NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. JOSEPH A. ZARAGOZA (CRD No. 2417735), Respondent.	Disciplinary Proceeding No. E8A2002109804 Hearing Officer – SNB **HEARING PANEL DECISION** July 27, 2007

For discretionary trading without written authorization in violation of Rules 2120 and 2510; for excessive trading in violation of Rules 2310 and 2110; and for failure to submit email correspondence for supervision and review in violation of Rule 2110, Respondent is barred in all capacities. In light of the bar, no further sanctions are imposed for the failure to make written disclosure of outside business activities, in violation of Rules 3030 and 2110.

Appearances

Kevin G. Kulling, Esq., and UnBo Chung, Esq., Chicago, IL, (Rory C. Flynn, Esq., and Mark P. Dauer, Esq., Of Counsel) for the Department of Enforcement.

Joseph A. Zaragoza, pro se.

DECISION

I. Procedural History

On September 11, 2006, the Department of Enforcement filed a four-cause Complaint. The first cause charges that Respondent Joseph A. Zaragoza, Jr. ("Respondent") failed to make written disclosure of outside business activities. The second cause charges that Respondent exercised discretion in the account of a public customer ("DV") without written authority. The third cause charges that Respondent engaged in excessive trading in DV's account. The fourth cause charges that Respondent failed to submit email correspondence for supervision and review before sending it to DV.

Respondent filed an answer denying the charges and requesting a hearing, which was held in Chicago, Illinois on February 27-28, 2007, before a Hearing Panel that included a Hearing Officer and two members of the District 8 Committee.[1] The Department of Enforcement called four witnesses, including Respondent. Respondent called two witnesses and testified on his own behalf.

II. Facts

A. Respondent

Between November 1999 and July 2002, Respondent was registered with NASD member firm David A. Noyes & Co. ("Noyes"). From July 2002, through the time of the hearing, he was associated with another NASD member firm. Respondent has no prior disciplinary history. CX-1.

B. DV Opens Account with Respondent

When he opened his account with Respondent at Noyes, Respondent's cousin, DV, was a 67 year-old, retired Inland Steel train operator. Tr. 17; CX-8. He opened his account in January 2000 by rolling over his 401(k) retirement account valued at approximately $192,000. Tr. 18-19; CX-8. As reflected in his new account form, DV had an annual income of less than $50,000, consisting of pension and social security payments, and a net worth between $100,000 and $500,000. Tr. 20-21; CX-8. DV listed his investment objectives as "growth" and "growth and income." CX-8.

DV opened his account with Respondent because Respondent was his cousin, and DV trusted him. Tr. 50. Before opening his account with Respondent, DV had no investment

[1] Enforcement offered Complainant's Exhibits "CX" 1-15, which were admitted without objection, except CX-7 and CX-11, which the Hearing Officer admitted over Respondent's objection. Respondent offered Respondent's Exhibits "RX" 2 and 13-17, which were admitted without objection, except RX-13, which the Hearing Officer admitted over Enforcement's objection. Citations to the hearing transcript are cited as "Tr. p."

experience other than purchasing his employer's stock through a monthly payroll deduction. Tr. 57-58. DV deferred to Respondent's judgment as to investments, only expressing a preference for "large" companies and a hope to increase the value of his account with a view toward taking required distributions when he reached age 70.[2] Tr. 22-23.

C. Trading Activity

Respondent began trading in DV's account on March 10, 2000, the day after the deposit of $192,000 in proceeds from DV's 401(k). Over the next 28 months at issue in the Complaint, Respondent executed 290 transactions in DV's account, the vast majority of which were marked "solicited." Tr. 102; CX-9, CX-13. During this period, Respondent purchased $955,956 in securities for DV's account, and the average monthly equity in the account was $78,548. Tr. 102-103; CX-13, CX-14. Respondent generated commissions of $32,912 for this trading activity, which generally involved technology stocks. Id.

In an attempt to time the market, Respondent engaged in a strategy of "in and out trading"[3] in DV's account. In one example of many, in the spring of 2000, Respondent bought and sold the securities of Vitesse Semiconductor Corp. ("Vitesse") numerous times over the

[2] While Respondent testified that DV mentioned some companies, Respondent later acknowledged that the trading and investment ideas were "more or less" or "mainly" his. Tr. 117-119.

