BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Marc Winters Chatsworth, CA, Respondent.	DECISION Complaint No. E102004083704 Dated: July 30, 2009

Respondent caused his member firm's books and records to contain inaccurate information. Held, findings affirmed and sanctions modified.

Appearances

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

For the Respondent: Mitchell J. Albert, Esq., Albert & Will, LLP

Decision

The review subcommittee of the National Adjudicatory Council ("Review Subcommittee") called this matter for review pursuant to NASD Rule 9312 to examine the findings and sanctions imposed by the Hearing Panel.[1] After a complete review of the record, we affirm the Hearing Panel's findings that Marc Winters ("Winters") violated NASD Rules

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

3110 and 2110 by claiming waivers of contingent deferred sales charges ("CDSCs") on 42 redemptions of Class B mutual funds over the course of nine months for 14 customers by falsely claiming that those customers were disabled.[2] For this misconduct, the Hearing Panel fined Winters $30,000 and suspended him for 30 business days. We determine that a modification of sanctions is warranted, and therefore we fine Winters $19,882 and suspend him for 90 days.

I. Background

Winters entered the securities industry in September 1999 when he associated with UBS Financial Services ("UBS" or the "Firm") and registered with FINRA as a general securities representative. During the time that the misconduct here took place, Winters handled approximately $50 million in assets for roughly 200 customers. Winters remained registered with UBS until August 2004, when the Firm terminated him for violating a Firm policy related to providing accurate customer information relevant to mutual fund sales. FINRA began its investigation of Winters after UBS's termination of Winters for cause.

Winters associated with Firm One on August 25, 2004, as a general securities representative. He remains employed by that firm. Approximately 80 to 85 percent of Winters's UBS clients transferred with him to Firm One. At the time of the hearing in this matter, Winters managed $67 million in assets for 1,062 clients.

II. Procedural History

The Department of Enforcement ("Enforcement") filed a complaint against Winters on November 29, 2006. The complaint alleged that during the period March 2003 through December 2003, Winters claimed CDSC waivers on 42 redemption transactions for 14 customers by falsely stating that those customers were disabled, which caused UBS's books and records to contain false and misleading information related to the actual disability status of these customers and their entitlement to the CDSCs. The complaint further alleged that this conduct violated NASD Rules 3110 and 2110. In his answer to the complaint, Winters admitted that he engaged in the alleged misconduct, but denied that he acted in a way that would justify a sanction.

The Hearing Panel held a hearing on September 26, 2007. At the hearing, Winters again admitted that he obtained CDSC waivers by claiming disability for customers who were not disabled. In a decision issued on February 7, 2008, the Hearing Panel found Winters liable for the misconduct as alleged in the complaint. The Hearing Panel fined Winters $30,000 and suspended him for 30 business days. On March 19, 2008, the Review Subcommittee called this matter for review.

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[2] A CDSC is a sales charge applied by mutual fund companies to the sale of Class B or C mutual fund shares. The amount of the CDSC varies based on the terms set forth by the mutual fund company. Information about a fund's CDSC is contained in the fund's prospectus. The purpose of a CDSC is to reimburse a mutual fund's distributor for commissions paid when an investor purchases the fund's shares.

III. Facts

There are no material facts in dispute in this matter. Winters admits that from March 2003 through December 2003, he entered disability waivers in 42 mutual fund transactions for 14 customers whom he knew were not disabled.[3] In addition, Winters stipulated that he obtained CDSC waivers totaling $14,882.[4] Winters stated that he received no personal monetary benefit by entering the waivers and that the customers would have entered into the transactions even if they had to pay the CDSCs. Winters testified that once he began obtaining CDSC disability waivers for nondisabled customers, he "really gave it no further thought" and "just wanted to save [the customers] money."

During Winters's employment at UBS, the Firm used an electronic mutual fund order entry system. When entering an order in the system to sell Class B or C mutual fund shares, a registered representative would arrive at an electronic field titled "CDSC Waiver." The default entry for this field was "No." If a registered representative elected to claim a waiver, the system required him to substitute "Yes" for "No." The system then would prompt the registered representative to select a reason for the waiver. The available reasons were death, disability, mandatory distribution, or systematic withdrawal.

