FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RICHARD J. IAVECCHIA (CRD No. 1438990), Respondent.	Disciplinary Proceeding No. 20070094253 Hearing Officer – MC **HEARING PANEL DECISION** **October 1, 2009**

Respondent Richard J. Iavecchia is suspended from associating with any FINRA member firm in any capacity for 60 days and is fined $3,500 for (i) making misrepresentations on compliance forms issued by his member firm employer, in violation of Conduct Rule 2110, and (ii) failing to inform his member firm employer of brokerage accounts opened in his wife's name with other firms and, in turn, failing to inform those firms of his association with his member firm employer, in violation of Conduct Rules 2110 and 3050.

Appearances

Margaret Tolan, Senior Trial Counsel, and Aida Vernon, Senior Counsel, New York, NY, for the Department of Enforcement.

Ivan B. Knauer, Esq., Washington, DC, for Respondent Richard J. Iavecchia.

DECISION

I. Introduction and Procedural History

In September 1998, Respondent Richard J. Iavecchia ("Respondent"), who was then employed by FINRA member firm Morgan Stanley DW Inc. ("Morgan Stanley" or the "Firm"), opened a new account in his wife's name at another member firm. He did not inform Morgan Stanley of the account, and he did not disclose to the other firm that he was associated with Morgan Stanley. In May 2005, Respondent's wife opened a

second account at another member firm. Once again, Respondent did not inform Morgan Stanley of the existence of the outside account or inform the other firm of his association with Morgan Stanley. Morgan Stanley learned of the existence of the outside accounts in May 2005. Respondent resigned from the Firm shortly thereafter.

On December 23, 2008, FINRA's Department of Enforcement ("Enforcement") filed the Complaint in this disciplinary proceeding. The First Cause of Action alleges that Respondent gave false answers to questions about the two outside brokerage accounts on compliance questionnaires administered by Morgan Stanley in 2000, 2002, 2003 and 2004, in violation of Conduct Rule 2110.[1] The Second Cause of Action alleges that by failing to inform Morgan Stanley of the two outside accounts, and by failing to disclose to the firms at which they were opened that he was associated with Morgan Stanley, Respondent violated Conduct Rules 2110 and 3050.

In his Answer, Respondent admitted most of the allegations in the Complaint but denied Enforcement's ultimate assertions that he had violated Conduct Rules 2110 and 3050.[2] In his Pre-Hearing Brief, and in the course of the Hearing, [3] however, Respondent and his counsel made clear that Respondent does not contest the allegations that he "did

[1] 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. The applicable rules are available at www.finra.org/rules.

[2] *See* Answer of Respondent Richard J. Iavecchia (hereinafter "Answer"), ¶¶ 24, 26.

[3] The court reporter who transcribed the first two days of testimony was replaced by another court reporter on the final day of the hearing. Thus, references to the testimony of the first two days of the hearing are designated as "Tr. 1, _," while references to the testimony of the third day of the hearing are designated as "Tr. 2, _." References to Enforcement's Exhibits are designated as "CX-_." References to Respondent's Exhibits are designated as "RX-_." References to the joint exhibits filed by the parties are designated as "JX-_."

not inform Morgan Stanley about his wife's accounts," that the outside firms were not informed of his employment at Morgan Stanley, and that his answers on the Morgan Stanley compliance questionnaires were incorrect.[4] Thus, Respondent concedes liability for the violations of Conduct Rules 2110 and 3050 as alleged in the Complaint. Consequently, when the Hearing Panel[5] convened on June 24, 2009, for a three-day hearing in Philadelphia, PA, the focus was primarily on the issue of sanctions.

II. Findings of Fact and Conclusions of Law

A. The Respondent

Respondent began his career in the securities industry in 1986 when he became a registered representative with Dean Witter Reynolds Inc. ("Dean Witter").[6] He has no disciplinary history. During the period relevant to this disciplinary proceeding, Respondent worked at the Jenkintown, PA branch office of Dean Witter, which became Morgan Stanley Dean Witter in 1997. From January 1986 to May 27, 2005, Respondent was employed as a general securities representative with the Firm.[7] He is currently registered as a general securities representative with another FINRA member firm,[8] and therefore FINRA retains jurisdiction over him for the purposes of this proceeding.

[4] Respondent's Pre-Hearing Brief, p. 1; Tr. 1, 30-31; Tr. 2, 270 ("… the only issue here is intent, and it's only relevant to the question of sanctions.")

[5] The Hearing Panel consisted of one current and one former member of the District 9 Committee, and the Hearing Officer.

[6] JX-1, p. 3.

[7] JX-1, p. 2.

[8] *Id.*, p. 1.

