

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

R. MATTHEW SHINO  
(CRD No. 1380293),

Respondent.

Disciplinary Proceeding  
No. E3A20050037-02

Hearing Officer – LBB

**HEARING PANEL DECISION**

**September 22, 2009**

**For late filing and failing to file Rule 3070 reports, in violation of NASD Conduct Rules 3070 and 2110, and late filing and failing to file amendments to Forms U4 and U5, in violation Article V, Sections 2(c) and 3(b) of the NASD By-Laws and NASD Conduct Rule 2110, Respondent is suspended for nine months in all principal capacities. For permitting a branch office with more than three representatives to transact an options business without having a Registered Options Principal or Limited Principal – General Securities Sales Supervisor as the principal supervisor of the office, in violation of NASD Conduct Rules 2860(b)(20)(C) and 2110, Respondent is suspended for an additional three months in all principal capacities.**

*Appearances*

Jacqueline D. Whelan, Esq., San Francisco, California, for the Department of Enforcement.

Timothy Feil, Esq., Garden City, New York, for Respondent.

**DECISION**

The Department of Enforcement (“Enforcement”) filed the Complaint in this disciplinary proceeding on June 12, 2007, asserting six causes of action against Berry-Shino Securities, Inc. (“BSSI”), three of which were also asserted against its president, R. Matthew Shino (“Respondent”). The charges against BSSI were settled, leaving Shino as the sole respondent in the proceeding, charged with failing to report and late reporting of matters for which reports to FINRA are required by NASD Conduct Rule 3070, in violation of NASD Conduct Rules 3070

and 2110; late filing and failing to file amendments to Forms U4 and U5,<sup>1</sup> in violation of Article V, Sections 2(c) and 3(b) of the NASD By-Laws, and Conduct Rule 2110; and failing to have a qualified principal in a branch office conducting an options business, in violation of NASD Conduct Rules 2860(b)(20)(C) and 2110.<sup>2</sup>

A hearing was held in Phoenix, Arizona, on May 14, 2009, before a Hearing Panel consisting of a Hearing Officer and two members of the District 3 Committee. There were no significant disputes concerning the relevant facts, many of which were stipulated. Respondent also stipulated that there were violations with respect to most of the violations alleged in the Complaint. Tr. 15, 28, 91.<sup>3</sup> Respondent was the only witness who testified at the hearing. Enforcement offered declarations in lieu of testimony from the two FINRA examiners who had conducted the 2004 and 2005 cycle examinations, which led to the disciplinary action. The declarations were received in evidence without objection. CX-34; CX-35. Because of the stipulations, the hearing focused on the appropriate sanctions.

## **I. Respondent**

Respondent was first registered with FINRA in 1985. CX-1; Tr. 38. Respondent was a founder of BSSI, as well as its CEO and president. He was a registered principal of BSSI from

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<sup>1</sup> Form U4 is the Uniform Application for Securities Industry Registration or Transfer; Form U5 is the Uniform Termination Notice for Securities Industry Registration.

<sup>2</sup> As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008, including certain conduct rules and procedural rules. *See* Regulatory Notice 08-57 (Oct. 2008). This decision refers to and relies on the NASD Conduct Rules that were in effect at the time of Respondent's alleged misconduct. In addition, because the Complaint was filed before December 15, 2008, the NASD Procedural Rules were applied in this disciplinary proceeding.

<sup>3</sup> References to the exhibits provided by Enforcement are designated as "CX-\_\_\_." Respondent did not submit any exhibits. The parties submitted a set of stipulations that was received in evidence, and marked as JX-1. References to the stipulations are identified as "Stip. \_\_\_." References to the hearing transcript are designated as "Tr. \_\_\_."

June 1996 until October 2007. Stip. 1; CX-30; Tr. 40. Respondent has not participated in the securities industry since he left BSSI in September 2007. Tr. 38; CX-1.

## **II. Violations**

Respondent stipulated that he committed all of the Rule 3070 violations alleged in the Complaint; all but two of the reporting violations alleged in the Complaint concerning failure to file and late filing of amendments to Forms U4 and U5. He stipulated to all facts necessary to establish the violation with respect to the failure to have a principal in a branch office who was qualified to supervise that office's options business. The evidence, including the stipulations of fact, supports findings of violations with respect to all of the violations charged in the Complaint, including those that Respondent did not stipulate were violations.

