

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

KIRK L. GRAVELLE
(CRD No. 2580309),

Respondent.

Disciplinary Proceeding
No. 2008014712201

Hearing Officer – SNB

HEARING PANEL DECISION

May 5, 2011

For mismarking customer orders as unsolicited and causing his firm’s records to be inaccurate, in violation of NASD Conduct Rules 3110 and 2110, Respondent is suspended for five business days, fined \$10,000 and required to re-qualify by examination.

Appearances

Mark J. Fernandez, Esq., and Sarah Belter, Esq., New Orleans, LA, for the Department of Enforcement.

Peter J. Aldrich, Esq., for Respondent.

DECISION

I. Background

The Complaint alleges that Respondent Kirk L. Gravelle (“Respondent”) violated NASD Conduct Rules 3110 and 2110 when he mismarked customer orders as unsolicited, causing his firm’s records to be inaccurate.¹

¹ NASD consolidated with the member regulation and enforcement functions of NYSE Regulation in July 2007 and began operating under a new corporate name, the Financial Industry Regulatory Authority (“FINRA”). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008. See Regulatory Notice 08-57 (Oct. 2008). In that process, FINRA renumbered NASD Rule 2110 as FINRA Rule 2010. This decision refers to and relies on the Rules that were in effect at the time of Respondent’s alleged misconduct. In addition, because Enforcement filed the Complaint after December 15, 2008, FINRA’s procedural rules govern this proceeding. The applicable rules are available at www.finra.org/rules.

Respondent filed an Answer and requested a hearing. On December 7, 2010, a hearing was held before a hearing panel composed of the Hearing Officer, a current member of the District 7 Committee, and a current member of the District 5 Committee.² Four witnesses testified, including Respondent.

II. Origin of Investigation

The investigation leading to this proceeding began in September 2008 after Respondent's firm disclosed that he had been suspended for violating his firm's procedures. Tr. 26, 59.

III. Jurisdiction

Respondent entered the securities industry in 1995. JX -1, at 6. In 2001, he became employed as a general securities representative with Morgan Stanley DW Inc. (along with its successors, referred to as "the Firm"). JX-1, at 4; Tr. 29, 166. He continues to be employed there. JX-1, at 2.

IV. Discussion

The facts are generally undisputed. On June 17, 2008, Respondent became interested in BHP Billiton Ltd. ("BHP") as a potential investment when a customer placed an unsolicited order to purchase BHP shares. JX-8; Tr. 37, 176. Respondent then researched BHP and decided to recommend it to certain customers. Tr. 27, 177-178. Specifically, on the morning of June 20, 2008, Respondent left messages for 11 customers recommending that they purchase BHP shares. Tr. 27, 97, 178-179. The 11 customers requested that Respondent purchase BHP shares on their behalf. Tr. 97, 182. The customers authorized the purchases at different times during the period from Friday, June 20, 2008, through Monday, June 23, 2008. JX-8; Tr. 97, 180-181, 207-210.

² References to the transcript of the hearing are designated as "Tr." followed by the page number. The parties submitted joint exhibits in this case. References to the exhibits are designated as "JX" followed by the exhibit number and, if necessary, the page number. Exhibits JX-1-12 and JX-14-15 were admitted into the record. Tr. 57, 199-200, 255.

Respondent did not consult the Firm's *No Solicitation List* ("NSL") prior to recommending BHP shares to his customers. Tr. 99. The NSL listed securities that registered representatives were restricted from soliciting because conflicts could arise from activity within the Firm's investment banking department. JX-6, at 17-18, JX-7, at 3; Tr. 55. The NSL included hundreds of securities and was updated throughout each day. JX-2; Tr. 30, 67, 103-104. The Firm's written supervisory procedures required Respondent to check the NSL on a daily basis. JX-7, at 3.

Had Respondent checked the NSL prior to recommending BHP to his customers, he would have learned that he was restricted from soliciting customer purchases of BHP shares. JX-2, at 9-10, 13-14; Tr. 32-33. In fact, unbeknownst to Respondent, the Firm's investment banking department was advising Rio Tinto in connection with its potential merger with BHP. As a result, BHP had been placed on the NSL in November 2007. JX-10; Tr. 30.

