

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

AON D. MILLER  
(CRD No. 3083225),

Respondent.

Disciplinary Proceeding  
No. 2012034393801

Hearing Officer—LOM

**EXTENDED HEARING PANEL  
DECISION**

December 18, 2015

**Respondent violated NASD Rule 3040 and FINRA Rule 2010 by participating in private securities transactions without providing the required prior written notice to his firm. Respondent is suspended from association with any FINRA member in any capacity for two years, fined \$50,000, and ordered to pay costs.**

**Appearances**

For the Complainant: David M. Monachino, Esq., Margery M. Shanoff, Esq. and James E. Day, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondents: Donald J. Aho, Esq. and Kyle J. Wilson, Esq., Miller & Martin PLLC.

**I. INTRODUCTION**

This is a disciplinary proceeding brought by FINRA’s Department of Enforcement (“Enforcement”) against Respondent, Aon D. Miller (“Respondent” or “Miller”). Miller was a registered representative with a Chattanooga, Tennessee, branch office of Benjamin F. Edwards (“BFE” or the “Firm”) at the time of the events that are the subject of this proceeding.

The issue is whether Miller “participated” in five private securities transactions while at BFE without providing the Firm with the prior written notice of those transactions that is required by NASD Rule 3040.<sup>1</sup> NASD Rule 3040 prohibits an associated person from “participating” in any private securities transaction “in any manner” without providing prior written notice to the person’s firm and describing in detail the transaction and the nature of the

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<sup>1</sup> FINRA’s Rules (including NASD Rules) are available at [www.finra.org/industry/finra-rules](http://www.finra.org/industry/finra-rules).

person's participation. Rule 3040 further provides that a firm shall approve or disapprove the person's participation in a transaction for compensation. If the firm approves a transaction involving compensation, it is required to supervise the transaction. Even if no compensation is involved, the firm may still impose conditions on any participation. Miller's Firm required both prior written notice and prior written approval to participate in *any* private securities transaction, regardless of whether compensation was involved.

Miller admits that he failed to give his Firm prior written notice of the private securities transactions at issue (and thus also failed to obtain his Firm's prior written approval). Miller claims that notice was not required, however, because he did not "participate" in the transactions. He contends that he did not solicit, recommend, or cause the transactions to occur. He asserts that, as part of good customer service, he discussed the investments with his clients when they asked, and that he performed only administrative tasks at their instruction in connection with the transactions. Thus, Miller contends that he did not violate NASD Rule 3040.

The Extended Hearing Panel concludes that Miller did participate in the transactions within the meaning of NASD Rule 3040. "Participate" is a broad term and is not limited to soliciting, recommending, or causing a transaction. Furthermore, Miller's characterization of his activities as merely responding to customers' inquiries and following their instructions is contrary to the record. Accordingly, we find that Miller violated NASD Rule 3040.

Miller's misconduct was serious. It involved three different issuers, four clients, five transactions, and a total of \$1,550,000. The circumstances also demonstrate that the misconduct was part of Miller's pattern and practice of ignoring his duty to give his Firm prior written notice. In one instance, it was a conscious evasion of his duty. Miller assisted one issuer in its marketing effort even though his Firm had specifically instructed him not to discuss it with his clients.

For the reasons discussed below, the Extended Hearing Panel suspends Miller from association with any FINRA member in any capacity for two years and fines him \$50,000. We also impose hearing costs.

## II. FACTS

### A. Background

#### 1. Hearing

The four-day hearing took place on June 22-25, 2015. The record includes testimony<sup>2</sup> and exhibits.<sup>3</sup> Post-hearing briefs were filed on September 11 and 25, 2015.<sup>4</sup>

On October 6, 2015, Enforcement filed a motion to withdraw a summary exhibit that Respondent's counsel had maintained contained factual errors, and to replace the exhibit with another version that Enforcement contends is accurate. The summary exhibit, CX-1, purports to summarize facts relating to the five transactions at issue. It purports to set forth the issuer, the name of each of Miller's clients who invested, the amount invested by each investor, and the date of each investment. On October 19, 2015, Respondent filed an opposition explaining his objections to both the original and the revised version of the exhibit. The objections all had to do with the dates of the five transactions at issue.<sup>5</sup> Simultaneously with the issuance of this decision, the Hearing Officer has issued an Order overruling Respondent's objections to the admission of CX-1 and granting Enforcement's motion. The original version of CX-1 has been withdrawn and the revised version admitted in its place.

However, in light of the objections to CX-1, which cast doubt on the reliability of the dates, the Extended Hearing Panel has not relied upon the dates in the exhibit. The Panel has only relied upon the other information in the exhibit. That information includes the identities of the investors and issuers and the amounts Miller's clients invested in the transactions at issue.

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<sup>2</sup> In addition to Miller, the following persons testified at the hearing: Joseph Edward ("Ward") Petty ("Petty"), Miller's supervisor and BFE branch manager in Chattanooga; Peter Biebel ("Biebel"), BFE vice president of alternative products and strategies, located in its home office in St. Louis, Missouri; Jane Matoesian ("Matoesian"), BFE vice president and managing counsel, located in its home office; Customer WKJ, furniture company owner and Miller client; Customer JDS, retired president of a national carpet company and Miller client; Customer JGH, retired former bank president and Miller client; Customer EWR, construction company owner and Miller client.

References to the hearing transcript are cited here as "Hearing Tr." with the page number of the transcript and a parenthetical for the last name of the witness whose testimony is cited and the page number of the transcript. Thus, Miller's testimony is cited "Hearing Tr. 577-78 (Miller)." This decision cites to the transcripts as corrected on September 21, 2015.

<sup>3</sup> Complainant's exhibits are referred to here with the prefix "CX" and an identifying number. Respondent's exhibits are referred to with the prefix "RX" and an identifying number.

<sup>4</sup> The Parties simultaneously filed opening briefs on September 11, 2015, titled as follows: Enforcement's Post-Hearing Memorandum ("Enf. PH Mem."); Respondent's Post-Hearing Brief ("Resp. PH Br."). The Parties simultaneously filed reply briefs on September 25, 2015, titled as follows: Enforcement's Response To Respondent's Post-Hearing Brief ("Enf. Reply"); Respondent's Reply To Complainant's Post-Hearing Memorandum ("Resp. Reply").

<sup>5</sup> Enforcement's motion is titled "Enforcement's Motion To Withdraw The Original CX-1 And Offering CX-1 Revised Into Evidence." Respondent's opposition is titled "Respondent's Objection To Complainant's Exhibit 1."

Respondent's counsel represented at the hearing that that information, which stayed the same in both versions of CX-1, is correct.<sup>6</sup>

Respondent filed a supplemental memorandum on October 23, 2015. Respondent's supplemental memorandum attaches and discusses new authority he believes relevant to the proceeding, a decision issued by the Office of Hearing Officers five days after the close of post-hearing briefing.<sup>7</sup>

This decision is based on careful consideration of the entire record.<sup>8</sup>

## **2. Jurisdiction**

BFE terminated Miller on October 2, 2012.<sup>9</sup> Although he considered joining another broker-dealer, Miller decided to start his own firm.<sup>10</sup> His registration with FINRA ended in April 2013.<sup>11</sup> He now heads a registered investment advisory firm.<sup>12</sup> As Miller acknowledges, FINRA still has jurisdiction to bring this proceeding against him because the Complaint was filed less than two years after the effective date of the termination of his registration and it charges him with misconduct committed while he was registered.<sup>13</sup>

## **3. Respondent And His Business**

Following college graduation in 1998, Miller joined a broker-dealer firm in Chattanooga, Tennessee, A.G. Edwards. That firm was later merged into Wachovia Securities, which was then merged into Wells Fargo Advisors. In July 2011, Miller and several colleagues resigned from the

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<sup>6</sup> Hearing Tr. 350-54 (remarks of counsel, in judicial admission).

<sup>7</sup> Respondent's filing bears the title Respondent's Supplement To His Post-Hearing Memorandum To Advise The Hearing Panel Of Recently Issued Case Authority ("Resp. Supp."). The new authority is *Dep't of Enforcement v. Lee*, No. 2013035095301, 2015 FINRA Discip. LEXIS 51 (OHO Sept. 30, 2015).

<sup>8</sup> The parties also submitted stipulations to the Extended Hearing Panel on the first day of the hearing. The stipulations covered certain facts regarding Respondent's career, jurisdiction, the dates and amounts of the transactions at issue, and the authenticity of exhibits. However, after the hearing, in the context of the disagreement about the summary exhibit, Enforcement informed the Extended Hearing Panel that the stipulations could not be relied upon. The stipulations were never filed and did not become part of the record.

<sup>9</sup> RX-37.

<sup>10</sup> Hearing Tr. 396-98 (Miller).

<sup>11</sup> Hearing Tr. 360-61 (Miller).

<sup>12</sup> Hearing Tr. 364-65 (Miller). Depending on their size, investment adviser firms have to register with either the SEC or the state securities agency where they have their principal place of business. For the most part, investment advisers who manage \$100 million or more in client assets must register with the SEC. <http://www.sec.gov/investor/pubs/invadvisers.htm>.

<sup>13</sup> Hearing Tr. 360-61, 423-24, 431-34 (Miller); Hearing Tr. 421-22 (remarks of counsel & Miller); FINRA By-Laws, Art. V, Section 4.

Wells Fargo Advisors to work at BFE.<sup>14</sup> Part of the impetus for Miller's move to BFE was his unhappiness with the compliance regime at the merged firm.<sup>15</sup>

Ward Petty, who had been Miller's manager from the beginning of Miller's career, was part of the group that moved to BFE, and Petty became the branch manager of a new BFE branch. Initially, the compliance function was handled from BFE's home office in St. Louis, Missouri. In 2012, the branch hired JW to assist in the compliance function.<sup>16</sup>

Miller's clients are mostly accredited investors with substantial investment sophistication. They are business owners, bankers, and professional investors. His clients include men who are prominent in the Chattanooga business community, but also nationally known business and sports figures.<sup>17</sup>

Miller has close personal and professional relationships with his clients. Some of them have known him almost his whole life.<sup>18</sup> He also is active in community affairs, and one of those activities plays a big role in his business development. Miller plays a leading role at a golf club called the Honors Course. He explained, "I'm a big golfer, so most of my clients play golf. That's how I retain some of the relationships I have."<sup>19</sup> For example, he met Customer JDS, who is one of his most important clients, roughly 15 years ago at the Honors Course.<sup>20</sup> By the time of the events at issue, Customer JDS had approximately \$70 million in accounts with Miller at

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<sup>14</sup> Hearing Tr. 361 (Miller); Hearing Tr. 72-73 (Petty).

<sup>15</sup> In response to an inquiry from FINRA staff, Miller's former firm reported that Miller had expressed general unhappiness with the firm. According to the firm, he was particularly unhappy with changes in compliance following the mergers. Miller indicated frustration with a perceived lack of flexibility in his former firm's rules and policies after the mergers. RX-75. Miller testified at the hearing, however, that he did not recall unhappiness with the merged firm's compliance regime. Hearing Tr. 452-53 (Miller). The Extended Hearing Panel credits the firm's response because it is consistent with other evidence, there is no evidence to explain why Miller's former firm would have an interest in fabricating its response to its regulator, and Miller's testimony generally lacked credibility, as discussed below.

<sup>16</sup> Hearing Tr. 71-75 (Petty); Hearing Tr. 363-64 (Miller).

<sup>17</sup> Hearing Tr. 367-68 (Miller); Hearing Tr. 104 (Petty); Hearing Tr. 751-52 (Customer WKJ) (Customer WKJ owns and runs a furniture company with revenues in the hundreds of millions); Hearing Tr. 816-17 (Customer JDS) (until 2006, Customer JDS ran a national floor covering company that had \$4 to \$6 billion in revenues); Hearing Tr. 935-36 (Customer JGH) (Customer JGH founded and ran a bank that had assets of roughly \$260 million when he retired in 2007); Hearing Tr. 1048-49 (Customer EWR) (Customer EWR is an owner of a construction company that works on projects in the \$5 to \$30 million size range); Hearing Tr. 399-400 (Miller) (Miller considers MP, a nationally known television host, a close friend and client); RX-15; RX-27; and RX-28 (Miller connecting a colleague to PM, a nationally recognized football player).

<sup>18</sup> Hearing Tr. 404-08 (Miller) (Customer JGH a family friend for close to 30 years; Customer WKJ a life-long friend for 30 years; Customer EWR a "very, very good close friend" Miller met playing golf after they both returned from college to Chattanooga; SW a childhood friend whom Miller has known for at least 35 years).

<sup>19</sup> Hearing Tr. 367 (Miller).

<sup>20</sup> Hearing Tr. 401-02 (Miller); Hearing Tr. 820 (Customer JDS).

BFE.<sup>21</sup> Customer JDS oversees around \$750 million in investments on behalf of himself and his family.<sup>22</sup>

Miller cultivates these relationships, putting in long hours trying to get to know his clients as well as possible.<sup>23</sup> He estimates, for example, that he probably speaks to Customer JDS nearly every day. They talk about stock in the client's portfolio, business generally, family doings, travel, golf and Honors Course business.<sup>24</sup>

The connections Miller cultivates are critical to his business and make him a central node in a network of people exchanging local business information and investment ideas. Customer JDS testified that the "rumor mill" in Chattanooga was "terrible." He said that Miller is viewed by some in the Chattanooga business community as an "entrée" to Customer JDS.<sup>25</sup> Because Customer JDS does not live in Chattanooga, he uses Miller as "another eye"<sup>26</sup> and as a "conduit" of information.<sup>27</sup> Customer JDS explained,

[I]n Chattanooga, there's a good old boys network there, I call it. And it seems that everybody knows everybody else's business....Aon—they all come up to me and say, your boy, Aon, this and you know, they know I do business with Aon....<sup>28</sup>

While registered with BFE, Miller golfed, networked, and discussed investments with his clients. As a result of his efforts, Miller was probably one of BFE's highest producers nationwide.<sup>29</sup> He had approximately 200 clients at BFE and the dollar value of their accounts was a little more than \$200 million. At his current advisory firm he has 282 clients with assets under management of approximately \$315 million.<sup>30</sup> Customer JDS currently has \$120 million invested through Miller's advisory firm.<sup>31</sup> Close to 95% of Miller's clients at BFE work with him now at his investment advisory firm.<sup>32</sup>

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<sup>21</sup> Hearing Tr. 823 (Customer JDS).

<sup>22</sup> Hearing Tr. 404 (Miller).

<sup>23</sup> Hearing Tr. 365 (Miller); Hearing Tr. 104-06 (Petty).

<sup>24</sup> Hearing Tr. 402 (Miller). Customer JDS estimated that they spoke an average of every other day. Hearing Tr. 824 (Customer JDS). In either case, they spoke frequently.

<sup>25</sup> Hearing Tr. 866 (Customer JDS). *See also* Hearing Tr. 858-59 (Customer JDS).

<sup>26</sup> Hearing Tr. 821 (Customer JDS).

<sup>27</sup> Hearing Tr. 867 (Customer JDS).

<sup>28</sup> Hearing Tr. 858-59 (Customer JDS).

<sup>29</sup> Hearing Tr. 858 (Customer JDS).

<sup>30</sup> Hearing Tr. 364-65 (Miller).

<sup>31</sup> Hearing Tr. 483 (Miller).

<sup>32</sup> Hearing Tr. 398-99 (Miller).

## **B. Miller Participated In The Private Securities Transactions At Issue**

Miller is charged with participating in private securities transactions involving three different issuers. As detailed below, issuer by issuer, Miller participated in the transactions in a variety of different ways. In all the transactions, however, Miller played an active role.<sup>33</sup>

In summary, with respect to the first issuer, Chestnut Development Partners LP (“CDP”), a limited partnership for real estate investing, Miller participated by working closely with one of the principals of the issuer in the issuer’s promotional effort. Miller encouraged his clients to invest in CDP and reported back to the issuer’s principal on his progress in marketing the investment. Three of Miller’s clients invested a total of \$350,000 in CDP. *See* II. B. 1.

With respect to the second issuer, City Title Loan, LLC (“CTL”), a fund for purchasing auto loans in which a fourth client invested, Miller participated by serving as his client’s proxy in analyzing the investment and dealing with the issuer. Miller’s client invested \$1 million in CTL. *See* II. B. 2.

With respect to the third issuer, KB International, LLC (“KBI”), a drilling construction company in which the fourth client made another investment, Miller participated by introducing the potential investment to his client and endorsing the issuer’s principal. Miller’s client invested \$200,000 in KBI. *See* II. B. 3.

