STATE OF ILLINOIS
SECRETARY OF STATE
SECURITIES DEPARTMENT

IN THE MATTER OF: MARK WINTERS	)	FILE NO. 0900456

NOTICE OF HEARING

TO THE RESPONDENT:

Mark Winters
(CRD#: 4043113)
10901 Winnetka Avenue
Chatsworth, California 91311

Mark Winters
(CRD#. 4043113)
C/o Wedbush Morgan Securities, Inc
1000 Wilshire Boulevard Suite 900
Los Angeles, California 90017-2457

You are hereby notified that pursuant to Section 11.F of the Illinois Securities Law of 1953 [815 ILCS 5] (the "Act") and 14 Ill. Adm. Code 130, Subpart K, a public hearing will be held at 69 West Washington Street, Suite 1220, Chicago, Illinois 60602, on the 3rd day of February, 2010 at the hour of 10:00 a.m. or as soon as possible thereafter, before Soula Spyropoulos Esq., or such other duly designated Hearing Officer of the Secretary of State.

Said hearing will be held to determine whether an Order shall be entered revoking Mark Winters' (the "Respondent") registration as a salesperson in the State of Illinois and/or granting such other relief as may be authorized under the Act including but not limited to the imposition of a monetary fine in the maximum amount pursuant to Section 11 E(4) of the Act, payable within ten (10) business days of the entry of the Order

The grounds for such proposed action are as follows:

1 That at all relevant times, the Respondent was registered with the Secretary of State as a salesperson in the State of Illinois pursuant to Section 8 of the Act.

2 That on July 30, 2009 the National Adjudicatory Council ("NAC") of FINRA entered Decision in Complaint No. E102004083704 Which sanctioned the Respondent as follows:

a. fined $19,882. ; and

b. suspension for 90 days. The Respondent is also ordered to pay hearing costs of $1,949.52.

3. That the Decision found:

The review subcommittee of the National Adjudicatory Council ("Review Subcommittee") called this matter for review pursuant to NASD Rule 9312 to examine the findings and sanctions imposed by the Hearing Panel. After a complete review of the record, we affirm the Hearing Panel's findings that Marc Winters ("Winters") (hereinafter referred to as ("Respondent") violated NASD Rules 3110 and 2110 by claiming waivers of contingent deferred sales charges ("CDSCs") on 42 redemptions of Class B mutual funds over the course of nine months for 14 customers by falsely claiming that those customers were disabled For this misconduct, the Hearing Panel fined the Respondent $30,000 and suspended him for 30 business days. We determine that a modification of sanctions is warranted, and therefore we fine the Respondent $19,882 and suspend him for 90 days.

Background

The Respondent entered the securities industry in September 1999 when he associated with UBS Financial Services ("UBS" or the "Firm") and registered with FINRA as a general securities representative. During the time that the misconduct here took place, the Respondent handled approximately $50 million in assets for roughly 200 customers The Respondent remained registered with UBS until August 2004, when the Firm terminated him for violating a Firm policy related to providing accurate customer information relevant to mutual fund sales. FINRA began its investigation of the Respondent after UBS's termination of the Respondent for cause.

The Respondent associated with Firm One on August 25, 2004, *as a* general securities representative. He remains employed by that firm. Approximately 80 to 85 percent of the Respondent's UBS clients transferred with him to Firm One. At the time of the hearing in this matter, the Respondent managed $67 million in assets for 1,062 clients

Procedural History

The Department of Enforcement ("Enforcement") filed a complaint against the Respondent on November 29, 2006 The complaint alleged that during the period March 2003 through December 2003, the Respondent claimed CDSC waivers on 42 redemption transactions for 14 customers by falsely stating that those customers were disabled, which caused UBS's books and records to contain false and misleading information related to the actual disability status of these customers and their entitlement to the CDSCs. The complaint further alleged that this conduct violated NASD Rules 3110 and 2110. In his answer to the

complaint, the Respondent admitted that he engaged in the alleged misconduct, but denied that he acted in a way that would justify a sanction

The Hearing Panel held a hearing on September 26, 2007. At the hearing, the Respondent again admitted that he obtained CDSC waivers by claiming disability for customers who were not disabled. In a decision issued on February 7, 2008, the Hearing Panel found the Respondent liable for the misconduct as alleged in the complaint. The Hearing Panel fined the Respondent $30,000 and suspended him for 30 business days On March 19, 2008, the Review Subcommittee called this matter for review.

