

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of

Department of Enforcement

Complainant,

v.

Ansula Pet Hwa Liu
Minneapolis, MN,

and

Brooklin Park, MN,

and

Minnetrista, MN,

Respondent.

DECISION

Complaint No. C04970050

District No. 4

Dated: November 4, 1999

In a decision on default, the Hearing Officer found that a registered representative engaged in private securities transactions without providing prior written notification to her employer and failed to respond to NASD requests for information. Held: findings affirmed and sanctions modified to eliminate the censure and reduce the \$100,000 fine to \$50,000 if respondent pays the required \$50,000 plus interest in restitution to the customers within six months.

Ansula Pet Hwa Liu ("Liu") has appealed an October 15, 1998 default decision issued by a Hearing Officer.¹ After a review of the entire record in this matter, we affirm the findings of

¹ On November 7, 1998, Liu simultaneously filed a Notice of Appeal Pursuant to Rule 9311 ("Notice of Appeal") and a Motion to Set Aside the Hearing Officer Default Decision Pursuant to Rule 9269 (b) ("Motion to Set Aside Default"). On November 11, 1998, the Hearing

the Hearing Officer that: (1) NASD Regulation, Inc. ("NASD Regulation") properly asserted jurisdiction over Liu pursuant to Article V, Section 4(a) of the NASD By-Laws; (2) Liu engaged in private securities transactions without providing prior written notification to her employer; and (3) Liu failed to respond to requests for information issued by the Department of Enforcement ("Enforcement"). We eliminate the Hearing Officer's imposition of a censure,² affirm the bar in all capacities and the order to pay \$50,000, plus interest, in restitution, and affirm the \$100,000 fine, but order that it be reduced to \$50,000 (\$25,000 for cause one and \$25,000 for cause two) if Liu pays the required restitution to customers within six months.

Factual Background

Liu entered the securities industry in 1985. From December 1985 to July 13, 1995, she was registered as a general securities representative with The Equitable Life Assurance Society and Equico Securities, Inc. ("Equitable" or "the Firm"). Liu has not been associated with any member of the Association since July 1995.

Private Securities Transactions. This matter arose following NASD Regulation's receipt of a written complaint from married customers B & DK, dated February 15, 1997, alleging, among other things, that Liu had recommended and sold them shares of Emphasys Software, Inc. ("Emphasys"), a company with which she was affiliated and which later declared bankruptcy, thereby rendering their shares worthless. Shortly thereafter, NASD Regulation received a second complaint, dated March 3, 1997, from a different customer, JA, who also alleged that she had suffered losses because Liu had recommended and sold her shares of Emphasys.

Enforcement initiated an investigation and mailed a request for information to Equitable. In a response dated March 21, 1997, Equitable stated that "[a]t no time during Ansula Liu's association with Equitable was the Firm aware of any sales of securities by Ms. Liu in Emphasys Software, Inc. . . ." Equitable further stated that "[t]he Firm's records [did] not reflect any requests by Ms. Liu to participate in a private securities transaction during the relevant time period."

Officer issued an Order Retaining Jurisdiction For Purposes of Determining Whether to Set Aside Default Decision. On January 6, 1999, the Hearing Officer issued an Order Denying Motion to Set Aside Default. Accordingly, this matter proceeded on appeal, and a scheduling notice was issued for the submission of written statements. No oral argument was scheduled because Liu had failed to participate in the proceedings before the Hearing Officer and had not shown good cause for such failure.

² This is in accordance with the policy we adopted on June 10, 1999 not to impose a censure in cases where a bar or a suspension is imposed. See NASD Notice to Members 99-59.

Documents submitted to Enforcement by Equitable demonstrate that Liu became Chief Executive Officer ("CEO") of Emphasys on June 5, 1994. Liu informed Equitable of her position with Emphasys in a letter dated August 19, 1994, representing her duties as consisting of "the evaluation of products/markets and Company's financial situation, [and] the development & implementation of a sale/marketing plan." On September 22, 1994, Equitable wrote to Liu and noted that, because of her position as CEO of Emphasys, she might be in jeopardy of violating the "selling away" rule, *i.e.*, raising capital by engaging in private securities transactions. (The September 22, 1994 letter also addressed Equitable's concern with Liu's activities in connection with a separate company, Pioneer Investment and Management, Inc. ("Pioneer"). Those activities are not at issue in this action.) In her response of October 1, 1994, Liu simply informed Equitable that she had ceased her activities with Pioneer, but did not address Equitable's concerns about her duties with Emphasys, clarify what those duties were, or notify Equitable that she was engaging in private securities transactions.

