowledged that the limited partnership interests were governed by Regulation D, Rule 504, promulgated under the Securities Act of 1933.

20, 1999) (quoting In re Ronald J. Gogul, 52 S.E.C. 307 (1995)). Goritz's admitted solicitation of investors while he was at Barclay plainly constituted participating "in any manner" in the resulting sales of Phoenix LP units. And even though Goritz testified that he did not solicit any new investors after he became associated with Highland, he admitted that he continued to make follow-up calls to the investors he had already solicited, to encourage them to close their purchases. As Goritz himself acknowledged, a securities sale is completed "[w]hen the check comes in." (Tr. 365, 366.) Therefore, the Panel concludes that Rule 3040 applied to his follow-up calls while he was at Highland, as well as his initial solicitations while at Barclay.

The Hearing Panel also finds that Goritz received "selling compensation" for his sales of the Phoenix LP units. "Selling compensation" has been construed broadly to include "any item of value." In re William Louis Morgan, 51 S.E.C. 622 (1993). Here, the funds raised by Goritz went to Phoenix LP, which in turn paid him draws amounting to $72,500 in 1995. (Tr. 370; CX 11, p. 258; JX 7, pp. 24-25.) The National Adjudicatory Council recently upheld a finding that a respondent received selling compensation, for purposes of Rule 3040, under virtually identical circumstances. Department of Enforcement v. Newcomb, Complaint No. C3A990050 (NAC Nov. 16, 2000).

Having found that Rule 3040 applied to Goritz's activities, the Hearing Panel also finds that Goritz failed to comply with the Rule's requirements. He failed to give either Barclay or Highland written notice in accordance with the Rule. Goritz points to his written response to Barclay's request for information regarding outside business activities (RX 7), but that response did not comply with Rule 3040(b) because it was not submitted prior to Goritz participating in the sale of the Phoenix LP units and did not contain the information required by the Rule. It did not even disclose that Goritz was participating in the sale of Phoenix units, much less describe the transactions in detail and Goritz's

proposed role, and disclose whether he would receive sales compensation, as required by the Rule. See In re Gordon Wesley Sodorff, Exchange Act Release No. 31,134 (Sept. 2, 1992) (Rule 3040 requires that a representative give sufficient information to enable the firm to evaluate the proposed transaction, and anything short of a complete description does not satisfy the requirements of the rule). Goritz does not claim to have given any other written notice to Barclay, or to have given Highland any written notice whatsoever.

Furthermore, because Goritz would receive selling compensation for the Phoenix LP units, he was required to obtain written permission from Barclay and Highland prior to participating in the sale of the units. He admits that he did not receive any such permission from either firm.

Therefore, the Hearing Panel finds that Goritz violated Rule 3040 as alleged in the first two causes of the Complaint. By violating Rule 3040, Goritz also violated Rule 2110.

3. Misrepresentation

The third cause of the Complaint charges that Goritz violated Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110. In particular, Enforcement contends that the Offering Memorandum Goritz disseminated to potential investors misrepresented Goritz's experience in the investment banking field. According to the Memorandum, Goritz had "33 years of investment banking experience, notably in institutional sales and capital formation" including serving as president of his own firm "specializing in international capital formation and institutional sales." (CX 6, p. C0183.)

As the National Business Conduct Committee explained:

> Conduct Rule 2120, the NASD's anti–fraud rule, parallels SEC Rule 10b–5, and provides that no member shall effect any transactions, or induce the purchase or sale of any security, by means of any manipulative, deceptive, or fraudulent device. To find a violation of Conduct Rule 2120 and Rule 10b–5, there must be a showing that: (1) misrepresentations and/or omissions were made in connection with the purchase or sale