Facts

There are no material facts in dispute in this matter. The respondent admits that from March 2003 through December 2003, he entered disability waivers in 42 mutual fund transactions for 14 customers whom he knew were not disabled In addition, the Respondent stipulated that he obtained CDSC waivers totaling $14,882. The respondent stated that he received no personal monetary benefit by entering the waivers and that the customers would have entered into the transactions even if they had to pay the CDSCs The Respondent testified that once he began obtaining CDSC disability waivers for non-disabled customers, he "really gave it no further thought" and "just wanted to save [the customers] money."

During the Respondent's employment at UBS, the Firm used an electronic mutual fund order entry system. When entering an order in the system to sell Class B or C mutual fund shares, a registered representative would arrive at an electronic field titled "CDSC Waiver" The default entry for this field was "No" If a registered representative elected to claim a waiver, the system required him to substitute "Yes" for "No" The system then would prompt the registered representative to select a reason for the waiver. The available reasons were death, disability, mandatory distribution, or systematic withdrawal.

The Respondent first learned of the idea to falsely claim that a customer was disabled for CDSC purposes from another UBS representative. The Respondent testified that he remembered having a conversation with this representative about one of the Respondent's clients who did not want to pay the CDSC. The representative said, "Oh that's no problem Just put down that he's disabled " The Respondent thought this was a "great way to save [his] clients some money " The Respondent testified that the mutual fund companies "spent money like it was going out of style" and that he thought that waiving these fees "was effectively built into their expenses." The Respondent learned that two or three other representatives in the office were also obtaining CDSC disability waivers for non-disabled customers and assumed it was just kind of a standard thing that was done at times." UBS policies expressly prohibited employees from "making false or misleading entries in the firm's books and records," the Respondent acknowledged at the hearing below that he never consulted UBS's compliance

manual to determine whether his conduct might violate a UBS policy and never spoke with any UBS supervisor, branch manager, or compliance person regarding the topiary of the waivers. He further acknowledged that he never reviewed the mutual fund prospectuses for the funds whose CDSCs he was waiving.

The Respondent testified that months after he obtained the waivers in this case, a UBS supervisor requested proof of the clients' disabilities The Respondent admitted to her that he could not provide such proof because the clients were not disabled. Several months after this conversation, UBS terminated the Respondent for violating Firm policy by falsely claiming the waivers.

Discussion

We affirm the Hearing Panel's findings of violation NASD Rule 3110 requires member firms to "make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the Rules of this Association and as prescribed by SEC Rule 17a-3." In turn, Rule 17a-3 requires member firms to make and keep "[a] memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities " 17 C.F.R. § 240.17a-3(a)(6)(i). NASD Rule 2110 requires FINRA members, in conducting their business, to "observe high standards of commercial honor and just and equitable principles of trade "[5] Dept of Enforcement v. Trevisan, Complaint No E9B2003026301, 2008 FINRA Discip LEXIS 12, at *27 (FINRA NAC Apr. 30, 2008) (internal quotation omitted)

Entering false information in a member firm's books or records-violates NASD Rule 3110 and also violates NASD Rule 2110's requirement that members observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business. Fox & Co. Inv., Inc., Exchange Act Rel No. 52697, 2005 SEC LEXIS 2822, at *30-32 (Oct 28, 2005) (finding that entering incorrect information in documents constitutes a violation of NASD Rules 3110 and 2110) Moreover, it is a "long-standing and judicially-recognized policy that a violation of another Commission or NASD rule or regulation constitutes a violation of Conduct Rule 2110." Stephen I. Gluckman, 54 S E C 175, 185 (1999); see also Dep't of Enforcement v. Shvarts, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12-13 (NASD NAC June 2, 2000) ("[V] violations of federal securities laws and NASD Conduct Rules [ ] are viewed as violations of Conduct Rule 2110 without attention to the surrounding circumstances because members of the securities industry are expected and required to abide by the applicable Rules and regulations ").

The Respondent admitted that he entered 42 inaccurate disability waivers for 14 customers into UBS's records in 2003. The Respondent's entry of false information into the Finn's mutual fund order entry system violated NASD Rules 3110 and 2110.

Findings

The Hearing Panel fined the Respondent $30,000 and suspended him for 30 business days. We determine that the Hearing Panel ignored aggravating factors and improperly weighted certain factors it considered mitigating. For the reasons discussed below, we modify the sanctions by fining the Respondent $19,882 and suspending him for 90 days.