[3] "The term "in and out" trading means the sale of all or part of a customer's portfolio, with the money reinvested in other securities, followed by the sale of the newly acquired securities." Costello v. Oppenheimer & Co., Inc., 711 F. 2d 1361, 1369 n. 9 (7th Cir. 1983).

course of slightly more than a month:

Date	Purchased/Sold	Number of Shares	Share Balance
4/24	purchased	300 shares	300 shares
5/16	purchased	100 shares	400 shares
5/19	sold	100 shares	300 shares
5/31	sold	100 shares	200 shares
6/5	purchased	100 shares	300 shares
6/7	sold	100 shares	200 shares
6/15	purchased	100 shares	300 shares
6/16	sold	100 shares	200 shares
6/22	sold	100 shares	100 shares
6/31	sold	100 shares	none

CX-9.

At the hearing, Respondent attempted to explain his trading strategy:

> at that point in time with the stocks skyrocketing up and falling really fast, it was difficult at that time…We looked technical – we did technicals. We did fundamentals. Nothing worked. But yeah, we tried to time the market. We got reports every day…research reports…trading reports, stocks to trade today or buy today…we were experts on technology companies and emerging growth companies…The point being is we did our research and we did try to time the market, and sometimes…it just did not work.

Tr. 257-258.

Enforcement calculated an annualized turnover rate for DV's account of 5.2,[4] and a commission (or cost) to equity ratio of 17.9%.[5] CX-13, CX-14. Respondent disputed Enforcement's calculation because it excluded DV's $25,000 investment in an annuity outside DV's account at Noyes. Respondent argued that if the annuity were treated as an investment, the turnover rate would be 4.56, and the cost to equity ratio would be 16.09%. The Panel did not find this difference to be material. However, it determined that Enforcement's calculations more accurately reflected the level of Respondent's trading in DV's account, because the annuity was not purchased through Noyes and was not held in DV's account there. Tr. 113.

D. Communications with DV Regarding Trading in the Account

As noted above, Respondent actively traded DV's account – engaging in 290 transactions during the 28 months at issue in this case. CX-13. Respondent claimed that he received oral authority from DV prior to executing each of these trades. Tr. 120-121. Respondent explained that DV's first language was Spanish and Respondent spoke very little Spanish. To compensate for this, DV and Respondent generally communicated through emails or they passed messages through Respondent's father, who served as a translator.[6] Id. Respondent used his personal internet account to send DV emails, rather than his account at Noyes. Tr. 140. He also acknowledged during his on-the-record interview ("OTR") conducted by the NASD Staff during

[4] Turnover rate is a well-accepted tool in evaluating the activity level of a securities account. It is "computed by dividing the aggregate amount of the purchases by the average cumulative monthly investment. The average monthly investment is the cumulative total of the net investment in the account at the end of each month, exclusive of loans, divided by the number of months under consideration." DBCC v. Pinchas, 1998 NASD Discip. LEXIS 59 at n. 16 (NAC June 12, 1998) (citations omitted), aff'd, Exch. Rel. Act No. 41,816, 1999 SEC LEXIS 1754 (Sept. 1, 1999).

[5] The cost-to-equity ratio "is sometimes expressed as the 'break-even cost factor.' The phrases refer to identical calculations. ... This calculation represents the percentage of return on the customer's average net equity needed to pay broker/dealer commissions and other expenses, such as margin interest. Put another way, because of the transaction costs related to trading, the account would need to appreciate that amount to break even." Pinchas, 1998 NASD Discip. LEXIS 59 at n.7 (citations omitted).

[6] DV testified at the hearing. The Panel found him to be fluent in English and easy to understand. Nonetheless, the Panel also observed that DV was not fully confident in his ability to speak English.

its investigation that he did not get approvals from anyone at Noyes prior to sending these emails.[7]

In contrast with Respondent's testimony, DV testified that he did not approve of Respondent's trades in advance. Rather, he generally learned about transactions after-the-fact from trade confirmations or emails from Respondent. Tr. 26, 33-35. DV specifically identified ten trades that he did not authorize, which occurred from October 2000 through April 2001. Tr. 32-33; CX-7. DV did not complain about this at the time, because, as an inexperienced investor, he did not know that Respondent was required to get his permission before initiating trades. Tr. 72; CX-7. DV also testified that he told Respondent to "go ahead, do the trading when you think is the best to do it. Don't wait for me to approve…and when I see something I don't like it, I tell your father right away." Tr. 72.