> of securities; (2) the misrepresentations and/or omissions were material; and (3) they were made with the requisite intent, i.e., scienter.
>
> Scienter has been defined as an "intent to deceive, manipulate or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). Scienter may also be established by a showing that the respondent acted recklessly. See, e.g., In re DWS Securities Corp., 51 S.E.C. 814 (1993). "Recklessness" has been defined by a majority of the federal circuit courts of appeals as being "not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1569 (9th Cir. 1990).
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> A misrepresentation may violate Conduct Rule 2110 even where there is no finding of intent to mislead. Kauffman v. SEC, No. 94–3011 (3d Cir. Oct. 20, 1994). "[C]oncepts such as fraud and scienter are irrelevant," and there is no need for a finding of materiality or harm to investors, Id. (citing Eichler v. SEC, 757 F.2d 1066, 1070 (9th Cir. 1985)). "Proceedings instituted by the NASD . . . are instituted to protect the public interest, not to redress private wrongs. Thus it [is] unnecessary for the NASD to show that customers [are] in fact misled." In re Wall Street West, Inc., 47 S.E.C. 677, 679 (1981), aff'd, Wall Street West, Inc. v. SEC, 718 F.2d 973 (10th Cir. 1983).

District Business Conduct Committee for District No. 9 v. Michael R. Euripides, Complaint No. C9B950014 (NBCC July 28, 1997).[3]

At the hearing, Goritz's counsel argued that the statements in the Memorandum concerning Goritz's investment banking experience were true, not misrepresentations, based on a very broad, general definition of "investment banking." In his testimony during the investigation, however, Goritz repeatedly acknowledged that he did not have relevant investment banking experience. (JX 7, pp. 8-9, 20-21, 32-33, 84-85.) At the hearing, he recanted these admissions, saying he had misunderstood the questions during the investigation, and he described certain aspects of his experience in the securities

[3] To establish a violation of Section 10(b) and Rule 10b-5, there must also be proof that the respondent used "any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange." In this case, this requirement is satisfied because Goritz testified he sent the Memorandum to prospective investors by mail. (Tr. 316.)

industry that he thought qualified as "investment banking" under the definition advanced by his counsel. (Tr. 289-91, 304-07, 310, 336, 339-40.)

The Hearing Panel finds, however, that the Memorandum misrepresented Goritz's relevant investment banking experience by stating that he had extensive experience in "capital formation." The Offering Memorandum described at length Phoenix LP's plans to market capital formation services among other investment banking services. The Memorandum explained that Phoenix LP "will not deal through a sales force which has only cursory knowledge of a broad array of unrelated products. The Principals of the Firm [which included Goritz] will be directly involved in initiating and structuring each financing, conducting the necessary due diligence, the direct marketing and negotiating of terms with the institutional investors and assuring timely closing." The Offering Memorandum went on to state that the capital formation services Phoenix LP planned to sell would include "[d]evelop[ing] an optimum financing structure …; [p]repar[ing] all requisite offering materials needed for institutional investors to make a firm commitment; [n]egotiat[ing] conditions to obtain commitments on all material terms …; [and] [m]anag[ing] all subsequent phases of the process to assure a timely close, including due diligence sessions and the documentation process" on behalf of Phoenix LP's hoped-for clients. (CX 6, p. C0178.)

In light of this business plan, prospective investors would reasonably have understood the Memorandum's representation that Goritz's had "33 years of investment banking experience, notably including … capital formation" to mean that he had extensive experience in the kinds of capital formation activities that Phoenix LP intended to market. In fact, however, there is no evidence that Goritz had any meaningful investment banking experience relevant to the capital formation services described in the Memorandum, such as initiating and structuring financing, preparing offering materials needed by

institutional investors, negotiating commitments, or managing due diligence sessions or the documentation process. On the contrary, the evidence clearly establishes that Goritz's expertise was strictly in sales. Pistone testified that he had known Goritz since they worked together in the late 1970's or early 1980's, and that Goritz was a salesman, primarily selling to high net worth individuals and foreign accounts. (Tr. 238.) Holland, who testified that he had known Goritz since about 1972 or 1973, also testified that Goritz was a good institutional salesman, selling primarily to Middle-Eastern clients, and that to his knowledge Goritz had no investment banking experience as Holland understood investment banking. (Tr. 261-62.)