In deciding upon an appropriate sanction, we have considered the FINRA Sanction Guidelines ("Guidelines"). The appropriate Guidelines to apply are those for falsification of records The Respondent argues that the Guidelines for recordkeeping violations are most analogous to his misconduct and should be applied here We disagree As we have previously determined, the Guidelines for falsification of records are applied in cases when CDSC waivers were improperly obtained intentionally. Compare Dep't of Enforcement v. Correro, Complaint No. E102004083702, 2008 FINRA Discip. LEXIS 29, at *16, 17 & n.8 (FINRA NAC Aug 12, 2008) (applying falsification of records Guidelines when misconduct was intentional), with Trevisan, 2008 FINRA Discip. LEXIS 12, at *30-31 & n.14 (applying recordkeeping Guidelines when misconduct was negligent). Unlike the respondent in Trevisan, the Respondent does not contend that he inadvertently coded the sales as being on behalf of disabled persons. The Respondent's misconduct was not comprised of negligent acts, but rather, he intentionally obtained waivers of CDSCs by claiming disability for persons he knew were not disabled

The Guidelines for falsification of records recommend a fine of $5,000 to $100,000 and a suspension for up to two years in cases where mitigating factors exist. In egregious cases, the Guidelines recommend considering a bar. The Hearing Panel found, and we agree, that this was a serious, but not an egregious, case.

The Guidelines for falsification of records also provide two considerations in determining the appropriate sanctions: (1) the nature of the documents falsified; and (2) whether the respondent had a good-faith, but mistaken, belief of express or implied authority to falsify the records ° Both considerations serve to aggravate the Respondent's misconduct. First, the customer order information that the Respondent falsified to process the waivers is an important record in the securities industry. See Edward J. Ma w. & Co., 46 S.E.C. 865, 873 n.39 (1977), aff'd, 591 F 2d 588 (10th Cir. 1979); see also James F. Novak, 47 S.E.C. 892, 898-99 (1983) (describing falsification of order tickets as serious misconduct). Second, the Respondent did not have a good faith belief of authority to submit that the

customers were disabled when he knew they were not. The Respondent admits as much, acknowledging that he never considered whether his conduct violated a UBS policy and that he never consulted with UBS management or compliance regarding the propriety of these waivers. In submitting the falsified documents to UBS, [the Respondent] evidenced a disregard of his responsibilities to his employing member and of the basic requirement that associated persons ensure the accuracy of member firm records " Geoffrey Ortiz, Exchange Act Rel No 58416, 2008 SEC LEXIS 2401, at *28 (Aug. 22, 2008).

We agree with the Hearing Panel's consideration of a number of mitigating factors with respect to sanctions in this case. Specifically, the Respondent acknowledged his misconduct from the outset, first to UBS and then to FINRA. The Respondent recognized the gravity of his behavior, expressed sincere remorse, and testified convincingly that he only intended to benefit his customers

The Hearing Panel also found mitigating that the Respondent was forthcoming when he was questioned about the improper CDSC waivers and noted that he cooperated fully with FINRA's and UBS's investigations We disagree that the Respondent's cooperation was mitigating. The Guidelines recognize as generally mitigating a respondent's substantial assistance to FINRA in its investigation of misconduct." We do not find that the Respondent provided substantial assistance to FINRA but, instead, cooperated with the investigation as he was obligated to do. When the Respondent registered with FINRA, he agreed to abide by its rules, which are "unequivocal with respect to the obligation to cooperate" with FINRA See Philippe N. Keyes, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631, at *23 (Nov. 8, 2006)

Throughout the proceedings below, the Respondent did not attempt to rationalize his misconduct. During this call for review proceeding, however, he now asserts that if he is sanctioned at all, such sanctions should be minor because he received "no prior warnings from regulators or supervisors" regarding the disability waivers and he understood the practice to be commonly accepted within the Firm and the securities industry. We reject the Respondent's attempts to deflect responsibility for his own shortcomings onto his employer and regulators. The responsibility for compliance with applicable requirements was the Respondent's alone. See John Montelbano. Exchange Act Rel No. 47227, 2003 SEC LEXIS 153, at *26-27 (Ian 22, 2003), see also Dep't of Enforcement v Roethlisberger, Complaint No. C8A020014, 2003 NASD Discip. LEXIS 48, at *12-13 (NASD NAC Dec. 15, 2003) (finding that a representative's attempts to blame his firm for allowing him to violate securities laws demonstrate representative's unwillingness to accept responsibility for his conduct) It is self evident that misrepresenting the disability status of customers is wrong See, e.g , Correro, 2008 FINRA Discip. LEXIS 29, at *14-16 (entering false CDSC disability waivers for customers is unethical conduct), Dep 't of Enforcement v Prout, Complaint No CO1990014, 2000 NASD Discip LEXIS 18, at *6 (NASD NAC Dec. 18, 2000) (submitting false information about customers on variable annuity applications

