

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant

v.

JOEL E. MOSKOWITZ
(CRD No. 500460),

Respondent.

Disciplinary Proceeding
No. C9B040093

Hearing Officer – DMF

HEARING PANEL DECISION
June 3, 2005

Summary

Respondent disseminated and attempted to disseminate options communications to the public without obtaining advance approval from his employer firm and NASD, in violation of Rules 2220 and 2110, and such communications failed to comply with the content requirements for options communications in various respects, in violation of Rules 2220 and 2110. For these violations, Respondent is suspended for a total of 35 business days, fined a total of \$12,500 and assessed costs.

Apearances

David B. Klafter, Esq. and Jonathan M. Prytherch, Esq., Woodbridge, NJ (Rory C. Flynn, Washington, DC, Of Counsel) for Complainant.

Respondent pro se.

DECISION

I. Procedural History

The Department of Enforcement filed a Complaint on October 26, 2004, charging that Respondent Joel E. Moskowitz produced and distributed, or attempted to distribute, written options communications to the public without obtaining advance approval from his employer firm and NASD, in violation of Rules 2220 and 2110. The Complaint also charged that in various respects the communications did not comply with the content

standards for such communications set forth in Rule 2220. Moskowitz filed an Answer contesting the charges and requested a hearing, which was held in Woodbridge, New Jersey, on March 30, 2005, before a Hearing Panel that included a Hearing Officer, a current member of the District 9 Committee and a former member of the District 9 Committee.

II. Facts

A. Respondent

Moskowitz has been employed in the securities industry since the 1970s. At the time in question, he was employed by UBS PaineWebber, Inc. as a General Securities Representative. He is currently registered in the same capacity with another NASD member. He has no prior disciplinary history. (CX 1.)¹

B. Moskowitz's Options Communications

In late November 2002, while reviewing Moskowitz's outgoing customer correspondence, Michelle Oliveira, the assistant to the manager of the UBS branch at which Moskowitz worked, noted that one letter from Moskowitz to a customer enclosed a three-page document describing a "covered call" options investing strategy.² She recognized this as a document that she had submitted to UBS Compliance for review on Moskowitz's behalf in 1999; she also recalled that, in response, she had received a facsimile from Compliance dated August 11, 1999, stating:

due to various industry regulations [Financial Advisors] cannot create marketing material for options. You can only use pre-approved marketing material supplied by the [Chicago Board Options Exchange (CBOE)]. This material must be used in its entirety. It cannot be altered in any way.

¹ In this decision, CX refers to Complainant's Exhibits and Tr. refers to the transcript of the hearing.

² Under the branch office's procedures, Oliveira screened all outgoing customer correspondence before providing it to the branch manager for his review.

Option material must only go to pre-qualified and suitable investors only [sic].³

In light of this, Oliveira returned the customer correspondence to Moskowitz's box along with a copy of the 1999 facsimile from Compliance, and advised the branch manager. After the branch manager spoke to Moskowitz, at the branch manager's direction she ordered, for Moskowitz's use, copies of the CBOE brochure that the Compliance facsimile identified as the only approved options material. Shortly thereafter, however, in December 2002, in reviewing another piece of Moskowitz's customer correspondence she discovered Moskowitz had stapled his document inside a CBOE brochure that he was sending to the customer. She immediately brought this to the attention of the branch manager. (Tr. 27-61; CX 3, 7-10.)

Louis Sforza, the branch manager, confirmed that in November 2002, Oliveira advised him that she had intercepted Moskowitz's correspondence to a customer containing the options document, and gave him a copy of the 1999 Compliance facsimile (which pre-dated his appointment as branch manager). Sforza spoke to Moskowitz, gave him a copy of the 1999 Compliance facsimile and advised him that he could only use the CBOE brochure, and he directed Oliveira to order a supply of the CBOE brochures for Moskowitz's use. In December 2002, Oliveira informed him that Moskowitz had included his document inside a CBOE brochure that he was attempting to send to a customer. Sforza then spoke to Moskowitz, who said he had included his document because he felt it "was easier to understand." Sforza brought these facts to the attention of his superiors and Moskowitz was terminated. (Tr. 63-90; CX 4.)