B. Background

1. The Waterhouse Account

In September 1998, Respondent opened an investment account at FINRA member firm TD Waterhouse Investors Services, Inc. ("Waterhouse") for his wife, Cynthia Iavecchia ("C. Iavecchia").[9] She and Respondent testified that the purpose of the account was to provide her with the opportunity to acquire investment experience.[10] Respondent stated that over the years he had observed the difficulties encountered by newly-widowed clients who did not know how to manage their investments, and he wanted his wife to know how to do so if something should happen to him.[11]

At the time Respondent opened the Waterhouse account, he and his wife held a joint account at Morgan Stanley, and she also had an individual retirement account at the Firm.[12] Respondent was the broker of record for the Morgan Stanley accounts.[13]

C. Iavecchia's Waterhouse account was funded with the deposit of a check in the amount of $25,000 drawn on her personal credit union checking account.[14] Respondent testified that one reason for selecting Waterhouse as the situs of the account was that Waterhouse charged lower commissions on trades than Morgan Stanley,[15] even considering the discount he received as an employee of the Firm.[16] Respondent denied

[9] CX-2; Tr. 1, 422.

[10] Tr. 1, 430-431, 637; Tr. 2, 11-12.

[11] *Id.* at 430-431.

[12] Tr. 1, 426-428; JX-12, JX-13, JX-14.

[13] Tr. 1, 429.

[14] *Id*. at 635-636.

[15] *Id.* at 422-423.

[16] Respondent testified that he explained to his wife that he received a 50 percent discount on commissions as a Morgan Stanley employee, but that commissions charged by "discount brokers are still 75 percent cheaper" than those charged at Morgan Stanley. *Id.*

that he intended to conceal the existence of his wife's outside accounts from Morgan Stanley.[17] Respondent testified that he filled out the application for his wife's Waterhouse account so that it would provide her with the broadest possible variety of investment experiences. For example, he opened it as a margin account because this would provide his wife with "flexibility" to experiment with investing at different risk levels.[18] For the same reason, Respondent filled out an options trading application on his wife's behalf.[19] He listed his wife's investment objective as "speculative" because, he testified, doing so would allow her to buy "something aggressive" and to speculate if she chose.[20]

With his wife's consent, Respondent filled out the new account opening application paperwork[21] and signed her name on the form.[22] He testified that he did not disclose on the new account application the existence of his wife's retirement account, or their joint account, at Morgan Stanley because at the time he did not think this information was important.[23] Similarly, he testified that he did not inform Waterhouse, on the application or otherwise, that he was associated with Morgan Stanley because he considered the account to be "Cindy's [his wife's] money and it was her account."[24]

According to Respondent, some of the information he provided in the new account application form was incorrect because he was "checking off blocks" and not

[17] Tr. 1, 458.

[18] *Id.* at 440.

[19] *Id.* at 442-443.

[20] *Id.* at 490.

[21] *Id.* at 445-446, 476.

[22] *Id.* at 450, 476.

[23] *Id.* at 456, 638.

[24] *Id.* at 459-460.

paying attention to detail.[25] For example, he indicated that his wife's marital status was single.[26] In the space on the form for identifying "Other Brokerage Accounts," Respondent failed to identify his wife's accounts at Morgan Stanley and, instead, wrote "Schwab," indicating that his wife had an account at Charles Schwab and Company.[27] In fact, she did not have an account at Schwab, although she did have a retirement account at Fidelity Investments ("Fidelity").[28] Where the form called for a description of his wife's financial information, Respondent factored in the couple's joint assets without indicating that he was doing so.[29]

On the Waterhouse application, Respondent summarized his wife's investment experience in terms that described his own background, indicating that she had ten years of experience investing in stocks and bonds, and engaging in margin and options trading.[30] Respondent insisted in his hearing testimony that this was accurate because he and his wife, together, had purchased options in her retirement account and in their joint account for years.[31] Respondent conceded, however, that his wife relied on his recommendations and advice, that he was the one who recommended the options

[25] Tr. 1, 481-482.

[26] *Id.* at 479; CX-2, p. 5.

[27] CX-2, p. 6; Tr. 1, 500.

[28] Tr. 1, 501.

[29] *Id.* at 500.

[30] CX-2, p. 5.