Winters first learned of the idea to falsely claim that a customer was disabled for CDSC purposes from another UBS representative. Winters testified that he remembered having a conversation with this representative about one of Winters's clients who did not want to pay the CDSC. The representative said, "Oh that's no problem. Just put down that he's disabled." Winters thought this was a "great way to save [his] clients some money." Winters testified that the mutual fund companies "spent money like it was going out of style" and that he thought that waiving these fees "was effectively . . . built into their expenses." Winters learned that two or three other representatives in the office were also obtaining CDSC disability waivers for nondisabled customers and assumed it was "just kind of a standard thing that was done at times."

UBS policies expressly prohibited employees from "making false or misleading entries in the firm's books and records." Winters acknowledged at the hearing below that he never consulted UBS's compliance manual to determine whether his conduct might violate a UBS policy and never spoke with any UBS supervisor, branch manager, or compliance person regarding the propriety of the waivers. He further acknowledged that he never reviewed the mutual fund prospectuses for the funds whose CDSCs he was waiving.

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3 The 14 customers were LM, MM, B Family Trust, SI, OG, MB, GD, JLJ, LC, MS, YJK, MD, GH, and JRG.

4 The specific amount of several of the CDSC waivers could not be precisely calculated; therefore, the parties stipulated to amounts based on an estimated three percent of the amount of the sales. The 42 waived CDSCs ranged in value from $5.00 to $2,098.02. Thirteen of the 42 waivers involved amounts under $100.

Winters testified that months after he obtained the waivers in this case, a UBS supervisor requested proof of the clients' disabilities. Winters admitted to her that he could not provide such proof because the clients were not disabled. Several months after this conversation, UBS terminated Winters for violating Firm policy by falsely claiming the waivers.

IV. Discussion

We affirm the Hearing Panel's findings of violation.

NASD Rule 3110 requires member firms to "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." In turn, Rule 17a-3 requires member firms to make and keep "[a] memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities." 17 C.F.R. § 240.17a-3(a)(6)(i). NASD Rule 2110 requires FINRA members, in conducting their business, to "observe high standards of commercial honor and just and equitable principles of trade."[5] *Dep't of Enforcement v. Trevisan*, Complaint No. E9B2003026301, 2008 FINRA Discip. LEXIS 12, at *27 (FINRA NAC Apr. 30, 2008) (internal quotation omitted).

Entering false information in a member firm's books or records violates NASD Rule 3110 and also violates NASD Rule 2110's requirement that members observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business. *Fox & Co. Inv., Inc.*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822, at *30-32 (Oct. 28, 2005) (finding that entering incorrect information in documents constitutes a violation of NASD Rules 3110 and 2110). Moreover, it is a "long-standing and judicially-recognized policy that a violation of another Commission or NASD rule or regulation . . . constitutes a violation of Conduct Rule 2110." *Stephen I. Gluckman*, 54 S.E.C. 175, 185 (1999); *see also Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12-13 (NASD NAC June 2, 2000) ("[V]iolations of federal securities laws and NASD Conduct Rules[ ] are viewed as violations of Conduct Rule 2110 without attention to the surrounding circumstances because members of the securities industry are expected and required to abide by the applicable rules and regulations.").

Winters admitted that he entered 42 inaccurate disability waivers for 14 customers into UBS's records in 2003. Winters's entry of false information into the Firm's mutual fund order entry system violated NASD Rules 3110 and 2110.

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[5] NASD Rule 0115 makes all NASD rules, including NASD Rule 2110, applicable both to FINRA members and all persons associated with FINRA members.

V. Sanctions

The Hearing Panel fined Winters $30,000 and suspended him for 30 business days. We determine that the Hearing Panel ignored aggravating factors and improperly weighted certain factors it considered mitigating. For the reasons discussed below, we modify the sanctions by fining Winters $19,882 and suspending him for 90 days.