constitutes a serious breach of the ethical standards inherent in NASD Rule 2110). Similarly, the Respondent's contentions that other representatives at the Firm were also improperly waiving CDSCs and that he believed that the activity was "commonplace" are not relevant mitigating factors. See Charles E. Kautz, 52 S.E.C. 730, 733 (1996) (holding that it is no defense that others in the industry are also acting improperly).

The Hearing Panel also considered the testimony of the Respondent's supervisor at Firm One, Robert Woods ("Woods"), in determining sanctions. Woods testified that he believed the Respondent to be both a "superb" broker and "one of the few brokers" with whom he would entrust his own money to invest. Woods further testified to his belief that continuing to employ the Respondent would not be a risk based on the Respondent's character and the conservative business in which the Respondent engages. The Hearing Panel found Woods's testimony about the Respondent's character "very credible " We disagree that Woods's opinion of the Respondent's character is germane to our sanctions determination and therefore give it no mitigative weight. The Respondent's deliberate falsification of order information is more relevant than a character witness's beliefs in evaluating the risk that the Respondent poses in the future.

While the Hearing Panel also acknowledged that the Respondents' misconduct caused economic harm to the mutual fund distributors, it failed to take into account the substantial number of transactions involved or the extended time period over which the Respondent processed the false waivers." The Respondent entered false waivers on 42 mutual fund redemptions over the course of nine months for 14 customers. It is appropriate for us to consider that the underlying violation involved numerous acts of misconduct and that the misconduct occurred over an extended period. See, e g., William H. Gerhauser. 53 S.E.C. 933, 946 (1998) (recognizing that an extended period of a continuing violation is an aggravating factor under the Guidelines).

When arriving at its choice of sanction, the Hearing Panel elected to forgo a longer suspension and imposed a larger fine in order to "do no significant harm to" the Respondent's business or his customers We find that the Hearing Panel improperly weighted any such harm when assessing sanctions. The economic hardship that results from *a* longer suspension and the impact that this matter may have upon the Respondent's business do not mitigate his misconduct. See Hans N. Beerbaum, Exchange Act Rel No 55731, 2007 SEC LEXIS 971, at *20 (May 9, 2007); **see** also Ashton Noshir Gowadia, 53 S.E.C. 786, 793 (1998) (holding that "economic harm alone is not enough to make the sanctions imposed upon [respondent) by the NASD excessive or oppressive"); Dept **of Enforcement** v. Cipriano, Complaint No C07050029, 2007 NASD laiscip. LEXIS 23, at *40-41 (NASD NAC July 26, 2007) (determining that the impact that a matter has upon a respondent's career does not mitigate sanctions). Further, the Respondent has only himself to blame for any consequences to his customers The Respondent should have been attuned to his obligations under FINRA rules and, in effect, to his obligations to his Firm and his customers. See Beerbaum, 2007 SEC LEXIS 971,

at *20; cf. Jay Frederick Keeton, 50 S.E C 1128, 1130 (1992) (holding registered individuals are chargeable with knowledge of NASD rules).

The Respondent contends that either no sanction is necessary or, alternatively, that a nominal fine is appropriate because a sanction is imposed "only to deter future misconduct " In his view, any suspension would be punitive because there is no likelihood that he will re-offend The Respondent admits, however, that at the time he engaged in the misconduct, he believed that the mutual fund companies had money to spare, that waiving CDSCs was built into their expenses, and that be "didn't really think there was any harm." By falsifying the disability status of customers, however, he caused obvious harm to the mutual fund distributors and deprived UBS of its duty to keep accurate records. See Maw,d & Co., 46 S.E.C at 873 n.39 (stressing the importance of broker-dealer records and characterizing them as the "keystone of the surveillance of brokers and dealers by our staff and by the securities industry's self-regulatory bodies"). We are concerned that future violations are thus not unlikely should potentially volatile conduct serve his customers' interests at the expense of others Sanctions "that are significant enough to ensure effective deterrence" are therefore necessary to discourage the Respondent from repeating this misconduct and to protect the investing public. Moreover, the possibility of reoccurrence is merely one component. of determining whether a sanction is remedial.

