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## NASD OFFICE OF HEARING OFFICERS

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| DEPARTMENT OF ENFORCEMENT,<br><br>Complainant,<br><br>v.<br><br><br><br>Respondent. | Disciplinary Proceeding<br>No. C9B040020<br><br>Hearing Officer – JN<br><br>**HEARING PANEL DECISION**<br><br>April 6, 2005 |

**Department of Enforcement did not carry its burden of proving by a preponderance of the evidence that Respondent failed to take appropriate supervisory action.**

**Appearances**

For the Complainant: Michael J. Newman, Esq. and Jonathan M. Prytherch, Esq.

For the Respondent: Howard R. Elisofon, Esq. and David M. Rosenfield, Esq.

## DECISION

### I. Introduction

On March 11, 2004, the Department of Enforcement filed a Complaint against two respondents: [CM], a broker in [a] branch office of A.G. Edwards & Sons, Inc., and [Respondent], the manager of that office. The Complaint charged CM with excessive trading of mutual fund shares in a customer's account and Respondent with supervisory liability.

CM settled, and the proceeding went forward as to Respondent, who strongly contested the allegations of supervisory liability. A Hearing Panel, composed of an NASD Hearing Officer and a current and a former member of District Committee 9 (each of whom had supervisory experience, including service as branch managers), conducted hearings on October 25, 26, and 27 and November 19 of 2004. The parties filed post-hearing briefs on February 11, 2005. In this Decision, Enforcement's exhibits are cited with the prefix "CX," Respondent's exhibits are cited with the prefix "RX," and the pages of the hearing transcript are cited with the prefix "Tr."

## II. Background

### A. The Excessive Trading Allegation

CM was a young broker who had been with the [] branch for over three years. Among his clients was JL, a wealthy retired businessman in his early eighties. As here relevant, this customer maintained two Edwards accounts, and deposited about $200,000 in each when the trading in question began. From January through June of 2001, and again from February through June of 2002, JL, on CM's recommendations, engaged in over sixty transactions involving purchases and sales of various mutual funds.

Under NASD Rule 2310, "a registered representative [must] have reasonable grounds for believing, on the basis of information furnished by the customer, and after reasonable inquiry concerning the customer's investment objectives, financial situation, and needs, that the recommended transaction is not unsuitable for the customer." Dane S. Farber, Exchange Act Release No. 49,216, 2004 SEC Lexis 277, at *13 (Feb. 10, 2004) (citations omitted). A broker who involves a customer in inappropriate excessive trading violates this Rule. See, e.g., Michael David Sweeney, Exchange Act Release No. 29,884, 1991 SEC LEXIS 2455 (Oct. 30, 1991). Switching of mutual funds "on its face may raise" suitability questions (IM-2310-2 (b)(3)). Indeed, "[i]t has long been established that a pattern of mutual fund switching is presumptively violative of NASD rules." Dep't of Enforcement v. Respondent, No. C07010037, 2003 NASD Discip. LEXIS 16, at **21-22 (NAC May 13, 2003).

Nothing in this record rebuts that presumption. CM suggested all of the trades and, they generated some $53,000 in commissions (CX-24). Many of the transactions involved sales charges. Finally, the customer held the funds for relatively short periods of time, ranging from two weeks to nine months (CX-24), a circumstance which is wholly inconsistent with the principle that "[m]utual fund shares generally are suitable only as long-term investments and cannot be regarded as a proper vehicle for short-term trading…"[1]

The Panel concludes that even if some of the transactions arguably might have been proper (e.g., certain purchases in 2002, discussed later), the overall switching, taken as a whole, occurred over substantial periods of time and constituted excessive trading.

CM was later fired because of the above activities and subsequent questions involving other customers[2] (Tr. 131, 1259). As noted, he settled the charges against him in this case, agreeing to a six-month suspension and restitution of $22,500 (his share of the relevant commissions) to the customer.[3] Meanwhile, the firm settled with the customer, paying him $35,000, a number which was also related to commissions (RX-28; Tr. 1258).

B. Respondent

Respondent manages [an] A.G. Edwards & Sons, Inc.'s branch office. At the time of the events in issue, that office employed over 20 brokers, who handled about 10,000 accounts, had as much as $1 billion in assets under management, executed tens of thousands of trades per year, and grossed about $10 million in commissions between 2001 and 2002 (Tr. 807-809). He entered

[1] Dep't of Enforcement v. Respondent, 2003 NASD Discip. LEXIS 16, at *22, citing Kenneth C. Krull, 53 SEC 1101, 1105 (1998), aff'd Krull v. SEC, 248 F.3d 907 (9th Cir. 2001).