In deciding upon an appropriate sanction, we have considered the FINRA Sanction Guidelines ("Guidelines"). The appropriate Guidelines to apply are those for falsification of records.[6] Winters argues that the Guidelines for recordkeeping violations are most analogous to his misconduct and should be applied here. We disagree. As we have previously determined, the Guidelines for falsification of records are applied in cases when CDSC waivers were improperly obtained intentionally. *Compare Dep't of Enforcement v. Correro*, Complaint No. E102004083702, 2008 FINRA Discip. LEXIS 29, at *16, 17 & n.8 (FINRA NAC Aug. 12, 2008) (applying falsification of records Guidelines when misconduct was intentional), *with Trevisan*, 2008 FINRA Discip. LEXIS 12, at *30-31 & n.14 (applying recordkeeping Guidelines when misconduct was negligent). Unlike the respondent in *Trevisan*, Winters does not contend that he inadvertently coded the sales as being on behalf of disabled persons. Winters's misconduct was not comprised of negligent acts, but rather, he intentionally obtained waivers of CDSCs by claiming disability for persons he knew were not disabled.[7]

The Guidelines for falsification of records recommend a fine of $5,000 to $100,000 and a suspension for up to two years in cases where mitigating factors exist.[8] In egregious cases, the Guidelines recommend considering a bar.[9] The Hearing Panel found, and we agree, that this was a serious, but not an egregious, case.

The Guidelines for falsification of records also provide two considerations in determining the appropriate sanctions: (1) the nature of the documents falsified; and (2) whether the respondent had a good-faith, but mistaken, belief of express or implied authority to falsify the records.[10] Both considerations serve to aggravate Winters's misconduct. First, the customer order information that Winters falsified to process the waivers is an important record in the

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6 *FINRA Sanction Guidelines* 39 (2007), http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf [hereinafter *Guidelines*].

7 *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

8 *Id.* at 39.

9 *Id.*

10 *Id.*

securities industry. *See Edward J. Mawod & Co.*, 46 S.E.C. 865, 873 n.39 (1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979); *see also James F. Novak*, 47 S.E.C. 892, 898-99 (1983) (describing falsification of order tickets as serious misconduct). Second, Winters did not have a good faith belief of authority to submit that the customers were disabled when he knew they were not. Winters admits as much, acknowledging that he never considered whether his conduct violated a UBS policy and that he never consulted with UBS management or compliance regarding the propriety of these waivers. "In submitting the falsified documents to UBS, [Winters] evidenced a disregard of his responsibilities to . . . his employing member and of the basic requirement that associated persons ensure the accuracy of member firm records." *Geoffrey Ortiz*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401, at *28 (Aug. 22, 2008).

We agree with the Hearing Panel's consideration of a number of mitigating factors with respect to sanctions in this case. Specifically, Winters acknowledged his misconduct from the outset, first to UBS and then to FINRA. Winters recognized the gravity of his behavior, expressed sincere remorse, and testified convincingly that he only intended to benefit his customers.

The Hearing Panel also found mitigating that Winters was forthcoming when he was questioned about the improper CDSC waivers and noted that he cooperated fully with FINRA's and UBS's investigations. We disagree that Winters's cooperation was mitigating. The Guidelines recognize as generally mitigating a respondent's *substantial assistance* to FINRA in its investigation of misconduct.[11] We do not find that Winters provided substantial assistance to FINRA but, instead, cooperated with the investigation as he was obligated to do. When Winters registered with FINRA, he agreed to abide by its rules, which are "unequivocal with respect to the obligation to cooperate" with FINRA. *See Philippe N. Keyes*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631, at *23 (Nov. 8, 2006).

Throughout the proceedings below, Winters did not attempt to rationalize his misconduct. During this call for review proceeding, however, he now asserts that if he is sanctioned at all, such sanctions should be minor because he received "no prior warnings from regulators or supervisors" regarding the disability waivers and he understood the practice to be commonly accepted within the Firm and the securities industry. We reject Winters's attempts to deflect responsibility for his own shortcomings onto his employer and regulators. The responsibility for compliance with applicable requirements was Winters's alone. *See John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *26-27 (Jan. 22, 2003); *see also Dep't of Enforcement v. Roethlisberger*, Complaint No. C8A020014, 2003 NASD Discip. LEXIS 48, at *12-13 (NASD NAC Dec. 15, 2003) (finding that a representative's attempts to blame his firm for allowing him to violate securities laws demonstrate representative's unwillingness to accept responsibility for his conduct). It is self evident that misrepresenting the disability status of customers is wrong. *See, e.g.*, *Correro*, 2008 FINRA Discip. LEXIS 29, at *14-16 (entering false CDSC disability waivers for customers is unethical conduct); *Dep't of Enforcement v. Prout*, Complaint No. C01990014, 2000 NASD Discip. LEXIS 18, at *6 (NASD NAC Dec. 18,

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[11] *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 12) (emphasis added).