Enforcement introduced numerous email communications between Respondent and DV into evidence at the hearing. CX-10, CX-11. Contrary to Respondent's claim that he received prior authority for each trade, the emails demonstrated that in many instances, Respondent notified DV of trading activity in his account only after Respondent placed the trades. For example:

> October is the worst month in the market for everything. I will make changes when necessary, but not many. I recently bought some Intel at 37 5/8. It's up over 38 today.

CX-10 p. 2. (Email dated October 10, 2000).

> Today I picked up 100 shares of triquent semiconductor (TQNT). We already own 200, but much higher than were (sic) it is today. I bought it for 32.25, right now the stock is up over ten points. It is at 34.25. All of the stocks are doing well, Intel is up for us at 42 a share. Nokia is up over 8 points today. Remember

[7] During the hearing, Respondent claimed that he did not recall whether he obtained prior approval for the emails, and that he "may have" done so. Tr. 141. The Panel found this equivocation insufficient to outweigh his OTR admission. Moreover, Respondent's supervisor credibly testified at the hearing that he did not review and approve the emails. Tr. 187-188.

> what I said: even thought these stocks went down fast, they also can go up just as fast. I will be in contact with you if any situation develops.

CX-10 p. 5 (Email dated October 19, 2000).

> Uncle Diego, good news…I sold the stock for Vitesse today at 70.25…I've bought an excellent company called Cree Research. I've followed this company for years. If this stock goes 20% higher than where we bought it I will sell it to make you a profit.

CX-10 p. 8 (Email dated January 23, 2001).

> I recently bought a little bit of a company that your know, Intel. They have been down for quite some time, trading around 36. I'm looking for the stock to go to 42-45…if the nasdaq keeps doing well, your account is going to look better.

CX-10 p. 10 (Email dated January 24, 2001).

> …I did a few things recently. I sold half of the cree to book you some profits…A stock that I am going to put you in is Texas Instruments…

CX-10 p. 13 (Email dated February 1, 2001).

> …Also, let me say that I like to be active, meaning if a stock is up and you are at a profit, I may sell. For instance the Vitesse that I sold for you. You bought that stock at 58 and sold it at 70. also I sold have the CREE for you. You bought it at 33 and sold it at 37.25. Also, the DIGL, you bought the stock at 44, it is up 7 today so I sold a little bit. This time I will also do this if a stock is going down. I will sell it if a negative announcement comes out to minimize losses. I forgot to mention you also own AT&T.

CX-10 p. 15 (Email dated February 1, 2001).

> …I have been active in your account recently in a good way. …I just made you close to 1,000 dollars in one day on one stock. I bought you 1000 shares of Lucent at 7.61. today it jumped to 9.00. I sold it to take a quick profit for you. Like I said, I will continue to try to take profits for you when I can.

CX-10 p. 18 (Email dated April 19, 2001).

These emails were consistent with DV's credible testimony, and established that Respondent informed DV of trading activities in the account after they occurred rather than beforehand, as Respondent claimed. Moreover, even giving credit to the testimony of Respondent's father that he initially spoke with DV approximately once or twice a week, and

after approximately six or seven weeks his communications with DV trailed off to once or twice a month, communications with DV were not frequent enough to support Respondent's claim that he received authority in advance of the almost daily trading in the account.[8] Tr. 192, 196-197, 200.

E. Losses in DV's Account

On December 23, 2000, DV sent Respondent an email expressing concern to Respondent about losses in the account:[9]

> Joe I got your e-mail, please understand that is very hard for to write in English. The family don't help because they believe in a few more months all money will be gone. When we had around $146,000 I told your dad it would be better to buy CD's until market got better. You said we have sold companies and by the end of the year we should be almost even.

CX-11, p. 11.

Later, on June 19, 2001, DV sent Respondent another email:

> Hi Joey, how are you? Hey Joey sorry to have to tell you this but I'm concerned about my money. It seems to me you are doing to much "turning." Last month there were 23 transactions, are those too many? I lost $6,583.11. Your commission was $2,266. I hope to receive some better news from you.

CX-11, p. 21.