### **1. CDP (First Issuer): Miller Participates In Multiple Transactions By Assisting The Issuer In Marketing The Investment**

Miller participated in the CDP transactions by assisting the issuer in marketing the investment. Throughout these efforts, Miller was in constant contact with the issuer and reporting on his progress in marketing the investment. Miller’s marketing activities included receiving and distributing CDP promotional literature, recommending CDP to his clients and suggesting amounts to be invested, endorsing the principals of CDP, encouraging others to invest by telling them that he had studied the investment closely and had invested in CDP, and arranging and attending at least one meeting between a potential investor and the principals of CDP.

Miller’s participation in the CDP transactions was particularly egregious misconduct because of the events leading up to the transactions and the restrictions his Firm imposed on him. As discussed here, although scienter is not required for a violation of Rule 3040, Miller knew or should have known that he was forbidden to do what he did. This increases the unethical nature of his misconduct.

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<sup>33</sup> The primary evidence of Miller’s activities consisted of contemporaneous emails. All of the emails discussed here were sent from and received at Miller’s business account with BFE. Miller did not use a personal email address during the relevant period. Hearing Tr. 488-90 (Miller).

### a. CDP Promoter Seeks Miller's Assistance In Selling The Security

In September 2011, one of Miller's childhood friends, SW, emailed Miller to discuss a business idea that ultimately became CDP, a real estate investment limited partnership. From the outset, SW indicated that he wanted to "partner" with Miller on the project, and he sought Miller's ideas about how to raise capital for the fund. He wrote that Miller "probably ha[d] a much better idea about how to source equity investments from individuals capable of investing in an investment vehicle such as the one I have in mind."<sup>34</sup>

Miller met with SW and another principal in the fund, GR, at Miller's office at BFE.<sup>35</sup> As a "reference," Miller provided SW the offering documents for another investment fund in which Miller had invested.<sup>36</sup> SW asked how the principals of the other fund had raised capital.<sup>37</sup> Miller responded that they had used their own money and that of friends and family, before branching out to others. Miller said that he had personally invested \$100,000 in the other investment fund and that his clients had invested a total of \$2.5 million.<sup>38</sup>

At the hearing, Miller denied that he gave SW the sample offering documents for the other investment fund in order to help SW develop a business strategy. Miller also denied that he gave the materials to SW in order to help him get investors. Miller testified, "I was simply trying to help my friend."<sup>39</sup> He was vague about exactly how he thought he was helping his friend.<sup>40</sup> He did admit that SW wanted his "feedback" on CDP's business strategy.<sup>41</sup>

SW and Miller continued to correspond by email about CDP as the principals worked on their business strategies and offering materials. In October 2011, Miller set up a meeting on CDP with Petty, his supervisor at BFE.<sup>42</sup> At the meeting they discussed the possibility of BFE becoming a selling agent for the security they would offer and the possibility that Miller and Petty might personally invest in CDP.<sup>43</sup>

After the meeting, SW expressed his hope of "figuring out a way for both of you [Miller and Petty] to participate in this venture."<sup>44</sup> He explained that although the principals had their

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<sup>34</sup> CX-20; Hearing Tr. 488-93 (Miller).

<sup>35</sup> CX-20; Hearing Tr. 494-95 (Miller).

<sup>36</sup> CX-20; Hearing Tr. 495-96, 500-01 (Miller).

<sup>37</sup> CX-20.

<sup>38</sup> CX-20. Shortly after that first meeting, SW opened a personal trading account with Miller. CX-20; Hearing Tr. 502 (Miller).

<sup>39</sup> Hearing Tr. 497 (Miller).

<sup>40</sup> Hearing Tr. 500-01 (Miller).

<sup>41</sup> Hearing Tr. 498 (Miller).

<sup>42</sup> CX-21; Hearing Tr. 506-08 (Miller).

<sup>43</sup> Hearing Tr. 75-76 (Petty).

<sup>44</sup> CX-22; Hearing Tr. 509-10 (Miller).



own contacts they could solicit, he considered the assistance of Miller and Petty to be “crucial to the successful launch of the business.”<sup>45</sup> SW told Miller and Petty that offering materials would not be ready until the end of the year, but that the promoters of CDP would then be in a position to speak to prospective investors.<sup>46</sup>

As things turned out, the offering materials were not ready to be presented until March 2012, when the CDP principals had a follow-up meeting with Miller and Petty.<sup>47</sup> Miller subsequently provided BFE with copies of financial documents concerning CDP for BFE’s review in considering whether to become a selling agent for the investment.<sup>48</sup>

#### **b. Miller’s Firm Decides Not To Become A Selling Agent For CDP**

The Firm has a product review committee that determines whether the Firm will offer and sell a security. Peter Biebel took the lead for the committee in conducting the review of CDP.<sup>49</sup> He is the Firm’s vice president for alternative products and strategies.<sup>50</sup>

In an email summarizing CDP’s structure and business, Biebel recommended that the committee reject the proposal to become a selling agent. Among other things, he noted that the Firm had not previously approved any such private real estate investment fund, and in several respects this one was inferior to others the Firm had considered. He thought that the fees to be paid by clients were too high, that the promoters had no history of providing solid returns, and that the investment was not as diversified as other public and private real estate investment funds. On March 27, 2012, the committee voted unanimously to reject the proposal.<sup>51</sup>

In connection with his recommendation, Biebel wrote in the email that if the proposal was rejected he would call the financial consultants involved and inform them of the decision. He added that he would tell the financial consultants that they could personally invest if they contacted compliance to document the investment. His purpose was for them to “be reminded of the restrictions/prohibitions on soliciting their clients and prospects on outside investments.”<sup>52</sup>

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<sup>45</sup> CX-22.

<sup>46</sup> CX-22.

<sup>47</sup> Hearing Tr. 81-85 (Petty).

<sup>48</sup> CX-23; Hearing Tr. 83-86 (Petty); Hearing Tr. 511 (Miller).

<sup>49</sup> Hearing Tr. 84-87 (Petty).

<sup>50</sup> Hearing Tr. 166 (Biebel).

<sup>51</sup> CX-24; Hearing Tr. 168-79 (Biebel).

<sup>52</sup> CX-24.

**c. Miller's Firm Specifically Instructs Him Not To Discuss CDP With Clients**

Biebel delivered the news that the Firm had rejected the proposal by telephone, first to Petty and then to Miller. He believes that he called them the same day that the committee rejected the proposal, March 27, 2012.<sup>53</sup>

Biebel testified that he told them that the investment had not been approved for distribution but that they might personally invest in it as long as they contacted the compliance department and followed the rules.<sup>54</sup> In particular, he said to Miller "something to the effect that even when you're playing golf, you should not be soliciting clients for sales of this product."<sup>55</sup>

As discussed below, after the Firm became aware of some of Miller's activities in connection with CDP, it conducted an investigation. In response to an inquiry by FINRA staff regarding the results of that investigation, BFE vice president and counsel, Jane Matoesian, provided a detailed chronology of relevant events. She reported in a December 13, 2012 letter that Biebel was explicit in his instructions to Petty and Miller. She wrote:

Mr. Biebel emphasized the breadth of the prohibition on Mr. Miller's soliciting sales in [CDP] by providing him with an example of forbidden conduct. Mr. Biebel told Mr. Miller that he could not even participate in group golf outings that included both BFEC clients and the [CDP] promoters.<sup>56</sup>

Biebel's notes about the product and the email that he sent to the product committee, focus on making sure that Miller and Petty understood that they should not promote the investment away from the Firm, and making sure that they contacted compliance if they decided to make a personal investment in CDP.<sup>57</sup> He testified that if they invested personally there was a danger that they might also solicit others to invest, and that possibility concerned Biebel. He said,

I think the danger to the firm in allowing our advisors to invest individually on an outside product is that there was the risk that they might solicit business in an outside product, and that's something we would not want them to do.<sup>58</sup>

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<sup>53</sup> Hearing Tr. 179-83 (Biebel).

<sup>54</sup> Hearing Tr. 180-81 (Biebel).

<sup>55</sup> Hearing Tr. 182 (Biebel).

<sup>56</sup> CX-17, at 4.

<sup>57</sup> CX-24; CX-25; Hearing Tr. 170, 173 (Biebel).

<sup>58</sup> Hearing Tr. 173 (Biebel).

Petty testified about his conversation with Biebel. He said that Biebel told him that the Firm did not want them to offer CDP “through our selling channel.”<sup>59</sup> Petty testified that Biebel told him that they were permitted to make a personal investment in CDP, but added a caveat. Biebel stressed that they could do so only if they “went through the formal channels,”<sup>60</sup> meaning that they should fill out the paperwork for an outside business activity.<sup>61</sup> Petty understood from the conversation that he and Miller could not discuss the offering with BFE customers because it was not approved by the Firm.<sup>62</sup> Petty did not speak with anyone from CDP again after BFE determined not to be a selling agent for the investment.<sup>63</sup>

Miller testified that he did not recall Biebel telling him that he could not recommend CDP or solicit BFE clients in connection with it.<sup>64</sup> He further testified that he did not recall Biebel specifically saying that Miller was not supposed to solicit sales in CDP even when golfing with clients.<sup>65</sup> He testified that he did not recall Biebel telling him that he should not personally invest in CDP without first filling out the proper BFE paperwork.<sup>66</sup> He said he remembered nothing more about the call except that CDP was not approved for sale by the Firm, and that he could invest if he wanted to do so.<sup>67</sup>

The Extended Hearing Panel finds that Biebel expressly instructed Miller not to discuss the CDP investment opportunity with clients, and that Biebel did so in a memorable and specific way by referring to potential interactions on the golf course. The Extended Hearing Panel further finds that Biebel expressly instructed Miller that he should contact BFE’s compliance department if he decided to invest personally in CDP, and that Biebel told Miller that he should make sure that he followed the Firm’s policies and procedures.

Biebel viewed the requirement to contact compliance as an opportunity to remind Miller of the prohibition on selling away from the Firm. Petty testified that Biebel clearly informed him that CDP should not be sold to Firm customers and that they had to follow Firm procedures if they decided to make a personal investment in CDP. Biebel wrote in his email to the committee that he would tell Miller to follow the Firm’s procedures if he personally invested, and there is no reason to think that Biebel forgot to tell that to Miller. Nor is there any reason to think that Biebel failed to tell Miller what he told Petty. Miller’s testimony that he recalled no such specific instructions is difficult to credit.

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<sup>59</sup> Hearing Tr. 87 (Petty).

<sup>60</sup> Hearing Tr. 89 (Petty).

<sup>61</sup> Hearing Tr. 89 (Petty).

<sup>62</sup> Hearing Tr. 87, 90 (Petty).

<sup>63</sup> Hearing Tr. 91 (Petty).

<sup>64</sup> Hearing Tr. 512 (Miller).

<sup>65</sup> Hearing Tr. 513-14 (Miller).

<sup>66</sup> Hearing Tr. 522 (Miller).

<sup>67</sup> Hearing Tr. 511-14 (Miller).

**d. Miller's Firm Informs Miller Generally Of The Firm's Restrictions On Private Securities Transactions And Defines Participation Broadly**

Miller's Firm not only required its registered representatives to give it prior written notice before "participating" in a private securities transaction—as mandated by NASD Rule 3040—but it imposed additional conditions on "participation" in *any* private securities transaction. Regardless of whether compensation was involved, the Firm required a registered representative to obtain prior written approval, both from his or her supervisor and from the compliance department.<sup>68</sup>

The Firm defined "participation" for its registered representatives so that they understood what was required. It defined "participation" broadly to include not only solicitation but "providing advice or referrals ... concerning the purchase, sale or distribution of any registered or non-registered security." The Firm permanently posted these requirements on its intranet, where they were available to Miller. The requirements were also part of the Firm's Written Supervisory Procedures, which Miller certified in 2011 he had read, understood, and agreed to be bound by.<sup>69</sup>

In addition, BFE's employee handbook prohibited its representatives from independently acting as an agent in the sale of securities for a client or anyone else other than the Firm. The handbook also specifically forbade a representative from raising money or capital for real estate syndications or other investments except as an agent of BFE. The handbook expressly prohibited acting as an agent or arranging for a transaction in any limited partnership or other security without the express written consent of BFE.<sup>70</sup> Miller signed a copy of the handbook on July 26, 2011, certifying that he understood that these acts were prohibited. He agreed to comply with the Firm's policies relating to such activities.<sup>71</sup>

When Miller joined BFE, he signed a disclosure document relating to outside business activities. In it he disclosed outside business activities that he had already disclosed to his former firm.<sup>72</sup> The BFE disclosure document reiterated that he had to disclose to the Firm any outside business activity before engaging in that activity. The requirement applied to both non-securities related activities and private securities transactions. Miller signed the document, agreeing to notify the compliance department if the information in the disclosure document changed.<sup>73</sup>

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<sup>68</sup> CX-5; CX-6; Hearing Tr. 221-22 (Matoesian).

<sup>69</sup> CX-3; CX-5; CX-6; Hearing Tr. 216-19, 221-22 (Matoesian).

<sup>70</sup> CX-97; Hearing Tr. 223-25 (Matoesian).

<sup>71</sup> CX-97; Hearing Tr. 225-26 (Matoesian).

<sup>72</sup> Miller's former firm also had policies and procedures requiring disclosure of an associated person's participation in private securities transactions away from the firm. Miller filed disclosure forms with that firm similar to the disclosure forms he filed with BFE. CX-10; Hearing Tr. 213-15 (Matoesian); Hearing Tr. 457-58 (Miller).

<sup>73</sup> CX-9; Hearing Tr. 226-30 (Matoesian).

**e. Miller Invests In CDP Without Giving The Required Prior Written Notice And Obtaining The Required Approval**

Miller did not comply with Biebel's instructions to follow the proper procedures if he made a personal investment in CDP. Miller made a \$50,000 investment in CDP without giving the Firm prior written notice, as required under Rule 3040 for any private securities transaction, and without obtaining the Firm's prior written approval, as required by the Firm.

On April 4, 2012, SW wrote Miller, thanking him for his investment in CDP and forwarding papers for Miller to execute documenting the investment.<sup>74</sup> On April 18, 2012, Miller executed a CDP subscription agreement, limited partnership agreement, and promissory note, committing himself to pay \$50,000 for the investment. Miller acknowledged at the hearing that this was a legally binding agreement obligating him to pay \$50,000.<sup>75</sup>

Nevertheless, Miller maintains that he did not actually make the investment on April 18, 2012, because he did not at that time pay the \$50,000.<sup>76</sup> In this way he justifies his failure to disclose the CDP investment on BFE's 2012 Annual Attestation Report, which he signed on April 20, 2012, only two days after making the commitment.<sup>77</sup>

Miller's position is undermined by the structure of CDP. The CDP investment was structured as a commitment to fund capital calls as they arose at unspecified times. Investors were not required to pay the entire amount of their commitment up front, but, rather, to fund the partnership as it found investment opportunities.<sup>78</sup> Accordingly, Miller committed to the \$50,000 investment when he executed the legally binding agreement, and actual payment was not required until later.

Indeed, in an email written by Miller and dated May 30, 2012, he treated the investment as having already been made. He expressed enthusiasm for the CDP investment to a potential investor and wrote, "I have already signed the offering documents. I put in 50K."<sup>79</sup>

Although Miller has a theory for why he did not disclose his CDP investment to the Firm in April 2012, when he committed to it, the Extended Hearing Panel finds that theory untenable. Once he was legally obligated, he was committed to the investment. He did not disclose his participation in that transaction prior to committing to it. Moreover, even if his theory were correct, he still was required to disclose the transaction prior to making the deposit—but he did

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<sup>74</sup> CX-27; Hearing Tr. 521-22 (Miller).

<sup>75</sup> CX-30; Hearing Tr. 530-32 (Miller).

<sup>76</sup> CX-30; Hearing Tr. 529-31, 542, 550, 653-54 (Miller).

<sup>77</sup> CX-31; Hearing Tr. 550 (Miller); Hearing Tr. 231-37, 241-42 (Matoesian).

<sup>78</sup> CX-30, at 4-5; Hearing Tr. 638, 646-48 (Miller).

<sup>79</sup> CX-36, at 1. Miller attempted to make a \$1,000 initial payment in September 2012, as discussed below.

not. He only submitted the disclosure paperwork after JW told him to do it. His failure to comply with his Firm's requirements casts doubt on his credibility.