2000) (submitting false information about customers on variable annuity applications constitutes a serious breach of the ethical standards inherent in NASD Rule 2110). Similarly, Winters's contentions that other representatives at the Firm were also improperly waiving CDSCs and that he believed that the activity was "commonplace" are not relevant mitigating factors. *See Charles E. Kautz*, 52 S.E.C. 730, 733 (1996) (holding that it is no defense that others in the industry are also acting improperly).

The Hearing Panel also considered the testimony of Winters's supervisor at Firm One, Robert Woods ("Woods"), in determining sanctions. Woods testified that he believed Winters to be both a "superb" broker and "one of the few brokers" with whom he would entrust his own money to invest. Woods further testified to his belief that continuing to employ Winters would not be a risk based on Winters's character and the conservative business in which Winters engages. The Hearing Panel found Woods's testimony about Winters's character "very credible." We disagree that Woods's opinion of Winters's character is germane to our sanctions determination and therefore give it no mitigative weight. Winters's deliberate falsification of order information is more relevant than a character witness's beliefs in evaluating the risk that Winters poses in the future.

While the Hearing Panel also acknowledged that Winters's misconduct caused economic harm to the mutual fund distributors,[12] it failed to take into account the substantial number of transactions involved or the extended time period over which Winters processed the false waivers.[13] Winters entered false waivers on 42 mutual fund redemptions over the course of nine months for 14 customers. It is appropriate for us to consider that the underlying violation involved numerous acts of misconduct and that the misconduct occurred over an extended period.[14] *See, e.g., William H. Gerhauser*, 53 S.E.C. 933, 946 (1998) (recognizing that an extended period of a continuing violation is an aggravating factor under the Guidelines).

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[12] *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 11).

[13] *Id.* (Principal Considerations in Determining Sanctions, Nos. 8, 9).

[14] *Id.* (Principal Considerations in Determining Sanctions, Nos. 8, 9). Winters argues that we should not treat this misconduct as numerous acts occurring over an extended period of time. Rather, in his view, these 42 transactions should be aggregated. The fourth General Principle Applicable to All Sanction Determinations states that an adjudicator may aggregate the range of monetary sanctions for similar types of violations rather than impose a fine per individual violation. *Id.* at 4. Winters was charged in a single count complaint with violating NASD Rules 3110 and 2110. He was not charged with violating any other rules in a separate cause of action. While we disagree with Winters's interpretation of the principle of aggregation contained in the Guidelines, regardless of whether his numerous falsifications are aggregated for sanctions purposes, the issue of aggregation applies to the monetary portion of a sanction and we have determined it appropriate to reduce the fine imposed upon Winters.

When arriving at its choice of sanction, the Hearing Panel elected to forgo a longer suspension and imposed a larger fine in order to "do no significant harm to" Winters's business or his customers. We find that the Hearing Panel improperly weighted any such harm when assessing sanctions. The economic hardship that results from a longer suspension and the impact that this matter may have upon Winters's business do not mitigate his misconduct. *See Hans N. Beerbaum*, Exchange Act Rel. No. 55731, 2007 SEC LEXIS 971, at *20 (May 9, 2007); *see also Ashton Noshir Gowadia*, 53 S.E.C. 786, 793 (1998) (holding that "economic harm alone is not enough to make the sanctions imposed upon [respondent] by the NASD excessive or oppressive"); *Dep't of Enforcement v. Cipriano*, Complaint No. C07050029, 2007 NASD Discip. LEXIS 23, at *40-41 (NASD NAC July 26, 2007) (determining that the impact that a matter has upon a respondent's career does not mitigate sanctions). Further, Winters has only himself to blame for any consequences to his customers. Winters should have been attuned to his obligations under FINRA rules and, in effect, to his obligations to his Firm and his customers. *See Beerbaum*, 2007 SEC LEXIS 971, at *20; *cf. Jay Frederick Keeton*, 50 S.E.C. 1128, 1130 (1992) (holding registered individuals are chargeable with knowledge of NASD rules).

