NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. BRIAN J. CLARK (CRD #1440175) Monroe, NJ Respondent.	Disciplinary Proceeding No. C9B020052 Hearing Officer – DMF **HEARING PANEL DECISION** August 6, 2003

Respondent (1) participated in private securities transactions for compensation without providing prior written notice to or obtaining prior written permission from the NASD members with which he was employed, in violation of Rules 3040 and 2110; and (2) submitted a Form U-4 to become registered with an NASD member that contained false information, in violation of Rule 2110. Respondent is barred from associating with any NASD member in any capacity.

Appearances

David Utevsky, Esq., Seattle, WA (Rory C. Flynn, Esq., Washington, DC, Of Counsel) for Complainant.

Respondent Brian J. Clark pro se.

DECISION

1. Procedural History

The Department of Enforcement filed a Complaint on January 2, 2003, charging that respondent Brian J. Clark (1) participated in private securities transactions for compensation while associated with two NASD member firms without providing prior written notice to or obtaining prior written permission from the firms; and (2) submitted a Form U-4 to become registered with an NASD member that contained false information.

Clark filed an Answer in which he contested the charges but waived his right to a hearing. The Hearing Officer, however, determined that it would assist the Hearing Panel in reaching a decision in this matter to have an opportunity to hear from Clark in person, and therefore scheduled the matter for a hearing. Moreover, at a subsequent pre-hearing conference, Clark indicated that he wished to withdraw his waiver and have a hearing. Therefore, a hearing was held in Woodbridge, NJ, on June 17 and 18, 2003, before a Hearing Panel that included an NASD Hearing Officer and two members of the District 9 Committee.[1]

2. Facts

Clark was registered through Horner, Townsend & Kent, Inc. ("HTK") as a General Securities Representative from September 1995 to March 1999. He was registered in the same capacity with American Investment Services, Inc. ("AIS") from July 1999 through May 2002. He is currently registered with another NASD member. (CX 1; Tr. 206-07.)

HTK is a subsidiary of Penn Mutual Life Insurance Company. While he was associated with HTK, Clark worked as a sales manager for the Katchen Financial Group, an insurance agency that was affiliated with Penn Mutual and functioned as a branch office of HTK. Clark's supervisor for both Penn Mutual and HTK was Mitchell Katchen. (Tr. 11-14, 87, 207.)

Sometime in 1997 or early 1998, Clark learned of a program involving the sale of promissory notes issued by U.S. Capital Funding, Inc. U.S. Capital claimed that it

[1] The Panel heard testimony from four witnesses, including Clark, and received 561 Complainant's Exhibits (CX 1, 1A, 2-119, 121-31, 133-78, 199-200, 200A, 201-75, 275A, 276-78, 278A, 279-81, 281A, 281B, 282-577). Clark did not offer any separate exhibits.

provided the money it obtained through sales of the notes to First Capital Services, Inc. to fund First Capital's receivables factoring business. The notes were issued for six-month terms, although most of the investors in this case renewed their notes for at least one additional six month term. The notes promised the investors from 9.25% to 10.25% interest, on an annualized basis. The promotional materials for the notes stated that First Capital was "in the business of financing government backed and insured receivables"; and that, except for government backed receivables, all receivables financed by First Capital were "underwritten and insured by the Continental Insurance Company." As a result, U.S. Capital promised investors "the opportunity for higher yields without the exposure to greater risk." U.S. Capital sold the notes through insurance agents such as Clark, paying them substantial commissions.[2] (CX 13-17; Tr. 234-35, 291-93, 307.)

In February 1998, Clark's supervisor, Mitchell Katchen, sent a letter to HTK's compliance department asking for a review of promotional materials concerning the sale of notes to provide funding for First Capital. Katchen testified that he sent the letter after Clark asked about selling the notes and gave him the promotional materials. Although the materials that Katchen sent to HTK referred to a company called American Benefit Services, Inc., rather than U.S. Capital, the materials were otherwise identical to the promotional materials Clark subsequently used in selling U.S. Capital notes. (Tr. 20; CX 58.)

[2] The amount of commission that the selling agent received depended on the amount of interest promised to the purchaser of the note. U.S. Capital agreed to pay a total of 15.25% on the notes, on an annualized basis, or 7.625% on each six month note or renewal. If the note promised the purchaser, for example, 9.25% annualized interest, the balance went to the seller as a commission; if the note promised 10.25%, annualized, the seller's commission was correspondingly reduced. Of course, the selling agent received the commission upon the closing of the sale, while the purchaser depended on U.S. Capital paying the promised interest over time. As explained below, U.S. Capital ultimately defaulted, and the note sales were revealed to be an elaborate Ponzi scheme. (CX 157-62, 200A; Tr. 122, 217, 319.)