Miller testified that he told Petty orally that he planned to invest in CDP. Petty did not recall discussing Miller's investment in CDP with him.<sup>80</sup> In any event, Miller admitted that he did not comply with the Firm's policies and procedures in connection with that investment. He did not inform the Firm in writing in advance of entering into the transaction, and he did not obtain prior written approvals from his supervisor and the Firm's compliance department.<sup>81</sup>

#### **f. Miller Assists The Issuer In Marketing CDP**

Miller also did not comply with Biebel's instructions prohibiting him from discussing CDP with clients. Despite the Firm's decision not to be a selling agent for CDP, Miller continued to work with the promoters to raise capital for the venture and encouraged his clients to invest in it.

On April 4, 2012 (approximately a week after Biebel told Miller he should not discuss CDP with his BFE clients), SW sent Miller an email regarding arrangements to set up an account at the Firm to receive money invested in CDP. SW wrote that CDP's attorney thought that "we can set it up so that your clients can fund their commitments."<sup>82</sup> Miller admitted that SW wanted to set up a CDP account at the Firm, but, when he was asked what SW meant by "your clients," he said, "I'm not sure what he means."<sup>83</sup>

The Extended Hearing Panel finds Miller's professed confusion about the meaning of "your clients" to be disingenuous. The email correspondence plainly indicates that SW wanted to open the account with Miller at the Firm to facilitate the deposit of funds invested in CDP, including funds invested by Miller's clients at BFE. As noted above, investors in CDP agreed to make funds available to CDP for investment upon notice of a capital call.<sup>84</sup> Setting up an account to receive funds as needed would permit investors to continue to use their funds in other ways until CDP actually needed the funds. At the same time, the establishment of the account would enhance CDP's ability to obtain the funds it needed promptly. This would be particularly true with respect to funds that investors might already hold at accounts at BFE.

Miller did not inform SW that he was prohibited from soliciting his clients. On April 7, 2012, Miller wrote back to SW that he had forwarded SW's email to Biebel, who was reviewing the proposal for BFE to become the selling agent for CDP. Miller said he would update SW on the review.<sup>85</sup> Miller did forward the information to Biebel and asked Biebel if it would change

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<sup>80</sup> Hearing Tr. 91 (Petty).

<sup>81</sup> Hearing Tr. 532 (Miller).

<sup>82</sup> CX-28.

<sup>83</sup> Hearing Tr. 523-24 (Miller).

<sup>84</sup> CX-30, at 4-5.

<sup>85</sup> CX-28.

anything regarding CDP. Biebel wrote back on April 9, 2012, that the additional information would not be enough to alter the committee's decision, although he would mention it at the next meeting.<sup>86</sup>

On May 1, 2012, Miller opened an account at his Firm for CDP. The Extended Hearing Panel finds that the purpose was to receive funds invested in CDP.<sup>87</sup> Indeed, when BFE later investigated Miller's activities in connection with CDP, it found that BFE clients and others had deposited funds in the CDP account pursuant to their investments in CDP.<sup>88</sup>

On May 15, 2012, SW sent Miller an email asking for an update on the review and BFE's approval, and the same day Miller responded by email. Miller did not tell SW that the Firm had rejected the proposal that it be the selling agent for CDP. Rather, Miller created a sense that the review was ongoing and it was still possible that the Firm would approve the product. Miller told SW that issues were being discussed and the last he heard it "was in front" of the Firm's chief compliance person.<sup>89</sup> Miller explained that the review was taking a long time mainly because the Firm did not currently offer any product like CDP.

Most importantly, Miller told SW, "Worst case, we can get together with a couple folks and tell the story."<sup>90</sup> This statement suggests that, even if the Firm rejected the proposal, Miller intended that he and SW would still talk to potential investors about CDP.<sup>91</sup> Miller testified, however, that he never got together with SW and "a couple of folks" to "tell the [CDP] story."<sup>92</sup>

The next day, May 16, 2012, SW and Miller continued their email correspondence. Miller wrote SW, "I am excited to get this up and running not only for me, clients, and BFE but you, [and the other principals of CDP]."<sup>93</sup> Miller conveyed to SW the sense that they were working together to raise capital from BFE clients. He also gave SW the impression that BFE was continuing to review the product to determine whether it would be the selling agent. In the same email, Miller wrote,

I get frustrated sometimes how things progress in the world of business. When I know something is right and should be done, I like it done. I forget we have to have jobs for all the law school punks sometimes.<sup>94</sup>

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<sup>86</sup> CX-29.

<sup>87</sup> CX-17, at 5.

<sup>88</sup> CX-17, at 5.

<sup>89</sup> CX-34.

<sup>90</sup> CX-34.

<sup>91</sup> Hearing Tr. 1028 (Miller).

<sup>92</sup> Hearing Tr. 1028 (Miller).

<sup>93</sup> CX-34.

<sup>94</sup> CX-34; Hearing Tr. 538 (Miller).

Miller concluded the email by saying, “Lets strategize on Friday. I am around all day.”<sup>95</sup>

Miller claimed at the hearing that he created a false impression that he was assisting SW, because he wanted to keep his friend “upbeat.”<sup>96</sup> When asked whether the word “clients” in his May 16 email referred to BFE clients, Miller evasively answered, “I’m not sure what I meant by that.”<sup>97</sup>

On May 30, 2012, Miller and SW had a discussion about CDP, and afterward SW emailed Miller a promotional piece for CDP. SW described the promotional piece as something “for those who want to quickly get a sense of our business.” In his email, SW said that he would “get [Miller] copies of books and other materials tomorrow but wanted [Miller] to also have this in case it would be helpful.”<sup>98</sup>

On May 31, 2012, SW followed up with an email to Miller that included a CDP promotional brochure. In the email, SW said that the brochure “will be good to pass along.”<sup>99</sup> At the hearing Miller was shown the email and its attachment and asked whether SW wanted him to pass along the information to his customers. He responded, “I’m not sure what he wanted me to do.”<sup>100</sup> Then he volunteered, “I will tell you that I did not pass it along or market this.”<sup>101</sup>

Miller’s testimony undercuts his assertion that he was uncertain what SW wanted him to do. Miller denied passing along the promotional brochure or doing anything to market CDP because he understood that that was exactly what SW was asking him to do.

In June, Miller and SW continued to update each other on potential investors in CDP. When SW also mentioned that he was working on a potential deal for CDP to invest in, Miller wrote, “Good. Get back to that and leave the glad handing to me!”<sup>102</sup> He continued to portray himself to SW as actively promoting CDP.

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<sup>95</sup> CX-34.

<sup>96</sup> Hearing Tr. 534-35 (Miller). Miller testified at the hearing that when he was confronted with this email at his OTR he recognized that it looked like he was leading SW on. He said that sometime after the OTR he called SW to apologize. Hearing Tr. 534-35 (Miller). Miller later reiterated that he was pretending to assist SW, but that he never intended to solicit investors or endorse or sell CDP. He said, “I should not have led my friend on. It was a mistake on my part, [I] should not have done it. I was trying to let him down easy.” Hearing Tr. 558 (Miller).

<sup>97</sup> Hearing Tr. 539 (Miller).

<sup>98</sup> CX-39.

<sup>99</sup> CX-38.

<sup>100</sup> Hearing Tr. 545 (Miller).

<sup>101</sup> Hearing Tr. 546 (Miller).

<sup>102</sup> CX-40, at 4. When Matoesian later investigated Miller on behalf of BFE, she asked him about the “glad handing” comment. He told her it had nothing to do with CDP. He described it as a “tongue-in-cheek” email “about he’s doing his job seeking out clients for himself.” Hearing Tr. 250 (Matoesian). The Extended Hearing Panel finds that, in context, Miller’s comment about glad-handing was connected to CDP. His denial is not credible.



By late June, SW still did not know that Miller had been prohibited from soliciting his clients for CDP and continued to think that Miller was actively promoting CDP. In an email dated June 26, 2012, he wrote Miller about a real estate deal he hoped to close separate from CDP. In that email he told Miller, “If you have any conversations with your clients about our deal [referring to CDP], please feel free to mention that we are also going to be providing ... deals outside the fund structure.”<sup>103</sup>

In early July, the promoters accelerated their efforts to find and lock in CDP investors. They were hoping to close the offering soon.<sup>104</sup> A July 9, 2012 email from SW to Miller indicates that he was still coordinating with Miller to find new potential investors, and that Miller had distributed information about CDP to potential investors. SW wrote,

Aon,

We’re looking to make hay over the next several weeks. As you know, much of the challenge is converting verbal commitments into written ones. That said, we still need to press forward with getting in front of new potential investors. Do you have some time in the next several days to chat about maybe getting in front of some of the folks you sent our information to? Thanks.<sup>105</sup>

The Extended Hearing Panel finds that Miller’s testimony that he was only pretending to help SW is not credible. It is highly unlikely that SW could be deceived for months into thinking that Miller was actively promoting CDP if Miller did nothing at all to promote CDP to potential investors. Moreover, the contemporaneous emails reflect that Miller connected SW to some of his clients.<sup>106</sup>

In fact, SW and his co-principals in CDP thought that Miller had been a critical component of their capital raising campaign. SW joked in an email under the subject of “[CDP] Promotional Piece,” dated May 31, 2012, that Miller was helping so much that another founding principal, JS, wanted to send SW and Miller “to his place in Cabo, [Mexico]” as a reward. Miller responded by email the same day, “Sounds good to me.”<sup>107</sup>

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<sup>103</sup> CX-40, at 3.

<sup>104</sup> Email traffic between SW and Miller during this period bore the subject line “Final Countdown.” CX-43.

<sup>105</sup> CX-43, at 2.

<sup>106</sup> CX-39 (email correspondence indicating that Miller gave Customer JGH’s cell telephone to SW and gave SW a “heads up” that NL or NL’s father might invest).

<sup>107</sup> CX-39. Miller testified that he had no intention of going to Cabo, no intention of soliciting investors for CDP, no intention of endorsing or selling the investment for SW. He said he was trying to let his friend down easy. Hearing Tr. 558 (Miller). In light of the numerous contemporaneous emails between Miller and SW discussing progress in marketing CDP, and in the absence of any contemporaneous evidence that would support, even remotely, Miller’s assertion that he was only pretending to help his friend, the Extended Hearing Panel does not credit Miller’s testimony.

The Extended Hearing Panel finds that Miller continued to work with the CDP promoter on strategies for marketing the investment after the Firm rejected his proposal that it act as selling agent. Furthermore, the email correspondence indicates that Miller marketed CDP to his clients, directly contrary to Biebel's instructions.

**g. Miller Successfully Markets CDP To Customer JGH (First Transaction Charged)**

Customer JGH was Miller's client at BFE at the time of the events at issue.<sup>108</sup> In the first transaction charged in the Amended Complaint, Miller recommended CDP to Customer JGH in a quarterly review of Customer JGH's portfolio. Both before and after that review, Miller maintained a steady email correspondence with SW, the issuer's principal, reporting on Miller's progress in marketing the investment to Customer JGH. Ultimately, Customer JGH invested \$100,000 in CDP.<sup>109</sup>

The record with regard to this transaction is extensive. SW asked Miller for assistance in marketing CDP to Customer JGH. In a June 11, 2012 email from SW to Miller, SW told Miller that JS had played golf with Customer JGH and talked with him about CDP. Customer JGH "thought that he had seen something from you [Miller]." SW said that JS thought that Customer JGH would be interested in hearing more on the subject. He asked Miller, "How do you recommend that we proceed if at all?"<sup>110</sup>

In response, Miller called Customer JGH, sent him CDP promotional materials, connected him to SW, the issuer's principal, and recommended that he invest \$200,000. Miller wrote back to SW, "I will call him. Will update you after I hear from him."<sup>111</sup> The next day, on June 12, 2012, Miller wrote to SW that he had spoken to Customer JGH and that he was "mailing [Customer JGH] the package today."<sup>112</sup> Miller told SW that Customer JGH would like SW to call him, and Miller provided SW with Customer JGH's cell telephone number.<sup>113</sup> Miller concluded, "I told him he should give you a couple hundred K."<sup>114</sup>

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<sup>108</sup> CX-1.

<sup>109</sup> CX-1; Hearing Tr. 350 (in judicial admission, Respondent's counsel confirmed accuracy of amount).

<sup>110</sup> CX-39, at 4. Customer JGH testified that he first learned about CDP from JS at a golf game. He noted that they had been paired together by someone else and that he had not previously known JS. Customer JGH said he had known the other two founding principals of CDP, SW and GR, a long time. Hearing Tr. 944-46 (Customer JGH).

<sup>111</sup> CX-39, at 4. Customer JGH testified that he asked Miller more about JS than about CDP, since Customer JGH had met JS on the Honors Course and Miller might know him because of the Honors Course connection. Miller told him some of JS's work history. Hearing Tr. 947-48 (Customer JGH).

<sup>112</sup> CX-39, at 3.

<sup>113</sup> CX-39, at 3.

<sup>114</sup> CX-39, at 3. Customer JGH testified that he and Miller had discussed how much money he might prudently invest in CDP. Hearing Tr. 949, 969-70 (Customer JGH).

After SW spoke with Customer JGH, he informed Miller that Customer JGH was “going to review what you [Miller] sent him and then be in touch.”<sup>115</sup>

On June 22, 2012, Miller wrote in an email to SW that he was going to meet with Customer JGH for a quarterly review and was “sure” they would discuss CDP.<sup>116</sup> On July 9, 2012, Miller updated SW by email, saying, “I am meeting with [Customer JGH] on Thursday after the market closes. Should know something then on him.”<sup>117</sup> SW wrote to Miller on July 11, 2012, that he had spoken to [Customer JGH] and given him his “best pitch.”<sup>118</sup>

By email dated July 12, 2012, Miller told SW, “I am going to recommend he invest tonight.”<sup>119</sup> The next morning, Miller sent SW an email reporting on his meeting with Customer JGH,

We had a good discussion on [CDP] last night. He has a note coming due in a couple weeks ... [in an account] with me. I suggested that he take those proceeds and invest with you. He said that he will more than likely do 1 to 2 units. Good news!”<sup>120</sup>

When asked whether he recommended the investment to Customer JGH, Miller portrayed himself as playing a more neutral role in the transaction. Miller testified,

The only thing I can remember telling [Customer JGH] was I thought it would be appropriate for him to invest a couple of \$100,000 from the note coming [due]. That was a sensible amount to invest for him. That’s what I recall telling [Customer JGH].<sup>121</sup>

Customer JGH admitted that Miller discussed the investment with him, and that he was interested in what Miller thought about JS, the CDP principal who was unfamiliar to Customer JGH.<sup>122</sup> Customer JGH also acknowledged that when you have confidence in your investment advisor, as he did in Miller, then the advisor’s comments and opinions go into the mix of factors

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<sup>115</sup> CX-39, at 2.

<sup>116</sup> CX-40, at 5.

<sup>117</sup> CX-41, at 1.

<sup>118</sup> CX-43, at 1.

<sup>119</sup> CX-43, at 1.

<sup>120</sup> CX-44.

<sup>121</sup> Hearing Tr. 596 (Miller).

<sup>122</sup> Hearing Tr. 975-76 (Customer JGH).

in making an investment decision.<sup>123</sup> Customer JGH testified that he did not recall one way or the other whether Miller recommended the CDP investment to him.<sup>124</sup>

The Extended Hearing Panel finds that Miller sent promotional materials to Customer JGH, encouraged Customer JGH to invest in CDP, advised him on the amount to invest, and, unbeknownst to Customer JGH,<sup>125</sup> kept SW apprised of his progress in persuading Customer JGH to invest. Miller's statement to SW that he was going to "recommend" CDP to Customer JGH is the clearest possible indication that he was marketing the investment to Customer JGH.

#### **h. Miller Successfully Markets CDP To WKJ (Second Transaction Charged)**

Customer WKJ was one of Miller's clients at BFE at the time of the events at issue.<sup>126</sup> As set forth below, he asked for Miller's opinion about CDP and Miller responded enthusiastically, informing Customer WKJ that he himself had invested and praising one of the principals of CDP. Their discussion of CDP occurred by email from Miller's BFE account, along with other recommendations by Miller of other investments. Nothing in the email distinguished one recommendation from the other. Customer WKJ invested \$200,000 in CDP.<sup>127</sup>

The evidence regarding this transaction was as follows. Customer WKJ initiated a discussion of CDP with Miller by email, after hearing about CDP from SW, who was a friend for more than 35 years. On May 30, 2012, Miller emailed Customer WKJ, urging him to buy shares in a publicly traded coal company referred to as ANR. Customer WKJ responded that same day, saying he thought another coal company, BTU, was a better buy. Then Customer WKJ asked whether Miller had seen SW's "pitch" on the real estate investment fund, CDP. Customer WKJ thought the CDP investment was attractive and set forth his analysis of why.<sup>128</sup>

Miller responded to Customer WKJ's inquiry in another email dated May 30, 2012. First, he discussed the possible coal investment, explaining why he liked ANR more than BTU. Then he suggested buying shares in ANR and in eBay.