### **A. Respondent Was Responsible for Filing BSSI's Rule 3070 Reports and Amendments to Forms U4 and U5**

From June 1996 through July 31, 2005, Respondent was the BSSI principal responsible for submitting to FINRA information required to be submitted by BSSI pursuant to Conduct Rule 3070. Stip. 2. From June 1996 through July 31, 2005, Respondent submitted any information pursuant to Conduct Rule 3070 that was submitted to FINRA on behalf of BSSI. Stip. 3; Tr. 145. During the same period, Respondent was the BSSI principal responsible for submitting to FINRA amendments to Forms U4 and U5 required to be submitted by BSSI. Stip. 4. From June 1996 through July 31, 2005, Respondent submitted, or caused to be submitted, any Form U4 and Form U5 amendments that were submitted to FINRA on behalf of BSSI. Stip. 5; Tr. 145.

## B. Rule 3070 Reporting Violations

Respondent stipulated that all of the Rule 3070 violations alleged in the Complaint occurred. The Hearing Panel finds that Respondent violated Rules 3070 and 2110<sup>4</sup> as follows:

- On or about October 2, 2003, BSSI learned that representative Everton Lewis had pleaded guilty to felony charges of falsification of business records. Respondent reported the criminal matter pursuant to Rule 3070 on April 26, 2004. Stip. 6; Tr. 58 – 61; CX-4. Under Rules 3070(a)(5) and (b), BSSI was required to report the guilty plea within ten business days after the firm knew or should have known of the guilty plea. Respondent reported Lewis's guilty plea on Lewis's Form U4 promptly, but at the time, he did not realize that it also had to be reported on the Rule 3070 system.<sup>5</sup> Tr. 60 – 61. The report was filed approximately 193 days late. By filing the report late, Respondent violated Rules 3070(b) and 2110.
- As of January 31, 2004, Respondent knew that the Hearing Panel had issued its decision in *Dep't of Enforcement v. Berry-Shino Sec., Inc. and R. Matthew Shino*,<sup>6</sup> finding that BSSI and Respondent had violated FINRA's rules by charging unfair and excessive commissions and executing options transactions without having obtained required information and documentation from customers. Respondent reported the decision on the Rule 3070 system on April 26, 2004. Stip. 7; Tr. 23 – 24; CX-2. Under Rules 3070(a)(1) and (b), BSSI was required to file the report within ten business days after the firm knew or should have known

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<sup>4</sup> A violation of Rule 3070 is also a violation of Rule 2110. *Dep't of Enforcement v. Fox & Co. Inv., Inc.*, No. C3A030017, 2005 NASD Discip. LEXIS 5, at \*36 (Feb. 24, 2005), *aff'd*, *Fox & Co. Inv., Inc.*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822 (Oct. 28, 2005).

<sup>5</sup> The Hearing Panel found Respondent to be a very credible witness, and finds that his explanations for his reporting violations, as discussed in this decision, were truthful.

<sup>6</sup> No. C3A030001, 2003 NASD Discip. LEXIS 61 (Dec. 10, 2003).

of the Hearing Panel's decision. The report was filed approximately 72 days late. By filing the report late, Respondent violated Rules 3070(b) and 2110.

- As of November 9, 2004, BSSI knew of the settlement of an arbitration claim filed by customers FH and HH. BSSI and the other respondents in the arbitration were required to pay \$35,000 in settlement of the claims. CX-12. Respondent submitted the four reports related to this settlement on January 14, 2005. Stip. 8; CX-12. BSSI was required by Rules 3070(a)(7) and (b) to file a report of the settlement within ten business days after it knew or should have known of the settlement. Respondent testified that he did not understand at the time that there were different deadlines for different reports. He did not know that the settlement was required to be reported within ten business days of discovery under Rule 3070. Tr. 77 – 79. The reports were filed approximately 52 days late. By filing the reports late, Respondent violated Rules 3070(b) and 2110.
- As of July 12, 2004, BSSI and Respondent knew that an award had been rendered against BSSI and one of its representatives in an arbitration proceeding initiated by customers Mr. CQ and Ms. CQ. Respondent submitted the two reports related to this arbitration on January 14, 2005. Stip. 9; CX-13. BSSI was required by Rules 3070(a)(7) and (b) to file a report within ten business days after it knew or should have known of the award. The reports were filed approximately 172 days late. By filing the reports late, Respondent violated Rules 3070(b) and 2110.
- On April 27, 2005, Respondent and BSSI's Financial and Operations Principal ("FINOP") signed a Letter of Acceptance, Waiver and Consent ("AWC") and

submitted it to FINRA.<sup>7</sup> On May 18, 2005, FINRA issued a notice of acceptance of the AWC to BSSI, Respondent, and the FINOP. BSSI and Respondent knew of the issuance of the AWC as of about May 23, 2005. Stip. 10; CX-14.