[2] The events involving other customers apparently occurred well after cessation of JL's trades (see CX-2, pp. 24-25) and are not relied upon here by Enforcement as relevant to Respondent 2's alleged supervisory liability.

[3] Enforcement's Pre-Hearing Submission, p. 2, fn. 1; Tr. 27.

the securities industry as a trainee in 1978 and has been employed by Edwards as a branch manager since 1986 (Tr. 777). He has no disciplinary history (Tr. 415-416, 782).

Respondent recognized his responsibility "[t]o make sure the brokers are acting the way they are supposed to act" (Tr. 791). He abided by all of the firm's procedures, and, indeed, implemented various supervisory steps which went beyond Edwards' own requirements.[4] His conduct with regard to the instant transactions complied with the firm's procedures. As discussed below, although the Firm maintained warning devices to automatically alert managers about possible mutual fund switching, the trades at issue here were so structured that they did not set off those alarms. Nor did Respondent have any particular reason to distrust or suspect CM at that time; the broker had been employed with the branch for over three years and had never been the subject of any complaint (Tr. 814, 1192).

Enforcement acknowledged that Respondent cooperated fully in the staff's investigation (Tr. 540). Respondent's firm supported him throughout the instant hearings, supplying its Eastern Regional Director, a Surveillance Supervisor, and a litigation specialist as witnesses on his behalf. After seeing and hearing Respondent, the Panel was left with the impression of a knowledgeable, careful, and responsible professional.

## III. Supervisory Liability

### A. Introduction

NASD Rule 3010(a) requires that firms maintain a supervisory system "reasonably designed to achieve compliance with" securities laws and regulations and with NASD Rules. That Rule and Rule 2110's mandate for high standards of commercial honor and just and

[4] These included: sending new account cards to customers to assure accuracy, requiring branch manager approval of certain transactions at dollar levels below Edwards' requirement, review of "large trades" reports, review of (and questions about) the daily blotter, and requiring letters which show that margin customers understood the transactions and possible ramifications. (Tr. 799, 800, 802-804, 806-807).

equitable principles of trade, require that supervisors act reasonably under the particular circumstances. Dist. Bus. Conduct Committee v. William A. Lobb, No. C07960105, 2000 NASD Discip. LEXIS 11, at **16-17 (NAC Apr. 6, 2000).

Enforcement has the burden of showing that Respondent "failed to reasonably exercise" his authority, and for that purpose, "[i]t is not enough to demonstrate that an individual is less than a model supervisor or that the supervision could have been better" (Id.). A supervisor's conduct may be reasonable under the circumstances, even if it was "not perfect."[5]

B. The Alleged Red Flags

The Complaint set out five specific "red flags" which, according to Enforcement, should have led Respondent to do more than he did. (Complaint, ¶ 16). Much of the hearing focused on those items, and the Panel now turns to them.

1.) "The pattern of switches in JL's accounts"

The Panel agrees with Respondent's argument that the trading patterns in JL's account were extremely difficult to detect. Indeed, the transactions escaped the firm's screening devices and only came to light several months later, when Respondent reviewed a three-month commission report which led him to send an activity letter.

Respondent reviewed daily blotter reports, but such documents reflected only the activity of a particular day. As explained by Edwards' Regional Director (who had responsibility for 65 branches, including the [] office), "it's exceptionally difficult" to detect a mutual fund switch, unless the transactions occur on the same day or the broker notifies the manager (Tr. 126-127). Respondent was responsible for over 20 brokers, who executed 30,000 to 40,000 trades per year

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[5] Lobb, 2000 NASD Discip. LEXIS 11, at *22, n.19 (citing Patricia Ann Bellows, Admin. Proceeding File No. 3-8951, 1998 SEC LEXIS 1521 (July 23, 1998)).