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<sup>123</sup> Hearing Tr. 989-90 (Customer JGH).

<sup>124</sup> Initially, when asked by Miller's counsel whether Miller had encouraged him to invest in CDP, Customer JGH testified, "Not that I recall." Hearing Tr. 948 (Customer JGH). When Enforcement counsel showed Customer JGH the email in which Miller told SW he was going to recommend the investment to Customer JGH, Customer JGH clarified his testimony. He made it plain that he was not denying that Miller had made a recommendation. Rather, he testified, he simply did not remember one way or the other if Miller recommended the investment. Hearing Tr. 984 (Customer JGH).

<sup>125</sup> Customer JGH was unaware of the email correspondence between Miller and SW regarding his potential investment in CDP. Hearing Tr. 967-71 (Customer JGH). He did not know that SW was asking Miller how to proceed in approaching Customer JGH for an investment in CDP. Hearing Tr. 981.

<sup>126</sup> Hearing Tr. 753 (Customer WKJ).

<sup>127</sup> CX-1; Hearing Tr. 350 (in judicial admission, Respondent's counsel confirmed accuracy of amount).

<sup>128</sup> CX-36, at 2; Hearing Tr. 758-59, 787 (Customer WKJ).

In a separate paragraph, Miller answered Customer WKJ's inquiry about CDP. Miller enthusiastically endorsed the principals and the investment. He created the impression that he had analyzed the investment closely and had come to the conclusion it was a great deal because he had himself invested in it. He wrote,

I reviewed [SW's] deal Very closely. He made the pitch a couple weeks ago. I have already signed the offering documents. I put in 50K. It is a solid income play with upside as you mentioned. [GR] is tight as a tick as well. He WILL NOT lose a penny.<sup>129</sup>

Miller testified that when he answered Customer WKJ he "was just giving him my thoughts and opinions on the individuals."<sup>130</sup> Miller said he was just giving an "opinion," not a "recommendation."<sup>131</sup> Miller suggested that, because he was responding to Customer WKJ, he was not affirmatively recommending the investment. He said that he was "just answering questions" that his client had.<sup>132</sup>

Customer WKJ tried to minimize the role Miller played in his purchase of CDP. He testified that he made the decision to invest in CDP for himself, and that Miller had little or no influence on the decision.<sup>133</sup> However, Customer WKJ admitted that if Miller had told him that investing in CDP was a "horrible idea," then he "might have taken pause and gone back to [CDP] and reanalyzed it."<sup>134</sup> Customer WKJ also testified that he understood that Miller was acting as his stockbroker and was making recommendations with regard to ANR and eBay in the same email that Miller discussed CDP, but he thought Miller was acting more as his friend than his stockbroker when, in the same email, Miller discussed CDP.<sup>135</sup>

The Extended Hearing Panel finds that Miller's email response to Customer WKJ contained a recommendation to invest in CDP. Miller did not balance pros and cons of the investment in a neutral way. Nor did Miller merely respond that Customer WKJ had the money in his account to invest in it. Instead, Miller expressed unalloyed enthusiasm for the investment and encouraged Customer WKJ to invest. He told Customer WKJ that he had already invested as an endorsement or recommendation that would encourage Customer WKJ to invest. Furthermore, the opinion appears in the same email with recommendations for buying publicly traded stocks. Nothing in the email distinguishes those recommendations from Miller's praise of the CDP investment opportunity. When viewed against the backdrop of Miller's behind-the-

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<sup>129</sup> CX-36, at 1.

<sup>130</sup> Hearing Tr. 610 (Miller).

<sup>131</sup> Hearing Tr. 608-09 (Miller).

<sup>132</sup> Hearing Tr. 601 (Miller).

<sup>133</sup> Hearing Tr. 803-05 (Customer WKJ).

<sup>134</sup> Hearing Tr. 794 (Customer WKJ).

<sup>135</sup> Hearing Tr. 805-10 (Customer WKJ).

scenes coordination with SW in marketing CDP, Miller's response to Customer WKJ went beyond fielding a question from the customer; it constituted a recommendation.

**i. Miller Successfully Markets CDP To EWR (Third Transaction Charged)**

Customer EWR also was one of Miller's clients at BFE. SW, the issuer's principal, sought Miller's assistance in marketing CDP to Customer EWR and asked Miller to recommend the investment to the customer. Miller did. Afterward, Customer EWR invested \$50,000 in CDP.<sup>136</sup>

Again, emails reflect these interactions. SW had given Customer EWR some promotional materials and met with Customer EWR. Afterward, on August 27, 2012, SW sent an email to Miller notifying him that Customer EWR was going to call Miller to discuss CDP. SW said he would appreciate a "good word" on CDP from Miller. Miller responded later the same day, "Of course. I will go over it with him as well."<sup>137</sup>

Customer EWR emailed Miller and asked him how a CDP investment would fit into his portfolio. Miller told him it would fit.<sup>138</sup> At some point during Customer EWR's consideration of the investment, Miller told him that he had invested in CDP.<sup>139</sup> Customer EWR spoke to SW four or five times about CDP before investing.<sup>140</sup>

After Customer EWR invested in CDP, there were CDP capital calls. Customer EWR instructed BFE staff to transfer the necessary funds.<sup>141</sup> Miller contends that he only discussed CDP with Customer EWR as part of his administrative duties to comply with EWR's instructions to transfer funds.<sup>142</sup>

The Extended Hearing Panel finds that Miller was working with the promoter, SW, to encourage Customer EWR to invest. Miller promised SW that he would put in a "good word" and he would "go over" the investment with Customer EWR. By telling Customer EWR that he

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<sup>136</sup> CX-1; Hearing Tr. 350 (in judicial admission, Respondent's counsel confirmed accuracy of amount).

<sup>137</sup> Hearing Tr. 1058-59, 1089 (Customer EWR); CX-45. Customer EWR had known SW since 1997, and they are very good friends. Hearing Tr. 1056 (Customer EWR).

<sup>138</sup> Hearing Tr. 1059-60 (Customer EWR).

<sup>139</sup> Hearing Tr. 1062, 1090, 1092 (Customer EWR); CX-17, at 7.

<sup>140</sup> Hearing Tr. 1060 (Customer EWR); CX-47, at 1.

<sup>141</sup> Hearing Tr. 1065 (Customer EWR). To date, there have been capital calls for around \$40,000 to \$45,000 of his total investment of \$50,000. Hearing Tr. 1070 (Customer EWR).

<sup>142</sup> Resp. PH Br. 13, 31; Resp. Reply 4; Hearing Tr. 612, 614 (Miller).

had invested in CDP, he signified his confidence in the investment and encouraged Customer EWR to invest.<sup>143</sup>

#### **j. Miller Markets CDP To Other Potential Investors**

Customer JDS. Although Customer JDS did not invest in CDP, there is evidence that Miller discussed the possibility with him. In an email to Miller dated June 15, 2012, SW wrote, “Thanks for mentioning our deal to [Customer JDS]. Let me know if I need to go out to Jackson Hole [where Customer JDS has a vacation home] to close the deal!!!”<sup>144</sup> Subsequently, in a July 9, 2012 email from Miller to SW, Miller reported that Customer JDS had told him no more real estate for him. Miller explained that Customer JDS had decided to invest in another real estate firm that managed apartments.<sup>145</sup>

When the Firm later investigated the matter, Miller denied mentioning the deal to Customer JDS.<sup>146</sup> At the hearing Miller testified that he did not recall mentioning the deal to Customer JDS and did not believe that he had.<sup>147</sup> He reiterated that he had been pretending to help SW and that he had no intention of soliciting, endorsing, or selling the investment.<sup>148</sup>

The Extended Hearing Panel finds Miller’s testimony denying that he discussed CDP with Customer JDS inconsistent with the contemporaneous emails. In the emails, Miller indicated that he had spoken to Customer JDS about CDP and that Customer JDS did not intend to invest in CDP. There is no evidence other than Miller’s own hearing testimony to rebut the contemporaneous evidence of the emails. We find that Miller did discuss CDP with Customer JDS, contrary to what he told the Firm and the Panel.<sup>149</sup>

Customer MD. Miller arranged and attended a meeting between the CDP principals and Customer MD, Miller’s good friend and a BFE client.<sup>150</sup> Although Miller characterized it in his testimony as a meeting for his own benefit, because he also considered Customer MD his attorney,<sup>151</sup> the record shows it was a meeting to promote a potential investment in CDP by Customer MD.

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<sup>143</sup> When Matoesian investigated on behalf of the Firm, she asked Miller about Customer EWR’s journal request to deposit funds in the CDP account at the Firm. Miller told Matoesian that he did not know that Customer EWR was going to invest in CDP until the journal request was received. Miller did admit to discussing CDP with Customer EWR and telling Customer EWR that he had personally invested in CDP. Hearing Tr. 251-52 (Matoesian).

<sup>144</sup> CX-40, at 11; Hearing Tr. 553-54 (Miller).

<sup>145</sup> CX-43, at 2.

<sup>146</sup> CX-17, at 6; Hearing Tr. 243-44 (Matoesian).

<sup>147</sup> Hearing Tr. 555, 558 (Miller).

<sup>148</sup> Hearing Tr. 557-58 (Miller).

<sup>149</sup> At the hearing, counsel did not seek to elicit testimony from Customer JDS regarding CDP.

<sup>150</sup> Hearing Tr. 556, 580 (Miller).

<sup>151</sup> Hearing Tr. 582 (Miller).

From June 19, 2012, through June 28, 2012, Miller and SW exchanged emails about their progress in interesting investors in CDP, including their attempts to arrange a meeting with Customer MD.<sup>152</sup> SW wrote on June 27, 2012, asking, “Any luck in getting something lined up with [Customer MD]? I’d enjoy talking to him.”<sup>153</sup> On June 28, 2012, Miller responded, “[Customer MD] is attending tonight. We will pin him down.”<sup>154</sup> On July 9, 2012, they were still emailing back and forth about the date for a meeting with Customer MD. SW suggested a lunch meeting in CDP’s offices on July 17, 2012.<sup>155</sup>

SW expressed his gratitude to Miller for arranging the meeting with Customer MD. SW wrote, “Thanks, Aon. Really appreciate you setting up the meeting with [Customer MD] and following up with the other fellas.”<sup>156</sup>

Miller admitted that he arranged a meeting of the three principals of CDP, himself, and Customer MD in CDP’s offices.<sup>157</sup> Miller claimed, however, that the meeting was for his personal benefit, and not to provide SW an opportunity to market CDP to Customer MD.<sup>158</sup> Miller testified that he wanted Customer MD to meet the principals of CDP so that Customer MD could advise Miller. He said, “I considered him my attorney ... and I just wanted him to hear.... And I wanted to hear his thoughts on what they were doing.”<sup>159</sup> He reiterated, “I wanted [Customer MD] to hear what they were doing and meet these fellows, and I personally wanted his impression of what they were doing because I know he is very well versed in this area and a private equity investing, and I value his opinion.”<sup>160</sup>

But Miller had already, two months before, in early April 2012, committed \$50,000 to the investment. Moreover, as discussed above, Miller had been encouraging others to invest in CDP already, before introducing MD to the principals of CDP.

The contemporaneous email correspondence also is inconsistent with Miller’s explanation of the meeting. Both before and after the meeting with Customer MD, SW thanked Miller for arranging it.<sup>161</sup> That suggests that the meeting was for SW’s benefit, and not Miller’s benefit. After the meeting, Miller told SW he could continue to talk with Customer MD without

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<sup>152</sup> CX-40, at 1-2, 6-7.

<sup>153</sup> CX-40, at 2.

<sup>154</sup> CX-40, at 1.

<sup>155</sup> CX-42, at. 3-4.

<sup>156</sup> CX-43, at 2.

<sup>157</sup> Hearing Tr. 583-84 (Miller).

<sup>158</sup> Hearing Tr. 598-99 (Miller).

<sup>159</sup> Hearing Tr. 582 (Miller).

<sup>160</sup> Hearing Tr. 583-84 (Miller).

<sup>161</sup> CX-43, at 2; CX-98.



Miller. Miller wrote, “You can take it from here.”<sup>162</sup> That suggests that Miller did not intend to be involved in further discussions with Customer MD about CDP. He had only facilitated the initial meeting to encourage Customer MD to continue talking about CDP with the promoters. Finally, it was Miller and SW who were coordinating, not Miller and Customer MD.

The Hearing Panel finds that Miller’s explanation for the meeting is inconsistent with the record and not credible. The Hearing Panel finds that, contrary to Miller’s testimony, he arranged for Customer MD to meet the principals in CDP as part of the marketing campaign for CDP.

Other Additional Customers. In connection with the Firm’s investigation of his activities, Miller indicated that he had communicated with other BFE clients about CDP. The Firm briefly summarized these communications with other clients in its report to FINRA staff. According to the Firm, Miller told Customers NL and JH1 that he was investing in CDP in response to their inquiries. He also told Customer GC that he was investing, and he told Customer JC about CDP.<sup>163</sup>

Contemporaneous emails corroborate the Firm’s report. Miller and SW discussed by email their contacts with Customers NL, JH1, GC, and JH2 in the marketing effort for CDP. The emails also show Miller freely discussing with SW other potential investors and authorizing SW to tell them that Miller had already invested in CDP.<sup>164</sup> Miller admitted in testimony that he had spoken to Customers NL and JH1 about CDP, but he characterized it as merely answering their questions.<sup>165</sup>

The pattern of email traffic shows that Miller continually updated SW on whether his clients were likely to invest in CDP and how much they might invest. He explained this conduct as “simply answering [SW]’s questions and just bringing him up to date on if I had any conversations with any of my clients about—if they asked me questions, I was just relaying that, you know, what conversations I’d had with those clients.”<sup>166</sup>

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<sup>162</sup> CX-98; Hearing Tr. 634-35 (Miller).

<sup>163</sup> CX-17, at 7.

<sup>164</sup> CX-39, at 2 (Miller telling SW about contact with Customer NL); CX-40, at 5 (Miller telling SW about Customer JH1; also mentioning that Customer JH1 was a potential investor); CX-40, at 9-10 (Miller and SW talking about Customer JT as a potential investor; Miller telling SW to tell Customer JT that Miller had invested in CDP); CX-43, at 1 (Miller telling SW that he would call Customer JH2 about CDP and keep SW updated); CX-43, at 2 (Miller tells SW that Customer GC decided not to invest in CDP); Hearing Tr. 597 (Miller) (Miller told Customer JH1 that CDP promoters were “good guys” and he knew them very well).

<sup>165</sup> Hearing Tr. 577-78 (Miller).

<sup>166</sup> Hearing Tr. 601-02 (Miller).

## 2. CTL (Second Issuer): Miller Participates In Transaction As His Client's Proxy (Fourth Transaction Charged)

Customer JDS, one of Miller's most important clients, invested \$1 million in CTL, a limited partnership for investing in auto loans.<sup>167</sup> Miller did not introduce the investment to his client, but he nevertheless participated in the transaction without giving his Firm prior written notice. In brief, Miller acted as his client's proxy and as an intermediary between his client and the issuer. Miller analyzed the issuer's promotional materials and explained aspects of the deal to Customer JDS. Miller also recommended or endorsed the investment.

The record details how Miller came to participate in the transaction. Customer JDS and Miller were partners in an investment fund, LMP. LMP sent information by "blast" email to all its limited partners regarding CTL as a potential side investment, separate from LMP.<sup>168</sup>

Customer JDS testified that he asked if Miller was going to participate.<sup>169</sup> Usually, if Miller was going to invest in something, so would Customer JDS. In this case, Customer JDS invested even though Miller did not. Miller said he was unable to commit to the investment.<sup>170</sup>

Even though Miller did not invest in CTL, he acted as Customer JDS's proxy in dealing with the promoters. He took questions from them about Customer JDS's interest and relayed them to Customer JDS.<sup>171</sup> He also took messages from Customer JDS relating to the investment back to the promoters.<sup>172</sup> The promoters spoke to Miller by telephone and sent him emails with information for him to provide Customer JDS.<sup>173</sup> Miller passed along to Customer JDS some of the points he learned from the promoters.<sup>174</sup> In a contemporaneous email, Miller wrote to his friend, Customer MD, that Customer JDS "wants me to handle."<sup>175</sup>

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<sup>167</sup> Hearing Tr. 860 (Customer JDS).

<sup>168</sup> Hearing Tr. 831- 33 (Customer JDS); Hearing Tr. 667-68 (Miller); CX-61.