On Friday, June 20, 2008, at 11:04 a.m., Respondent entered his first customer order for BHP in the Firm's electronic order system. He correctly designated the order as solicited. Tr. 37-38, 203. In response, the Firm's electronic order system displayed a red pop-up screen stating: "ORDER ENTRY REJECT. This security is on the No Solicitation List." JX-11, at 3; Tr. 203-204. The pop-up window referenced a page on the NSL and a compliance department telephone number to call. *Id.*

Rather than calling the compliance department telephone number as indicated or consulting the compliance staff in his branch office, Respondent changed the order to unsolicited to override the electronic order system and complete the trade. JX-8, at 5; Tr. 180-183, 204-205, 244. Respondent testified that he felt he had no choice but to do so, because "the bell had been rung;" he had already solicited the customer order. Tr. 182. Respondent testified that he decided

to put the client first – he had good orders and he had to execute them. Tr. 182, 186. Similarly, when Respondent entered the 10 subsequent BHP purchase orders – one more on Friday and nine on Monday – he again mismarked the orders as unsolicited in order to circumvent the pop-up restriction and facilitate the purchases. JX-8; Tr. 37-42, 206.

On Tuesday, June 24, 2008, the Firm’s compliance officer in the branch office, Aldonna Allgood (“Allgood”), sent Respondent an email inquiring about the BHP purchases and the unlikely coincidence that 11 clients would place unsolicited orders to buy the same stock at the same time. JX-9; Tr. 107, 182-183. Respondent immediately gave Allgood a truthful and detailed explanation, voluntarily disclosing that he had mismarked the orders as unsolicited in order to complete the trades. *Id.*; Tr. 110, 159. Respondent suggested calling the clients and reversing the trades, and offered to cover any costs associated with doing so. Tr. 183. Allgood then called the telephone number appearing in the pop-up window and spoke with Ellen Scanlon (“Scanlon”), the Firm’s compliance officer in New York. Tr. 155, 159. Scanlon advised Allgood to let the trades stand.³ Tr. 109, 118-19, 192.

After further review, the Firm determined to discipline Respondent for mismarking the solicited orders as unsolicited. The Firm placed Respondent on a one-week suspension and required him to attend a day of compliance training. JX-5; Tr. 184. Respondent was later placed on heightened supervision.⁴ Tr. 147, 187. In addition, the Certified Financial Planner Board of Standards (“CFP Board”) issued a public letter of admonishment. Tr. 175-176.

³ The Firm did not issue corrected confirmations. Tr. 119-121, 149-150. The record is unclear whether this was a conscious decision or an oversight. Tr. 150. Scanlon testified that she suggested to Allgood that the confirmations should be corrected, but escalated the issue to the legal department for a final decision. Tr. 193. Allgood did not recall this suggestion from Scanlon. She testified that she did not receive any instructions to correct the confirmations, so she took no action. Tr. 118-120.

⁴ The Firm has detected no issues with Respondent’s conduct in connection with this heightened supervision. Tr. 150.

At the hearing, Respondent expressed remorse for not consulting compliance personnel to resolve the issue. Tr. 180-182. He explained that his decision to change the orders to unsolicited was based on an experience eight or nine years prior, when an order he designated as solicited was blocked and an experienced colleague instructed him to change it to unsolicited to complete the trade Tr. 170-171, 180, 204-205. While this testimony is self-serving and uncorroborated, Allgood's testimony tends to substantiate the general notion that there was a lack of clear direction from compliance personnel as to the importance of accurately entering orders as solicited or unsolicited. Specifically, Allgood testified that, for managed accounts, she has seen orders marked both solicited and unsolicited, but that they should "probably" be marked solicited. Tr. 134-135. In addition, Respondent testified that, a month after the BHP orders at issue, when a trade in his personal account was blocked, Allgood advised him to change the order from solicited to unsolicited to override the system and complete the trade. Specifically, Firm procedures required Respondent to designate all trades in his personal account as solicited. When he did so with respect to the purchase of a low-priced security, the electronic order system blocked the trade because the Firm prohibited solicitation of orders in low-priced securities. However, because the trade was for his account, it was permissible. According to Respondent, Allgood advised him to mark the order unsolicited to override the system, rather than documenting an exception. Tr. 172-173. Allgood did not recall the conversation, but did not refute it. Tr. 126. Moreover, when Respondent's mismarking of the BHP orders came to light, Allgood took no initiative to correct the mismarked confirmations, although the trades had not yet settled, and it would have been easy to correct them. Tr. 118-120.