(Tr. 808-809). As he said, "on the blotter, it will show purchased $10,000 worth of Washington Mutual…. If they sold it two weeks later, for example, and [they are] supposed to be held for a long period of time, you are talking about maybe a thousand trades in between. You are not going to remember that. There is nothing to bring it back and correlate back to the other trade" (Tr. 842). Virtually every one of the switches in this case occurred after the passage of weeks or months (<u>See</u> CX-24) and, as Enforcement's own witness acknowledged, would not have been detectable on a daily review of blotters (Tr. 553-554, 562).[6]

The firm automatically issued "switch letters" to alert customers and branch managers of customer movement from one open-end fund to another. But Edwards viewed closed-end funds as the equivalent of equity securities and thus believed that moving from an open-end fund to a closed-end fund was not really a "switch," but was analogous to moving from a mutual fund to a stock (Tr. 640, 712, 716-717, 1256). For that reason, as the parties agree, CM's transactions for JL triggered neither switch letters to the customer, nor alerts to Respondent (Tr. 564-565, 569-570, 572).

The transactions thus circumvented detection by blotter review and also avoided the firm's mutual fund switching alarm system. As Respondent said, the trades were "done in a way to trick me, because they weren't done on the same day [and] they were done on things that did not create a compliance problem, as far as being switches. [Under Edwards' definition], [t]here were no switches whatsoever" (Tr. 1191).

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[6] One set of switches in the trust account did occur on the same day (February 28, 2002), but that was long after most of the trades in issue. Moreover, Respondent 2 believed for particular reasons, including the fact that Edwards recommended the funds purchased, that they made investment sense (Tr. 1224-1225, 1274-1275).

Enforcement argues that Respondent should have required CM to obtain certain "breakpoints" (volume discounts) in executing some of the transactions (Post-Hearing Br., pp. 16-17). The Panel finds that Respondent's conduct in this regard was not unreasonable.

First, a supervisor's review of each transaction would not necessarily illuminate breakpoint eligibility. Respondent testified that there are thousands of mutual funds with various breakpoints, and the Regional Manager explained that even funds within the same family may have different breakpoints (Tr. 128, 1055-1056). Unless a branch manager knew and retained every such number, an individual review of a particular transaction would not be meaningful in the context of discount potential.

Certainly Respondent did not ignore breakpoints. He believed that clients should receive them whenever possible, and they were employed for several of the transactions in issue (Tr. 548, 1055). On one occasion, he instructed CM to "double up" one of JL's purchases to achieve a discount which Respondent thought to be available (Tr. 874-875, 1068). Nor is a breakpoint an absolute goal which overrides all other considerations. As acknowledged by witnesses for both sides, the advantage of achieving the discount must also be balanced against considerations of quality and diversity in choosing particular funds (Tr. 125-126, 549, 581).

Finally, there was nothing in the particular circumstances which required heightened attention to breakpoints. Edwards maintained a system which automatically generates a warning whenever a transaction comes within 5% of being eligible for a breakpoint (Tr. 727, 839-840; RX-53B). The parties agree that none of the transactions in issue here triggered any such breakpoint alerts (Tr. 580-581, 730-731).

In short, Edwards' own alarm systems, designed to alert supervisors about mutual fund switching or breakpoint avoidance, did not go off. The Panel agrees with Respondent's argument that CM carried out his activities "in a manner that ensured that they did not hit the firm's radar screen" (Post-Hearing Br., p. 15). On this record, the Panel is not persuaded that Respondent acted unreasonably with regard to these matters.

2.) "CM's inconsistent explanations for certain switches in JL's accounts"

Although JL's objectives in one of the accounts changed from "tax free income" to "aggressive growth," the branch did not update its records, which continued to reflect that original goal (Tr. 826-827). Respondent's review of daily trading records thus caused him to question CM as to why certain transactions were inconsistent with that reported goal and to remind the broker to update the record where necessary (Tr. 857-863).

On May 7, 2001, after JL sold that account's holdings in a Nuveen tax-free Fund, Respondent asked "why sell?" (CX-18; Tr. 1085). CM responded: "out of conservative stock and into fixed income security to get a dividend on quarterly basis." (CX-18). Respondent further pursued the matter, asking "Why? Nuveen will pay monthly?" (Id.). Respondent then answered: "he kept some of the Nuveen but he's got a huge tax bill (100 k)" (Id.).

Enforcement argues that the inconsistency between these responses should have led Respondent to take additional action (Post-Hearing Br., p. 21).

The Panel does not see the inconsistency as rising to the "red flag" level. These communications occurred on or about May 7, 2001, a time when there was no reason for Respondent to have suspected wrongdoing. He certainly had not detected any pattern of excessive trading. Indeed, it was not until June of 2001, when he examined the three-month commission report and other records, that he had even the slightest suspicion and issued an activity letter to the customer (Tr. 879-880, 884, 994-995, 999-1000; RX-20).