On November 22 and 30, 1994, Equitable sent memoranda to Liu demanding that she complete an Outside Business Activities ("OBA") report disclosing her "status at Emphasys: (1) when it will end [and] (2) [her] current role." This communication also stated that if Liu did not respond by December 9, 1994 "[Equitable] will terminate your registration." Liu completed the OBA report and dated it December 24, 1994, disclosing her status as "Chairman and Supervising President" of Emphasys, but failed to notify Equitable of any activities in private securities transactions.³

After receiving Equitable's response, Enforcement requested information and documents from customers B & DK and JA relating to their investments in Emphasys. These customers responded that Liu had recommended Emphasys to them, and they provided photocopies of canceled checks, stock certificates for Emphasys, and correspondence with Liu, showing the following:

- 1) On April 9, 1993, customers B & DK purchased 4,000 shares of Emphasys for \$10,000;

³ Equitable's March 21, 1997 letter to Enforcement further stated that Liu submitted her OBA report indicating her involvement with Emphasys and that subsequently she orally assured Equitable's Agency Manager and Agency Operations Manager that she was "acting only as an interim CEO for Emphasys, was looking to recruit a replacement CEO, and was not involved in raising capital for or selling securities of Emphasys." Equitable's response also stated that Liu not only failed to request approval to participate in private securities transactions, but also concealed fund raising activity on behalf of Emphasys when she completed Equitable's Annual Compliance Notification Form, dated April 10, 1995, on which she answered "yes" to questions about whether she had properly reported outside business activities and complied with Equitable's prohibition against private securities transactions.

- 2) On August 22, 1994, customers B & DK purchased 50,000 shares of Emphasys for \$5,000;
- 3) On February 28, 1995, customer JA purchased 12,500 shares of Emphasys for \$5,000; and
- 4) On March 29, 1995, customer BK, as trustee for her mother, ET, purchased 300,000 shares of Emphasys for \$30,000.

On May 15, 1997, pursuant to NASD Procedural Rule 8210, Enforcement sent a first request for information to Liu concerning the private securities transactions in Emphasys. Liu responded incompletely, via facsimile transmission on May 30, 1997 of a letter dated May 29, 1997, characterizing her association with Emphasys as "business consultant" from April 9, 1993 until June 1, 1994, and as CEO from June 3, 1994 until March 31, 1996. Liu stated that she "did not get permission" from Equitable to provide her services to Emphasys and that she had resigned as a registered representative of Equitable.

Failure to Respond to Requests for Information. As previously mentioned, on May 15, 1997, Enforcement mailed a first request for information and documents relating to the customer complaints and private securities transactions to Liu. This request was sent to her at her residential Central Registration Depository ("CRD") address⁴ ("CRD address") via first-class and certified mail, return receipt requested. Both mailings were returned marked "Return to Sender."⁵ In an affidavit dated March 4, 1998,⁶ signed by an Enforcement compliance specialist ("the Enforcement Affidavit"), Enforcement represented that a request for information was not mailed to Liu at her CRD business address because she had ended her employment there nearly two years earlier.

Enforcement also mailed the May 15, 1997 request for information to an address obtained from Equifax ("the Equifax Address").⁷ The mailing to the Equifax Address was sent via first-

⁴ Brooklin Park, Minnesota.

⁵ The certified mailing return notation indicated "Unknown," while the first-class mailing return notation indicated "Attempted Not Known."

⁶ The Enforcement Affidavit was submitted on March 4, 1998 in connection with Enforcement's Motion For Entry of Default Decision.

⁷ Minneapolis, Minnesota. Liu also listed this as her address on the OBA report that she provided to her employer in December, 1994. Since Liu's CRD Address has remained listed as Brooklin Park, Minnesota, it is apparent that Liu's CRD address was out of date as early as December 1994, when she completed the OBA report.

class and certified mail, return receipt requested. The certified mailing was returned, bearing the notation: "Return to Sender - Unclaimed." The first-class mailing was not returned, and (by facsimile on May 30, 1997 of a letter dated May 29, 1997), Liu responded to Enforcement's May 15 letter, stating: "I have received your letter dated May 15, 1997," and describing the services she had provided to Emphasys. Liu also stated: "I did not get permission or thought [sic] that I would need permission to provide these services to Emphasys." Liu briefly discussed her relationship with the customers, but she denied that she had solicited their investments in Emphasys.⁸ Liu did not address many of the issues raised in Enforcement's first request for information, nor did she provide any of the requested documents.