In a letter dated March 13, 1998, HTK's compliance department responded to Katchen's letter, advising him that "any participation in this offering may be construed as a 'Private Securities Transaction' as defined in Rule 3040 of the NASD's Rules of Conduct …. Therefore, please be advised that HTK representatives are prohibited from engaging in any transactions with the general public in connection with the aforementioned program." According to Katchen, he forwarded a copy of the letter to Clark, after placing a handwritten note on the letter stating: "Brian, please read. Basically they squashed the … notes. You could try to appeal. … In the interim I would cease any activity until it is appealed." (CX 8; Tr. 23, 100-01.)

Clark claims he never sought permission from Katchen or HTK to sell the notes, did not provide the promotional materials that Katchen sent to HTK's compliance department, and never received the letter from HTK, with the note from Katchen, disapproving the sale of the notes. The evidence shows, however, that Clark began selling U.S. Capital notes in February 1998 at about the same time that Katchen sent his inquiry. Clark admits he did not give HTK any written notice of his involvement in those sales. (Tr. 211-14, 295, 308-10; CX 199.)

In July 1998, Clark arranged for the incorporation of LJC Consulting Corp., a company that was nominally owned by his wife, but which Clark controlled. He established LJC as an agent for the sale of U.S. Capital notes and thereafter routed his note sales through LJC, with LJC receiving the commissions on the sales. In addition, he introduced other representatives that he supervised in the Katchen Financial Group office to U.S. Capital notes. Several of them subsequently sold the notes, routing their sales through Clark and LJC to U.S. Capital, with the resulting commissions being divided between LJC and the selling representative. Altogether, Clark and the representatives who routed their orders through him and LJC sold more than $6 million in notes and renewals. Most of the sales were to HTK or Penn Mutual customers and most of the customers who purchased the notes renewed them for at least one additional six month term.[3] (Tr. 116, 214-18, 227, 295-97; CX 20, 33, 44, 122, 199.)

In February 1999, Katchen ordered Clark to cease any further involvement in the sale of the notes. Katchen testified that he did so when he discovered that Clark and other representatives were selling the notes, after seeing some checks on Clark's desk and questioning Clark about them. Clark, on the other hand, claims that Katchen ordered him to stop his involvement only after Clark raised concerns with Penn Mutual managers about certain activities at the Katchen Financial Group, and after Katchen asked for a 50% interest in LJC, which Clark refused. Katchen, however, denied that he ever asked for a share of LJC. (Tr. 28-31, 56, 299-300.)

Regardless of Katchen's motivation, Clark admits that he received a letter from Katchen dated February 11, 1999, stating:

> So there is no confusion moving forward, promissory notes are not an approved outside business activity by our broker dealer [HTK]. As we discussed, effective 2/9/99 there will be no further solicitation or renewals on any existing notes previously sold. There will be ZERO tolerance for any deviation of any kind regarding the above. Any further involvement with the promissory note program from 2/9/99 forward will be grounds for immediate termination.

In addition, Katchen distributed an "Urgent Memo" to all of the representatives in the office advising them that they could not be involved in "solicitation of promissory notes or renewals of any existing notes previously sold." In spite of this, Clark continued his

[3] According to Clark, in total, LJC received "maybe couple hundred thousand" in commissions for the sale of the notes. (CX 33 at p. 21.)

involvement in the sale and renewal of the notes, including the renewal of notes he had sold to his customers and sales and renewals by other representatives that he routed to U.S. Capital through LJC. (CX 9,10, 33; Tr. 249-57, 317-20.)

On March 10, 1999, representatives of HTK and Penn Mutual made an unannounced visit to the offices of Katchen Financial Group to discuss with Clark his involvement in the sales of U.S. Capital notes. Clark told them that LJC, which he described as his wife's corporation, had a contractual arrangement to sell the notes and was receiving commissions for selling them. Clark claimed that he was not receiving any share of the commissions, and that when any of his clients wanted to purchase the notes, he simply referred them to his wife's company and "was not personally involved in any of the sales other than the referral." He told the HTK and Penn Mutual representatives that after the referral, his wife "would talk to the clients, work with them, and handle their transaction. My only involvement was the referral to her corporation." These statements were untrue. Clark's wife had no involvement in the operations of LJC, did not even know what business it was conducting, and had no discussions with the investors. Instead, Clark conducted all of LJC's business, including all of its contacts with customers. Furthermore, LJC paid him $22,500 as officer compensation in 1998, established a simplified employee pension (SEP) individual retirement account for him, and paid him additional sums in 1999. (CX 21, 22, 30 at 27-29, 33 at 21, 122; Tr. 106-09, 227-30, 259.)