Nor were CM's responses themselves cause for suspicion. Respondent viewed the first response as the kind of "flip or easy" answer which brokers often give in order to get supervisors "off their back" (Tr. 868-869). The industry members of this Panel credit that explanation as consistent with their supervisory experience. Respondent pursued the matter. The subsequent response referred to the customer's tax liability, a subject which he acknowledged having discussed with CM, who then told Respondent that JL had sold some property and thereby incurred a substantial tax bill (Tr. 242-243, 866, 1090, 1098). The customer testified that he had "a large capital gains tax" from the sale (Tr. 226). The second answer was thus logical and made sense to Respondent (Tr. 866, 869 1096), especially because he "never had a problem with [CM] before. There was never a complaint. There was no reason why I should not believe him" (Tr. 869).[7]

For the above reasons, the Panel is not persuaded that CM's responses in May of 2001 can fairly constitute the predicate for a finding of supervisory liability.

3.) "JL's complaints to CM, Respondent and A. G. Edwards regarding trading losses, commissions and the amount of trading in his accounts"

During the hearing, Enforcement focused on JL's complaint to Respondent, during a June 25, 2001 meeting, and on his subsequent communication to Edwards' president (Post-Hearing Br., pp. 24-27, 38-39). The Panel thus addresses those communications.

a.) The June 25, 2001 meeting with Respondent

In June of 2001, Respondent reviewed a three-month commission report and other documents which led him to send an activity letter to the customer. As a result, the customer

[7] As of May 7, 2001, JL had not yet complained, and there was no evidence of complaints from any other customer.

came in to meet with Respondent.[8] Respondent explained that during the meeting, the customer expressed two concerns: that he was sustaining losses and paying too much in commissions (Tr. 890). He told JL that the drop in value was consistent with declines in the overall market, showing him a computer monitor reflecting that trend, and that mutual funds were not short-term investments, but should be held for longer periods of time. Respondent advised the customer, who had already sold equity funds and purchased income funds, that he should retain his holdings and not trade any further (Tr. 896-898). As to commissions, the customer believed they were too high, based on "his way of figuring commissions, which I couldn't follow" (Tr. 903).[9]

Shortly thereafter, Respondent met with CM and told him of the meeting, explaining that JL was not happy with the performance and the commissions (CX-2, p. 79). He told CM that the customer "had a good situation and I think he should stay where he is" with no further trading (Id. at 79, 82-83). The broker "was fine with" those instructions (Id. at 79).

The customer, who was hard of hearing, claimed to have heard little of Respondent's advice and said that he viewed the meeting as "fruitless" and a waste of time (Tr. 81). But if that was so, Respondent certainly had no way of knowing. He testified that JL told him he understood the advice to stop trading and to stay where he was (Tr. 898-899). Respondent knew that the customer was hard of hearing, and in some instances, at JL's request, Respondent repeated things, which JL then understood (Tr. 891, 904) – a pattern consistent with the customer's demeanor before the Panel. Respondent said that during the meeting, JL did not appear to be frustrated or confused in any way (Tr. 903; CX-2, p. 80). The customer himself

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[8] Though the record does not contain a copy of that letter - some of the firm's documents were lost during a move (Tr. 822-824) – the customer himself acknowledged that he received it and came to the meeting as a result (Tr. 301).

[9] The customer continued to dispute the method of calculating the commissions, and the matter was finally resolved when Edwards paid him $35,000 in settlement of all claims.

acknowledged that he did not tell Respondent of any frustration or of an inability to understand what was said and could not remember ever telling Respondent that he could not hear him (Tr. 312). According to Respondent, the customer "said he was satisfied and thanked me" (Tr. 899).

Respondent reacted reasonably to his meeting with the customer. That JL's losses came at a time of market downturn is undisputed. Respondent's advice that the customer hold on to his income funds and stop trading was certainly appropriate (See Dep't of Enforcement v. Respondent, supra). JL made no complaint about CM, and, indeed, stated that he liked him; nor did the customer then make any allegation of unauthorized trading (Tr. 892-894). Moreover, JL's assurances that CM had discussed the transactions with him before they occurred left Respondent "absolutely certain" that there had been no unauthorized trading (Tr. 893). The customer seemingly understood the conversation and left without showing any sign of frustration. Respondent then met with CM and told him that JL "had done enough trading, leave him alone, and he did" (Tr. 1004). From Respondent's perspective, the mutual fund trading, apparently authorized by JL, would cease, and Respondent – about whom he had still not received a single complaint – would comply with his instructions to maintain the status quo in the accounts.