On June 5, 1997, Enforcement issued a second request for information via first-class and certified mail, return receipt requested, to the Equifax Address. The first-class mailing was not returned. The certified mailing was returned with the notation: "Return to Sender - Unclaimed." No response was received from Liu.

On July 9, 1997, Enforcement sent a final written request for information to Liu via first-class and certified mail, return receipt requested, to the Equifax Address. The first-class mailing was not returned. The certified mailing was returned bearing the Postal Service notation: "Return to Sender - Unclaimed." Liu did not respond to this request.

The Enforcement Affidavit asserted that, in a final effort to obtain information from Liu, Enforcement staff attempted to communicate with her via telephone on September 29, 1997. Liu returned the telephone call on October 1, 1997. The compliance specialist stated in the Enforcement Affidavit: "Respondent Liu returned my call and stated the information I requested was not relevant and that she would not respond to the requests."

Discussion

Jurisdiction. Liu was registered as a general securities representative with Equitable from December 1985 to July 13, 1995. After Liu terminated her employment, Equitable received two customer complaints that asserted that Liu had engaged in private securities transactions with Emphasys. On June 5, 1997, Equitable amended its Uniform Termination Notice ("Form U-5") and disclosed the customer complaints.⁹ The Hearing Officer concluded that because the Form U-5 amendment was filed within two years of Liu's July 13, 1995 termination from Equitable, the two-year period during which the NASD retained jurisdiction over Liu recommenced as of the

⁸ With respect to customers B & DK she stated they were close friends and that she "refer[ed] them to invest in Emphasys." With respect to customer JA, Liu stated that JA was a referral from customers B & DK, and that Liu "did not solicit [JA] to invest in Emphasys."

⁹ The customer complaint letter from B & DK to Equitable is dated July 11, 1996, and the JA complaint letter to Equitable is dated June 27, 1996.

June 5, 1997 amendment. The Hearing Officer further concluded that since the complaint in this action was filed on December 5, 1997, which was within two years of the filing of the amended Form U-5, the NASD retained jurisdiction over Liu for the purposes of this disciplinary proceeding under Article V, Section 4(a) of the NASD By-Laws.

We concur with these findings. Liu argued in her Motion to Set Aside Default that she actually had terminated her employment with Equitable on May 5, 1995, when she submitted a "resignation letter." The evidence, however, fails to substantiate Liu's claim that she had resigned on that date.¹⁰

Moreover, as noted by the Hearing Officer in the Order Denying Motion to Set Aside Default Decision, any arguments that Liu terminated her employment with Equitable on that date and that Equitable was not timely in its filing of her Form U-5 are not relevant or material to a determination of whether the NASD had jurisdiction over Liu. It has long been established that the Association's jurisdiction is determined not from the termination of an individual's employment or association with a firm, but from the effective date of termination of the individual's registration, which is the date of the NASD's receipt of a Form U-5. In re Donald

¹⁰ This resignation letter was not part of the record provided by Equitable to Enforcement and was never mentioned or produced by Liu prior to her attempt to set aside the default decision. Liu was presented with many opportunities to mention the existence of such a letter, yet she did not produce it or mention it in response to any of Enforcement's requests for information, in response to the complaint, or in response to Enforcement's Motion for Entry of a Default Decision.

We also note that we have further reason to doubt Liu's credibility. In support of her Motion to Set Aside Default, Liu first claimed that she had terminated her association with Equitable "in or around June of 1994." Yet this assertion is contradicted by evidence in the record. Specifically, in a letter dated August 19, 1994, Liu requested a leave of absence from Equitable because she had become CEO of Emphasys. In a response dated September 22, 1994, Equitable informed Liu that it was concerned about her activities with Emphasys and that her position with Pioneer must cease, or she must terminate her association with Equitable. Equitable informed her that if she did not respond by October 3, 1994, it would terminate her association. On October 1, 1994, Liu replied to Equitable, did not mention Emphasys, stated that Pioneer was no longer in business, and asserted that she looked "forward to continuing [her] well established and rewarding career with Equitable." On November 30, 1994, Equitable advised Liu that if she did not complete her OBA report by December 9, 1994, her registration would be terminated. Liu complied and submitted an OBA report to Equitable, dated December 24, 1994. We find that this evidence shows that Liu did not terminate her association with Equitable in June 1994. Rather, she took specific steps to ensure that her association with Equitable was not terminated.