As noted above, at the hearing Goritz pointed to some of his experience over the years as falling within the broad definition of "investment banking" advanced by his counsel. He candidly admitted, however, that this experience was essentially limited to selling initial public offerings, attending meetings during which "[a]t times [he] would put in a word or two," and generally being involved in projects from the perspective of a salesperson. (Tr. 304-06, 357-60.) This testimony is consistent with Goritz's forthright admissions during his investigative testimony that he did not have the kinds of investment banking experience that Phoenix LP planned to offer. Therefore, the Hearing Panel finds that the Offering Memorandum's representation that Goritz had substantial experience in providing capital formation services, as described in the Offering Memorandum, was false.

Goritz's counsel also argued that the representation regarding Goritz's relevant investment banking experience was not material. Material facts include those that affect the probable future of a company and might affect the desires of investors to invest in the company. SEC v. Hasho, 784 F. Supp. 1059, 1108 (S.D.N.Y. 1992). Plainly, the misrepresentation that Goritz had substantial relevant experience in the capital formation area was highly material, since it had clear implications for Phoenix

LP's likely success in marketing its services. Therefore, the misrepresentation would likely have affected the desire of reasonable investors to invest in the company.

Finally, Goritz argues that he did not intend to mislead investors. As explained above, to establish that Goritz violated Section 10(b), Rule 10b-5 and NASD Rule 2120, Enforcement was required to prove that he acted with "scienter." It was sufficient to satisfy that standard if the evidence showed that Goritz acted recklessly, by engaging in conduct that represented an extreme departure from the standards of ordinary care and presented a danger of misleading investors that was either known to Goritz or was so obvious that he must have been aware of it.

The Hearing Panel finds that Goritz acted recklessly under this standard, based on his own investigative testimony. In response to a question asking whether he had read the Offering Statement, Goritz responded: "I am not a good reader, to be honest with you. I read as much as I could, but I did not read all of it word for word." Subsequently, when his attention was directed to the representation in the Memorandum regarding his purported investment banking experience, Goritz acknowledged that he did not have any investment banking experience, and stated: "I'm sorry that's there, but [Del Valle] put it in there, it looks good, I guess." (JX 7, pp. 28, 84-85.) Even if he was not a good reader, it was reckless for Goritz to have employed the Memorandum in soliciting investors for Phoenix LP without reviewing it and correcting the misrepresentation regarding his investment banking experience.

Therefore, the Hearing Panel concludes that Goritz violated Section 10(b) of the Exchange Act, SEC Rule 10b-5 and NASD Rule 2120 as alleged in the third cause of the Complaint. By violating those provisions, he also violated NASD Rule 2110, as alleged.

IV. Sanctions

As sanctions for all the violations, Enforcement requested that the Hearing Panel fine Goritz $92,500, which would include the $72,500 he earned from Phoenix LP in draws plus an additional $20,000, and bar him from associating with any member firm in any capacity. Goritz did not propose any specific sanctions if the Hearing Panel found violations, but urged a number of facts in mitigation.

The Hearing Panel agrees with Enforcement that the violations in this case are sufficiently interrelated to call for combined sanctions, rather than separate sanctions for each violation. Although the private securities transaction violations occurred at two different firms, they involved a single course of conduct, and Goritz committed the misrepresentation violation in the context of the same course of conduct. Furthermore, it is the private securities transaction violations, not the misrepresentation violation, that are at the heart of this matter. That is, Goritz did not sell away from Barclay and Highland so that he could more easily misrepresent his investment banking experience in order to defraud investors. Instead, the Panel found that, although Goritz was reckless in employing the Offering Memorandum without reviewing it, there is no evidence that he wanted to mislead investors,. Furthermore, although the misrepresentation was clearly material, there is no evidence that any of the individuals who invested – sophisticated individuals who had preexisting relationships with Goritz – were actually misled by the misrepresentation. Therefore, in fashioning appropriate sanctions, the Hearing Panel will focus primarily on the Guidelines for private securities transaction violations.