On November 9, 2001, DV again emailed Respondent:

> Hi Joey, please do me a favor. I want a good explanation: Why you din't (sic) buy CD's when I asked? On that time we have over $142,000. When there were $77,000 I told you I don't care to recooperate (sic), what I want is DO NOT LOST ANY MORE MONEY! I even told you DAD to tell you if you lost any more money, is on YOU, NO MY MONEY – BUY CD's…Joey, you have wasted away my life savings and so far: NO EXPLANATION AT ALL. Do you have any idea how I feel? My family don't talk to me. I live in a little room down in the basement. So I want a BIG AND LONG EXPLANATION WHY YOU WASTED AWAY MY $192,000.

[8] Respondent's father testified that he did not take notes of these conversations, and there could be a one or two day lag between his conversation with DV and his conversation with Respondent. Tr. 197-198. This also undercuts Respondent's claim that he received DV's prior approval for specific trades.

[9] Tr. 42-44.

CX-11, p. 29.

On cross examination, Respondent acknowledged that DV may have requested "conservative investments of CDs or bonds." Tr. 132-133. Respondent's father confirmed that DV said he wanted to buy CDs, and Respondent's father relayed this request to Respondent. Tr. 203. However, Respondent reviewed the research reports, and determined to "stay the course." Tr. 134. Unfortunately, the equity in the account fell dramatically over the period at issue. From DV's initial deposit of $192,000 in March 2000, DV withdrew approximately $41,000 over the course of the account, and closed the account in June 2002 with $17,000 – losing approximately $134,000. CX-9, CX-13. DV was required to file an arbitration claim to recover these losses. Tr. 271, 280.

F. Respondent Sells Jackson National Life Annuities

In late 2001 or early 2002, Respondent signed an agreement to sell annuities for Jackson National Life. Tr. 144-146; CX-4. Following this, in January and February 2002, Respondent sold Jackson National Life annuities to at least one of his customers at Noyes, HH, and received $4,400 in commissions for these sales. Respondent arranged for the commission statements to be mailed to his home address. Tr. 143-144; CX-3. Respondent did not provide written notice to Noyes of these sales on behalf of Jackson National Life.

Although he admits he did not provide written notice, Respondent claimed that his firm would have been aware of his arrangement with Jackson National Life based upon its review of all outgoing correspondence. Tr. 228-229. Specifically, Respondent introduced as an exhibit a copy of a Noyes envelope with a July 1, 2001, postmark, purportedly enclosing a handwritten note and Jackson National Life annuity application. Tr. 238; RX-16. While Respondent claimed that he sent these documents through the Noyes mail system, there is nothing to indicate that this

occurred, or that a Noyes supervisor actually reviewed it. Tr. 249. Moreover, during cross examination, Respondent acknowledged that these documents, if reviewed, would not put his firm on notice that he was to receive compensation for selling Jackson National Life annuities.[10] Tr. 240. Moreover, Respondent's supervisor, Michael O'Mara, credibly testified at the hearing that he had no knowledge of Respondent's arrangement with Jackson National Life. Tr. 181.

III. Violations

A. Exercise of Discretion without Written Authorization (Rules 2510 and 2120)

The Complaint charges that Respondent violated Rules 2120 and 2510 by engaging in discretionary trading in DV's account without written authorization.

NASD Conduct Rule 2510(b) provides that "No member or registered representative shall exercise any discretionary power in a customer's account unless such customer has given prior written authorization to a stated individual … and the account has been accepted by the member …."

The Panel found that Respondent exercised discretion over trading in DV's account without obtaining written discretionary authority. Although Respondent testified that he obtained DV's approval before executing each trade, that testimony was not credible. Respondent's own emails to DV, as quoted above, together with the testimony of DV, as well as Respondent's father, demonstrate that Respondent made many trades on his own without advance approval from DV.

[10] Enforcement pointed out at the hearing that on January 2, 2002, Respondent answered "no" on a Noyes questionnaire that asked "do you seek or receive compensation directly or indirectly from any other type of employment or business activity?" Tr. 147-148; CX-12. However, since the record was unclear as to whether Respondent had contemplated or engaged in the selling of Jackson National Life annuities when he signed the questionnaire, the Panel gave this point no weight.

Accordingly, the Panel found that Respondent exercised discretionary authority without written authorization in violation of Rules 2510 and 2110. See, Paul F. Wickswat, 50 S.E.C. 785, 1991 SEC LEXIS 2482 (Nov. 6, 1991) (finding a violation when there was oral authorization to make discretionary trades without also obtaining written authority).