M. Bickerstaff, 52 S.E.C. 232, 234 (1995); In re Richard Greulich, 50 S.E.C. 216, 218 (1990). Cf. In re Eliezer Gurfel, Exchange Act Rel. No. 41229 (Mar. 30, 1999).

In this action, that date was July 13, 1995, when the CRD record shows that the NASD received an electronically filed Form U-5 that provided for the termination of Liu's association with Equitable. On that same day, the NASD terminated Liu's registration. Pursuant to Article V, Section 4(a) of the NASD By-Laws, the NASD retained jurisdiction over Liu for "two years after the effective date of termination of registration," or up to and including July 12, 1997. On June 5, 1997, Equitable filed an amended Form U-5 for Liu, disclosing customer complaints about Liu. The amended Form U-5 was filed within two years after the July 13, 1995 effective date of termination of Liu's registration with the NASD. Therefore, pursuant to Section 4(a), the two-year jurisdictional period recommenced from the June 5, 1997 date of the filing of the amended Form U-5, and the NASD retained jurisdiction over Liu up to and including June 4, 1999. Enforcement commenced this disciplinary action against Liu by filing a complaint on December 5, 1997, which filing was well before the expiration of jurisdiction.

Liu has asserted that Section 4(a) is ambiguous because "termination of registration" is not defined. We conclude, however, that there is no ambiguity. In 1992, the NASD By-Laws were amended to provide for a fixed two-year jurisdictional period from the effective date of termination of registration pursuant to the filing of a Form U-5. See Exchange Act Rel. No. 30506, SEC LEXIS 711 (Mar. 23, 1992). The amendments also provided that the two-year jurisdictional period recommences from the date of the filing of the last amendment to a person's Form U-5 that is filed within two years of the original Form U-5.

If a person's Form U-5 is amended on the last day of the two-year period, the NASD will retain jurisdiction for a total of four years after the effective date of the person's termination. Id. at 6, n. 10.

Liu has also asserted that Equitable failed to file the Form U-5 properly, and thus failed to comply with Section 3(a) of the By-Laws, because it did not file the Form U-5 within 30 days of May 5, 1995, the day that she alleges that she terminated her association with Equitable. We also reject this argument.

When the decision was reached regarding Liu's termination from Equitable, the Firm had 30 days to submit a Form U-5 to the NASD. See Article V, Section 3(a) of the NASD By-Laws. The penalty for a firm's failure to do this in a timely manner may be a late filing fee, or a disciplinary action against the firm. The late filing, however, was irrelevant as to the two-year jurisdictional provision and its effect on Liu. Failure of a member firm to file a Form U-5 within 30 days does not affect the date of an individual's termination for purposes of Article V, Section 4. Thus, even assuming for purposes of argument that Equitable was late in submitting the Form U-5, Liu remains subject to the NASD's jurisdiction.¹¹

¹¹ We note that under Liu's theory of jurisdiction, any respondent could avoid

The Default Decision. We affirm the Hearing Officer's finding that mailing the complaint to Liu's last known address (the Equifax Address) constituted valid service and notice under Rule 9134. As noted above, the NASD retained jurisdiction over Liu for a period beyond her employment with a member firm. Liu therefore was not relieved of her obligations to answer Enforcement's requests for information or disciplinary proceeding complaints simply because she no longer was employed by Equitable.¹²

We also affirm the Hearing Officer's finding that by failing to answer the complaint, Liu defaulted pursuant to Procedural Rules 9215(f) and 9269. Further, pursuant to Rule 9215(f), her failure to file an answer is deemed an admission of the allegations of the complaint.

Private Securities Transactions. Although the allegations of the complaint were appropriately deemed admitted, the Hearing Officer reviewed the evidence submitted by Enforcement to support the allegations of the complaint and found that the record supported the conclusion that Liu had engaged in unauthorized private securities transactions, in violation of Conduct Rules 2110 and 3040. We affirm that determination.