[31] Tr. 1, 483.

purchases[32] because his wife's understanding of options was "limited,"[33] and that his investment expertise exceeded that of his wife "[b]y far."[34]

Respondent testified that he understands the importance of accuracy in his customers' account applications[35] because the information serves as the basis for the recommendations given by a financial advisor.[36] When it came to his wife's new account application, however, because nobody at Waterhouse was going to provide his wife advice, he did not believe it was important to be accurate.[37]

His wife's Waterhouse account was open from September 1998 through June 2005.[38] Over the nearly seven years the account existed, Respondent and his wife executed approximately 35 transactions in 13 different securities.[39]

2. The Fidelity Account

In the beginning of May 2005, Respondent's wife opened a new account at Fidelity.[40] Respondent testified that she opened the account because her interest in the Waterhouse account had waned over time[41] and, as a result, she had not been as actively involved with her investments as originally planned.[42] C. Iavecchia corroborated her husband's statement, testifying that after discussing it with Respondent, she decided to

[32] Tr. 1, 483.

[33] *Id.* at 483-485.

[34] *Id.* at 641.

[35] *Id.* at 495-496.

[36] *Id.* at 638.

[37] *Id.* at 496.

[38] JX-5, JX-2, p. 130.

[39] JX-5.

[40] Tr. 1, 44-46; JX-7.

[41] Tr. 1, 577.

[42] *Id.* at 570-571.

open the Fidelity account to "reignite" her interest in investing as a way of learning more about managing her assets.[43] With Respondent's assistance, she selected Fidelity, in part because it had a branch office located conveniently near her office.[44]

The Fidelity account was funded with $20,000 that came partly from the couple's joint account at Morgan Stanley.[45] This time, Respondent did not fill out the account application; his wife did so, with the assistance of a Fidelity agent.[46]

3. The Morgan Stanley Compliance Questionnaires

In March 1999, Respondent filled out an annual Morgan Stanley compliance questionnaire, answering "no" to a question that asked if he maintained "any brokerage accounts" in which he had "a financial or fiduciary interest outside of Morgan Stanley."[47] In April 2000, Respondent filled out another compliance questionnaire that asked him to list his own and "employee-related" accounts. Respondent listed accounts at Morgan Stanley of his father, brother, and sister-in-law – but not his wife's Waterhouse account.[48] On the same form, he also was asked to list all brokerage accounts located outside of the Firm in which he had a "financial or fiduciary interest;" he wrote "N/A."[49] In a 2002 compliance questionnaire, Respondent listed his wife's Morgan Stanley IRA account, among others, as an account in which he had "a direct interest," yet he made no mention

[43] Tr. 2, 14-15.

[44] *Id.* at 16-17; Tr. 1, 556-557.

[45] *Id.* at 583; JX-8.

[46] Tr. 2, 19. The Fidelity new account application did not request any information concerning other accounts, marital status, or require the applicant to identify a spouse or spouse's employment. JX-7.

[47] Tr. 1, 617; JX-27, p. 1.

[48] JX-28, p. 1.

[49] Tr. 1, 618-619; JX-28, p. 2.

of his wife's Waterhouse account. [50] In Firm compliance questionnaires for 2003 and 2004, Respondent gave the same answers of "N/A" to questions asking whether there were any outside accounts in which he held a financial interest.[51]

Respondent understood that Morgan Stanley's policy required employees to maintain their accounts, including accounts in which they had an interest, at the Firm,[52] and to obtain approval from the Firm before opening outside accounts.[53] By 2001, the Firm's Code of Conduct stated explicitly that these requirements applied to "any securities account owned or controlled, in whole or part, directly or indirectly" by an employee, and to accounts the employee "could be expected to influence or control," including spouses' accounts.[54] Respondent testified that previously the Firm's policy statement made no mention of spouses' accounts, and he did not recall being aware of the clarification being made in 2001.[55] He admitted that, as a registered representative, he was nevertheless responsible for knowing and complying with the Firm's policy, but maintained that he simply did not understand at the time that the policy applied to his wife's Waterhouse and Fidelity accounts.[56]

Respondent testified that he held this mistaken view because, insofar as he was concerned, the accounts belonged to his wife, and she was free to make whatever investment decisions she pleased with them.[57] Respondent and his wife considered the

[50] Tr. 1, 621-622; JX-29, p. 1.

[51] JX-30, JX-31.

[52] Tr. 1, 613.

[53] *Id.* at 607-608, 632.

[54] *Id.* at 606, 609-610; JX-24, pp. 55-56.

[55] Tr. 1, 655-656.

[56] *Id.* at 656.