On March 16, 1999, an HTK compliance officer sent Clark a letter enclosing documents and correspondence showing Clark's involvement in the sale of the notes, and asking Clark to provide additional detailed information. The following day, March 17, Clark resigned from HTK and Penn Mutual. On March 22, Clark sent a letter responding to HTK's March 16 letter, in which Clark stated that he had served as a consultant to LJC "for a short period of time at the beginning of 1998" and that Katchen had told him he did not have to disclose this consulting arrangement as an outside business activity. Clark claimed that he was "not up on the relationship" between U.S. Capital and LJC and that he had no access to LJC's records. He said that he simply referred his clients to LJC, but had no other involvement in their purchases of U.S. Capital notes; that he did not know the reasons for the formation of LJC; and that he did not know what business LJC was involved in and "had and have absolutely no involvement in that corporation what so ever." These statements were untrue. Clark had arranged for LJC's incorporation and for the establishment of its relationship with U.S. Capital; controlled LJC and its records; and had conducted all of LJC's business, including all of its contacts with Clark's customers who purchased U.S. Capital notes. (CX 30, 32, 122; Tr. 106-09, 117, 227-30, 259.)

In July 1999, Clark became associated with AIS. Clark continued to take part in more than $1 million in sales and renewals of U.S. Capital notes after he joined AIS, including routing sales and renewals made by others. He admits he never gave AIS written notification of his involvement. (Tr. 245, 247, 277-80, 323; CX 199.)

When Clark joined AIS, he signed a Form U-4 Uniform Application for Securities Registration or Transfer, which AIS submitted to NASD on his behalf. Among other things, the Form U-4 disclosed that HTK "alleged that I violated NASD Rule 3040 by becoming involved in an outside business activity (LJC Consulting Corporation) after HTK had prohibited me from doing so. Furthermore, HTK alleged that the corporation LJC offered unregistered securities (promissory notes) for sale to the general public." In the section offering Clark an opportunity to respond to HTK's allegations, the Form U-4 stated, in part: "I was not involved in the sale of promissory notes, nor compensated, with LJC Consulting Corporation." These statements were untrue; in fact, Clark had sold promissory notes that were routed through LJC, and had been compensated by LJC. Clark, however, testified that "[t]he statements [on the Form U-4] were not my statements," claiming that AIS made them up, and that he either signed a blank Form U-4 to which AIS later added the statements, or signed the Form U-4 containing the statements without reading it.[4] (CX 5; Tr. 269-72.)

It appears that by late 1999, U.S. Capital stopped paying note holders. In May 2000, the SEC filed an action against U.S. Capital, First Capital and others alleging that they had defrauded investors in connection with the sale of the notes. The SEC alleged that the defendants "used a nationwide network of insurance agents to induce more than 600 investors to purchase at least $55 million in unregistered promissory notes," employing a number of false and misleading representations concerning the investment. In 2002, the SEC obtained consent judgments against U.S. Capital, First Capital and other defendants in the case. During the same time period, several HTK or Penn Mutual customers who had purchased the notes filed suit against Penn Mutual and HTK, and others complained. Eventually, Penn Mutual and HTK settled with approximately 61 customers for a total of more than $5 million. (CX 157-162; Tr. 163-69.)

[4] NASD staff tried unsuccessfully to obtain information from AIS during the staff's investigation. AIS filed a Form BDW to withdraw from NASD membership in May 2002, and in January 2003, a Hearing Officer issued a default decision expelling AIS for violations of various SEC and NASD rules. (CX 61-65.)

3. Discussion

The first charge against Clark is that his involvement in the sale of U.S. Capital notes while he was associated with HTK and AIS violated Rule 3040, which prohibits any person associated with an NASD member from participating in any manner in a private securities transaction without providing prior written notice to the member "describing in detail the proposed transaction and the person's proposed role therein …." If the person has received or may receive compensation for participating, the member must advise the person, in writing, whether the member approves or disapproves the person's participation. If the member approves, "the transaction shall be recorded on the books and records of the member and the member shall supervise the person's participation in the transaction as if the transaction were executed on behalf of the member."

Rule 3040 is intended to protect both the investing public and NASD members.

> The purpose of NASD Rule 3040 is to ensure that a member firm adequately supervises the suitability and due diligence responsibilities of its associated persons. … The rule also serves to protect employers against investor claims arising from an associated person's private transactions and to prevent customers from being misled as to the employing firms' sponsorship of their associated person's transactions.

Department of Enforcement v. Carcaterra, No. C10000165, 2001 NASD Discip. LEXIS 39, at *8-9 (NAC Dec. 13, 2001) (citations omitted).