B. Excessive Trading – Rules 2310 and 2110

The Complaint charges that Respondent violated Rules 2310 and 2110 by engaging in excessive trading in DV's account.

Rule 2110 requires registered representatives to "observe high standards of commercial honor and just and equitable principles of trade."[11] Rule 2310(a) requires that, in recommending the purchase or sale of a security, an associated person must have a reasonable basis for believing that the recommendation is suitable for the customer, based on the facts disclosed by the customer as to his or her other security holdings and his or her financial situation and needs. In other words, recommendations must be consistent with the customer's best interests. Wendell D. Belden, Exch. Act Rel. No. 47,859, 2003 SEC LEXIS 1154, at *11 (May 14, 2003). Excessive trading, by itself, "can violate NASD suitability standards by representing an unsuitable frequency of trading." Pinchas, 1999 SEC LEXIS 1754 at *22 (Sept. 1, 1999).

Excessive trading occurs when a broker has control over an account and the level of activity in the account is inconsistent with the customer's objectives and financial situation. Pinchas, 1999 SEC LEXIS 1754, at **11–12 (Sept. 1, 1999).

Control may be established where a customer expressly agrees to give the broker discretion to trade the account, or absent that, where the broker exercises de facto control of the account. DBCC v. Gates, No. C05930020, 1994 NASD Discip. LEXIS 190, at *24 (April 5,

[11] Although Rules 2110 and 2310 refer to the member's obligations, Rule 0115 provides, "Persons associated with a member shall have the same duties and obligations as the member under these Rules."

1999). De facto control may be established "where the customer habitually follows the advice of the broker." J. Stephen Stout, 2000 SEC LEXIS 2119, at *75 (Oct. 4, 2000). In this case, Respondent initiated the trading in DV's account, generally contacting him only after he placed the trades, if at all. Moreover, DV generally acquiesced in Respondent's trading, further indicating Respondent's control over the account.

There is no single test to determine whether trading is excessive, because it depends, to a large degree, upon each customer's investment objectives and financial situation. However, there are a number of factors that may provide guidance, such as the turnover rate, the cost-to-equity ratio, the use of "in and out" trading, and the number and frequency of trades in the account. See, Department of Enforcement v. Gliksman, No. C02960039, 1999 NASD Discip. LEXIS 12 at *25, (NAC March 31, 1999), aff'd, Exch. Act Rel. No. 42,255, 1999 SEC LEXIS 2685 (Dec. 20, 1999). Generally, excessive trading is indicated by a turnover rate in excess of six. David Wong, Exch. Act Rel. No. 45,426, 2002 SEC LEXIS 339, at *14, n.18 (Feb. 8, 2002); Bucchieri, Exch. Act Rel. No. 37,218, 1996 SEC LEXIS 1331, at *11, n.11 (May 14, 1996), citing Mihara v. Dean Witter & Co., Inc., 619 F.2d 814, 821 (9th Cir. 1980). Excessive trading is also generally indicated where there is an annualized cost-to-equity ratio in excess of 20%. Pinchas, 1999 SEC LEXIS 1754, at *18 (Sept. 1, 1999). However, lower rates may provide "strong support" for a finding of liability. See, e.g., Donald A. Roche, Exch. Act. Rel. No. 38742, 1997 SEC LEXIS 1283 (June 17, 1997) (turnover rates of 3.3, 4.6 and 7.2); Michael H. Hume, Exch. Act Rel. No. 35608, 1995 SEC LEXIS 983 (Apr. 17, 1995), citing Samuel B. Franklin & Co., Exch. Act Rel. No. 7407, 1964 SEC LEXIS 562 (Sept. 3, 1964) (turnover rates of 3.5 and 4.4).

In this case, DV's account had an annualized turnover rate of 5.2, and an annualized cost-to-equity ratio of 17.5%. Over the 28 months at issue, Respondent executed 290 trades in the

account. Respondent also did "in and out" trading, purchasing, selling, and repurchasing the same stock within days, in his attempt to time the market.