[57] *Id.* at 654.

money that funded the accounts to be hers.[58] As corroboration, he pointed out that he was not a beneficiary of his wife's Waterhouse account;[59] according to C. Iavecchia's Will, the proceeds of the Waterhouse account were to go to her family, not to Respondent.[60]

4. Respondent Had a Financial Interest in, and Influenced, His Wife's Accounts

The Hearing Panel, however, finds that Respondent possessed a financial interest in both of his wife's accounts. As noted above, the Fidelity account was initially funded by a withdrawal from the Iavecchia's joint Morgan Stanley account. Even though the initial funds deposited in the Waterhouse account came from a check drawn on C. Iavecchia's separate credit union account, when the Waterhouse account was closed in June 2005, most of the proceeds were transferred to the couple's joint account.[61]

Respondent also influenced the investment decisions made in his wife's accounts. The record clearly shows that Respondent provided investment advice to his wife.[62] Of the two of them, he had far greater investment expertise.[63] Thus, it was natural for his wife to rely upon Respondent for guidance in making her own investments,[64] often "piggybacking" on the decisions he made to purchase and sell securities in their joint and retirement accounts.[65] Based on the preponderance of the evidence, the Hearing Panel

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[58] Tr. 2, 10, 208.

[59] Tr. 1, 622.

[60] Tr. 1, 655; RX-3.

[61] Tr. 1, 661-662, 674-676; Tr. 2, 91.

[62] Tr. 1, 442-443.

[63] *Id.* at 641.

[64] Tr. 2, 90-91.

[65] Tr. 1, 570.

finds that C. Iavecchia consulted with Respondent and relied upon the information and advice he provided, even though she retained the prerogative to make the final investment decisions, and did so.[66]

5. Morgan Stanley Learns of the Outside Accounts

In 2005, Joseph E. Links ("Links") was Morgan Stanley's manager for the branch office at which Respondent was employed.[67] On May 12, 2005, the Firm's legal department notified Links that Respondent's wife maintained a securities account away from the Firm at Fidelity.[68] When Links confronted him about the Fidelity account, and told him that it violated Firm policy, Respondent argued that he had done nothing wrong because it was his wife's account and her money.[69] When Links told him that under Firm policy the account was nonetheless impermissible, Respondent voluntarily revealed that his wife had a second outside account at Waterhouse about which the Firm did not know, because he had not disclosed it.[70]

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[66] Enforcement endeavored to prove that Respondent controlled the Waterhouse and Fidelity accounts, and that they were effectively his personal accounts. Tr. 2, 233. The Hearing Panel notes that the Complaint contains no allegation that Respondent, with or without authorization, exercised discretion over his wife's two accounts. Both Respondent and his wife emphatically, and credibly, denied that he did so, and the Hearing Panel finds that Respondent did not control the two accounts. Tr. 1, 429, 644; Tr. 2, 28. The preponderance of the evidence supports the inference that C. Iavecchia had, and exercised, the right to approve or disapprove of transactions in her account recommended by Respondent. *See Follansbee v. Davis, Skaggs, & Co.*, 681 F.2d 673, 677 (9th Cir. 1982), *cited in Dep't of Enforcement v. Medeck*, 2009 FINRA Discip. LEXIS 7, *38, n. 23 (July 30, 2009). It is noteworthy that JX-5, a summary of the trading in the Waterhouse account, shows that over almost seven years, there were only approximately 35 transactions in approximately 13 securities. This stands in sharp contrast to the number of transactions Respondent effected in the Morgan Stanley joint account for which Respondent was the broker of record, with more than 2,000 trades during the same period. Tr. 1, 646-647.

[67] Tr. 1, 209-211.

[68] *Id.* at 211-212, 602.

[69] *Id.* at 467.

[70] *Id.*

C. Violations

Conduct Rule 3050(c) provides, in relevant part, that "[a] person associated with a member, prior to opening an account or placing an initial order for the purchase or sale of securities with another member, shall notify both the employer member and the executing member, in writing, of his or her association with the other member." Paragraph (e) of Rule 3050 specifies that the requirements of paragraph (c) apply to accounts in which the associated person has either a financial interest or discretionary trading authority.

Respondent admits that he failed to disclose the existence of the two accounts in his wife's name to the Firm,[71] even though, he now concedes, he had a financial interest in the accounts.[72] Respondent also failed to inform Waterhouse, when he opened his wife's account there, that he was employed by Morgan Stanley,[73] and neither he nor his wife informed Fidelity of his employment at the Firm.[74] Respondent admits that he ought to have made the disclosures: "my wife's accounts should have been disclosed, as I understand [the Firm's policy] today."[75] His failures to disclose his wife's Waterhouse account on the Firm's annual compliance forms violated Conduct Rule 2110, as alleged in the First Cause of the Complaint. His failure to inform the Firm of his wife's two outside accounts, and failure to inform Waterhouse and Fidelity of his association with Morgan Stanley, also violated Conduct Rules 2110 and 3050, as alleged in the Second Cause of Action of the Complaint.

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[71] Answer, ¶ 8; Tr. 1, 617-619; JX-28, p. 2.

[72] Tr. 1, 30; Tr. 2, 265-266.