The Respondent's argument fails to account for the objective of deterring others from engaging in similar misconduct. We find that the fine and longer suspension will discourage the Respondent from again causing a member firm's records to be inaccurate and will impress upon others the importance of the accuracy of the information when processing a CDSC waiver.

The Respondent also asserts that the NAC should eliminate the sanctions imposed by the Hearing Panel because he has not been found to have engaged in misconduct before or after the current action. While the existence of a disciplinary history is an aggravating factor when determining the appropriate sanction, its absence is not mitigating. See Rooms v. SEC, 444 F.3d 1208, 121415 (10th Cir. 2006) (determining that the lack of disciplinary history is not mitigating and representative "was required to comply with the NASD's high standards of conduct at all times") We also do not consider it mitigating that UBS terminated the Respondent as a result of his misconduct and that he forfeited certain related monetary benefits. "As a general matter, we give no weight to the fact that a respondent was terminated by a firm when determining the appropriate sanction in a disciplinary case. We consider the disciplinary sanctions we impose to be independent of a firm's decision to terminate or retain an employee." Trevisan, 2008 FINRA Discip. LEXIS 12, at *35 n.20 (internal quotation omitted).

The Respondent further argues that the sanctions imposed in this case are too severe when compared with those imposed in other FINRA disciplinary proceedings involving other associated persons. We reject the Respondent's

argument The Commission has firmly established "that the appropriate remedial action depends on the facts and circumstances of each particular case, and cannot be precisely determined by comparison with action taken in other cases." Pac. On-Line Trading & Sec., Inc., 2003 SEC LEXIS 2164, at *20 (Sept. 10, 2003), see also Butz v. Glover Livestock Comm 'n Co., 411 U.S. 182, 187 (1973) ("The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases ")

The Respondent's misconduct over an extended period of time and his willingness to misrepresent the disability status of multiple customers on many occasions represents a departure from the standards to which securities professionals must be held. The Respondent had an obligation to ensure the accuracy and truthfulness of documents submitted to UBS He failed to meet this "basic requirement " See Kautz, 52 S.E.C. at 734. Thus, based on the facts of this case, we suspend the Respondent for 90 days and fine him $19,882, consisting of the $14,882 that the Respondent's misconduct cost the mutual fund distributors in CDSCs and an additional $5,000 fine,"

Conclusion

We affirm the Hearing Panel's findings that the Respondent caused UBS's books and records to contain inaccurate information about 14 customers selling Class B mutual fund shares by entering sales charge waivers for those customers that falsely represented that these customers were disabled, in violation of NASD Rules 3110 and 2110

4 That Section 8.E(1)(j) of the Act provides, inter alia, that the registration of a salesperson may be revoked if the Secretary of State finds that such Salesperson has been suspended by any self-regulatory organization Registered under the Federal 1934 Act or the Federal 1974 Act arising from Any fraudulent or deceptive act or a practice in violation of any rule, regulation or standard duly promulgated by the self-regulatory Organization.

5 That FINRA is a self-regulatory organization as specified in Section 8 E(1)(j) of the Act

6 That by virtue of the foregoing, the Respondent's registration as a Salesperson in the State of Illinois is subject to revocation pursuant to Section 8 E(1)(j) of the Act

You are further notified that you are required pursuant to Section 130 1104of the Rules and Regulations (14 ILL. Adm. Code 130) (the "Rules"), to file an answer to the allegations outlined above within thirty (30) days of the receipt of this Notice. A failure to file an answer within the prescribed time shall be construed as an admission of the allegations contained in the Notice of Hearing.

Furthermore, you may be represented by legal counsel; may present evidence; may cross-examine witnesses and otherwise participate. A failure to so appear shall constitute default, unless any Respondent has upon due notice moved for and obtained a continuance.

A copy of the Rules, promulgated under the Act and pertaining to hearings held by the Office of the Secretary of State, Securities Department, is included with this Notice

Delivery of Notice to the designated representative of any Respondent constitutes service upon such Respondent.

Dated: This 9th day of December 2009

Jesse White/ms
JESSE WHITE
Secretary of State
State of Illinois

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