Conduct Rule 3040(b) provides, in pertinent part:

[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

The Commission has made clear "that the requirement [in Rule 3040] to describe the proposed transaction 'in detail' requires, at the very minimum, disclosure of the identity of the investor and the amount involved in the securities transaction."¹³

disciplinary action simply by making an unsupported claim that she had terminated her association with a member long before the member submitted the Form U-5 that triggered the commencement of the two-year jurisdictional period. This theory would severely limit the NASD's ability to carry out its regulatory function to investigate misconduct and initiate disciplinary action and would circumvent the Commission's stated interest in the NASD's accomplishment of its regulatory duties in a fair and efficient manner with a "clear workable standard" to determine jurisdiction. See Exchange Act Rel. No. 30506 SEC LEXIS 711 at *7.

¹² See, e.g., District Business Conduct Committee No. 10 v. Veisman, Complaint No. C10960060, 1997 NASD Discip. LEXIS 36, at *6-10 (NBCC May 20, 1997) (citing In re Reed A. Hatkoff, 51 S.E.C. 991 (1994)).

¹³ District Business Conduct Committee No. 5 v. Goldsworthy ("Goldsworthy"), Complaint No. C05940077, 1997 NASD Discip. LEXIS 31, at *10 (NBCC May 21, 1997)

The record unequivocally demonstrates that Liu failed to comply with the requirements of Conduct Rule 3040 and engaged in private securities transactions. Documents submitted by the customers include copies of their complaint letters, discussing Liu's recommendations of Emphasys; stock certificates signed by Liu; and canceled checks for four separate private securities transactions.

The record also unequivocally shows that Liu failed to provide Equitable with prior written notice describing the four private securities transactions with customers B & DK, JA, and ET (the mother of BK) and that Equitable did not authorize Liu to effect any private securities transactions in Emphasys. Equitable's letter dated March 21, 1997 stated that "[t]he Firm's records [did] not reflect any requests by Ms. Liu to participate in a private securities transaction during the relevant time period." Additionally, Equitable informed Liu of its concerns that her duties with Emphasys might violate "selling away" rules. When Equitable specifically asked Liu to disclose her position and duties with Emphasys, she failed to notify Equitable that she had engaged in private securities transactions. Liu also admitted, in her facsimile transmission dated May 29, 1997, that she "did not get permission" from Equitable to provide services to Emphasys.

Thus, we find that Liu violated Conduct Rule 3040 by effecting four private securities transactions without prior written notice to and written approval and/or acknowledgment from her member firm. We also find that Liu's misconduct in effecting the four private securities transactions without notice and approval violated her obligation to observe high standards of commercial honor and thereby violated Conduct Rule 2110. As the Commission has recognized:

The duty of a member firm's employee to inform [her] employer regarding certain private transactions is both long-standing and essential. It protects the firm from exposure to loss and litigation, and investors from the hazards of unmonitored sales. [. . .] The obligation arises under the general ethical considerations of [Rule 2110] and under the specific requirements of [Rule 3040.]¹⁴

Failure to Provide Information. We also affirm the Hearing Officer's conclusion that the evidence supports a finding that Liu failed to respond to repeated requests for information concerning the private securities transactions.

(quoting In re William Louis Morgan, 51 S.E.C. 622, 627 at n.19 (1993)). Cf. In re Ronald J. Gogul, et al., 52 S.E.C. 307, 310 (1995).

¹⁴ In re William Louis Morgan, 51 S.E.C. 622, 625 (1993). See also In re Allen S. Klosowski, 48 S.E.C. 954, 956 (1988).

Procedural Rule 8210(a)(1) authorizes NASD staff to require persons associated with members to report "orally or in writing with respect to any matter" involved in an investigation or examination. This rule provides a means for the Association to carry out its self-regulatory functions in the absence of subpoena power. Rule 8210 is a "key element in the NASD's efforts to police its members."¹⁵ Thus, failure to respond subverts the NASD's ability to carry out its regulatory responsibilities.¹⁶

Enforcement sent three requests for information to Liu requiring her to provide information in connection with customer complaints concerning private securities transactions. Enforcement mailed the first request to Liu at her residential CRD address, as required by Rules 8210(d) and 9134(b). Further, Enforcement mailed the first request to a residential address obtained from Equifax. Although the mailings to the CRD address were returned to Enforcement, Liu acknowledged actual receipt of the first request sent to the Equifax address by her response of May 29, 1997. Even though Liu actually received the first request for information, her response thereto did not comply with it.