[73] Tr. 1, 459-460; CX-2, p. 1.

[74] Tr. 1, 580-582; JX-7, p. 1.

[75] Tr. 1, 611-612.

III. Sanctions

For violations of Conduct Rule 3050, the FINRA Sanction Guidelines recommend fines ranging from $1,000 to $25,000 and, in egregious cases, suspension in any or all capacities for up to two years, or a bar.[76] The Guidelines identify two aggravating factors in the Principal Considerations specific to Conduct Rule 3050 violations: (i) whether transactions in the undisclosed outside accounts presented real or perceived conflicts of interest for customers or the employer member firm; and (ii) whether the transactions involved "hot" issues or violations of the Free-Riding and Withholding Interpretation.[77]

The Hearing Panel finds neither of these aggravating factors present in this case. There is no evidence that the transactions in C. Iavecchia's outside accounts presented real or perceived conflicts of interest for Respondent's customers or Morgan Stanley, or involved "hot" issues or free-riding and withholding violations.

A. Recommendations of the Parties

Enforcement characterizes Respondent's violations as egregious and recommends a suspension from association with any FINRA member firm in all capacities for one year and a fine of $20,000. Enforcement refers to two aggravating circumstances warranting such a lengthy suspension. First, Enforcement argues that Respondent intentionally subverted Morgan Stanley's ability to monitor the trading in his wife's two outside accounts by secretively establishing them, after being told that it would violate Firm policy, and then concealed their existence when he entered false information in Firm compliance questionnaires. Second, and more generally, Enforcement asserts that

[76] *FINRA Sanction Guidelines*, 17 (2007).

[77] *Id*. The Principal Considerations also identify a potentially mitigating factor, whether the respondent gave verbal notice of the violative transactions to his employer member firm or the executing member firm, in which the employer firm acquiesced. This factor is not present here, as Respondent does not claim he gave verbal notice of the activity in the outside accounts to Morgan Stanley.

Respondent's misrepresentations, in the Waterhouse account application and the Morgan Stanley compliance questionnaires, reflected gross disregard for the professional obligations of a registered representative and the governing professional standards.[78]

Respondent, having conceded liability for the rule violations, requests that any suspension imposed be for no more than two weeks.[79] He denies intentionally concealing the outside accounts. Respondent argues in mitigation that (i) he honestly misunderstood the requirements imposed by his Firm's policy,[80] (ii) he incorrectly believed that he did not have a financial interest in his wife's two outside accounts,[81] and (iii) Morgan Stanley was not harmed by his mistakes.[82]

B. Respondent's Conduct Was Serious, But Not Egregious

1. Establishment of the Outside Accounts

Enforcement presented evidence to suggest that Respondent established the Waterhouse account for his wife after being explicitly informed by a supervisor that doing so would violate Firm policy. The support for this contention is found in a portion of the testimony Enforcement elicited from Links, Respondent's supervisor at Morgan Stanley.

Links testified that, in a brief conversation that occurred "years ago," Respondent told him that he "wanted his wife to get more experience making investment decisions,

[78] In its Pre-Hearing Brief, Enforcement argued that there was a "perceived conflict of interest" with regard to trades in a particular stock that were executed in the Fidelity account as well as in Respondent's Morgan Stanley joint account. *Dep't of Enforcement's Pre-Hearing Brief*, pp. 20-21. Enforcement did not pursue this argument during the course of the Hearing, however, and made no mention of a perceived conflict of interest in its examination of witnesses or in its arguments to the Hearing Panel.

[79] Tr. 2, 289.

[80] *Id*. at 271.

[81] *Id.* at 279-280.

[82] *Id.* at 276.

and he was thinking about … [opening] an account outside of the office, at which I said to him, 'Rick [Iavecchia] it's against the firm policy to have an account outside the office.' He said to me, 'Does that include my spouse?' I responded, 'Yes, I understand that it does.'"[83] Links suggested that Respondent consult with Randy Smith ("Smith"), Morgan Stanley Branch Administrative Manager, to confirm that the policy applied to accounts held by spouses outside the office.[84]

Respondent denies that he had the conversation that Links testified took place years ago.[85] According to Respondent, the only time he spoke to Links about an outside account for his wife was in May 2005, when Links confronted him about the Firm's discovery of the Fidelity account.[86] Respondent testified that Links, who was coping with heavy managerial demands at the time,[87] had a reputation for being forgetful and sometimes becoming confused about what people said to him.[88]

Respondent's description of Links' memory was corroborated by other testimony.[89] Links himself admitted that the conversation he recounted occurred "a

[83] Tr. 1, 216-217.

[84] *Id*. at 216.