³ Oliveira testified that her practice upon receiving such a communication from Compliance is to provide a copy to the Financial Advisor, in this case Moskowitz, although she had no specific recollection of giving Moskowitz a copy of the 1999 Compliance facsimile when she received it. (Tr. 36, 56-57.)

Moskowitz confirmed that he created a three-page document explaining a covered call options strategy, but said he was uncertain when he created it. The first page of the document explained covered calls in general terms, while the second and third pages set out a hypothetical example showing possible outcomes of such a strategy using a particular security. Moskowitz testified that he submitted the document to UBS for review; he said he was uncertain when that happened, but did not dispute Oliveira's testimony it was in 1999. He testified, however, that he did not receive a copy of the Compliance facsimile, and that no one told him that he either could or could not use his document at that time. (Tr. 91-92, 94-95, 98-108; CX 7-10.)

Moskowitz admitted that he began using his document without receiving affirmative approval from UBS. According to Moskowitz, while the text of the first page of his document remained the same during the entire period he used it, he frequently revised the last two pages, containing hypothetical outcomes for a covered call investment, to reflect the current market values for particular securities that he was recommending. Enforcement's exhibits include examples of the document taken from Moskowitz's UBS computer after he was terminated that reflect hypothetical investments in several different options over a period from at least January 2001 until December 2002, when he was terminated. Thus, it is clear that he used the document for at least that period. (Tr. 94-96, 108-09; CX 10.)

Moskowitz acknowledged that, during this period, he included the document in outgoing correspondence to customers, but claimed he did not know whether the correspondence was actually mailed, or was intercepted by the branch office's review process. He also admitted delivering the document directly to customers. Moskowitz

disputed, however, Oliveira and Sforza's testimony that he attempted to enclose a copy of the document in correspondence to a customer in November 2002. (Tr. 98, 100, 102-03, 107-12.)

According to Moskowitz, he met with UBS Compliance in September 2002, with Sforza sitting in. At that meeting, he was told for the first time that he could not use his document but rather could only use the CBOE brochure, and from then on he used the CBOE brochure, not his document. He testified that Oliveira and Sforza lied when they testified that Oliveira discovered his document in customer correspondence in November 2002 and that Sforza at that time gave him the 1999 Compliance facsimile and told him to use only the CBOE brochure. He did admit that, in December, he enclosed the last two pages of his document, which provided hypothetical results of a covered call strategy for a particular security, inside a CBOE brochure that he was sending to a customer. He denied including the first page of his document and said that he included those pages instead of completing, by hand, a "Covered Call Worksheet" that was part of the CBOE brochure because he was in a hurry to leave on vacation. He acknowledged that this was "a very serious mistake." (Tr. 92, 109-12.)

III. Discussion

As the CBOE brochure explains:

Covered call writing is either the simultaneous purchase of a stock and the sale of a call option or the sale of a call option against a stock currently held by an investor. The writer receives cash for selling the call but will be obligated to sell the stock at the strike price of the call if the call is assigned to his account. In other words, an investor is "paid" to agree to sell his holdings at a certain level (the strike price). In exchange for being paid, the investor gives up any increase in the stock above the strike price.

...

If an investor is neutral to moderately bullish on a stock currently owned, the covered call might be a strategy he would consider. ... The covered

call can also be used if the investor is considering buying a stock on which he is moderately bullish for the near term.

(CX 8.)

Options communications are governed by Rule 2220. Among other things, Rule 2220(b) provides: “All advertisements, sales literature (except completed worksheets), and educational material issued by a member or member organization pertaining to options shall be approved in advance by the Compliance Registered Options Principal or designee.” Thus, even if Moskowitz did not receive a copy of the 1999 Compliance facsimile, that would not provide a defense to the charges. Under the Rule, he was required to obtain affirmative approval from UBS before utilizing his document; he admits that he had no such approval. Rule 2220(c) also requires that “every advertisement and all educational material of a member or member organization shall be submitted to [NASD’s] Advertising/Investment Companies Regulation Department … at least ten days prior to use”⁴ Moskowitz never submitted his document to NASD for approval.⁵

At the hearing, Moskowitz argued that to establish a violation, Enforcement was required to prove that his document was actually sent out to customers. He contends that because Oliveira testified that she intercepted the November and December correspondence containing his document, Enforcement did not meet its burden. The

⁴ Enforcement contends, and the Hearing Panel agrees, that Moskowitz’s options document may properly be characterized as “educational material,” which Rule 2220(a)(2) defines as “explanatory material distributed … to customers … that is limited to information describing the general nature of the standardized options market or one or more strategies.” Moskowitz’s materials described generally a covered call strategy, and Moskowitz testified that in his materials he intended “to boil down the discussion of Selling Covered Calls … and to stimulate conversation about is this something for the client to do or not to do.” (Tr. 92.)