In the Panel's view, Respondent's responses to the June 25, 2001 meeting were reasonable.

b.) The July 25, 2001 Complaint to Edwards

By letter dated July 25, 2001, the customer wrote to Edwards' Chairman, complaining about the losses in the accounts and saying, for the first time, that the accounts reflected unauthorized "excessive 'frenzied' trading" (CX-11, pp. 2-3). Enforcement argues that this letter should have prompted Respondent to take some additional supervisory action. In the circumstances of this case, the Panel disagrees.

Though that letter showed that JL was no longer satisfied with the result of his June meeting with Respondent, the matter was now under review in the Edwards law department, which had sent a copy of the July letter to Respondent (Tr. CX-11, p. 4; Tr. 1179). Respondent told CM not to talk to the client about the complaint (Tr. 909), and deferred to the law department as a matter of company policy. As he explained:

> When you get a letter like this, it's accompanied by a memo with specific instructions from the law department on what to do. You're basically hands off. You give them what they want or anything else that may occur to you, or any other thing that happened. But you do not do an independent investigation. We're very strict there. Law department gets involved, you walk away. You do what they tell you to do, and that's it (Tr. 1181-1182).

When the law department handles a matter, the branch manager becomes merely a transmitter of information (Tr. 1267). As Respondent said, "[o]nce the law department is involved, you have to step away. You don't go talk to the client about it" (Tr. 1268). The firm's Regional Manager corroborated Respondent, stating that "once we turn over a complaint to the … law department, you don't do anything without it going through the law department" and that if the department saw serious misconduct, it would take the initiative by asking the manager what he planned to do (Tr. 133, 172). The staff's own witness confirmed that under "common practice throughout the industry," when a complaint reaches the law department, it "will take over and … tell them not to talk to the customer directly about the particular complaint, the details of the complaint" (Tr. 1311).

The law department's role in the context of a complaint rests on the need to centralize responses, while obtaining the views of attorneys who had no involvement in the particular transactions. Considering the practice of law department dominance in addressing complaints, the concomitant appropriateness of Respondent's instruction that CM not discuss the case with the customer, the absence of evidence that Edwards' department suggested any particular supervisory action, and the fact that Respondent had already instructed CM to stop any further trading in the accounts, the Panel is not persuaded that reasonable supervision required more.

4.) "CM's use of [Edwards'] letterhead to prepare a letter signed by JL regarding his account activity, in violation of [Edwards'] procedures"

On Aug. 16, 2001, by letter to Respondent, written on the branch's letterhead, the customer rescinded his prior complaint, stating that there was no unauthorized trading and that he understood there were sales loads paid for the mutual fund purchases (CX-11, p. 5). CM handed this letter to Respondent, who immediately realized that the broker had misused the letterhead and had disobeyed his instructions not to talk to the client (Tr. 909, 912-914). Respondent then told CM that he had committed an error in judgment, warned him not to repeat his abuse of the company letterhead or to contact a customer whose complaint was under review in the legal department, and placed him under closer supervision (Tr. 919-922, 936).[10]

The Department contends that Respondent should have imposed more serious discipline (Post-Hearing Br., pp. 26-28). To be sure, Respondent reasonably could have taken stronger action. But in the Panel's view, his alternative approach was also not unreasonable under the circumstances.

Respondent balanced Repondent 1's errors against other factors. Having sent JL's August 16, 2001 letter to the law department, which was reviewing the customer's complaint, he did not

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[10] Thereafter, a few weeks before October 16, 2002, Respondent 2 began pre-execution review of CM's tickets, noting an inappropriate trade in another customer's account (CX-2, pp. 24-25). Respondent fired CM in August 2003, following questions involving additional customers (Tr. 923, 926, 929, 1194-1195; CX-22). These other customer problems evidently occurred after JL's transactions, which ceased on June 4, 2005 (CX-24), and Enforcement does not rely on them here.

want to "shoot [from] the hip" and act "in the middle of the complaint" before completion of that review (Tr. 914-916, 1203). The department told him that "we'll handle it for now. Don't get involved with anybody else. Make sure he knows to stay away and not talk to" the customer (CX-2, p. 95). Moreover, Respondent considered the letter's recitals that the customer had no complaints about CM and had been consulted before each transaction, statements which were consistent with what JL had told Respondent in June (Tr. 916, 934).[11]

As to the letterhead, he believed that using it for a customer communication to the firm differed from using the stationery to make representations or guarantees for which the firm could be held responsible – the "primary reason" why the firm controls access to it (Tr. 912, 976). Respondent wanted to teach the broker, but not "destroy him," and Edwards' Regional Manager (with many years of supervisory experience), consulted with Respondent and approved the decision not to fire CM, but "to keep an eye on him and watch him and see if he can guide him in doing his business in a better manner" (Tr. 117-118, 131, 918, 933-934). Under all of these circumstances, the Panel believes that Respondent's decision was an equally reasonable alternative to discharging CM.