<sup>169</sup> Hearing Tr. 829-30 (Customer JDS).

<sup>170</sup> Hearing Tr. 829-30 (Customer JDS); CX-62.

<sup>171</sup> Hearing Tr. 835-37 (Customer JDS); CX-62; CX-63; CX-64.

<sup>172</sup> CX-60; CX-65, at 3-4; Hearing Tr. 665-67 (Miller).

<sup>173</sup> CX-65, at 2-3.

<sup>174</sup> CX-64, at 1.

<sup>175</sup> CX-56; Hearing Tr. 657-58 (Miller). Miller protested that he was never "in charge" of Customer JDS's investments, including LMP and CTL. Hearing Tr. 658 (Miller). He testified that he was merely "providing very good customer service to my friend and co-investor." Hearing Tr. 658 (Miller). He denied that he endorsed, recommended, or solicited Customer JDS to invest in LMP or CTL. Hearing Tr. 664-67, 689-90 (Miller). He reiterated that he was "just providing good customer service." Hearing Tr. 665 (Miller), and that he "was just simply answering [Customer JDS's] question and providing what I thought to be good customer service." Hearing Tr. 687 (Miller). He explained, "[W]hat I was doing was providing good customer service and letting [Customer JDS] know that I was aware of what [CTL] was and what was going on, and I was prepared to answer any of his questions, if he asked." Hearing Tr. 689-90 (Miller).

Miller undertook to highlight and explain aspects of the CTL investment to Customer JDS. The offering materials that had accompanied the blast email were more than 30 pages long. Miller excerpted two pages for Customer JDS, and highlighted provisions he thought particularly significant. He scanned those pages on a BFE machine and sent them to Customer JDS from a BFE email address. In particular, Miller pointed out the high interest rate offered by CTL, 16%. He wrote, “This is not a bad deal.”<sup>176</sup> Miller wrote in a later email about CTL, “I like this. If you’re looking for a 2-3 year (max) income play. Your capital is very safe/low risk. I will explain the 16% in the morning.”<sup>177</sup>

Later, Miller forwarded an email he had received from one of the principals of LMP about the CTL offering. The forwarded email contained seven bullet points with information meant to encourage investment. When Miller forwarded it to Customer JDS, he explained that the 16% interest being offered did not signify a distressed debt deal. Rather, Miller explained, the “loan book isn’t big enough to garner” the interest of big banks.<sup>178</sup>

In another email on CTL, Miller wrote Customer JDS, “I wish I had some more room to do this personally. This is a solid/VERY Low risk Income play. It makes sense for you and [your] family in my opinion.”<sup>179</sup> Customer JDS understood from this that if Miller had the money, he would invest in CTL.<sup>180</sup> At the hearing, Miller drew a distinction between a recommendation and an opinion, agreeing that he had provided Customer JDS with his opinion but denying that he had recommended the investment.<sup>181</sup>

When Customer JDS decided to make the investment, he did not call the promoters. He sent an email to Miller instructing him to talk to the promoters. He emailed Miller, “Tell them I’ll take it all or a large portion. I don’t want to bother with a small amount.”<sup>182</sup> By that, Customer JDS meant that he would invest \$1 million.<sup>183</sup>

When CTL told Miller that it had a \$1 million investment unit to offer Customer JDS, Miller later told Customer JDS, “I told them to hold it for you.”<sup>184</sup> Customer JDS then asked Miller what he thought and whether Customer JDS had the money to make the investment.<sup>185</sup> Miller advised him in an email dated August 23, 2012, “JDS, [m]y recommendation would be

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<sup>176</sup> CX-63; Hearing Tr. 673-76, 681-82 (Miller).

<sup>177</sup> CX-64.

<sup>178</sup> CX-65; Hearing Tr. 694-98 (Miller).

<sup>179</sup> CX-66.

<sup>180</sup> Hearing Tr. 845 (Customer JDS).

<sup>181</sup> Hearing Tr. 701-02 (Miller).

<sup>182</sup> CX-66.

<sup>183</sup> Hearing Tr. 846 (Customer JDS).

<sup>184</sup> CX-68.

<sup>185</sup> CX-70.

one [million dollars].”<sup>186</sup> Customer JDS understood from the stream of email correspondence with Miller about CTL that the investment was a “good deal.”<sup>187</sup> Matoesian testified that, when she confronted Miller with the email correspondence, he admitted that he had recommended CTL to Customer JDS.<sup>188</sup>

Customer JDS testified that the email correspondence “evidently” reflected that he had asked Miller to gather information for him on the CTL investment.<sup>189</sup> Customer JDS said that there were two reasons for involving Miller. One was that the money to invest in CTL was going to come from Customer JDS’s accounts at BFE; the other was that Miller knew the promoters much better than Customer JDS did.<sup>190</sup> Miller and his friend, Customer MD, had played golf with them.<sup>191</sup>

The Hearing Panel finds that Miller acted as Customer JDS’s proxy in dealing with the promoters of CTL. The Panel further finds that Miller gave advice and recommended the investment to Customer JDS. We reject the distinction Miller attempts to draw between his enthusiastic positive opinion about the investment and a recommendation. In noting that Miller knew the promoters better than Customer JDS did, Customer JDS implicitly acknowledged that he wanted Miller’s assessment of them. Miller’s response constituted an endorsement.<sup>192</sup> Miller

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<sup>186</sup> CX-70; Hearing Tr. 851-52 (Customer JDS). In the Firm’s investigation of Miller’s activities, Matoesian asked Miller about the recommendation to Customer JDS in this email. When she asked what it meant, he said, “[W]ell, I guess I did.” He then apologized and said, “[W]ell, if I did something wrong, I’ll make it right.” Hearing Tr. 268-69 (Matoesian).

<sup>187</sup> Hearing Tr. 854 (Customer JDS).

<sup>188</sup> Hearing Tr. 269 (Matoesian).

<sup>189</sup> Hearing Tr. 849 (Customer JDS).

<sup>190</sup> Hearing Tr. 850 (Customer JDS).

<sup>191</sup> Hearing Tr. 847-48 (Customer JDS).

<sup>192</sup> Customer JDS bristled at the notion that Miller would need to explain anything about the investment or give him advice. He insisted “I make the decisions” and Miller “does not tell me what to do.” Hearing Tr. 838-39 (Customer JDS). Customer JDS seemed to conflate giving advice with giving direction.

The fact that Customer JDS made his own independent decision regarding the investment is separate from whether Miller gave him advice. Customer JDS could accept the advice or not; the advice could be a factor in Customer JDS’s decision making or not. As Miller admitted, the same is true when he gives advice to one of his clients about an investment sold through his Firm. Even if Miller solicited a customer to buy stock, the customer would still have to make an independent decision whether to do it (unless Miller had authority over a discretionary account). Hearing Tr. 516-17 (Miller).

did not merely report to Customer JDS that he had enough money in his BFE accounts to make a \$1 million investment.<sup>193</sup>

### **3. KBI (Third Issuer): Miller Participates In Transaction By Introducing It To His Client And Endorsing The Issuer's Principal (Fifth Transaction Charged)**

The fifth transaction charged involved a loan by Miller's client, Customer JDS, to KBI in exchange for a promissory note. Miller introduced Customer JDS to the investment. KBI principal KG had contacted Miller initially to assist him in finding investors for membership interests in KBI, and, later, KG told Miller that he needed a short-term loan. As evident from the email correspondence discussed below, Miller reviewed offering materials for KBI, coordinated with KG, served as a go-between for KG and Customer JDS, encouraged Customer JDS to invest, and endorsed KG to Customer JDS.<sup>194</sup>

Emails provide the details. KG, whom Miller had known for 20 years,<sup>195</sup> first contacted Miller about whether Miller's clients might be interested in membership interests in KBI. KG wrote Miller a brief outline of KBI's business plan in an email dated May 3, 2012, and then followed up by email on May 10, 2012, with a detailed confidential private placement memorandum more than 50 pages long that included six years of financial data.<sup>196</sup>

On May 23, 2012, Miller emailed Customer JDS with information about the KBI offering and told him KG "was looking for money."<sup>197</sup> On June 4, 2012, Miller wrote to KG that he was meeting with Customer JDS in a few days for a "review and discussion." Miller told KG that he planned to discuss "it," referring to KBI.<sup>198</sup> Miller wrote, "I thought we should give him first

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<sup>193</sup> Although he denied it, Miller acted in similar fashion for Customer JDS in connection with an offering by a private equity fund called Angelo Gordon. Miller gave Customer JDS a detailed analysis of the offering, acted as an intermediary between Customer JDS and the promoters, and recommended that Customer JDS invest elsewhere. The offering was not an approved BFE product. Hearing Tr. 996-1007 (Miller); CX-99; CX-100. Miller told Customer JDS that in his opinion another investment would be better than the Angelo Gordon offering. In doing so, he recommended that Customer JDS not invest in the Angelo Gordon offering. Miller wrote to Customer JDS, "It is my opinion that the Angelo Gordon Star Fund will be a Low Risk – Lower return investment...I doubt if you will do much better than 7% a year. This is a safe place to put monies looking for income. All in all, I would probably look elsewhere....I like [CBO Preferred Vizio Link 7.75 better. Plus no fees." CX-100.

Miller testified that he gave his opinion, not a recommendation, in connection with the Angelo Gordon offering. Hearing Tr. 1006-07 (Miller). The Extended Hearing Panel rejects the distinction that Miller draws between opinion and recommendation.

In addition to Angelo Gordon, Miller admitted in the Firm's investigation of his activities that he routinely talked with Customer JDS about "other types" of investment opportunities. He told Matoesian that Customer JDS "likes to hear about other things, and I routinely do that." Hearing Tr. 258 (Matoesian).

<sup>194</sup> CX-77; CX-78; CX-80; CX-81; Hearing Tr. 729-39 (Miller).

<sup>195</sup> Hearing Tr. 727 (Miller).

<sup>196</sup> CX-77; CX-78; Hearing Tr. 732 (Miller).

<sup>197</sup> Hearing Tr. 859, 863-64 (Customer JDS); CX-78.

<sup>198</sup> CX-81; Hearing Tr. 738 (Miller).

option.”<sup>199</sup> The emails establish that Miller was working to find investors for KBI and coordinating with KG in that effort.

A few days later, on June 12, 2012, KG wrote Miller that things had changed and that he had a more immediate need for a short-term loan of \$200,000 to buy raw materials. KG offered 15% interest on the short-term loan.<sup>200</sup> Miller then forwarded KG’s email regarding the loan to Customer JDS with the comment, “JDS, this doesn’t look like a bad deal!”<sup>201</sup> The Extended Hearing Panel finds that Miller introduced the loan opportunity to Customer JDS.<sup>202</sup>

At the hearing, Miller was asked whether it was fair to say that he thought the short-term loan note was a good deal. He evaded the question, saying, “What I’m saying there [when I said it doesn’t look like a bad deal] is, I think [KG] is an upstanding citizen. I’ve known him for a long time. I’ve known him to be always honest, honorable and someone I would want to be around, and so, in my opinion, I think Mr. [KG] would pay the loan back. That’s what I’m stating here.”<sup>203</sup> He agreed with the characterization of the email to Customer JDS as a “character reference” for KG.<sup>204</sup> He reiterated, “I’m stating that I believe Mr. [KG] is a good, honest businessman, and he will pay his debts.”<sup>205</sup> Based on this testimony, the Extended Hearing Panel finds that Miller endorsed KG.

The conclusion that Miller endorsed KG is reinforced by Customer JDS’s testimony. Customer JDS testified that he might have asked Miller about KG and whether he was “in trouble.”<sup>206</sup> If Miller had told him that KG was “in trouble,” then Customer JDS said, “I wouldn’t have done it.”<sup>207</sup>

Miller continued to act as an intermediary for the loan note transaction. He received the loan note from KG and, on June 13, 2012, he forwarded it to Customer JDS.<sup>208</sup> Miller’s explanation for why he was involved in sending material from KG to Customer JDS was that he

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<sup>199</sup> CX-81; Hearing Tr. 738 (Miller).

<sup>200</sup> CX-82.

<sup>201</sup> CX-82; Hearing Tr. 741 (Miller). Miller testified that he also had a conversation with Customer JDS about the loan note deal. Customer JDS testified that Miller called him about it, saying that KG “was looking for money.” Hearing Tr. 859 (Customer JDS).

<sup>202</sup> Customer JDS did not remember whether he had first heard of the KBI offering from Miller or KG. But he concluded that it was likely that KG first called Miller and Miller then called him. Hearing Tr. 865 (Customer JDS).

<sup>203</sup> Hearing Tr. 742 (Miller).

<sup>204</sup> Hearing Tr. 742 (Miller).

<sup>205</sup> Hearing Tr. 743 (Miller).

<sup>206</sup> Hearing Tr. 867 (Customer JDS).

<sup>207</sup> Hearing Tr. 867 (Customer JDS).

<sup>208</sup> CX-83; Hearing Tr. 746-47 (Miller).

believed that the money for the investment would come from one of Customer JDS's accounts at BFE.<sup>209</sup>

This record of Miller's activities in connection with Customer JDS's investment in KBI shows that Miller acted as a proxy for Customer JDS in the Chattanooga business community. Rather than initiating a discussion with Customer JDS, KG contacted Miller to inquire about Customer JDS's interest in an investment. Miller was the intermediary between KG and Customer JDS until the discussion of the precise terms of the loan note,<sup>210</sup> despite the fact that KG and Customer JDS knew each other. According to Miller, KG was friendly with Customer JDS; KG and Customer JDS had a locker next to Customer JDS's at the Honors Course.<sup>211</sup> He could have contacted Customer JDS directly. Instead, he contacted Miller.<sup>212</sup>

As with SW in connection with CDP, Miller claimed that he did not do what he said in the emails he was doing. He said that he was only "flattering" KG. He denied reviewing or spending much time with the offering materials that KG sent him.<sup>213</sup> He denied that he was engaged in connecting KG to his client.<sup>214</sup>

Miller's claim is not credible. The email correspondence paints a different picture.

### **C. The Firm Discovers Miller's Activities And Investigates**

On September 18, 2012, Miller attempted to deposit a check for \$1,000 into the CDP account at BFE.<sup>215</sup> JW, who had been hired to help with compliance at the branch, asked whether he was approved to invest in CDP. Miller told her that he had been given oral approval. When she asked whether he had filled out the proper documentation, he said that he did not recall. She checked and discovered he had not. She then told him the deposit could not be accepted until he

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<sup>209</sup> Hearing Tr. 747 (Miller).

<sup>210</sup> Customer JDS did speak to KG directly when they discussed the precise terms of the note. KG volunteered to offer collateral, and Customer JDS asked him for 16% on the loan. They agreed easily to those terms. Hearing Tr. 862 (Customer JDS).

<sup>211</sup> Hearing Tr. 736 (Miller).

<sup>212</sup> Customer JDS commented that KG probably went to Miller first because KG thought Miller had access to Customer JDS, and Customer JDS acknowledged that in this case it turned out to be true. Hearing Tr. 859-60 (Customer JDS).

<sup>213</sup> Hearing Tr. 731-34 (Miller).

<sup>214</sup> Hearing Tr. 734 (Miller).

<sup>215</sup> On September 17, 2012, Customer EWR had emailed Miller with instructions to transfer \$1,000 to the CDP holding account at the Firm. Miller responded by email, asking if they had a capital call. Customer EWR wrote back that there was a 2% up front deposit required. Miller emailed SW, asking if he owed \$1,000 on his CDP investment. SW responded in a jocular way, saying, "Yes. Thanks. I knew where to find you so wasn't sweating it." CX-52; Hearing Tr. 1035-36 (Miller).

filled out the proper documentation and sent it to a compliance person in the head office. Miller testified that he filled out the paperwork that same day and forwarded it.<sup>216</sup>

JW went to Petty and told him that Miller had attempted to deposit \$1,000 in the CDP account. She did not think that Miller had formal approval for his investment in CDP.<sup>217</sup> Petty testified that he had no knowledge of Miller's personal investment in CDP.<sup>218</sup>

JW also went directly to compliance personnel in the Firm's St. Louis headquarters. AC, a senior executive at the Firm's headquarters, called Miller. AC asked Miller if he knew what "selling away" was. Miller asserted that he did.<sup>219</sup> Miller testified that soliciting is recommending to a client to purchase a security "through me."<sup>220</sup>

The Firm sent an in-house attorney, Jane Matoesian, to Chattanooga to investigate.<sup>221</sup> Matoesian interviewed Miller and others at the branch office, and reviewed documents.<sup>222</sup> Miller told Matoesian that the CDP account at the Firm was an escrow account.<sup>223</sup> Matoesian looked at the persons who had deposited funds in the account and asked Miller the names of the persons he had talked to about CDP. She identified these people as the universe of additional persons with whom she wanted to talk.<sup>224</sup>

Matoesian asked Miller questions about selling away. She also asked questions about specific clients and showed him emails. Most of the questions involved CDP.<sup>225</sup> Miller testified that he was shell shocked and felt like the interview was an interrogation.<sup>226</sup>

In general, Miller admitted to Matoesian that he told people he had invested in CDP, that the CDP principals were "good guys," and that he thought it was a good deal.<sup>227</sup> He told Matoesian he did not think that there was anything wrong with telling people that he had

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<sup>216</sup> Hearing Tr. 1009-10 (Miller).