⁵ Although Rule 2220 refers to a member’s options materials, Rule 0115 provides: “Persons associated with a member shall have the same duties and obligations as a member under these Rules.”

Hearing Panel finds, however, that the Rule requires registered representatives such as Moskowitz to obtain required approvals before placing options correspondence in the mail. Otherwise, the protection that the Rule is intended to afford for customers would depend on the firm intercepting non-complying communications, rather than on the pre-use clearance process contemplated by the Rule.

Moskowitz also claimed that Oliveira and Sforza fabricated their testimony regarding the alleged November mailing, and that the December mailing included only the last two pages of his document, not the complete document as Oliveira testified. The Hearing Panel had an opportunity to observe and question all three witnesses and found the testimony of Oliveira and Sforza generally credible. Oliveira, in particular, answered all questions posed to her in a candid, forthright and consistent manner. The Hearing Panel, therefore, rejects Moskowitz's claim that they fabricated any aspect of their testimony.

Moskowitz's testimony at the hearing that he recalled being told not to use his document during the September meeting differed from his testimony during his on-the-record (OTR) interview in April 2003. During his OTR, he testified that his options document "might have been the subject of a meeting that we had at the last compliance meeting, but again, I don't recall." Later in his OTR, Moskowitz testified that the September Compliance meeting involved "the correspondence policy." (CX 5,71-73 (emphasis added).) Further, there is nothing in the correspondence from UBS to NASD staff during the investigation indicating that Compliance told Moskowitz not to use his document at the September meeting. The Panel concludes, therefore, that assuming Moskowitz met with Compliance in September 2002, the meeting did not address

Moskowitz's options document. (If it did, he admits that he violated the directions he received by including at least the last two pages of his document in the December correspondence.) In any event, the Panel credits the testimony of Oliveira and Sforza regarding the November and December 2002 incidents.

Moreover, even apart from the November and December attempted mailings, Moskowitz admitted that he distributed his document to customers in person and included it in other correspondence that he placed in outgoing mail. As noted above, the various versions of the document found on Moskowitz's computer after he was terminated show that he used the document over a period of years without ever obtaining the required approvals from UBS and NASD, in violation of Rule 2220.

Moskowitz's failure to obtain the required approvals was particularly important because his document failed to comply with the content requirements for options communications set forth in Rule 2220 in various respects. Rule 2220(d)(2)(A) provides that options "communications shall include a warning that options are not suitable for all investors," but Moskowitz's document did not include such a warning. Furthermore, "[a]ny statement referring to the potential opportunities or advantages presented by options shall be balanced by a statement of the corresponding risks [which] shall reflect the same degree of specificity as the statement of opportunities" Moskowitz's document, however, explained the potential advantages of a covered call strategy at length and in detail without any balanced statement of the potential risks. Rules 2220(d)(2)(C)(i) and (iv) also prohibit the identification of any specific security or the use of projected performance figures, yet the various versions of Moskowitz's document

in the record all contained hypothetical performance figures for specific options that Moskowitz was recommending.

Rule 2220(d)(2)(C)(v) requires that educational material include “the name and address of a person or persons from whom the appropriate current Options Disclosure Document(s), as defined in SEC Rule 9b-1 of the [Securities Exchange] Act [of 1934] may be obtained.” Moskowitz’s document did not include this information. In describing a covered call strategy, Moskowitz’s document acknowledged the possibility that the price of the stock covering the call might decrease before the call expired, but stated: “This however is no more risky than buying any stock, and being paid for the call reduces the downside risk.” This statement is incomplete and misleading, in violation of Rule 2220(d)(1)(B), for a number of reasons. Among other things, as explained by the Options Industry Council on its website:

The risk of real financial loss with this [covered call] strategy comes from the shares of stock held by the investor. This loss can become substantial if the stock price continues to decline in price as the written call expires. At the call's expiration, loss can be calculated as the original purchase price of the stock less its current market price, less the premium received from initial sale of the call.⁶