Respondent submitted the three reports related to the AWC on July 16, 2005.

Stip. 10; Tr. 24 – 25; CX-14. Under Rules 3070(a)(1) and (b), BSSI was required to file the reports within ten business days after the firm knew or should have known of FINRA's action. It was the BSSI's first AWC, and Respondent thought the reports did not have to be filed until 15 days after the end of the calendar quarter. Tr. 82. The reports were filed approximately 39 days late. By filing the reports late, Respondent violated Rules 3070(b) and 2110.

- As of about July 15, 2004, BSSI knew of the settlement of an arbitration claim filed by customer WB. Stip. 11; CX-15. As of July 31, 2005, Respondent had neither submitted nor caused the submission of the two reports related to the settlement of the arbitration. Stip. 11. BSSI was required by Rules 3070(a)(7) and (b) to file the reports within ten business days after it knew or should have known of the settlement. By failing to file the reports, Respondent violated Rules 3070(b) and 2110.
- On January 16, 2004, Respondent reported to FINRA complaints by customers PV, WH, and TS, received during the fourth quarter of 2003, pursuant to the quarterly statistical report requirements set forth in Rule 3070(c).<sup>8</sup> Reports of these complaints were due on or before January 15, 2004. Stip. 12, 13.

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<sup>7</sup> Respondent signed both in his individual capacity and on behalf of BSSI as its president.

<sup>8</sup> All three customers complained of unauthorized trading. WH also complained of excessive commissions. CX-7; CX-8; CX-9.

Respondent filed the reports late in the evening of January 15 in Arizona, which was early in the morning of January 16, Eastern Standard Time. He erroneously believed that the reports would be deemed timely if they were filed by midnight local time on the day they were due to be filed. Tr. 62. By filing on January 16, Respondent filed the reports one day late, thereby violating Rules 3070(c) and 2110.

- On April 16, 2004, Respondent reported to FINRA complaints by customers DG and RP received during the first quarter of 2004, pursuant to the quarterly statistical report requirements set forth in Rule 3070(c).<sup>9</sup> The report of these complaints was due on or before April 15, 2004. Stip. 14, 15. Respondent reported these matters late in the evening of April 15 in Arizona, which was early in the morning of April 16, Eastern Daylight Time. Tr. 62, 90. Respondent was traveling in Arizona at the time, and he again filed late based on his misunderstanding that the filing deadline was determined by local time, rather than Eastern Time. Tr. 62, 90. By filing the report one day late, Respondent violated Rules 3070(c) and 2110.

**C. Violations for Failing to Amend and Late Amendment of Forms U4 and U5**

Article V, Section 2(c) of the By-Laws requires members to keep Forms U4 current. Amendments must be filed not more than 30 days after a member learns of facts or circumstances giving rise to the amendment. The same requirement is imposed by Article V, Section 3(b) with respect to Forms U5.

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<sup>9</sup> Both customers complained of excessive trading. DG also complained that he had lost money despite the promise by his BSSI broker to double his money, and RP complained of excessive charges. CX-5; CX-6.

Respondent stipulated that most of the violations for failure to file and late filing of amendments to Forms U4 and U5 that were alleged in the Complaint were violations of the By-Laws and Rule 2110. He contested two of the alleged violations, although he did not contest Enforcement's factual contentions with respect to those two alleged violations. The Hearing Panel finds that Respondent committed all of the violations alleged in the Complaint.

Respondent stipulated to violations with respect to the following:

- As of June 17, 2004, BSSI had received a written complaint from customer KS, alleging that BSSI registered persons Wayne Raymond and Patrick Butrico had “grossly and intentionally misrepresented the risks associated with the options scheme that they proposed to me.” As of August 31, 2004, when BSSI terminated the associations of Raymond and Butrico, Respondent had neither amended their Forms U4 nor caused them to be amended to report the customer complaint. Stip. 16; CX-18. Where a customer complaint does not specify a dollar amount, members must report the complaint unless they make a “good faith determination that the damages from the alleged conduct would be less than \$5,000.” Form U4, Question 14I(3)(a). Although the customer complaint did not state an amount, Respondent did not amend the Forms U4 to reflect the complaint because he believed the complaint was for a loss of less than \$5,000.<sup>10</sup> Tr. 84 – 86. Based on the stipulation of liability, the Hearing Panel finds that Respondent violated the By-Laws and Conduct Rule 2110.