The second and third requests for information were mailed to Liu's Equifax address. All certified mailings were returned unclaimed. The first-class mailings were not returned. We find that such mailings may be presumed to have been delivered to Liu. Moreover, the Enforcement Affidavit states that Liu verbally confirmed receipt of the second and third requests when she responded to Enforcement's September 29, 1997 phone call and stated that the information requested was not relevant and that she would not respond to the requests. Accordingly, we find that service of the second and third requests to the Equifax address was valid and that Liu had both actual and constructive notice of these requests and chose not to respond.

Liu's failure to respond completely and truthfully to Enforcement's first request for information, and her complete failure to respond to the second and third requests for information, violated Procedural Rule 8210 and Conduct Rule 2110.

Sanctions

In determining appropriate sanctions for the misconduct we have found in this case, we consulted the NASD 1998 Sanction Guidelines ("Sanction Guidelines"), which recommend a fine of \$5,000 to \$50,000 for private securities transactions and advise that adjudicators also should consider suspending the person in any or all capacities for up to two years, and, in egregious cases, barring the individual.¹⁷ Of the specific factors set out in the Sanction

¹⁵ In re Richard J. Rouse, 51 S.E.C. 581, 584 (1993).

¹⁶ In re John A. Malach, 51 S.E.C. 618, 621 (1993).

¹⁷ See Sanction Guidelines (1998 ed.) (Selling Away (Private Securities Transactions)) at 15.

Guidelines for private securities transaction violations, the following are relevant in determining appropriate remedial sanctions in this disciplinary proceeding: (1) whether the respondent had a proprietary or beneficial interest in, or was otherwise affiliated with, the selling enterprise or issuer; and (2) whether the respondent provided his or her employer firm with verbal notice of all relevant factors and, if so, the firm's verbal or written response, if any.

There is no question that Liu, as CEO of Emphasys, had a proprietary or beneficial interest in it. Further, Liu gave Equitable neither verbal nor written notice of her intent to engage in private securities transactions on behalf of Emphasys. In fact, in response to direct questions from Equitable respecting her activities for Emphasys, Liu concealed such transactions by providing incomplete or non-responsive and evasive answers to the Firm's inquiries.

We also considered the other relevant factors listed on pages 8-9 of the Sanction Guidelines. The application of these other relevant factors to the facts of this case support the sanctions we have imposed. First, the evidence shows that Liu has never accepted responsibility for or acknowledged her misconduct. Indeed, as noted above, she purposefully misled Equitable by providing misleading, incomplete, and evasive answers concerning her activities on behalf of Emphasys. The record also indicates that Liu never made restitution to the complaining customers or otherwise attempted to remedy her misconduct.

Further, Liu engaged in a pattern of misconduct over a period of time. She engaged in four separate transactions extending over a two-year period. During that period she had ample time to inform Equitable of her intended activities and, in fact, was given specific opportunities to do so in response to direct questions raised by Equitable concerning her position at Emphasys. Yet, Liu concealed her activities and misled Equitable concerning the private securities transactions.

Third, Liu did not assist Enforcement in its investigation of the customer complaints. Rather, she delayed and frustrated the investigation, by providing evasive, incomplete, and non-responsive answers to the first request for information and then by failing to respond at all to the second and third requests for information.

Fourth, we find that Liu engaged in private securities transactions notwithstanding prior warnings from Equitable that such conduct might violate applicable securities laws or regulations. This finding is supported by Liu's refusal to answer directly questions raised by Equitable concerning her activities on behalf of Emphasys. This finding also is supported by two private securities transactions with customers JA and B & DK in February 1995 and March 1995, respectively, after Liu had been warned by Equitable that such activities might violate the "selling away" rule.

Fifth, we also find that Liu's misconduct resulted in the potential for her monetary or other gain. Because Liu never responded to Enforcement's request for information, it is not

possible to determine what sales proceeds, commissions, or concessions she received as a result of the four private securities transactions. As CEO of Emphasys, however, Liu had, at a minimum, a proprietary or beneficial interest in the company, and the private securities transactions, which resulted in the raising of capital for Emphasys, would have inured to her benefit, either directly or indirectly.