The Hearing Panel, therefore, finds that Moskowitz disseminated, or attempted to disseminate, options communications without obtaining the required approvals from UBS and NASD, in violation of Rule 2220, and that such communications failed to satisfy the content requirements for options communications, in violation of Rule 2220. By violating Rule 2220, Moskowitz also violated Rule 2110.⁷

⁶ http://www.888options.com/learning/strategies/covered_call.jsp

⁷ See, e.g., Steven J. Gluckman, Exch. Act. Rel. No. 41,628, 1999 SEC LEXIS 1395, at *22 (July 20, 1999) (a violation of another NASD rule or regulation constitutes a violation of Rule 2110).

IV. Sanctions

For failure to obtain required approval of options communications, in violation of Rule 2220, the Sanction Guidelines recommend a fine of \$1,000 to \$15,000 and consideration of a suspension for up to five business days. NASD Sanction Guidelines at 83 (2005). Enforcement recommends that Moskowitz be fined \$2,500 and suspended for five business days.

The Guidelines direct Adjudicators to consider whether the failure was inadvertent, whether the communications were circulated widely and whether an individual respondent failed to notify a supervisor of a communication with the public. In this case, Moskowitz's failure to obtain approval for his document was not inadvertent; he utilized his document over a period of years; and he used and attempted to use it without notifying his supervisor. These factors amply support the sanctions recommended by Enforcement.

For the use of communications that fail to comply with the content requirements of Rule 2220, the Guidelines recommend a fine of \$1,000 to \$20,000 and, where the content violation was egregious, a suspension of up to 60 days. For the intentional or reckless use of misleading communications, the Guidelines recommend more severe sanctions: a fine of \$10,000 to \$100,000 and a suspension of up to two years. Guidelines at 84-85. Enforcement recommends a \$10,000 fine and a 30 business days suspension.

The Hearing Panel concludes that Moskowitz's violation of the content requirements of the Rule were egregious. Moskowitz's document failed to satisfy many of Rule 2220's content requirements, and he used it even though he knew he had not received approval from the firm. The Panel finds, however, that Moskowitz's content violations did not involve the intentional or reckless use of misleading communications.

He clearly intended to explain covered call writing accurately, and to the extent that his document was misleading, it was attributable to a lack of balance and completeness, rather than any misrepresentations. Further, as Moskowitz noted, his document was introductory educational material; before actually investing, a customer had to qualify as an options investor under UBS's standards and receive an options disclosure document as required by SEC Exchange Act Rule 9b-1.⁸ Therefore, the Panel finds that the sanctions proposed by Enforcement are appropriate.

V. Conclusion

Respondent Joel E. Moskowitz disseminated and attempted to disseminate options communications to the public without obtaining advance approval from his employer firm and NASD, in violation of NASD Rules 2220 and 2110, and such communications failed to comply with the content requirements for options communications in various respects, in violation of Rules 2220 and 2110. For these violations, he is fined a total of \$12,500 and suspended from associating with any NASD member in any capacity for a total of 35 business days. In addition, he is ordered to pay costs in the amount of \$1,513.70, which includes an administrative fee of \$750 and the cost of the hearing transcript. These sanctions shall become effective on a date set by NASD, but not earlier than 30 days after this decision becomes NASD's final disciplinary action in this matter, except that if this decision becomes NASD's final disciplinary action Moskowitz's

⁸ Rule 9(b)-1 requires each options market to provide a disclosure document for options customers providing a range of important information regarding options investing, and requires broker/dealers to provide a copy of such a disclosure document to each customer before approving the customer's account for options trading or accepting any order from the customer to purchase or sell an options contract.

suspension shall begin at the opening of business on August 1, 2005 and end at the close of business on September 19, 2005.⁹

HEARING PANEL

By: David M. FitzGerald
Hearing Officer

Copies to: Joel E. Moskowitz (*via overnight and first class mail*)
Financial Consultant Group, LLC (*via overnight and first class mail*)
David B. Klafter, Esq. (*electronically and via first class mail*)
Jonathan M. Prytherch, Esq. (*electronically and via first class mail*)
Rory C. Flynn, Esq. (*electronically and via first class mail*)

⁹ The Hearing Panel has considered and rejects without discussion all other arguments of the parties.