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<sup>10</sup> Enforcement alleged in its pre-hearing brief that Respondent had not made such a determination. Department of Enforcement's Pre-Hearing Statement of the Case Pursuant to Rule 9242(a), filed March 4, 2009, at page 17. The parties reached their stipulations after the pre-hearing submissions had been submitted.



- As of July 15, 2004, BSSI knew of the settlement with customer WB.<sup>11</sup>  
Respondent did not immediately amend his Form U4 because he had previously been dismissed from the case, and did not know that an amendment was required. Tr. 76 – 77. Respondent amended his Form U4 to reflect the settlement on November 15, 2004. Stip. 17; CX-15. Question 14I(1)(c) of Form U4 requires applicants to report the settlement of a consumer-initiated, investment-related arbitration alleging sales practices violations that was settled for \$10,000 or more, even if the applicant was dismissed from the arbitration.<sup>12</sup> Respondent filed the amendment to his Form U4 93 days later than required by the By-Laws, thereby violating the By-Laws and Conduct Rule 2110.
- Former BSSI representative Michael Frace was named as a co-respondent in the arbitration that BSSI settled with customer WB. Respondent neither amended Frace’s Form U5 to reflect the settlement nor caused such amendment to be submitted. Stip. 22. Respondent did not update Frace’s Form U5 because Frace was not a party to the settlement agreement, and BSSI reserved the right in the settlement agreement to file a claim against Frace. CX-15; Tr. 76 – 77. Despite Frace’s exclusion from the settlement, Form U5 requires the reporting of the settlement. By failing to update Frace’s Form U5, Respondent violated the By-Laws and Conduct Rule 2110.
- As of July 12, 2004, BSSI knew that an award of \$69,000 had been issued in an arbitration against BSSI and registered representative Richard Sheneman that had

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<sup>11</sup> As noted above, Respondent was also late in filing the Rule 3070 report for the settlement of the arbitration with WB.

<sup>12</sup> For settlements on or after May 18, 2009, the current Form U4 states that the reportable amount is \$15,000 or more.

been filed by customers Mr. CQ and Ms. CQ.<sup>13</sup> Respondent did not amend Sheneman's Form U5, or cause it to be amended, to disclose the award. On November 18, 2004, Respondent amended Sheneman's Form U5 to disclose information concerning a settlement of the arbitration occurring after the award was issued. Stip. 19; CX-13. He did not report the award earlier because BSSI had appealed the award, and he believed that BSSI was not required to report the award while it was on appeal. Tr. 71 – 74. Forms U5 and U4 require the reporting of the award, and do not exempt a matter that is on appeal from the reporting requirement. Respondent reported the award 99 days after it was required by the By-Laws, thereby violating the By-Laws and Conduct Rule 2110.

- As of November 30, 2004, BSSI knew that an arbitration claim filed by customer RT and naming BSSI and registered representative Walter Marino had been settled. At that time, Marino's Form U5 contained a "yes" answer disclosing that he was the subject of a pending arbitration. The settlement caused Marino's Form U5 to be inaccurate because there was no longer a pending arbitration. Further, the settlement did not have to be reported because the amount of the settlement was below the threshold for reporting on the Form U5. Respondent amended Marino's Form U5 to delete the "yes" answer on April 20, 2005. Stip. 20; CX-20. The amendment was filed approximately 111 days late, thereby violating the By-Laws and Conduct Rule 2110.

Although Respondent stipulated to the facts with respect to the other two violations, he did not stipulate that his actions constituted a violation. The Hearing Panel finds Respondent violated NASD's By-Laws and Conduct Rule 2110 with respect to both.

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<sup>13</sup> As noted above, Respondent was also late in filing the Rule 3070 report for this arbitration.

- As of July 24, 2004, Respondent knew of a complaint by customer MA about representative Joseph Steward. The customer alleged that Steward had effected unauthorized trades in his account, and demanded the return of \$26,460. The complaint caused Steward's then-current Form U4 to become inaccurate and require amendment not more than 30 days after discovery of the inaccuracy. Respondent amended Steward's Form U4 on August 26, 2004, three days late. Stip. 18; CX-16. The Hearing Panel finds that Respondent violated the By-Laws and Conduct Rule 2110 by reporting this complaint three days late.
- As of February 2, 2005, BSSI knew of the settlement of an arbitration claim filed by customers RR and SR. The claim alleged violations by BSSI, registered representative Adam Heng, and principals Raymond and Butrico. Respondent neither amended the Forms U5 of Heng, Raymond, or Butrico, nor caused such amendments to be submitted. Stip. 21. Respondent did not amend their Forms U5, believing that because they were expressly excluded from the settlement, a filing was not required. Tr. 87 – 88; CX-22. The Hearing Panel finds that BSSI was required to report the settlement, and that Respondent violated the By-Laws and Conduct Rule 2110 by failing to amend the Forms U5.