The Panel found that Respondent's trading in DV's account was excessive in light of DV's investment objectives and financial situation. DV was an inexperienced, elderly retiree on a modest fixed income of less than $50,000 per year. DV's IRA rollover account represented substantially all of his retirement assets, and it should have been managed conservatively. Despite this, Respondent employed a strategy of "in and out" trading of technology stocks, in an unsuccessful attempt to time the market, resulting in a turnover rate and a cost-to-equity ratio that were only slightly below the generally recognized measures generally indicative of excessive trading. The excessive nature of Respondent's trading was further underscored by his disregard of DV's request to purchase CDs, even as his losses mounted. Based upon these considerations, the Panel found that Respondent engaged in excessive trading in DV's account, in violation of Rules 2310 and 2110.

C. Failure to Submit Email Correspondence for Supervision and Review

The Complaint charges that Respondent violated Rule 2110 by failing to submit emails to his firm for supervision and review, prior to sending them to DV.

Noyes' procedures required prior branch manager approval of all outgoing correspondence, including emails. CX-2 p. 4. Review of outgoing correspondence allows member firms to fulfill their supervisory obligations, allowing them to confirm that account activities and communications to customers are consistent with applicable rules and laws. Despite this, Respondent sent emails to DV regarding activity in DV's account without branch manager review and approval. Moreover, he used his personal email account rather than his Noyes account to do so, thereby avoiding detection by his firm.

Accordingly, the Panel found that this failure to submit email correspondence for supervision and review was inconsistent with high standards of commercial honor and just and equitable principles of trade, in violation of Rule 2110.

D. Failure to Provide Written Disclosure of Outside Business Activities

The Complaint charges that Respondent violated Rules 3030 and 2110 by failing to make written disclosure of outside business activities.

Rule 3030 provides that no person registered with a member "shall be employed by, or accept compensation from, any other person as a result of any business activity . . . outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member . . . in the form required by the member." The purpose of Rule 3030 is to provide member firms with prompt notice of outside business activities so that the member's objections, if any, to such activities can be raised at a meaningful time and the member can exercise appropriate supervision as necessary under applicable law. Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons, Exch. Act Rel. No. 26,063, 1988 SEC LEXIS 1841 (Sept. 6, 1988), adopted at Exch. Act Rel. No. 26,178, 1988 SEC LEXIS 2032 (Oct. 13, 1988). Rule 3030 requires disclosure of all outside business activity, not just securities-related activity. DBCC v. Cruz, No. C8A930048, 1997 NASD Discip. LEXIS 62, at *96 (Oct. 31, 1997).

Here, there is no dispute that Respondent failed to provide written notice that he was selling Jackson National Life annuities. Accordingly, the Panel found that Respondent violated Rules 2110 and 3030 by failing to make written disclosure of outside business activities.

IV. Sanctions

A. Sanctions for Violations Related to DV's Account - Exercise of Discretion Without Written Authorization, Excessive Trading, and Failure to Submit Email Correspondence for Supervision and Review

For excessive trading, the NASD Sanction Guidelines ("Guidelines") recommend a fine of $5,000 to $75,000 and a suspension of 10 days to one year, and, in egregious cases, a longer suspension or a bar. Guidelines at 82 (2006 ed.). Enforcement requests a fine of $5,000 and a suspension of at least nine months for this violation. Tr. 270, 272.

The Panel considered that DV was particularly vulnerable due to his inexperience, age, and limited resources, and Respondent's position of trust. Respondent took advantage of this position of trust by engaging in excessive and unsuitable trading in DV's account - even disregarding DV's specific request for more conservative investments such as CDs. Moreover, Respondent failed to admit that DV did not approve the trades that Respondent initiated. Respondent escalated the activity and risk to DV's account in a desperate attempt to recoup losses attributable, in part, to the severe market downturn occurring at the time, rather than for Respondent's personal gain. However, this did little to mitigate Respondent's deliberate disregard of DV's financial situation and investment objectives. Accordingly, the Panel found that Respondent's conduct was egregious and supported a bar.

For the exercise of discretion without written authorization, the Guidelines recommend a fine of $2,500 to $10,000, and, in egregious cases, a suspension in all capacities for 10 to 30 business days. Guidelines at 90 (2006 ed.). Enforcement requests a fine of $2,500 and a suspension of 30 days for this violation. Tr. 272.