<sup>217</sup> Hearing Tr. 92 (Petty).

<sup>218</sup> Hearing Tr. 92-93 (Petty).

<sup>219</sup> Hearing Tr. 377 (Miller); Hearing Tr. 93-94 (Petty).

<sup>220</sup> Hearing Tr. 1016 (Miller).

<sup>221</sup> Hearing Tr. 93-94 (Petty).

<sup>222</sup> CX-17; Hearing Tr. 96-97 (Petty); Hearing Tr. 211 (Matoesian).

<sup>223</sup> Hearing Tr. 328 (Matoesian). Matoesian's boss later said that the Firm could not hold an escrow account because it was not a bank. Hearing Tr. 328 (Matoesian).

<sup>224</sup> RX-2; Hearing Tr. 211-12, 246, 251-54, 279-80, 294-95, 310-15, 328-29 (Matoesian).

<sup>225</sup> Hearing Tr. 378-80 (Miller).

<sup>226</sup> Hearing Tr. 378-79 (Miller).

<sup>227</sup> Hearing Tr. 246, 252-53 (Matoesian).



personally invested in CDP.<sup>228</sup> He denied recommending the investment to any clients or soliciting them to invest.<sup>229</sup>

Miller also admitted to Matoesian that, on a few occasions, he had violated the Firm's policy by advising his clients concerning outside investments, but he said that had done it in an effort "to assist my clients."<sup>230</sup> He told her he did not receive or expect compensation on those occasions, and he asserted that no client had suffered any adverse effect.<sup>231</sup>

At the end of her interview with Miller, Matoesian told him it was "a very serious situation."<sup>232</sup> She told him that she did not know what was going to happen and would have to return to headquarters in St. Louis to discuss the situation. She also told him that he had appeared to have done things that he could not do, and that he could not discuss the investments she had discussed with him with his clients. She explained why there were concerns.<sup>233</sup>

Matoesian understood Miller to be receptive and apologetic. He told her, "I will do what I can to – need to do to fix it."<sup>234</sup>

Matoesian reported orally to executives in St. Louis, who decided to terminate Miller.<sup>235</sup> Matoesian testified that the Firm thought that Miller was evasive in responding to questions raised in the investigation, and this caused the Firm "to lose faith in Mr. Miller."<sup>236</sup>

#### **D. The Firm Terminates Miller**

The Firm terminated Miller on October 2, 2012,<sup>237</sup> after first offering to let him resign.<sup>238</sup> Miller spoke to the head of the Firm, who said that the Firm wished him well but wanted him to

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<sup>228</sup> Hearing Tr. 248-49 (Matoesian).

<sup>229</sup> Hearing Tr. 247 (Matoesian).

<sup>230</sup> Hearing Tr. 273 (Matoesian).

<sup>231</sup> Hearing Tr. 273 (Matoesian); CX-2.

<sup>232</sup> Hearing Tr. 270 (Matoesian).

<sup>233</sup> Hearing Tr. 270-71 (Matoesian). Matoesian testified that even before she went to Chattanooga, she participated in a telephone call with Miller and a senior executive at the Firm, AC. She recalled that they asked Miller if he knew what "selling away" was. AC outlined the seriousness of the problem, saying that these kinds of activities "can bring a firm down, given the monetary amounts that it could involve." Hearing Tr. 276-77 (Matoesian).

<sup>234</sup> Hearing Tr. 271 (Matoesian).

<sup>235</sup> Hearing Tr. 271-72 (Matoesian).

<sup>236</sup> Hearing Tr. 278 (Matoesian). Matoesian testified, "Mr. Miller was asked whether he had ever—we asked that whether he had ever recommended [CDP] and any other investments to his clients. And he said no. He was asked whether he had personally invested after the firm had said no, and he said no, he hadn't because of the check, the investment wasn't until he got the check. He was asked whether he had ever recommended that Mr. [Customer JDS] invest in [CTL] which he said no until shown the document where he told Mr. [Customer JDS] to invest a million dollars." Hearing Tr. 279 (Matoesian).

<sup>237</sup> RX-37. *See also* CX-2; RX-34; RX-35; RX-36.

<sup>238</sup> Hearing Tr. 147 (Petty); Hearing Tr. 383, 437 (Miller).

resign. The head of the Firm told Miller he had placed the Firm at risk and that it might lose its licenses due to Miller's actions.<sup>239</sup> Miller insisted in email correspondence that the Firm had failed to identify to him the specific policy or reason for asking him to leave the Firm. He portrayed himself as not understanding the reason for the Firm's decision. Until they gave him an explanation, he declined to resign.<sup>240</sup> The Firm then terminated him.<sup>241</sup>

## **E. Credibility, Reliability, And Probative Value Of The Evidence**

### **1. Miller**

The Extended Hearing Panel finds that Miller generally was not credible. His explanations for his actions and his statements in various contemporaneous emails were frequently at odds with one another.

For example, the Extended Hearing Panel finds Miller's claim that he lied to multiple friends multiple times in numerous emails is not credible. The Hearing Panel does not believe that Miller was merely pretending to help SW, the CDP promoter. The contemporaneous email correspondence reveals that Miller worked closely with SW in promoting the investment to a number of people, some of whom purchased an interest in CDP and some of whom did not. Similarly, the Panel does not believe that Miller was only flattering KG, the promoter of the KBI investment. The emails show that KG went to Miller first in the hope that he could assist in finding partnership investors, and then as an entrée to Customer JDS when he needed a loan. Miller spoke positively of KG and the investment to Customer JDS. Customer JDS testified that in this instance Miller was an entrée to Customer JDS.

The Extended Hearing Panel also does not find Miller's testimony regarding the instructions from Biebel credible. The record establishes that Biebel was careful and specific in cautioning Miller against discussions of CDP with clients. Miller could not have forgotten or misunderstood that he was directed to avoid talking about CDP with clients.

Miller's credibility was further undermined by his responses to Matoesian's questions in the Firm's investigation. She testified that he denied recommending that Customer JDS invest in CTL until he was shown the document in which he told Customer JDS to invest \$1 million. She also testified that the Firm found him evasive, which caused the Firm "to lose faith" in him.

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<sup>239</sup> Hearing Tr. 383 (Miller).

<sup>240</sup> RX-34; RX-35; RX-36; Hearing Tr. 381-95 (Miller).

<sup>241</sup> RX-37; CX-2; Hearing Tr. 381-86, 394-95 (Miller).

Miller spoke with his client, Customer JDS, and his friend, MP, about his treatment by the Firm. Both of them had invested in the Firm when Miller joined it. They knew that Miller was one of the Firm's best producers and they did not want to lose him. Customer JDS also was concerned that Miller had gotten a "raw deal." Based on what Miller had told them, Customer JDS and MP did not think that what Miller had done was serious. So they called the head of the Firm to try to persuade the Firm to reinstate him. They said they would indemnify the Firm for any repercussions. The Firm nevertheless stood by its decision to terminate Miller. Hearing Tr. 856-58, 906 (Customer JDS).

In addition, there was evidence of other occasions on which Miller was not truthful. For example, when Miller tried to deposit \$1,000 in the CDP account at the Firm and JW asked him if he had obtained approval, he told her he had oral approval. But his supervisor, Petty, testified that he knew nothing about Miller’s own investment in CDP. He did not give any such approval.<sup>242</sup> Miller also told JW that he could not recall if he had filled out the paperwork. Given the circumstances and the importance of properly documenting any such outside security transaction, it is difficult to credit Miller’s statement that he did not remember if he had done it.

The Extended Hearing Panel is troubled by the accumulation of statements by Miller that lack credibility. As a consequence, the Panel relies primarily on the contemporaneous emails in reaching its conclusions. The Panel finds that the emails were not crafted to bolster a legal theory, and, contrary to Miller’s assertion that the emails have been taken “out-of-context,”<sup>243</sup> there are so many emails that the context is clear.

## **2. Clients**

Miller relies on the testimony and affidavits of his four clients—Customer JGH, Customer WKJ, Customer JDS, and Customer EWR—to show that he did nothing wrong and that the Firm was not at risk. The Extended Hearing Panel finds that the clients’ testimony and affidavits lack probative value. We explain our reasons below.

### **a. Client Testimony**

In their testimony, the clients remembered little about the specifics of their investments in CDP, CTL, and KBI.

- For example, Customer WKJ testified he had no direct recollection of where the money came from for his investment in CDP and he asked whether somebody in the hearing room had the transaction documents.<sup>244</sup> Customer WKJ likewise testified that he could not remember when he first learned about the opportunity to invest in CDP, but he “would assume” it was several months prior to the investment.<sup>245</sup>
- Customer JGH simply did not recall one way or another whether he gave Miller permission to share his telephone number with SW, the CDP principal,

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<sup>242</sup> Even if Miller had informed his supervisor orally, that was insufficient to comply with Rule 3040. Oral notification of intent to engage in a private securities transaction does not meet the requirement of prior written notice. *Stephen J. Gluckman*, Exchange Act Release No. 41628, 1999 SEC LEXIS 1395, at \*19-20 and n.28 (July 20, 1999) (citing *Dale M. Russell*, 51 S.E.C. 561, 563-64 & n.9 (1993)).

<sup>243</sup> Resp. PH Br. 4.

<sup>244</sup> Hearing Tr. 795-96 (Customer WKJ).

<sup>245</sup> Hearing Tr. 759 (Customer WKJ).

whether Miller sent him a package of material regarding CDP, or whether Miller recommended the investment to him.<sup>246</sup>

- Similarly, Customer JDS said that he did not remember when he first heard about the KBI opportunity or whether Miller might have first told him about it. Without a direct recollection, Customer JDS speculated. He said that “probably” the KBI principal called Miller and Miller “would have called me and said, [the principal] called him. That’s what I would think.”<sup>247</sup> When asked whether he then called the KBI principal, Customer JDS responded, “I could have. I don’t know if I did or not.”<sup>248</sup>

Instead, the clients testified that affidavits they had previously given were true and repeated many of the statements made in the affidavits. As discussed below, the circumstances and content of those affidavits are such that they have little probative value.

#### **b. Client Affidavits Created To Protect The Firm**

In mid-October 2012, after Miller’s termination, Matoesian interviewed 13 additional people in connection with Miller’s activities. They included SW and persons she had identified in her investigation as Firm clients and non-clients who had either invested in CDP or discussed it with Miller. Miller’s counsel contacted Miller’s clients in advance to let them know that Matoesian wanted to talk to them. After the interviews, Matoesian drafted affidavits for some of the people she spoke with and obtained their signatures. Eleven of these affidavits were introduced into evidence.<sup>249</sup>

The Extended Hearing Panel finds that the Matoesian affidavits were designed to protect the Firm from potential repercussions from Miller’s activities in connections with CDP, not to set forth the facts underlying Miller’s involvement with the transactions. In general, the Matoesian affidavits follow the same format and include the same language. Investors and potential investors simply absolve the Firm of any responsibility in connection with CDP. Those who invested in CDP acknowledged that the investment “had nothing to do with [BFE], or any of its current or former representatives, including Aon Miller.”<sup>250</sup> Each investor stated that he had made an independent decision to invest in CDP and that he understood that the Firm had no involvement with CDP.<sup>251</sup> The affidavits of those who did not invest in CDP contained similar

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<sup>246</sup> Hearing Tr. 967-69, 982-84 (Customer JGH).

<sup>247</sup> Hearing Tr. 865 (Customer JDS).

<sup>248</sup> Hearing Tr. 865 (Customer JDS).

<sup>249</sup> RX-2, at 4-11; RX-45 through RX-55 (affidavits of Customer MD, Customer EWR, JH1, NL, JH2, Customer WKJ, GC, affidavit with illegible signature, Customer JGH, SP, and AW); Hearing Tr. 294-310, 315-16 (Matoesian).

<sup>250</sup> RX-46; RX-50; RX-53; Hearing Tr. 315-17 (Matoesian).

<sup>251</sup> RX-46; RX-50; RX-53.

language distancing the Firm from responsibility. Those persons said that their “status as a non-investor in [CDP] had nothing to do with [BFE], or any of its current or former representatives, including Aon Miller.”<sup>252</sup>

Matoesian suggested what would be said in the affidavits and asked the persons interviewed to confirm the statements. Customer EWR, a Miller client who invested in CDP, testified about the process by which Matoesian obtained information from him and drafted the affidavit for his signature. Matoesian directed pointed questions to him—did you understand X; did you understand Y—to which he could answer yes or no.<sup>253</sup>

Matoesian explained that she was concerned with the Firm’s exposure. She testified that she wanted to talk to the 13 people “because, from the [F]irm’s standpoint, the [F]irm has risks of the people thinking that it involves us so that’s why we decided we needed to interview the people. That’s why a couple of the themes through our—did our—do you think that it involved us.”<sup>254</sup>

### **c. Client Affidavits Created For Purposes Of This Proceeding**

The four clients who invested in the charged transactions provided additional affidavits.<sup>255</sup> In these affidavits, the four investors largely vouch for Miller’s character as an honest, ethical, and moral person. They declare that they have known him a long time and consider him a friend. To the extent that they make statements regarding Miller’s involvement in the transactions at issue, the investors state that he did not solicit, recommend, endorse, or encourage them to make the investments. They further assert that whatever he did or said had no effect on their investment decisions. They emphasize that they made their own investment decisions, independent of anything Miller said or did. Finally, they assert that the Firm was not at risk because, even if they had lost money in the investments (which none of them did), they would never have sued the Firm or considered the Firm responsible.<sup>256</sup>

The Extended Hearing Panel finds that the four affidavits lack probative value for the following five reasons.

*First*, in their affidavits, the clients express opinions and conclusions, rather than facts. They equate “participation” with soliciting, recommending, endorsing, and having a determinative effect on their investment decisions, and they all deny that Miller did any of those

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<sup>252</sup> RX-45; RX-47; RX-48; RX-49; RX-51; Hearing Tr. 315-17 (Matoesian).

<sup>253</sup> Hearing Tr. 1071-74, 1093-94 (Customer EWR); RX-46.

<sup>254</sup> Hearing Tr. 328-29 (Matoesian). *See also* Hearing Tr. 330-31, 333-34 (Matoesian) for the circumstances of the interviews and affidavits.

<sup>255</sup> RX-38; RX-40; RX-41; RX-42.

<sup>256</sup> RX-38; RX-40; RX-41; RX-42.

things. The affidavits do not discuss what Miller actually said and did in connection with the investments.<sup>257</sup>

To the extent that these affidavits mention facts, they confirm that Miller discussed the investments with his clients. They do not undercut the email evidence of Miller's coordination with the promoters. Nor do they undercut the email evidence showing that Miller said things to encourage his clients to make the investments.

*Second*, the words used in the client affidavits to express their opinions and conclusions were chosen by Miller's counsel, not the investors. While this might not create a problem if the affidavits simply reported facts, it does create a problem here because the affidavits assert opinions and conclusions, using words that have legal significance.

Customer WKJ's testimony regarding his affidavit illustrates why this is a problem. Customer WKJ testified that he told Respondent's counsel what he thought, and counsel drafted the document. Because Customer WKJ agreed with what was written, he signed it. However, Customer WKJ also volunteered that he thought the word "endorsement," which was used in his affidavit (and the three others drafted by Respondent's counsel), was ambiguous.<sup>258</sup> Respondent's counsel did not ask him to explain his understanding of the word or why the word was ambiguous. Counsel only asked Customer WKJ to confirm that he thought he understood the meaning of the word.<sup>259</sup> As a result, even if Customer WKJ's opinion were relevant as to whether Miller "endorsed" the investment or the promoters, his opinion is not clear.

*Third*, the clients did not know all the facts. Particularly with respect to CDP, the investors were unaware that Miller was working with the promoter to market the investment, informing SW as to whether the investors were likely to invest and how much they might invest. Because they lacked all the facts, Miller's clients' opinions have negligible value.