**D. Violation for Transacting an Options Business in a Branch Office Without Supervision by a Principal Who Was Qualified to Supervise an Options Business**

At the time that BSSI had a New York office, NASD Conduct Rule 2860(b)(20)(C)

provided:

No branch office of a member shall transact an options business unless the principal supervisor of such branch office accepting options transactions has been qualified as either a Registered Options Principal or a Limited Principal – General Securities Sales Supervisor; provided that this

requirement shall not apply to branch offices in which no more than three registered representatives are located ....<sup>14</sup>

Respondent stipulated to all the facts necessary for a finding that he violated NASD Conduct Rules 2860(b)(20)(C) and 2110 from April 1 to April 30, 2004, the period for which the Complaint alleged that there was a violation. The Hearing Panel finds that a violation occurred because BSSI's New York branch office did not have either a Registered Options Principal or a Limited Principal – General Securities Sales Supervisor supervising the office during a period when the office was accepting options transactions and more than three representatives were located in that office.

The main office of BSSI was in Scottsdale, Arizona. CX-27; CX-30. BSSI opened a retail branch office, an office of supervisory jurisdiction (“OSJ”), in New York, New York, in June 2001. The office operated until August 2004. The parties stipulated that BSSI maintained the office in April 2004, the period covered by the allegations in the Complaint; that during the month of April 2004, Patricia Schaen, Arthur Young, Wayne Raymond, Patrick Butrico, and Haleem Mohammed were representatives and/or principals of BSSI; and that they conducted business for BSSI in the New York office. Stip. 23, 24; Tr. 41.

In April 2004, Schaen effected a total of three unsolicited options transactions for customer accounts. Stip. 29. In April 2004, Young effected a total of 27 options transactions for customer accounts. Stip. 30. In April 2004, Butrico and Raymond effected a combined total of 53 options transactions in customer accounts. These transactions were credited for purposes of

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<sup>14</sup> Conduct Rule 2860(b)(20)(C) was eliminated in 2008 by Regulatory Notice 8-28. The notice stated, “Effective June 23, 2008, the requirement for separate designations of Senior Registered Options Principal and Compliance Registered Options Principal is eliminated and member firms are required to integrate the responsibility for supervision and compliance of their public customer options business into their overall supervisory and compliance programs.”

commissions to their joint identification number. Stip. 31. In April 2004, Mohammed effected a total of 13 options transactions for customer accounts. Stip. 32.

When BSSI's New York office first opened, Marc Regnier was the options principal, but in July 2003, he left abruptly to return to school. Tr. 53, 152; CX-29. The office continued to have an options business because Raymond's business was options trading, primarily covered calls. Tr. 52 – 54, 152 – 153.<sup>15</sup> Respondent testified that he “knew about the three-broker limitation” and was “concerned that we needed to have an on-site options principal.” Tr. 55.

In April 2004, Butrico was the principal supervisor of BSSI's New York office. Stip. 33; CX-28. He was qualified as a General Securities Principal, but not as a Registered Options Principal or Limited Principal – General Securities Sales Supervisor. CX-25; CX-28. Respondent had directed Butrico to take the options principal examination. Tr. 56. Butrico had applied for registration as an Options Principal in December 2003 but did not pass the examination during his examination window. Stip. 34; CX-25.

In April 2004, Raymond was not qualified by examination as a Registered Options Principal or as a Limited Principal – General Securities Sales Supervisor. Respondent directed Raymond more than once to take the options principal examination. Raymond had applied for registration in that capacity in September 2003, but did not pass the examination during his examination window. Raymond opened a second examination window May 1, 2004, and passed the Series 4 examination to qualify as a General Options Principal on June 10, 2004. Stip. 35; CX-26; Tr. 56. Although the firm asked Young to take the options principal test, he never signed up for it. Tr. 151.

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<sup>15</sup> Raymond joined BSSI in February 2003. CX-26.

The Hearing Panel finds that Respondent violated NASD Conduct Rules 2860(b)(20)(C) and 2110 in April 2004, by transacting an options business in a branch office that had more than three representatives without supervision by a principal who was qualified to supervise an options business. BSSI had five registered representatives in the New York office who earned commissions for trading in options during that month. By failing to ensure that a principal with the proper qualifications was supervising the New York office, Respondent violated NASD Conduct Rules 2860(b)(20)(C) and 2110.