A principal consideration in determining an appropriate sanction for this violation is whether the customer's grant of discretion was express or implied, and whether the firm's policies prohibited discretionary trading. Guidelines at 90 (2006 ed.). Here, DV did not

expressly grant authority to Respondent. Rather, as an inexperienced investor, DV was unaware that a registered representative needed his authority before each trade was executed. Moreover, Noyes firm policies specifically prohibited registered representatives from exercising authority over a customer account without prior written permission from the Branch Manager and a member of the firm's Executive Committee. CX-12. The violation of Rule 2510 and the firm's policy are of particular significance here, where DV was inexperienced and placed trust in Respondent. Therefore, the Panel found Respondent's conduct egregious, and his reckless exercise of discretion - even disregarding DV's specific instructions to invest in CD's – would warrant the maximum sanctions for exercising discretion without written authorization provided in the Guidelines, if considered alone. As discussed in greater detail below, however, the Panel determined to combine the sanction for this violation with other violations arising from the same conduct.

There is no specific Guideline for the failure to submit electronic correspondence for supervision and review. However, the Guideline for recordkeeping violations suggest a review of the nature and materiality of inaccurate or missing information, and consideration of a suspension for up to 30 business days and a fine of $1,000 to $10,000. Guidelines at 30 (2006 ed.). Enforcement requests that Respondent be fined $2,500 and suspended 30 days for this violation. Tr. 272. Respondent's use of a personal email account to communicate information about activity in DV's account appeared to be designed to avoid detection by his firm. These emails, if reviewed, would have allowed the Branch Manager to address Respondent's misconduct earlier. Accordingly, the Panel found Respondent's violation of this Rule to be egregious, warranting sanctions at the top of the recommended range, if considered alone.

The Panel determined to impose a unitary sanction relating to the charges of discretionary trading without written authorization, excessive trading, and failure to submit email

correspondence for supervision and review, because they arose from the same course of conduct relating to the handling of DV's account. Respondent used his undocumented discretion to carry out excessive trading in DV's account, and he avoided detection by sending emails from his personal email account without supervisory review. Guidelines at 4 (General Principles Applicable to all Sanction Determinations, No. 4.) (2006 ed.). Accordingly, for the reasons discussed above, the Panel found that the charges related to Respondent's handling of DV's account - the exercise of discretion without written authorization, excessive trading, and failure to submit email correspondence for supervision and review - warrant a bar in all capacities.

B. Sanctions for Violations Unrelated to DV's Account – Failure to Disclose Outside Business Activities

For the failure to make written disclosure of outside business activities in violation of Rule 3030, the Guidelines recommend a fine of $5,000 to $50,000, and, in cases involving up to $100,000 in sales, a suspension of 10 business days to three months. Guidelines at 15 (2006 ed.). Enforcement requests that Respondent be suspended 30 days for this violation. Tr. 272.

In applying the Principal Considerations for this violation, the Panel considered that the conduct involved Respondent's customer at Noyes. However, the Panel also considered that the extent and duration of the activity charged - the sale of two annuities to one customer - was extremely limited.[12] Moreover, no customer was harmed. Accordingly, Respondent's conduct with respect to this charge would warrant sanctions on the low side of the range provided in the Guidelines. However, in light of the bar for Respondent's other violations, no further sanctions are imposed for this violation.

[12] The Complaint charges sales to "at least one" public customer, which Enforcement referenced at the hearing as customer HH. However, at the hearing the Panel and Enforcement learned that Respondent also sold an annuity to DV. Tr. 269. Because Respondent did not receive prior notice that the charge included the sale of an annuity to DV, the Panel did not consider it in arriving at an appropriate sanction for the charge.

V. Conclusion

For discretionary trading without written authorization in violation of Rules 2120 and 2510; for excessive trading in violation of Rules 2310 and 2110; and for failure to submit email correspondence for supervision and review in violation of Rule 2110, Respondent is barred in all capacities. In light of the bar, no further sanctions are imposed for Respondent's failure to make written disclosure of outside business activities, in violation of Rules 3030 and 2110. In addition, Respondent is ordered to pay costs in the amount of $3,327.52, which include an administrative fee of $750 and the cost of the hearing transcript.

These sanctions shall become effective on a date set by the NASD, but not earlier than 30 days after this Decision becomes the final disciplinary action of the NASD, except that the bar shall become effective immediately if this Decision becomes the final disciplinary action of NASD.[13]

HEARING PANEL

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By: Sara Nelson Bloom
Hearing Officer

Copies to:

Joseph A. Zaragoza, Jr. (*via overnight and first-class mail*)
Kevin G. Kulling, Esq. (*via electronic and first-class mail*)
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[13] The Hearing Panel has considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.