*Fourth*, there was no evidence that Miller's clients are familiar with NASD Rule 3040 and its requirements, or with regulatory guidance on the definition of "participation" for purposes of the Rule. Nor is there any evidence that they knew that Miller's Firm had expressly defined "participation" broadly to include the kinds of activities in which Miller engaged. Their opinions are unhelpful for the additional reason that they do not know the standard for determining whether activities amount to "participation" under the Rule.

*Fifth*, to the extent that the clients assert that the Firm was not at risk because they would never have held the Firm responsible, the Extended Hearing Panel notes that it is easy for them to say so after the fact, when none of them lost money on the transactions. As Petty testified, in

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<sup>257</sup> RX-38; RX-40; RX-41; RX-42.

<sup>258</sup> Hearing Tr. 802 (Customer WKJ).

<sup>259</sup> Hearing Tr. 802 (Customer WKJ).

speaking of wedding vows, things can go awry in ways one cannot anticipate.<sup>260</sup> Customer JDS acknowledged that sometimes business associates and even close friends sue one another.<sup>261</sup>

The Extended Hearing Panel does not question these investors' honesty, credibility, or sincerity. However, the Panel declines to substitute their opinions and conclusions, as filtered through Respondent's counsel's words, for the Panel's own conclusions as to whether Miller's activities constituted "participation" within the meaning of NASD Rule 3040.

### **III. CONCLUSIONS OF LAW**

#### **A. Miller Participated In The Five Transactions Charged In Violation Of NASD Rule 3040**

##### **1. Applicable Rules**

NASD Rule 3040(a) states that an associated person may not "participate" in a private securities transaction "in any manner" except in accordance with the Rule. Rule 3040(e) defines a private securities transaction as any securities transaction outside the regular course or scope of the associated person's employment.

Rule 3040(b) sets forth detailed disclosure requirements. It requires an associated person to provide written notice to his or her FINRA-regulated broker dealer employer prior to participating in any private securities transaction. The notice must describe in detail the proposed transaction, the person's proposed role in it, and any compensation the person might receive in connection with the transaction.

Under Rule 3040(c), where a transaction could involve compensation to the associated person and the transaction is approved, the FINRA member firm is required to supervise the transaction as though it were executed on the firm's behalf. If the firm does not approve a proposed transaction involving compensation, the associated person is prohibited from participating in any manner, directly or indirectly.

If a securities transaction does not involve compensation, Rule 3040(b) still requires an associated person to give prior written notice to the firm. Under Rule 3040(d), the firm is then required to provide prompt written acknowledgment. In the firm's discretion, the firm also may require the person to adhere to specified conditions in connection with participation in the transaction.

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<sup>260</sup> Hearing Tr. 160 (Petty).

<sup>261</sup> Hearing Tr. 885 (Customer JDS).

One of the purposes of NASD Rule 3040 is to protect investors from the hazards of unmonitored sales of securities. Another is to protect securities firms from loss and litigation.<sup>262</sup> The Rule is important for both reasons.<sup>263</sup> It ensures that associated persons and securities transactions are subject to appropriate oversight and regulation. The Rule plays a crucial role in the regulatory system, and its abuse triggers the need for significant sanctions.<sup>264</sup>

FINRA Rule 2010 (like its identical predecessor, NASD Rule 2110) is an ethical conduct Rule. It requires the observance of “high standards of commercial honor and just and equitable principles of trade.” It is well established that a violation of other NASD and FINRA rules, including a violation of Rule 3040, is inconsistent with the “high standards” required by the ethical conduct Rule, and so also constitutes a violation of FINRA Rule 2010.<sup>265</sup>

## 2. “Participation” Is A Broad Term

NASD Rule 3040 uses the word “participate,” which is a word that broadly applies to all kinds of activities. It encompasses solicitation, recommendation, and endorsement, but it is not limited to those activities. The Rule confirms that it covers a broad range of activities by declaring that it applies to participation “in any manner.” It would be contrary to the express language of the Rule to apply it only to instances where an associated person solicited, recommended, or endorsed an investment. Those words could have been easily inserted into the Rule if they were the limit of the Rule’s mandate—but they were not.

FINRA’s predecessor, NASD, gave guidance on the meaning of the word “participation” more than 35 years ago. NASD reminded associated persons that “participation” in a securities transaction includes “introducing customers to the issuer, arranging and/or participating in meetings between customers and the issuer, or receiving a referral or finder’s fee from the issuer.”<sup>266</sup> Under that guidance, just introducing a customer to an issuer or arranging for a

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<sup>262</sup> CX-4. (NASD Notice to Members 01-79 (NASD Reminds Members Of Their Responsibilities Regarding Private Securities Transactions Involving Notes And Other Securities And Outside Business Activities)). *See also Michael Frederick Siegel*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459, at \*46 (Oct. 6, 2008) (quoting *Chris Dinh Hartley*, Exchange Act Release No. 50031, 2004 SEC LEXIS 1507, at \*13 n.17 (2004)).

The 1979 Notice to Members, sometimes referred to as the Private Securities Transactions Interpretation, became the basis for what is now NASD Rule 3040. The Rule made more clear the supervisory and oversight responsibilities of firms after receiving notice from their associated persons. NASD Notice To Members 85-84 (New Rule of Fair Practice Relating to Private Securities Transactions).

<sup>263</sup> *Robin Bruce McNabb*, Exchange Act Release No. 43411, 2000 SEC LEXIS 2940, at \*23 and n.40 (Oct. 4, 2000); *Gluckman*, 1999 SEC LEXIS 1395, at \*38.

<sup>264</sup> *Dep’t of Enforcement v. Fox Fin. Mgmt. Corp.*, No. 2012030724101, 2015 FINRA Discip. LEXIS 8, at \*37-38 (OHO Mar. 9, 2015); *appeal docketed* (NAC Apr. 2, 2015).

<sup>265</sup> *See Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14 (Jan. 9, 2009), *aff’d*, 586 F.3d 122 (2d Cir. 2009), *cert. denied*, *Heath v. SEC*, 2010 U.S. LEXIS 3029 (U.S. Apr. 5, 2010); *Gluckman*, 1999 SEC LEXIS 1395, at \*22. *See also CMG Inst. Trading, LLC*, No. 2006006890801, 2010 FINRA Discip. LEXIS 7, \*3 n.2 (NAC May 3, 2010); *Dep’t of Enforcement v. Trende*, No. 2007008935010, 2011 FINRA Discip. LEXIS 54, \*11 and nn.12 & 13 (OHO Oct. 4, 2011).

<sup>266</sup> CX-4.



meeting between a customer and an issuer could be “participation.” While receipt of a fee would also amount to participation, the guidance was written in the disjunctive. Compensation is not necessary to a finding of “participation.” Indeed, the Rule specifically applies to all securities transactions, including both those that involve compensation and those that do not.

The SEC has consistently declared that “participation” in a private securities transaction is to be construed broadly.<sup>267</sup> It has emphasized that the Rule prohibits participation “in any manner,” declaring, “Rule 3040’s reach is very broad and encompass[es] the activities of an associated person who not only makes a sale but who participates in any manner in the transaction.”<sup>268</sup>

In various combinations, different activities have been found to constitute “participation” within the meaning of NASD Rule 3040. They include the following: (i) referring investors to people offering the investment or introducing investors to the investment; (ii) providing contact information to enable promoters to talk to potential investors; (iii) providing marketing material to investors; (iv) explaining a venture to investors; (v) making a recommendation, or endorsing an investment or its management by providing a favorable opinion or indicating a personal desire to invest; (vi) facilitating the mechanics of a transaction by processing documents or payments; (vii) meeting with promoters; (viii) touring the facility of a business in the process of raising the capital; and (ix) providing advice about an investment.<sup>269</sup>

### 3. Miller “Participated” In The Five Transactions

The Extended Hearing Panel concludes that Miller “participated” in the five transactions at issue. Miller was either working with the issuer or serving as an intermediary between the issuer and the investor. He was not simply reacting to client questions and instructions. Miller’s assertion that he was “irrelevant” to the transactions at issue<sup>270</sup> and his assertion that he “had nothing to do” with the transactions<sup>271</sup> are simply wrong.

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<sup>267</sup> *Harry Friedman*, Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at \*13-14 and n.8 (May 13, 2011).

<sup>268</sup> *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at \*32-33 and n.22 (Sept. 24, 2015) (internal quotations omitted), quoting *Gluckman*, 1999 SEC LEXIS 1395, at \*17 and n.24. *See also Abbondante v. SEC*, Exchange Act Release No. 53066, 2006 SEC LEXIS 23, at \*28 (Jan. 6, 2006) (“Conduct Rule 3040 is broad in scope and is not limited merely to solicitation of an investment”), *aff’d*, *Abbondante v. SEC*, 209 F. App’x 6, at \*8 (2d Cir. 2006).

<sup>269</sup> *Abbondante*, 209 F. App’x 6, 2006 U.S. App. LEXIS 30982, at \*7-8; *Friedman*, 2011 SEC LEXIS 1699, at \*20-21 and n.15; *Mark H. Love*, Exchange Act Release No. 49248, 2004 SEC LEXIS 318, at \*1-4, \*8-10 (Feb. 13, 2004); *John P. Goldsworthy*, Exchange Act Release No. 45926, 2002 SEC LEXIS 1279, at \*29 (May 15, 2002); *Gluckman*, 1999 SEC LEXIS 1395, at \*15-17; *Dep’t of Enforcement v. De Vietien*, No. 2006007544401, 2010 FINRA Discip. LEXIS 45, \*5-12, \*27-28 (NAC Dec. 28, 2010); *Dep’t of Enforcement v. Ryerson*, C9B040033, 2006 NASD Discip. LEXIS 17, at \*22 and n.22 (NAC Aug. 3, 2006).

<sup>270</sup> Resp. Reply 3.

<sup>271</sup> Resp. Reply 7.

In the case of the three CDP transactions, Miller identified potential investors to the promoter, strategized with the promoter in marketing the investment, distributed promotional materials, and updated the promoter on his discussions of the investment with his clients. He also endorsed or vouched for the principals, and expressed a degree of familiarity with and enthusiasm for the investment that amounted to a recommendation. He represented that he had carefully analyzed the investment and thought so well of it that he had invested in it himself. He also authorized the promoter to tell others that he had invested in CDP, apparently understanding that that information would have the effect of a recommendation or endorsement and encourage people to invest.

In the case of CTL, the auto loan fund, Miller was Customer JDS's proxy and intermediary, relaying information back and forth between the customer and the issuer, along with his own analysis and conclusion that it was "not a bad deal."

In connection with KBI, the loan to the drilling construction company, Miller introduced Customer JDS to the potential investment and reassured him that the promoter was not in "trouble." He endorsed KG, the promoter. Although the promoter and the investor negotiated the final terms of the transaction, Miller again served as an intermediary during the preliminaries.

#### **B. Respondent's Reading Of *Browne* To Impose A Causation Requirement Is Incorrect**

Miller's main argument against the charge that he violated NASD Rule 3040 is based on an SEC decision, *In re James W. Browne*.<sup>272</sup> Miller asserts that *Browne* stands for the proposition that Miller must have *caused* the transactions to have happened in order to be found to have participated.<sup>273</sup> Miller points to a statement in the *Browne* decision that Rule 3040 is violated where a representative takes "specific actions to effect the particular transaction." He relies on a dictionary definition of the phrase "to effect an event" to conclude that "effect" means to cause.<sup>274</sup> Miller then argues that he did not "cause" the transactions.<sup>275</sup>

*Browne* does not stand for the proposition Miller derives from it. That decision never uses the word "cause"—which certainly, for the sake of clarity and simplicity, it could and would have done if Rule 3040 only applies where a representative "causes" a transaction away from his firm.

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<sup>272</sup> *James W. Browne and Kevin Calandro*, Exchange Act Release No. 58916, 2008 SEC LEXIS 3113 (Nov. 7, 2008).

<sup>273</sup> Resp. PH Br. 23; Resp. Reply 1-5.

<sup>274</sup> Resp. PH Br. 26; Resp. Reply 1-2.

<sup>275</sup> Resp. PH Br. 1-2 (clients testified that Miller did not cause or have "any connection with their investment decisions"); Resp. PH Br. 7-14 (Miller had no effect on CDP investors' investment decisions; they made independent decisions); Resp. PH Br. 18 (Customer JDS would have invested in CTL without Miller); Resp. PH Br. 20 (Customer JDS would have made the loan to KBI without Miller); Resp. PH Br. 23 (assertion that the investors testified that Miller had "no bearing" on their independent investment decisions); Resp. Reply 6 (investors did not need Miller to participate in their investment decisions; they discussed their decisions with him as friends).

Furthermore, the decision describes NASD Rule 3040 as prohibiting “*involvement* in a private securities transaction outside the regular course or scope of employment without providing prior written notice to the member firm” (emphasis supplied).<sup>276</sup> The word “*involvement*,” like the word “*participation*” in the Rule, is a broad term encompassing all kinds of activities and connections to a transaction. For the decision to describe the Rule so broadly is inconsistent with limiting the application of the Rule to instances where a representative “*causes*” a private securities transaction.

In *Browne*, the SEC did not repudiate earlier precedents that emphasize the broad scope of Rule 3040. Rather, the SEC reiterated, “Our cases have consistently affirmed a broad interpretation of the Rule and its operative phrase, ‘participate in any manner.’”<sup>277</sup> Even after the *Browne* decision, the SEC has continued to instruct that NASD Rule 3040 should be interpreted broadly.<sup>278</sup>

Moreover, *Browne* is distinguishable from Miller’s case. In *Browne*, the charged transactions were solicited by the company directly. It was seeking additional investments from its shareholders. There was no evidence that the respondents were involved.<sup>279</sup> Their only connection was that they had introduced some of the existing shareholders to the entrepreneur who had started the business. The introductions were not for investment purposes (the persons introduced became suppliers and distributors or developed other business relationships with the entrepreneur), and the introductions occurred some two years before the charged transactions. The persons introduced for non-investment purposes did, at some point, become shareholders, but in transactions that were not charged.<sup>280</sup>

The SEC concluded that in those circumstances there was no “reasonably close factual nexus between the participatory conduct and a specific securities transaction.”<sup>281</sup> Respondent here argues that “factual nexus” means a “causal connection” to the securities transaction at issue.<sup>282</sup> Again, if the SEC had meant to say “causal connection,” it could have clearly said so in the decision. It did not. There is no reason to think that the SEC meant to say “causal connection” but used different words. Respondent has cited no authority that equates “factual nexus” with “causal connection.”

In fact, there is good reason to reject Respondent’s interpretation of *Browne* as requiring a “causal connection.” It would make little sense for the SEC to narrow the application of NASD Rule 3040 only to instances where an associated person “*causes*” a transaction away from his

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<sup>276</sup> *Browne*, 2008 SEC LEXIS 3113, at \*3 n.3.

<sup>277</sup> *Browne*, 2008 SEC LEXIS 3113, at \*23 and n.24.

<sup>278</sup> *Friedman*, 2011 SEC LEXIS 1699, at \*13-14 and n.8.

<sup>279</sup> *Browne*, 2008 SEC LEXIS 3113, at \*27-29

<sup>280</sup> *Browne*, 2008 SEC LEXIS 3113, at \*4-5, \*26-28.

<sup>281</sup> *Browne*, 2008 SEC LEXIS 3113, at \*30.

<sup>282</sup> Resp. PH Br. 26.

firm, because the Rule requires *prior* notice of participation in all securities transactions, and *prior* approval where compensation may be involved. Whether a representative has “caused” a transaction, however, can only be determined after the transaction occurs. If the applicability of the Rule could not be determined until after the transaction happened, as Respondent’s interpretation would have it, then the prior notice and approval requirements would become meaningless. The SEC could not possibly have intended that result.

### **C. Respondent’s Other Arguments Are Also Flawed**

#### **1. Application Of Rule 3040 To Miller’s Conduct Does Not Put Other Representatives At Risk**

Miller argues that it would be “unworkable” for the industry if the Extended Hearing Panel were to apply NASD Rule 3040 to his conduct. He contends that it would lead to the imposition of sanctions for simply answering a client’s questions about an investment away from the firm or following the client’s instructions to transfer funds. Miller further asserts that such discussions between representatives and their clients are necessary to serve the clients’ interests and satisfy “know your customer” requirements imposed by FINRA Rules.<sup>283</sup> He frames his argument in an alarmed tone, asserting that Enforcement “seeks to outlaw” conduct that representatives engage in every day, and that Enforcement’s interpretation of Rule 3040 is so overbroad that it provides no notice that such everyday conversations are at risk of sanctions.<sup>284</sup>

Respondent’s counsel elicited testimony in support of the argument. Miller and his supervisor at the Firm, Petty, testified that it is not uncommon for clients to call up a broker and bounce ideas off him about something they are thinking of doing, and that such discussions are not considered inappropriate.<sup>285</sup> Miller testified that, like any broker, he cultivated relationships with his clients in order to understand their financial needs and increase his book of business.<sup>286</sup>

Miller’s argument is based on a faulty premise. It presupposes that Miller did nothing more than respond to his customers’ questions and follow instructions regarding the transfer of funds. As discussed above, Miller did far more.