### **III. Sanctions**

Enforcement recommended a suspension of one year in all principal capacities and a \$10,000 fine for the reporting violations<sup>16</sup> and an additional \$10,000 fine for the options principal violation. The Hearing Panel finds that the appropriate sanctions are a suspension of nine months in all principal capacities for the reporting violations, and a suspension of an additional three months in all principal capacities for the options principal violation.<sup>17</sup> In reaching its decision on the appropriate sanctions, the Hearing Panel considered the sanctions recommended by FINRA's Sanction Guidelines ("Guidelines"), the principal considerations for those violations, the principal considerations applicable to all violations where relevant, and other considerations, as discussed below.

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<sup>16</sup> Although the applicable Sanction Guidelines refer to suspensions in supervisory capacities, Enforcement seeks a suspension in all principal capacities because Respondent's violations occurred with respect to his duties as a principal rather than as a supervisor, and contends that a suspension in principal capacities would be more remedial. The Hearing Panel agrees, and imposes a suspension in all principal capacities.

<sup>17</sup> Respondent testified at the hearing that he was unable to pay a fine, and explained his difficult financial situation. Tr. 126 – 128. After the hearing, Respondent made financial disclosures to Enforcement in support of his contention that he does not have the financial resources to pay a fine. After reviewing Respondent's financial disclosures, Enforcement did not contest Respondent's Motion to Waive Any Monetary Sanctions (June 26, 2009). Based on the testimony and the representations in the motion, including Enforcement's decision not to contest the motion, the Hearing Panel determined not to impose a fine, effectively granting Respondent's motion.

**A. Sanction Guidelines – Rule 3070 Violations**

For late reporting in violation of Rule 3070's reporting requirements, the Guidelines recommend a fine of \$5,000 to \$50,000, and in egregious cases, consideration of a suspension of the responsible principal in any or all capacities for up to two years, or a bar in all supervisory capacities. For failure to report, the Guidelines recommend a fine of \$5,000 to \$100,000, consideration of a supervisory suspension of ten to 30 business days, and in egregious cases, suspension in all capacities for up to two years, or a supervisory bar. The principal considerations for late reporting are the number and type of incidents not reported on time, and whether events that were reported late established a pattern of potential misconduct. For failure to file a report, the principal consideration is whether events not reported would have established a pattern of potential misconduct. *Guidelines* at 78.

Here, Respondent filed late reports, and failed to file one report, concerning sales practice incidents largely arising from the operations of the New York office. These incidents reflect a pattern of serious problems in BSSI's New York office.<sup>18</sup> This is an aggravating factor, as the failure to report this type of information deprived FINRA staff of an opportunity to make a timely assessment of the need for investigation and possible disciplinary action with respect to that office.

An important aggravating factor is that BSSI and Respondent have a history of violations of Rule 3070. As a result of the 2001 routine examination, the District Director for District 3 issued a Letter of Caution on December 27, 2001, concerning the firm's failure to report an arbitration settlement pursuant to the requirements of Rule 3070. This letter put Respondent on notice of deficiencies in the firm's reporting practices. CX-31. In addition, Respondent

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<sup>18</sup> In fact, these problems were part of the reasons that BSSI closed the New York office. Tr. 50.

submitted an AWC accepted by FINRA on May 18, 2005, for late filing and failing to file Rule 3070 reports, and failing to file and amend Forms U4 and U5 within the times required by NASD's By-Laws. Respondent was censured, and fined \$10,000 jointly and severally with BSSI. CX-14; Tr. 101 – 102.

**B. Sanction Guidelines – Failure to Amend and Late Amendments of Forms U4 and U5**

For late filing of amendments to Forms U4 and U5, the Guidelines recommend consideration of a fine of \$5,000 to \$50,000 for the responsible principal. For failure to file, the Guidelines recommend consideration of a fine of \$5,000 to \$100,000, and suspension of the responsible principal in all supervisory capacities for ten to 30 business days. In egregious cases, including those involving repeated failures to file or untimely filings; those involving the failure to disclose or late disclosure of a statutory disqualification event or customer complaint; or where the failure to disclose or late disclosure delayed regulatory investigation of terminations for cause, the Guidelines recommend consideration of a suspension in any or all capacities of up to two years of the responsible principal, or a bar of the responsible principal in all supervisory capacities. The principal considerations are the nature and significance of the information at issue; whether the failure resulted in a statutorily disqualified individual becoming or remaining associated with a firm; and whether the violation caused harm to anyone. *Guidelines* at 73 – 74.