[85] *Id*. at 626-630.

[86] *Id*. at 628-630.

[87] Links had managerial responsibility for several Morgan Stanley branches and supervised approximately 150 persons. Tr. 2, 124-125.

[88] Tr. 1, 686-689.

[89] For example, Smith testified that Links had a reputation for forgetting conversations, or recalling them incorrectly, among colleagues in the Jenkintown, PA, branch office of the Firm. *Id.* at 267-268. Donald Cornagie, former sales manager at the Jenkintown branch office, testified that he worked closely with Links and observed him to be forgetful, which Cornagie attributed to the heavy weight of responsibilities borne by Links at the time. Tr. 2, 141-143. Mary Frances Dean, a Morgan Stanley portfolio manager who worked with Links and Respondent, testified that Links frequently had trouble remembering what people had said to him. *Id*. at 184-185.

number of years ago" and was brief, lasting "at most" only a few minutes.[90]

The Hearing Panel carefully considered the testimony of Respondent, Links, and the other witnesses, and concludes that Links was simply mistaken when he testified that he told Respondent, years ago, that Firm policy forbade setting up an outside account for his wife. The Hearing Panel does not, therefore, find that Respondent established his wife's Waterhouse account after being specifically informed by Links that he could not. Had Respondent done so, this would have been a significant aggravating factor.

This finding, however, does not excuse Respondent's violation of the prohibition on unauthorized outside accounts. As noted above, Conduct Rule 3050(c) required Respondent, in writing, to disclose the accounts to Morgan Stanley and to disclose his association with Morgan Stanley to the executing firms. Furthermore, witnesses called by both parties concurred that the Firm's policy on outside accounts was clear and consistent with standard industry-wide practice.[91]

The Hearing Panel finds, therefore, that Respondent either knew or should have known the Firm's policy, and the Rule, relating to outside accounts. Respondent should

[90] Tr. 1, 217. Although he claimed to remember that brief conversation, Links was unable to recall any details of the more recent conversation he had with Respondent in May 2005, when he confronted Respondent about the Fidelity account, even though it was an important conversation about an upsetting matter. *Id.* at 222. And when Morgan Stanley first interviewed him about C. Iavecchia's outside accounts in May 2005, Links did not did not remember the earlier conversation. *Id.* at 225-226.

[91] For example, Links testified that the Firm's policy unambiguously required employees "to have their accounts with the firm" or "to request approval to have an outside account," and that the policy extended to accounts held by an employee's spouse. *Id.* at 215. Smith testified that the policy was clear, even though he encountered some people at Morgan Stanley who did not seem to understand it. *Id.* at 281-281. Thomas Nelli, employed in a compliance capacity at Morgan Stanley for 23 years, testified that the policy clearly required employees to maintain all accounts, including accounts for family members, at the Firm, *id.* at 332, that the policy reflected industry practice, *id.* at 336-337, and that it is commonly assumed that an employee possesses a financial interest in a spouse's account, requiring disclosure, *id.* at 356. David Lojpersberger, branch manager for Wells Fargo Advisors in Philadelphia, PA, testified that his firm's policy regarding outside accounts, like Morgan Stanley's, requires employees to obtain permission to open an outside account, applies to accounts of employees' spouses, and reflects an industry-wide standard. Tr. 2, 98, 108-111.

also have known that the Rule and the policy applied to accounts in his wife's name in which he held a financial interest. In light of all of these circumstances, the Hearing Panel finds that it was reckless for Respondent to have established the Waterhouse and Fidelity accounts without seeking permission from his Firm, and not to have disclosed the outside accounts on the Firm's compliance questionnaires.[92] These violations are serious, but not egregious.

2. The Waterhouse New Account Application

Enforcement also argues as an aggravating factor that when Respondent indicated on the Waterhouse new account application that his wife was single, and that she had a brokerage account at Schwab, he deliberately intended to deceive the Firm. Enforcement suggests that Respondent sought thereby to conceal from Waterhouse that his wife was married because an accurate answer might have led to the discovery that Respondent was employed in the securities industry,[93] and this would have prevented him from opening the outside account.

Respondent counters by arguing that when he indicated his wife was single and had a brokerage account at Schwab on the Waterhouse new account application, he was not trying to deceive anyone. Respondent testified that he was inattentive and made a mistake when he checked the box marked "single" on the Options Trading application, and although he cannot now recall what he was thinking at the time, he may have believed that by checking the box he was indicating that his wife was applying for a

[92] Recklessness has been defined as "an extreme departure from the standards of ordinary care." *Dep't of Enforcement v. Vines,* No. 2006005565401, 2009 FINRA Discip. LEXIS 16, p. 7, (Aug. 25, 2009), *citing Alvin W. Gebhart, Jr.*, Exch. Act Rel. No. 58,951, 2008 SEC LEXIS 3142, at *26 (Nov. 14, 2008).