A bright line divides Miller’s conduct from that of a representative whose client mentions an investment opportunity with which the representative has no prior connection. On one side of the line is the ordinary representative, whose involvement with an investment away from his firm is limited. In ordinary circumstances, a representative discusses the investment with the client at the client’s initiative and follows any instructions the client may give. The representative has no connection to the issuer or persons on the other side of the transaction.

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<sup>283</sup> Resp. PH Br. 1-2, 28.

<sup>284</sup> Resp. Reply 4-5. *See also* Resp. PH Br. 27-28.

<sup>285</sup> Hearing Tr. 105-08, 112-15, 118-24 (Petty); Hearing Tr. 368-69 (Miller).

<sup>286</sup> Hearing Tr. 368-69, 371-72 (Miller); Resp. PH Br. 5.

On the other side of the bright line is Miller. In the five charged transactions, he was either working with the promoters of the investment or serving as a bridge between them and his client. He was involved in constant communications with the promoter of CDP about marketing the investment. He acted as a proxy for the CTL investor, and analyzed and recommended the investment. He introduced the KBI investment and endorsed the promoter to the investor. In all these transactions, Miller played an active role. He therefore “participated” in them.

Miller’s argument is also based on a faulty understanding of the word “participation” within the meaning of NASD Rule 3040. The word signifies a level of involvement in a transaction beyond simply commenting on an investment not offered by one’s firm when a customer mentions it and following a customer’s remittance instructions. Activities such as those Miller engaged in—working with issuers to identify potential investors, distributing marketing materials, arranging and attending meetings with potential investors and issuers, endorsing promoters, recommending investments and the amount of money to be invested, and acting as a proxy or an intermediary between investor and promoter—constitute activities to facilitate and encourage a transaction. Such activities constitute “participation.”

## **2. Application Of Rule 3040 Does Not Turn On Whether Customers Lose Money Or Complain**

Miller asserts that no customer complained about his conduct or was harmed by it. The customers did not lose money on the transactions at issue, and they claim that they would never have held the Firm responsible, even if they had. Miller argues that in pursuing the case Enforcement has “ignor[ed] the sworn testimony of the very people and entities Rule 3040 is designed to protect.”<sup>287</sup>

It is well established that customer harm is not required to find a violation of a FINRA or NASD Rule.<sup>288</sup> In particular, it is not required to find a violation of NASD Rule 3040.<sup>289</sup> The failure to comply with the prior notice requirement of the Rule deprives investors of appropriate supervision of their investments regardless of whether they suffer financial harm.<sup>290</sup>

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<sup>287</sup> Resp. PH Br. 35-36.

<sup>288</sup> *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 SEC LEXIS 3583, at \*68 and n.137 (Nov. 15, 2013) (“The absence of . . . customer harm is not mitigating, as our public analysis focus[es] . . . on the welfare of investors generally.”) (citing *Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at \*26 and n.25 (Feb. 24, 2012) (internal quotations omitted)); *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at \*17 (Apr. 11, 2008) (holding that applicants’ failure to comply with NASD rule “are not mitigated because those failures did not, in themselves, produce a monetary benefit to Applicants or result in injury to the investing public”), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009); *Coastline Fin., Inc.*, Exchange Act Release No. 41989, 1999 SEC LEXIS 2124, at \*16-17 (Oct. 7, 1999) (rejecting absence of customer harm as a mitigating factor for sanctions).

<sup>289</sup> *Mielke*, 2015 SEC LEXIS 3927, at \*63 and n.62.

<sup>290</sup> *Mielke*, 2015 SEC LEXIS 3927, at \*63.

This makes sense, because NASD Rule 3040 addresses risks: the risk that a customer may lose money, the risk that a firm may be subject to regulatory action for failure to supervise its employee's activities, and the risk of litigation against the firm to recover losses. Rule 3040 is designed to allow a firm to assess the risk involved with its employee's proposed participation in a transaction and determine whether to permit it, supervise it, and take responsibility for it. Application of the Rule cannot depend on whether the risk actually materializes after-the-fact.

This case is even worse. Miller not only deprived his Firm of any opportunity to assess the risks associated with CTL and KBI by failing to notify the Firm before becoming involved with them, but he promoted CDP in direct contravention of his Firm's evaluation, conclusion, and instructions to him.

In a manner of speaking, whenever the guard rails are down, then the Rule is violated. That no accident occurred does not mean the violation can be ignored.

### **3. Respondent's Professed Good Intentions Are No Defense**

Miller argues that he was only trying to provide good customer service and he did not intend to do harm. He further argues that Enforcement is improperly trying to create a strict liability standard under Rule 3040.<sup>291</sup>

The short answer to these arguments is that a violation of NASD Rule 3040 does not require scienter. Liability is imposed regardless of motivation or a misapprehension that the Rule does not apply.<sup>292</sup> Again, as noted above, the Rule must work this way in order to permit firms to assess the risks involved in a particular transaction in advance of the transaction.

### **4. Respondent's Supplemental Authority Highlights The Unethical Nature Of His Conduct**

Respondent's supplemental authority, *Department of Enforcement v. Lee*,<sup>293</sup> does not assist his defense. That decision only highlights the unethical nature of his conduct.

The respondent in *Lee* had been suspended by the State of Washington's securities regulator from acting in a principal or supervisory capacity for twelve months. This rendered her statutorily disqualified from associating with a member firm in *any* capacity. She applied to FINRA to be able to continue associating with her firm, albeit not as a principal or supervisor. Enforcement opposed her application, alleging that she had violated the suspension order. The NAC approved her application to continue associating with her firm, finding that she had substantially complied with the restrictions imposed on her by the suspension order.

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<sup>291</sup> Resp. PH Br. 5, 7, 24.

<sup>292</sup> *De Vietien*, 2010 FINRA Discip. LEXIS 45, at \*29. See also *Alvin W. Gebhart, Jr.*, Exchange Act Release No. 53136, 2006 SEC LEXIS 93, at \*57-58 (Jan. 18, 2006).

<sup>293</sup> *Lee*, 2015 FINRA Discip. LEXIS 51.

Enforcement pursued a separate proceeding in which it charged Lee with unethical conduct. The *Lee* decision Miller filed in this case as supplemental authority dismissed the charge of unethical conduct.

The dismissal was based on facts far different than this case. Lee had sought legal counsel regarding what she could and could not do, and she made numerous good-faith efforts to comply with requirements imposed by the suspension order.

In contrast, we find here that Miller consciously evaded restrictions on his conduct. He certainly did not consult his supervisor or compliance before engaging in the violative conduct. There is no evidence that he made any attempt at the time to check whether his conduct was permissible. Accordingly, Miller’s quotation from *Lee* that “good-faith efforts at compliance” that fall short of “perfection” do “not inexorably lead to the conclusion” that conduct is unethical<sup>294</sup> is completely irrelevant here. Miller did not merely fall short of “perfection.” He engaged in a pattern and practice of violative conduct.

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In sum, we find that Miller violated NASD Rule 3040. As a consequence of that Rule violation, he also violated the ethical conduct Rule, FINRA Rule 2010.

#### **IV. SANCTIONS**

##### **A. Sanction Guidelines And Analysis**

Adjudicators in FINRA disciplinary proceedings look to the FINRA Sanction Guidelines in considering the appropriate sanction for a violation.<sup>295</sup> The Guidelines contain recommendations for sanctions for many specific violations, depending on the circumstances and any mitigating or aggravating factors. The Guidelines also contain General Principles and overarching Principal Considerations that are applicable in all cases.<sup>296</sup> The Guidelines are intended to be applied with attention to the regulatory mission of FINRA—to protect investors and strengthen market integrity.<sup>297</sup> They are intended to be remedial and to deter the respondent and others from similar misconduct in the future.<sup>298</sup>

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<sup>294</sup> Resp. Supp. 3.

<sup>295</sup> FINRA Sanction Guidelines (2015) (“Guidelines”), <http://www.finra.org/industry/sanction-guidelines>.

<sup>296</sup> Guidelines at 2-7.

<sup>297</sup> Guidelines at 1, Overview.

<sup>298</sup> Guidelines at 2, General Principle 1.

Ultimately, however, adjudicators must do what they believe is right in the circumstances of the particular case. The Guidelines “do not prescribe fixed sanctions.”<sup>299</sup> They are “not intended to be absolute.”<sup>300</sup>

## 1. Specific Guidelines For Private Securities Transactions

For violations of NASD Rule 3040 and FINRA Rule 2010, the Guidelines contain specific recommendations. The range of sanctions depends on the dollar amount of the transactions, the length of time over which the selling away occurred, and the number of customers involved.<sup>301</sup>

The Guidelines list a number of Principal Considerations that are particularly applicable to this type of violation. They include the following:

- dollar volume of sales,
- number of customers,
- length of time during which selling away activity occurred,
- whether there was a violation of federal or state securities laws or SRO rules,
- whether respondent was affiliated with or had a beneficial interest in the issuer, and
- whether respondent tried to create appearance that the employer firm had sanctioned the activity, as, for example, when using the employer’s facilities and name for the activity.<sup>302</sup>

With respect to these specific Principal Considerations, the Extended Hearing Panel concludes the following:

- The five transactions at issue involved a substantial sum totaling more than \$1.5 million. For any amount over \$1 million, the Guidelines indicate that a 12-month suspension up to a bar can be appropriate. An associated person also may be fined from \$5,000 to \$73,000.<sup>303</sup>
- The number of customers involved in the charged transactions is not high, however, only four.<sup>304</sup>

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<sup>299</sup> Guidelines at 1, Overview.

<sup>300</sup> *Id.* and at 3.

<sup>301</sup> Guidelines at 14.

<sup>302</sup> Guidelines at 14. Precedents look at the number of transactions, number of customers involved, duration of violative conduct, whether the associated person had a beneficial interest in the transaction, whether the associated person willfully disregarded known requirements, and whether there were attempts to conceal the activity. *McNabb*, 2000 SEC LEXIS 2040, at \*25 and n.43.

<sup>303</sup> Guidelines at 14.

<sup>304</sup> Guidelines at 7, Principal Consideration 18; Guidelines at 14.



- The length of time during which Miller participated in transactions away from his Firm extended roughly from April 2012 through September 2012. That five-month period is not particularly long.<sup>305</sup>
- Miller was not affiliated with the issuers in these transactions, except to the extent he purchased a half-unit of CDP. However, he disclosed that information to the customers.<sup>306</sup>
- Miller used his Firm's facilities. He corresponded with his clients about the private securities transactions on his Firm's email system, and he scanned and faxed investment marketing materials on the Firm's equipment. He did this during regular office hours. There was no evidence suggesting that Miller did this because he was attempting to create the impression his Firm sanctioned the activity, and his customers testified that they knew that the investments they were making were not offered through the Firm.

Nevertheless, Miller's use of the Firm's systems made it vulnerable to litigation claims if customers lost money on the investments and tried to recover losses from the Firm. The customers' after-the-fact assertions that they would not blame the Firm if they lost money did not prove that there was no risk of litigation. Miller's practice also left the Firm vulnerable to a regulatory action for failure to supervise activity that was taking place through its systems. In the circumstances presented by this case, the Firm would have had difficulty in either context, private litigation or regulatory proceeding, in denying responsibility for activities undertaken using its systems.

The Firm's response to its discovery of what Miller was doing and its investigation show how serious it thought the risks to it were. As one senior executive of the Firm said to Miller, such misconduct had the potential to "bring a firm down," given the amount of money involved.<sup>307</sup>

## **2. Aggravating Factors**

Miller's misconduct was the result of intentional acts. He was not merely negligent or reckless.<sup>308</sup> Particularly in connection with CDP, he consciously evaded specific instructions and

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<sup>305</sup> During the period prior to that, Miller's activities were aimed at persuading his Firm to become the selling agent for CDP. The Extended Hearing Panel does not treat his activities then as misconduct.

<sup>306</sup> Guidelines at 14.

<sup>307</sup> Guidelines at 14; Hearing Tr. 276-77 (Matoesian).

<sup>308</sup> Guidelines at 7, Principal Consideration 13.

the requirements imposed by a long-standing and well-known Rule. This is an aggravating factor.<sup>309</sup>

Miller's attitude toward his regulatory obligations has been testy. He was irritated by compliance restrictions at his former firm, and he expressed irritation with compliance and product review when he was at BFE. He disregarded clear instructions not to become involved with promoting the CDP investment. He was evasive when his Firm investigated. In general, he does not acknowledge or accept responsibility for his misconduct, an aggravating factor.<sup>310</sup> Miller evidences a reckless disregard for regulatory requirements, another aggravating factor.<sup>311</sup>

The proof of similar misconduct by Miller further tips the scale in favor of stringent sanctions. The misconduct was part of a pattern and was not an aberration.<sup>312</sup> First, Miller himself "participated" in a CDP transaction without giving his Firm the required prior written notice. Contrary to his assertion that this is irrelevant,<sup>313</sup> this failure to follow his Firm's policies and procedures sheds light on the likelihood of future misconduct. Second, Miller worked with the CDP promoter and discussed CDP with other clients who did not happen to invest. He engaged in these activities without giving his Firm notice. If the clients had invested in CDP, those transactions could have been charged, too. Third, during Matoesian's investigation, Miller admitted to her that he had engaged in similar discussions of unidentified additional investment opportunities with Customer JDS without giving his Firm notice.

### **3. Absence Of Mitigating Factors**

Miller has emphasized that his customers were not harmed. The Guidelines, however, make clear that stringent sanctions may be imposed for this type of misconduct regardless of whether the particular customers have been harmed. The Guidelines specifically contemplate that an individual may be barred for engaging in private securities transactions, even when there is no customer loss.<sup>314</sup> Indeed, in general, the absence of customer harm is not mitigating. Public interest analysis focuses on the welfare of investors generally, and the risks misconduct may pose even if those risks do not materialize in the particular case.<sup>315</sup> The absence of customer harm, thus, is not mitigating.

Miller's assertion that he was only trying to provide good customer service also does not mitigate his misconduct. As discussed above, a violation of Rule 3040 does not require scienter.

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<sup>309</sup> Guidelines at 7, Principal Consideration 15.

<sup>310</sup> Guidelines at 6, Principal Consideration 2.

<sup>311</sup> Guidelines at 2, General Principle 2.

<sup>312</sup> Guidelines at 6, Principal Consideration 9.

<sup>313</sup> Resp. PH Br. 3 and n.2.

<sup>314</sup> Guidelines at 10 (discussion of monetary sanctions). In such circumstances, as a general rule, no fine will be imposed. *Id.*

<sup>315</sup> *Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at \*45 (Jan. 9 2015).

Miller's motivation is irrelevant. Furthermore, regardless of motivation, a representative has no prerogative to opt out of giving his or her firm prior written notice. Under the Rule, a representative must allow the firm to evaluate the risk involved in any given transaction.

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Miller did not appreciate the seriousness of his misconduct at the outset of the Firm's investigation and initially thought he could do something "to fix" it. Once he could not secure "forgiveness" for his failure to seek permission, he started down a path of denying any wrongdoing and could not turn back, even as his position became more and more untenable in the face of evidence contradicting Miller's testimony.

The Extended Hearing Panel suspends Miller from associating with any FINRA member in any capacity for two years and fines him \$50,000.<sup>316</sup>

## **V. ORDER**

For violating NASD Rule 3040 and FINRA Rule 2010 by participating in private securities transactions without providing the required prior written notice to his Firm, Respondent Aon D. Miller is suspended from associating with any FINRA member in any capacity for two years and fined \$50,000. If this decision becomes FINRA's final disciplinary action, Miller's suspension shall commence on February 16, 2016, and end on close of business on February 15, 2018.

Respondent is also ordered to pay costs, which amount to \$9,474.35, including a \$750 administrative fee and the cost of the transcript. The fine and assessed costs shall be due on a date set by FINRA, but not sooner than thirty days after this decision becomes FINRA's final disciplinary action in this proceeding.

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Lucinda O. McConathy  
Hearing Officer  
For the Extended Hearing Panel

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<sup>316</sup> The Extended Hearing Panel has considered and rejects without discussion any other arguments made by the Parties that are inconsistent with this decision.