5.) "CM's failure to follow [Respondent's] directive not to engage in further mutual fund trades in JL's accounts"

As noted, the trading in JL's account stopped in June of 2001, after Respondent told CM to leave the account alone. In early 2002, the customer re-entered the market, acknowledging that in consultation with CM, he made various sales and subsequent purchases of funds to obtain better returns, yields, or rates (Tr. 355-356, 358-361). CM brought those transactions to Respondent, who approved them (Tr. 950-951).

[11] The customer acknowledged that he read and understood the letter before signing and knew that "rescind" meant to withdraw (Tr. 334, 336). Though Respondent's actions must be judged as events appeared to him at the time, the Panel notes that his perception of the rescission letter was consistent with JL's understanding.

Certainly Respondent could reasonably have chosen to continue his original instructions to do nothing in JL's accounts. But he was not compelled to take that approach. In the Panel's view, his decision to allow JL to trade was also reasonable.

First, Respondent never envisioned his June 2001 instructions to CM as imposing a permanent bar, which would last "forever" (Tr. 948). This was especially so after September 11, 2001, which "changed everything" (Id.). Investors were "scared," "frustrated," and did not know what to do (Tr. 946, 948, 1193). Respondent believed that you could not advise such people that they could "never do a trade again" and that because things had changed, "[y]ou can't keep someone in the same program forever" (Id.).

The vast majority of the 2002 transactions involved the customer's sales of certain funds, followed by the purchase of shares in the Van Kampen, Vestar, and Nuveen New Jersey municipal funds (CX-24). Respondent believed that each of the three funds reflected a sound investment.

The first two were bond funds, which Respondent saw as appropriate in the post 9/11 environment. He explained that each was recommended by Edwards and each was selling at a discount, which gave the customer a greater yield than what he was replacing, even allowing for contingent deferred sales charges (Tr. 945-946, 1225-1226, 1274-1275). Noting the customer's prior complaint, Respondent required that CM obtain signed Long Term Product Disclosure Documents, a step which exceeded the firm's own procedures (Tr. 953, 955-957, 963-965, 1137, 1164). The customer then signed those documents, acknowledging that he was selling certain funds with whose performance he was unhappy; that he was purchasing the Van Kampen and

Vestar shares with the hope of improving his position; that he was aware of specified deferred sales charges; and that he was authorizing the transactions (RX- 30 through RX-34).[12]

The Nuveen fund "had a very, very nice yield. And it paid monthly, which we like, and your yield was better if you paid monthly. It increased his yield and it was tax free. It made sense. It's where he should have been to begin with" (Tr. 1235). Moreover, JL's purchase of the Nuveen funds involved no commission charge to him, and for that reason Respondent did not require the above document (Tr. 1232-1233, 1253).

From Respondent's perspective, there were thus apparent reasonable bases for CM's recommendations that JL make the purchases. The two bond funds and the Nuveen tax free fund reflected good investments. In addition, Respondent saw the customer as "sharp" ("above the normal level of an investor") and believed that he had an income of over $100,000 and did not need to live on the money in question (Tr. 829, 898, 1211). Finally, the disclosure documents showed that JL, who certainly knew how to file a complaint, was apparently now knowingly consenting to the Van Kampen and Vestar transactions.

Considering all of the above circumstances, the Panel concludes that Respondent acted reasonably in allowing the customer to return to the market in the aftermath of the events of September 11, 2001.

## IV. Conclusion

Though there were occasions when Respondent reasonably could have taken stronger action, the Panel was not persuaded by a preponderance of the evidence that he failed to meet his

[12] Although the purchases rested on CM's recommendations, the customer acknowledged that he signed the documents, that he must have told CM of his desire to make the particular changes, and that he was aware of relevant sales charges (Tr. 108, 357-361).

supervisory responsibilities. It concludes that he reasonably exercised his supervisory discretion under the circumstances.

Jerome Nelson
Hearing Officer

April 6, 2005