[93] Tr. 1, 480.

single, or individual, as opposed to joint account.[94] Respondent denied that he was attempting to conceal his wife's true marital status.[95] With respect to the question on the application which asked about his wife's other accounts, he testified further that he had simply forgotten at which firm his wife had a retirement account, assumed that it was at Schwab, and was wrong.[96]

Respondent also testified that because he was his wife's investment advisor, he did not think the information he provided on the application "was important at all," because no Waterhouse account executive would be assigned to the account.[97] Respondent said he believed that checking the box indicating his wife was single was unimportant because the form did not require the name or any further identification of the applicant's spouse and, even if he had checked the correct box, it would not have raised a red flag or alerted anyone reviewing the form "to do anything."[98]

Nevertheless, Respondent admits that it was important for the Firm to be able to "monitor me … [and] monitor my family members" by reviewing outside accounts, and that when he filled out the Waterhouse new account form, he should have made it clear that he was employed by a brokerage firm: "I'm not claiming that I shouldn't have disclosed it." [99]

The Hearing Panel finds it unnecessary to decide whether Respondent was inattentive or deliberate when he entered incorrect information in the Waterhouse new

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[94] Tr. 1, 480-482.

[95] *Id.* at 480.

[96] *Id.* at 500-502.

[97] *Id.* at 638.

[98] *Id.* at 648.

[99] *Id.* at 649.

account form. Regardless of whether Respondent set out to mislead the Firm, as Enforcement contends, or was merely inattentive, sloppy and made a mistake, the Hearing Panel notes that the result was the same: the Firm was unaware of C. Iavecchia's outside accounts and was unable to review the activity in them. Indeed, Respondent cannot, and does not, deny that the answers he provided on the compliance questionnaires, and the misinformation on the Waterhouse account application, had the practical effect of being misleading.[100]

C. Relevant Principal Considerations in Determining Sanctions

In addition, Enforcement cites four Principal Considerations in Determining Sanctions applicable to all rule violations to support the imposition of severe sanctions in this case. They are Principal Considerations Two (acceptance of responsibility), Eight (numerous acts/pattern of misconduct), Nine (misconduct over an extended period), and Ten (concealment of misconduct to deceive the member firm or regulatory authorities).[101]

1. Acceptance of Responsibility

Respondent did not acknowledge and accept responsibility for his misconduct prior to the Firm's discovery of the Fidelity account. Once he was confronted with the Firm's discovery of the Fidelity account, however, Respondent made no effort to conceal, but voluntarily disclosed the existence of the Waterhouse account. In his testimony, Respondent stated: "The bottom line is, I didn't understand it the way I'm responsible to. I mean, there's a rule, as a registered rep, I'm responsible to know it. I accept that. I don't have any problem with it. I'm not going to sit here and make excuses. I mean, it's

[100] Tr. 1, 670.

[101] *FINRA Sanction Guidelines*, *supra* at 6.

my responsibility, I know that."[102] He testified further that "I know why I'm here,"[103] and when asked if he would ever make any "mistakes" similar to the misconduct with which he had been charged, he testified "Absolutely, positively, unequivocally, no."[104] Based upon Respondent's testimony, his demeanor, and testimony about Respondent's conduct from other witnesses who know him, the Hearing Panel finds Respondent's acknowledgement of his responsibility as a registered representative to adhere to the Conduct Rules to be sincere.

2. Pattern of Misconduct, Misconduct Over an Extended Period, and Concealment of Misconduct

Enforcement argues that by filling out compliance forms that failed to identify the Waterhouse account on five separate occasions, Respondent engaged in a deceptive pattern of misconduct comprised of numerous acts, over an extended period of time.

Respondent argues that although he failed to disclose the existence of the Waterhouse account on the Morgan Stanley compliance forms, his failure to do so was consistent with his claim that during the entire existence of the Waterhouse account he believed, albeit incorrectly, that disclosure was unnecessary. Thus, according to Respondent, his failure to identify the account on the compliance forms stemmed from his originally incorrect assumption, rather than separate, discrete efforts to mislead the Firm.

On the record of this case, the Hearing Panel is unable to ascertain why Respondent failed to provide accurate information on the Firm's compliance questionnaires, and whether he consciously, and repeatedly, set out to deceive the Firm

[102] Tr. 1, 656.