V. Violation – Inaccurate Books and Records

NASD Rule 3110(a) provides: "[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.” Under NASD Rule 115, Rule 3110 is applicable to persons associated with FINRA members.

As applied to this case, SEC Rule 17a-3 requires broker-dealers to make and keep current “[a] memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities, whether executed or unexecuted.” 17 C.F.R. §240.17a-3(a)(6)(i). Respondent attempts to distinguish his mismarking of the orders from this requirement, arguing that there is no specific requirement to maintain a record of whether a trade is solicited or unsolicited. Respondent’s argument misses the point. The recordkeeping requirements include the requirement that the records be true and correct. Regardless of whether a specific item is required to be included in a firm’s books and records, it is well settled that, “if additional information is recorded on required records, such information must be accurate.” *James F. Novak*, Exchange Act Rel. No. 19660, 1983 SEC LEXIS 2023 at *12 (Apr. 8, 1983).

A registered representative’s entry of false information in connection with a trade constitutes a violation of Rule 3110, because it renders the firm’s books and records inaccurate, and also a violation of Rule 2110, because the mismarking of trades as unsolicited is conduct inconsistent with high standards of commercial honor and just and equitable principles of trade. *See Fox & Co. Inv., Inc.*, Exchange Act Release No. 52697, 2005 SEC LEXIS 2822, at *30-32 (Oct. 28, 2005); *Dep’t of Enforcement v. Correro*, No. E102004083702, 2008 FINRA Discip. LEXIS 29, at *14 (N.A.C. Aug. 12, 2008).

Here, there is no dispute that Respondent mismarked 11 customer orders to buy BHP securities as unsolicited. Accordingly, the Panel finds that Respondent violated NASD Rules 3110 and 2110.

VI. Sanctions

The National Adjudicatory Council (“NAC”) has held that, in cases where the recordkeeping violation is intentional, the FINRA Sanction Guidelines (“Guidelines”) for falsification of documents applies. *Dep’t of Enforcement v. Nouchi*, No. E102004083705, 2009 FINRA Discip. LEXIS 8, at *6 (N.A.C. Aug. 7, 2009)(applying the Guidelines for falsification of documents where respondent intentionally entered false disability waiver claims).⁵ The falsification of documents Guideline recommends a fine of \$5,000 to \$100,000 and consideration of a bar in egregious cases, or a suspension of up to two years, where mitigation exists. *Guidelines*, at 37. Enforcement requests a six-month suspension in all capacities and a \$10,000 fine. Respondent asserts that the five-day suspension and off-site compliance training imposed by the Firm and the public admonishment by the CFB Board is a sufficient sanction.

In determining the appropriate sanction, the Panel first considered the Principal Considerations applicable to the falsification of documents; the nature of the falsified documents and whether the respondent had a good-faith, but mistaken, belief of authority to alter the document. *Id.* Here, the falsified documents were significant; they gave Respondent’s Firm the false impression that the orders were unsolicited and thereby circumvented the Firm’s restrictions against solicitations in BHP shares. Moreover, Respondent could not have reasonably believed that he was permitted to mismark the orders as unsolicited without

⁵ In reaching this holding, the NAC compared *Dep’t of Enforcement v. Correro*, No. E102004083702, 2008 FINRA Discip. LEXIS 29, at *14 (N.A.C. Aug. 12, 2008)(applying the Guideline for falsification of documents for a respondent’s intentional falsification of disability waivers), and *Dep’t of Enforcement v. Trevisan*, No. E9B2003026301, 2008 FINRA Discip. LEXIS 12 at *31, n. 14 (N.A.C. April. 20, 2008)(applying Guidelines for recordkeeping violations where intent was not established).

consulting the compliance department. *Guidelines*, at 6. Nonetheless, Respondent did not set out to falsify the order information; he entered the first order information accurately, only changing it to complete the orders and keep his customers happy.