Most of the information in question involved arbitrations of alleged sales practices violations by the New York office. In addition, there were two customer complaints, one alleging misrepresentations and one alleging unauthorized trading. As for the Rule 3070 violations, the nature of the information is significant because the failure to file the amendments within the prescribed times deprived FINRA of timely information concerning possible problems in the New York office.



Enforcement argued that Marino was harmed by the failure to file the Form U5 amendment reflecting the settlement of the arbitration against him within the time prescribed by the By-Laws, but presented no evidence of actual harm to Marino. Since the settlement excluded Marino, and both the claimant and BSSI retained the right to file claims against Marino, any harm to Marino was not sufficiently significant to be a substantial factor in the determination of sanctions.

As with the Rule 3070 violations, the Hearing Panel considers the repeat nature of the violations to be a substantial aggravating factor. As noted above, the May 2005 AWC included findings concerning failures to file and late filings of amendments to Forms U4 and U5.

**C. Sanctions Considerations for Violation of Rule 2860(b)(20)(C)**

There is no Guideline for the failure to have a qualified principal as supervisor for an office engaged in options transactions. Although not directly applicable, the Hearing Panel considered the Guideline for failure to supervise, which recommends, in egregious cases, suspending the responsible individual in any or all capacities for up to two years or imposing a bar. *Guidelines* at 108.

Although Respondent made efforts to get principals in the office to become qualified to supervise the options business so the firm would be in compliance, the violations could have been avoided despite the failure of his efforts. When Regnier left, Raymond remained at BSSI, conducting an options business in the New York office. Respondent permitted the New York office to continue to transact an options business from the end of July 2003, when Regnier left, through at least April 2004, the month for which the violation is charged in the Complaint, despite the absence of a principal qualified to supervise options transactions. He attempted to exercise some oversight of the office himself with his frequent visits, but was not at the office full time, and was not the principal supervisor of the office. If the firm's existing representatives

failed to qualify, and the firm could not recruit a qualified options principal, the firm was obligated to cease options transactions until it had a qualified principal in place. Respondent was negligent for failing to take the actions necessary to comply with Rule 2860.

**D. Other Considerations**

The Hearing Panel considered additional factors. One factor was the Hearing Panel's belief that a substantial contributing cause of the violations was that Respondent took on too many responsibilities. Respondent was BSSI's CEO, president, chief compliance officer, Senior Registered Options Principal, Compliance Registered Options Principal, and municipal bond principal. Throughout his tenure at BSSI, Respondent was the firm's chief compliance officer, and essentially the entire compliance department, because the firm could not afford to hire a compliance officer. Stip. 36; Tr. 40, 44, 138; CX-30. During the period when the violations occurred, Respondent split his time between the Arizona office and the New York office, where almost all of the matters that Respondent failed to report occurred. Tr. 44 – 45, 52. Overall, BSSI grew to 49 brokers, with 30 in the New York office. Tr. 46, 145 – 146, 149. When he was managing a small, one-office operation, perhaps he could have handled all of his many roles, but when he took on the task of building a much larger office in New York, his responsibilities became unmanageable. Respondent "wore so many hats" because "[he] had to, not because [he] wanted to." Tr. 122. Respondent should have recognized that he had taken on too many responsibilities, and was negligent for failing to correct the problem.

Respondent was also negligent in failing to understand the filing requirements for the 3070 reports and amendments to Forms U4 and U5. A number of the violations were the result of Respondent's failure to understand the applicable time periods for filing some of the reports. Others were due to his erroneous assumption that no filings were required for a broker who was a co-respondent in an arbitration but was excluded from the firm's settlement of the arbitration

on its own behalf. In determining sanctions for reporting violations, the NAC has noted, “Ignorance of NASD requirements ... is no excuse for violative behavior.”<sup>19</sup>

The Hearing Panel also considered Respondent’s disciplinary history for types of violations that were not involved in this proceeding. By a decision of a Hearing Panel on December 10, 2003, Respondent was suspended as a principal for ten days and fined jointly and severally with BSSI for charging excessive commissions on options transactions and executing options transactions without having obtained required information and documentation from the customers, in violation of Rules 2860 and 2110. CX-2.<sup>20</sup> The charges grew out of the pricing practices of a branch office in Frankfurt, Germany, that BSSI had acquired. CX-2; Tr. 94 – 99.<sup>21</sup>

On February 24, 2009, FINRA accepted a settlement with Respondent of charges of failing to supervise Butrico, who was allegedly engaged in mutual fund market timing and late trading; failure to establish and maintain an adequate supervisory system; and failure to establish, maintain, and enforce written supervisory procedures. Respondent was suspended as a principal for six months and fined \$25,000. CX-33.