Winters contends that either no sanction is necessary or, alternatively, that a nominal fine is appropriate because a sanction is imposed "only to deter future misconduct." In his view, any suspension would be punitive because there is no likelihood that he will re-offend. Winters admits, however, that at the time he engaged in the misconduct, he believed that the mutual fund companies had money to spare, that waiving CDSCs was built into their expenses, and that he "didn't really think there was any harm." By falsifying the disability status of customers, however, he caused obvious harm to the mutual fund distributors and deprived UBS of its duty to keep accurate records. *See Mawod & Co.*, 46 S.E.C. at 873 n.39 (stressing the importance of broker-dealer records and characterizing them as the "keystone of the surveillance of brokers and dealers by our staff and by the securities industry's self-regulatory bodies"). We are concerned that future violations are thus not unlikely should potentially violative conduct serve his customers' interests at the expense of others. Sanctions "that are significant enough to ensure effective deterrence" are therefore necessary to discourage Winters from repeating this misconduct and to protect the investing public.[15] Moreover, the possibility of reoccurrence is merely one component of determining whether a sanction is remedial. Winters's argument fails to account for the objective of deterring others from engaging in similar misconduct.[16] We find that the fine and longer suspension will discourage Winters from again causing a member firm's records to be inaccurate and will impress upon others the importance of the accuracy of the information when processing a CDSC waiver.

Winters also asserts that the NAC should eliminate the sanctions imposed by the Hearing Panel because he has not been found to have engaged in misconduct before or after the current action. While the existence of a disciplinary history is an aggravating factor when determining

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[15] *See Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations).

[16] *Id.; see also McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005) (stating that general deterrence is considered part of the overall inquiry into remedial sanctions).

the appropriate sanction, its absence is not mitigating. *See Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006) (determining that the lack of disciplinary history is not mitigating and representative "was required to comply with the NASD's high standards of conduct at all times"). We also do not consider it mitigating that UBS terminated Winters as a result of his misconduct and that he forfeited certain related monetary benefits. "As a general matter, we give no weight to the fact that a respondent was terminated by a firm when determining the appropriate sanction in a disciplinary case. We consider the disciplinary sanctions we impose to be independent of a firm's decision to terminate or retain an employee." *Trevisan*, 2008 FINRA Discip. LEXIS 12, at *35 n.20 (internal quotation omitted).

Winters further argues that the sanctions imposed in this case are too severe when compared with those imposed in other FINRA disciplinary proceedings involving other associated persons. We reject Winters's argument. The Commission has firmly established "that the appropriate remedial action depends on the facts and circumstances of each particular case, and cannot be precisely determined by comparison with action taken in other cases." *Pac. On-Line Trading & Sec., Inc.*, 2003 SEC LEXIS 2164, at *20 (Sept. 10, 2003); *see also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973) ("The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.").

Winters's misconduct over an extended period of time and his willingness to misrepresent the disability status of multiple customers on many occasions represents a departure from the standards to which securities professionals must be held. Winters had an obligation to ensure the accuracy and truthfulness of documents submitted to UBS. He failed to meet this "basic requirement." *See Kautz*, 52 S.E.C. at 734. Thus, based on the facts of this case, we suspend Winters for 90 days and fine him $19,882, consisting of the $14,882 that Winters's misconduct cost the mutual fund distributors in CDSCs and an additional $5,000 fine.[17]

VI. Conclusion

We affirm the Hearing Panel's findings that Winters caused UBS's books and records to contain inaccurate information about 14 customers selling Class B mutual fund shares by entering sales charge waivers for those customers that falsely represented that these customers were disabled, in violation of NASD Rules 3110 and 2110. For this violation, we impose a

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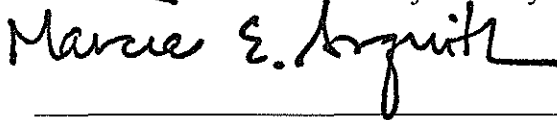
[17] We note that these sanctions are on the lower end of the range prescribed by the Guidelines for falsification of records. *See Guidelines*, at 39. We do not award any restitution here because FINRA's policy is to provide restitution to injured customers whenever possible, not to injured member firms. *See, e.g., Correro*, 2008 FINRA Discip. LEXIS 29, at *22 n.10. Moreover, the record is unclear as to the identities of the mutual fund distributors who were denied CDSC fees.

$19,882 fine and suspend Winters for 90 days. Winters is also ordered to pay hearing costs of $1,949.52.[18]

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith, Senior Vice President and Corporate Secretary

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18 We also have considered and reject without discussion all other arguments of the parties.

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