For such violations, the NASD Sanction Guidelines recommend that adjudicators impose a fine of $5,000 to $50,000 (which may be increased by the amount of the respondent's financial benefit from the violations) and consider a suspension of up to two years, or a bar in egregious cases. NASD Sanction Guidelines at 15 (1998 ed.). The Guidelines list four principal considerations that are

specifically applicable in determining sanctions for private securities transaction violations. The first, a possible aggravating factor, is whether the respondent had a proprietary or beneficial interest in the selling enterprise. That consideration is clearly applicable here. The second consideration, also a possible aggravating factor, is whether the respondent attempted to create the impression that the member firm sanctioned the activity. Enforcement concedes that there is no evidence that this consideration applies. The third consideration, again a possible aggravating factor, is whether the transactions involved customers of the member firm. Again, Enforcement concedes there is no evidence that this consideration applies. Thus, only one of the specific aggravating factors listed in the Guidelines applies in this case.

The fourth specific consideration listed in the Guidelines is a possibly mitigating circumstance: whether the individual provided the firm with oral notice of all relevant factors, and, if so, the firm's written or oral response, if any. Goritz testified that when he was at Barclay, his manager, Dale, knew he was soliciting funds for Phoenix LP; Dale, however, testified that he did not know Goritz was soliciting investors for Phoenix LP while he was working at Barclay. It is possible that both Goritz and Dale were truthful. Goritz's solicitation activity involved a small number of customers and took place over a fairly brief period of time. Goritz may have thought Dale was aware of what he was doing, when, in fact, Dale was not aware Goritz was soliciting investors. This interpretation finds support in Goritz's testimony that when he approached Barclay's principals directly and asked them whether they would participate in Phoenix LP, they not only declined, but required him to leave Barclay if he wanted to remain involved with Phoenix LP.

Similarly, the apparent conflict between the testimony of Goritz, who said he believed Highland knew he was continuing follow-up communications with the Phoenix LP investors who had not closed

their purchases, and the testimony of Pistone and Holland, who said Goritz told them before he joined Highland that he had concluded his solicitation activities on behalf of Phoenix, may be attributable to a communication failure. When Goritz said he did not intend to solicit any additional investors, Pistone and Holland may have assumed that the sales Goritz had already made had been closed, and the funds received by Phoenix LP. The risk of such miscommunications is undoubtedly one reason why Rule 3040 required that Goritz make complete disclosure, in writing, of all relevant information.

Even accepting Goritz's testimony at face value, it establishes, at most, that he gave Barclay and Highland some general notion of his activities on behalf of Phoenix LP, but received neither written nor oral approval for soliciting investors. Perhaps, based on the information Goritz provided, both firms should have asked for more. But under Rule 3040 Goritz had the obligation to disclose certain critical information without waiting for an inquiry from the firms. Goritz does not claim to have disclosed that information to either Barclay or Highland, even orally. Therefore, he has not established substantial grounds for mitigation under the fourth consideration set forth in the Guidelines for private securities transaction violations.

The Hearing Panel also reviewed the Guidelines' general considerations, which are applicable to all violations. Guidelines at 8-9. In that regard, the Hearing Panel noted the following: Goritz has no prior relevant disciplinary record; such a record would have been an aggravating factor calling for more severe sanctions. The violations in question took place over a relatively short period of time, and involved a relatively small number of investors, which is mitigating. The transactions involved substantial sums, which is aggravating, but all of the purchasers appear to have been sophisticated, wealthy investors, and there is no evidence that any purchaser has complained about Goritz's actions in connection with the Phoenix LP, all of which tends to be mitigating. As noted above, Goritz did not

orally disclose all relevant information to either Barclay or Highland, which would have been mitigating, but he did not try to conceal what he was doing from the firms, or from NASD Regulation when it began its investigation. Indeed, he cooperated in the investigation and was quite candid in his investigative testimony. His private securities transaction violations appear to have been the result of negligence, rather than reflecting reckless or intentional misconduct. These facts are mitigating. Taking all these factors into consideration, the Hearing Panel finds that Goritz's private securities transaction violations were serious, calling for substantial sanctions, but not egregious.