The Hearing Panel considered Respondent’s efforts to be compliant, and his contrition. He testified that he worked very long hours trying to be compliant, but he made mistakes, and he accepted responsibility for the mistakes. Tr. 102, 122 – 123. The violations were generally the result of his misunderstanding of the rules and procedures. Respondent testified that he tried to

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<sup>19</sup> *Dep’t of Enforcement v. Fox & Co. Inv., Inc.*, No. C3A030017, 2005 NASD Discip. LEXIS 5, at \*45 (N.A.C. Feb. 24, 2005) (citation omitted), *aff’d*, *Fox & Co. Inv., Inc.*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822 (Oct. 28, 2005). As the Hearing Panel found in that case, Respondent’s prior violations “should have led him to study carefully all the requirements of Rule 3070 to avoid any future violations of any sort.” *Dep’t of Enforcement v. Fox & Co. Inv., Inc.*, No. C3A030017, 2003 NASD Discip. LEXIS 60 (O.H.O. Dec. 30, 2003) (imposing ten-day supervisory and principal suspension and \$10,000 fine for intentional failure to file amended Form U5 and negligent failure to file Rule 3070 report; individual Respondent had received three letters of caution for Rule 3070 violations).

<sup>20</sup> *Dep’t of Enforcement v. Berry-Shino Sec., Inc. and R. Matthew Shino*, No. C3A030001, 2003 NASD Discip. LEXIS 61 (Dec. 10, 2003)

<sup>21</sup> The Frankfurt office was closed in February 2000. CX-2 at 7.

correct errors as soon as they were brought to his attention, typically by examiners during their examinations of BSSI. Tr. 63, 105. He noted that he had a tickler to remind himself of the deadlines for the quarterly Rule 3070 filings, but having the tickler may have contributed to some violations. Because of his reliance on the tickler, he came to believe that everything was due quarterly, but the Rule requires many events to be reported more promptly. Tr. 161.

The Hearing Panel believed that Respondent was sincere in his acceptance of responsibility, and that he genuinely intends to avoid putting himself in situations that make it difficult to comply with FINRA Rules in the future if he re-enters the industry. *See* Tr. 133 – 134.

#### **E. Sanction Imposed**

Consistent with Enforcement's recommendation, the Hearing Panel imposes a single sanction rather than separate sanctions for Respondent's reporting violations. The reporting violations are of a similar nature, arising to a substantial extent from the same causes. The Hearing Panel finds that the violations were egregious. A nine-month suspension in all principal capacities is appropriately remedial for the reporting violations.

The Hearing Panel considers the failure to have a properly qualified principal to supervise the New York options business to be a serious violation for which a substantial sanction is appropriate. While Respondent encouraged principals in the New York office to become qualified to supervise the options business, and was in the New York office frequently, he knowingly allowed the New York office to operate in violation of FINRA's Rules. Enforcement recommended a \$10,000 fine for this violation. However, as noted above, Enforcement has not opposed Respondent's motion to waive monetary sanctions. Enforcement has not recommended an alternative sanction. The Hearing Panel finds that an appropriate sanction is a suspension of three months in all principal capacities.

#### **IV. Conclusion**

For late filing and failing to file Rule 3070 reports, in violation of NASD Conduct Rules 3070 and 2110, and late filing and failing to file amendments to Forms U4 and U5, in violation of Article V, Sections 2(c) and 3(b) of the NASD By-Laws and NASD Conduct Rule 2110, Respondent is suspended for nine months from associating with any FINRA member in all principal capacities. For permitting a branch office with more than three representatives to transact an options business without having a Registered Options Principal or Limited Principal – General Securities Sales Supervisor as the principal supervisor of the office, in violation of NASD Conduct Rules 2860(b)(20)(C) and 2110, Respondent is suspended for an additional three months from associating with any FINRA member in all principal capacities. The suspensions shall run consecutively.

If this decision becomes FINRA's final action in this matter, Respondent's suspension will commence on November 16, 2009, and end at the close of business on November 15, 2010. In addition, Respondent shall pay costs in the amount of \$1,950.30, which represents the cost of the hearing transcript together with a \$750 administrative fee.<sup>22</sup> The costs shall be payable on a date set by FINRA, but not less than 30 days after this decision becomes FINRA's final disciplinary action in this matter.

#### **HEARING PANEL**

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By: Lawrence B. Bernard  
Hearing Officer

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<sup>22</sup> The Hearing Panel has considered and rejects without discussion all other arguments of the parties.

Copies to: R. Matthew Shino (*via overnight courier and first-class mail*)  
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