Accordingly, for her conduct relating to the first cause of complaint, Liu is fined \$50,000, and barred from associating with any member firm in any capacity. Further, Liu is ordered to pay restitution, plus interest from the date of investment, at the rate established for the underpayment of incomes taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. ' 6621(a), as follows:

\$10,000 to customers B & DK for their purchase of Emphasys on April 9, 1993;

\$5,000 to customers B & DK for their purchase of Emphasys on August 22, 1994;

\$5,000 to customer JA for her purchase of Emphasys on February 28, 1995; and

\$30,000 to customer ET for her purchase of Emphasys on March 29, 1997.

The Sanction Guidelines recommend a fine of \$25,000 to \$50,000 for failing to respond or failing to respond truthfully to requests made pursuant to Procedural Rule 8210 and Conduct Rule 2110.¹⁸ The Sanction Guidelines also recommend that in instances in which the respondent did not respond at all, a bar "should be standard." The Sanction Guidelines recommend consideration of the nature of the information requested, the number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response. The Sanction Guidelines also recommend consideration of the principal considerations listed on pages 8-9.

The evidence in this case demonstrated that the information requested by Enforcement was extremely important to the investigation of customer complaints concerning Liu. The requests for information directly related to the customer complaints and Liu's activities on behalf of Emphasys. Further, the undisputed evidence demonstrated that Enforcement sent Liu multiple requests and made a substantial effort, including telephone calls to Liu, in an effort to obtain the requested information. Liu, however, did not respond truthfully and adequately to Enforcement's first request and did not respond at all to Enforcement's second and third requests.

Most of the same principal considerations listed at pages 8-9 of the Sanction Guidelines and discussed above also are relevant to consideration of the sanctions for failure to respond. We

¹⁸ See Sanction Guidelines (1998 ed.) (Failure to Respond) at 31.

have applied these factors, in conjunction with the specific factors to be considered under Procedural Rule 8210, in determining sanctions.

Further, in imposing sanctions, we have considered the importance of truthful and complete compliance with Procedural Rule 8210. This Rule provides the means for the Association to carry out its regulatory functions in the absence of subpoena power and, as the Commission has recognized, is a "key element in the NASD's effort to police its members."¹⁹ There is no question that "failure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate."²⁰

Liu's facsimile transmission of the letter dated May 29, 1997, does not mitigate her failure to respond. The May 29 communication was non-responsive and was Liu's sole attempt to communicate with Enforcement. Moreover, it was not "truthful" since it did not disclose the private securities transactions on behalf of Emphasys. Subsequently, Liu affirmatively refused to respond to Enforcement's requests for information. Thus, there is no mitigation.

Accordingly, for Liu's conduct relating to the second cause of complaint, Liu is fined \$50,000 and barred from association with any member in any capacity.

Conclusion

For the reasons stated above, for the violations of NASD Conduct Rules 2110 and 3040 alleged in the first cause of complaint, we impose a fine of \$50,000; order restitution to the customers in the total amount of \$50,000, plus interest from the date of investment;²¹ and impose a bar in all capacities from association with any member firm.

For the violations of NASD Conduct Rule 2110 and NASD Procedural Rule 8210 as alleged in the second cause of complaint, we impose a fine of \$50,000 and a bar in all capacities from association with any member firm.²²

¹⁹ In re Richard J. Rouse, 51 S.E.C. 581, 584 (1993).

²⁰ In re Michael D. Borth, 51 S.E.C. 178, 180 (1992).

²¹ The restitution is to be paid to Liu's customers in the amounts set forth herein. In the event that customers cannot be located, unpaid restitution should be paid to the appropriate escheat, unclaimed-property, or abandoned-property fund for the state of the customer's last known address.

²² We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine,

We further order that the \$100,000 fine (\$50,000 for cause one and \$50,000 for cause two) be reduced to \$50,000 (\$25,000 for cause one and \$25,000 for cause two) if Liu pays the ordered restitution to customers within six months of the date of this decision. Liu should submit proof of payment of the restitution to staff of NASD District No. 4. The bar is effective immediately upon service of this decision.

On Behalf of the National Adjudicatory Council,

Alden S. Adkins
Senior Vice President and General Counsel

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 sanctions, after seven day's notice in writing, will summarily be revoked for non-payment.