Turning to the misrepresentation violation, for reckless or intentional misrepresentations the Guidelines recommend that adjudicators impose a fine of $10,000 to $100,000 and suspend the respondent for 10 days to two years, and in egregious cases consider barring the respondent. Guidelines at 80. The Guidelines list no special considerations applicable to such violations, and the general considerations apply largely as set forth above, except that the Hearing Panel found that the misrepresentation was the result of recklessness on the part of Goritz. As with the private securities transaction violations, the Hearing Panel concludes that the misrepresentation in this case was serious, but not egregious.

"Disciplinary sanctions are remedial in nature and should be designed to deter future misconduct and to improve overall business standards in the securities industry." Guidelines at 3. The Hearing Panel concludes that to accomplish these goals a substantial fine is essential, and the fine must be greater than the amount of Goritz's gains from the sale of the Phoenix LP units. Accordingly, the Hearing Panel will order him to pay a fine of $82,500.

The Hearing Panel also concludes that a suspension is required, but not a bar. The Panel concluded that the violations were serious but not egregious, and there is no indication that Goritz poses a danger to the investing public when functioning as a registered representative selling to institutional and high net worth individuals, the role he has occupied for nearly 40 years. The violations in this case did not arise from Goritz's activities in that role, but rather from what appears to have been an isolated instance in which he was encouraged by others to step into a different role, for which he was not qualified. An appropriate suspension should be sufficient to deter him from making another such mistake in the future, without precluding him from continuing to serve in his proper role.

In determining the appropriate length of the suspension, in addition to the factors described above, the Hearing Panel gave careful consideration to the NAC's recent decision in Newcomb. In that case, on the respondent's appeal from a Hearing Panel decision, the NAC increased the respondent's suspension for private securities transactions from the three months imposed by the Hearing Panel to two years. At the hearing, Enforcement argued that Goritz's actions were more egregious than Newcomb's because Goritz's activities spanned his association with two firms, and because Goritz also committed the misrepresentation violation.

The Hearing Panel disagrees. Newcomb, whose private securities transactions involved the sale of notes issued by a company he owned, twice gave his firm seriously misleading written notices regarding his activities; sold the notes to customers of the firm; and sold more than 90 notes for a total of more than $1 million over a period of approximately 18 months to relatively unsophisticated investors. All of these facts were seriously aggravating circumstances not present in this case. Goritz made only six sales, which were consummated during a period of about four months, to sophisticated

investors who were not firm customers, and his oral disclosures to the firms, though not complete or timely, appear to have been offered by Goritz in good faith. Furthermore, the Panel found that the misrepresentation was attributable to the fact that, because Goritz sold away from his firms, the Offering Memorandum did not receive appropriate review.

Under these circumstances, the Hearing Panel finds that a six month suspension is appropriate and will satisfy the NASD's remedial goals.

V. Conclusion

The Hearing Panel finds that Goritz violated NASD Rules 2330 and 2110 as alleged in the first and second causes of the Complaint, and violated Section 10(b) of the Exchange Act, SEC Rule 10b-5, and NASD Rules 2120 and 2110 as alleged in the third cause of the Complaint. As sanctions for these violations, Goritz is suspended from association with any member firm in any capacity for a period of six months, and fined $82,500. In addition, he is ordered to pay costs in the amount of $2,307, which includes an administrative fee of $750 and hearing transcript costs of $1,557.

These sanctions shall become effective on a date set by the Association, but not earlier than 30 days after this decision becomes the final disciplinary action of the Association, except that if this

decision becomes the final disciplinary action of the Association, Goritz's suspension shall begin on Monday, March 5, 2001, and shall end at the close of business on Wednesday, September 5, 2001.[4]

HEARING PANEL

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By: David M. FitzGerald
Deputy Chief Hearing Officer

Copies to:

George M. Goritz (overnight and first class mail)
William R. Kohler, Esq. (facsimile and first class mail)
Andrew Reich, Esq. (electronically and first class mail)
Rory C. Flynn, Esq. (electronically and first class mail)

[4] The Hearing Panel considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.