The Panel also considered the mixed messages from the Firm's compliance personnel as to the importance of accurately marking orders as solicited or unsolicited. Although this did not excuse Respondent's failure to contact the Firm's compliance personnel, it may have given Respondent the false impression that mismarking orders as unsolicited was not a serious matter.

Nonetheless, the Panel was concerned with Respondent's argument that he acted based upon his understanding from a colleague eight or nine years earlier that it was permissible to change orders from solicited to unsolicited to complete trades that were blocked. The Panel found that it was plainly unreasonable for Respondent to rely on this advice, particularly here, where the pop-up window rejecting the order included a compliance department telephone number. The Panel concluded that this demonstrated Respondent's lack of appreciation for recordkeeping requirements and Firm procedures. The Panel was concerned that Respondent took matters into his own hands rather than consulting with compliance personnel.

The Panel also observed that there was no evidence that Respondent received any material financial benefit from the misconduct. Tr. 179-180. There was also no evidence that he intended to harm anyone or that customers were harmed. Tr. 186-187. In addition, Respondent's actions occurred over a very limited period of two trading days and involved a small number of transactions. Further, Respondent was immediately forthcoming in response to his Firm's inquiry and offered to reverse the orders at his expense, although the Firm declined to do so. Respondent has also acknowledged that what he did was wrong. Tr. 180-82. The Panel

also considered that Respondent has already been disciplined by the Firm and the CFB Board for his misconduct. *Guidelines*, at 7.

More broadly, the Hearing Panel considered that the Guidelines do not prescribe fixed sanctions for particular violations. *Guidelines*, at 1. Instead, adjudicators are directed to tailor sanctions to address the misconduct in each case, and, in doing so, may impose sanctions that fall outside the ranges recommended. *Guidelines*, at 1, 3. Sanctions are intended to be remedial, not punitive. *Guidelines*, at 2.

After careful consideration, the Panel determined that the appropriate sanction is a \$10,000 fine and a ten-day suspension. However, because Respondent has already served a five-day suspension imposed by the Firm, the Hearing Panel imposes a five-day suspension. *See Dep't of Enforcement v. Freddy A. Medina*, OHO 2009016551301 (Mar. 8, 2011)(imposing \$5,000 fine and no suspension where respondent affixed a customer signature on an account application to expedite a transaction requested by the customer). In addition, given his apparent lack of familiarity with the recordkeeping requirements, the Panel determined that Respondent shall be required to re-qualify by examination.

VII. Conclusion

For mismarking customer orders as unsolicited and causing his employer firm's records to be inaccurate, in violation of NASD Conduct Rules 3110 and 2110, Respondent is suspended for five business days, fined \$10,000 and required to re-qualify by examination. Respondent is also ordered to pay costs in the amount of \$2,951.95, which includes a \$750 administrative fee and the cost of the hearing transcript.

These sanctions shall become effective on dates set by FINRA, but not earlier than 30 days after this decision becomes FINRA's final disciplinary action in this matter, except that if

this decision becomes FINRA's final disciplinary action, Respondent's suspension shall begin on July 5, 2011, with the opening of the business day and end July 11, 2011, at the close of the business day. Respondent shall re-qualify by examination within 90 days of the initiation of his suspension.⁶

HEARING PANEL

By: Sara Nelson Bloom
Hearing Officer

Copies to: Peter J. Aldrich, Esq. (*via electronic and first-class mail*)
Kirk L. Gravelle (*via courier and first-class mail*)
Laura Leigh Blackston, Esq. (*via electronic and first-class mail*)
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David R. Sonnenberg, Esq. (*via electronic mail*)

⁶ The Hearing Panel has considered all of the parties' arguments. They are rejected or sustained to the extent that they are inconsistent with the views expressed herein.