[103] Tr. 2, 204

[104] *Id.* at 209.

and regulators as Enforcement contends. The Hearing Panel notes that the evidence shows that most of the trading in the Waterhouse account involved the same securities Respondent traded in the couple's Morgan Stanley accounts, which he knew were monitored by the Firm. This evidence undercuts an inference that Respondent was motivated to conceal the nature of the trading in the Waterhouse account from Morgan Stanley or from regulators.

The Hearing Panel finds it unnecessary, however, to determine what motivated Respondent when he filled out the Firm's questionnaires. Regardless of his motivation, as the parties agree, Respondent's answers to the relevant questions on the Firm's compliance questionnaires had the effect of concealing the existence of his wife's outside accounts from the Firm, for a period of years.

D. Other Considerations in Determining Sanctions

Important to the determination of the appropriate sanctions to impose in this case, there is no evidence that the trading activity in the undisclosed outside accounts presented conflicts of interest for customers or the Firm. As previously observed, there is also no evidence that the transactions effected in the outside accounts involved "hot" issues or violated the Free-Riding and Withholding Interpretation, which would be aggravating factors.

Enforcement suggests that Respondent's misconduct was motivated partly by the potential for monetary gain, because Waterhouse charged lower commissions than Morgan Stanley. The level of trading in the Waterhouse account, however, approximately 35 trades over almost seven years, was relatively low, and the account

represented a tiny fraction of the couple's assets.[105] This volume of trading does not support a finding that Respondent was motivated to conceal the Waterhouse account from Morgan Stanley in order to save money on commissions.

Finally, and importantly, there is no evidence of any harm to the investing public, or to the Firm, resulting from Respondent's failure to disclose the outside accounts.

For all of these reasons, the Hearing Panel concludes that, although serious, Respondent's misconduct was not egregious, and sanctions as severe as Enforcement recommends are not necessary to meet the remedial goals that are the objective of FINRA sanctions.[106]

The Hearing Panel finds, therefore, that under the circumstances of this case, a sanction consisting of a suspension in all capacities for 60 days, and a fine of $3,500, will serve to deter Respondent from further similar misconduct, will serve to deter others in the securities industry as well, and is consistent with FINRA's remedial goals.

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[105] Tr. 1, 577.

[106] In its Pre-Hearing Brief and in oral argument at the hearing, Enforcement cited two prior FINRA Hearing Panel decisions it suggests possess precedential value in fashioning appropriate sanctions in this case, *Dep't of Enforcement v. Brack*, No. C9B020048, 2003 NASD Discip. Lexis 8 (OHO Feb. 7, 2003), and *Dep't of Enforcement v. Duma*, No. C8A030099, 2004 NASD Discip. LEXIS 44 (OHO Sept. 28, 2004). The Hearing Panel has considered these cases carefully and finds them distinguishable from this matter. In the former case, resulting in a bar, the respondent, a supervisor, failed to inform his firm of an outside account, falsely described himself as a student on a new account form, caused a form indicating supervisory approval of a securities transaction to be falsified by a subordinate, and denied he had the outside account both in writing and in response to oral questioning by his firm. In the latter case, also resulting in a bar, the respondent, a branch office manager, failed to disclose an outside account held with his brother, misrepresented his employment to the executing firm, fabricated the name of his employer to the executing firm, and gave false on-the-record testimony during the investigation. In both cases, the misconduct of the respondents was clearly egregious and significantly more serious than Respondent's misconduct in this case. The Hearing Panel also declines to rely upon these cases in gauging the seriousness of the Respondent's misconduct here consistent with the long-established principle that "appropriate remedial action depends upon the facts and circumstances of each particular case, and cannot be precisely determined by comparison with action taken in other cases." *Dep't of Enforcement v. Vines, supra* at *20, *quoting Dep't of Enforcement v. Bukovcik*, No. C8A050055, 2007 NASD Discip. LEXIS 21, at *17 n.10 (NAC July 25, 2007).

IV. Order

For making misrepresentations on compliance forms issued by his member firm employer, failing to inform his member firm employer of brokerage accounts opened in his wife's name with other member firms, and failing to inform those firms of his association with his member firm employer, in violation of Conduct Rules 2110 and 3050, Respondent Richard J. Iavecchia is suspended from associating with any FINRA member firm in any capacity for 60 days, and is fined $3,500.

In addition, Respondent is ordered to pay the costs of the hearing, in the amount of $6,704.05, which includes an administrative fee of $750 and the cost of the hearing transcript.

If this Decision becomes FINRA's final disciplinary action in this proceeding, the suspension shall become effective on the opening of business on Monday, December 7, 2009, and shall end at the close of business on Thursday, February 4, 2010. The fines shall be due and payable on Respondent's return to the securities industry. [107]

HEARING PANEL.

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By: Matthew Campbell
Hearing Officer

Copies to:

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