Clark argues that Rule 3040 did not apply to his involvement in the sale of the U.S. Capital notes because they were not securities. The term "security" is defined very broadly in Section 3 of the Securities Exchange Act of 1934, and includes "any note … but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." Clark relies on the fact that the U.S. Capital notes were issued for six-month terms, contending that, therefore, they were not securities.

In Reves v. Ernst & Young, 494 U.S. 56 (1990), the Supreme Court explained that in interpreting the definition of "security," "we are not bound by legal formalisms, but instead take account of the economics of the transaction under investigation. … Congress' purpose in enacting the securities laws was to regulate investments, in whatever form they are made and by whatever name they are called." 494 U.S. at 60-61 (citations omitted). With respect to notes, the Court recognized that they "are used in a variety of contexts, not all of which involve investments. Thus, the phrase 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts." The Court therefore established a four-factor test to "distinguish, on the basis of all of the circumstances surrounding the transactions, notes issued in an investment context (which are 'securities') from notes issued in a commercial or consumer context (which are not)." 494 U.S. at 62-63.

The factors identified by the Court were (1) the motivations of the seller and buyer of the note – "[i]f the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a 'security'"; (2) the plan of distribution – notes that are "offered and sold to a broad segment of the public" are likely to be "securities"; (3) the reasonable expectations of the investing public – if notes are characterized as "investments" they are likely to be "securities"; and (4) "whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary." 494 U.S. at 66-69.

All of these factors weigh in favor of finding that the U.S. Capital notes were securities. The purported purpose of the notes was to raise funds for the operation of First Capital's business and they were promoted to purchasers based on the amount of interest to be earned and the purported safety of the purchaser's principal; they were offered through Clark and other insurance agents to a broad segment of the investing public; they were promoted as investments, and the purchasers reasonably would have understood them to be investments; and there was no other applicable system of regulation or protection for investors that would have made the application of the securities laws unnecessary. See Department of Enforcement v. Hanson, 2001 NASD Discip. LEXIS 41 (NAC Dec. 13, 2001) (holding that the same notes were securities under a Reves analysis).

Clark, however, relies on the language excluding from the definition of "security" "any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." Although the Reves Court found it unnecessary to determine the precise reach of this exception, other courts have held that "[t]he mere fact that a note has a maturity of less than nine months does not take the case out of [the Securities Acts], unless the note fits the general notion of 'commercial paper.'" S.E.C. v. R.G. Reynolds Enterprises, Inc., 952 F.2d 1125, 1132 (9th Cir. 1991) (quoting Zeller v. Bogue Electric Manufacturing Corp., 476 F.2d 795, 800 (2d Cir.), cert.

denied, 414 U.S. 908 (1973)). "Commercial paper" means "'short term, high quality instruments issued to fund current operations and sold only to highly sophisticated investors.'" SEC v. J.T. Wallenbrock and Associates, 313 F.3d 532, 541 (9th Cir. 2002) (quoting Reves, 494 U.S. at 70). The notes that Clark sold did not qualify as commercial paper under these standards. They were not high quality instruments sold to highly sophisticated investors.[5] On the contrary, they were precisely the types of investments that Congress intended to cover when it enacted the securities laws. The Hearing Panel therefore finds that the U.S. Capital notes were securities.

The other elements of Rule 3040 are also satisfied in this case. Clark participated not only in the sale of the notes he sold directly to his customers, but also the notes that other representatives sold and routed through Clark and LJC, as well as the renewals of the notes. The SEC has explained: "The reach of Conduct Rule 3040 is very broad, encompassing the activities of 'an associated person who not only makes a sale but who participates "in any manner" in the transaction.'" Stephen J. Gluckman, 1999 SEC LEXIS 1395 at *17 (July 20, 1999) (quoting Ronald J. Gogul, 52 S.E.C. 307 (1995)). And Clark received "selling compensation" for the sales through LJC. "Rule 3040 defines 'selling compensation' broadly to include any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security." Jim Newcomb, 2001 SEC LEXIS 2172 at *16 (Oct. 18, 2001). Here, although the commissions went to LJC, and LJC was nominally owned by Clark's wife,

[5] Furthermore, the notes were, in fact, not short term instruments because investors were encouraged to roll over their investments, and most of the investors who purchased notes from Clark or the representatives who routed their sales through him renewed their notes for at least one additional six month term. (CX 199.) As a result, in practice the notes tended to be long-term investments. Cf. Wallenbrock, 313 F.3d at 540.

in fact Clark ran the business, and LJC paid him substantial sums and funded a SEP IRA for him, which constituted selling compensation. Id.

Therefore, pursuant to Rule 3040, Clark was required to give written notice to HTK and to AIS and to receive written permission from both firms before participating in the sale of the notes. He admits he did not give written notice to or receive written permission from either firm. Accordingly, the Hearing Panel finds that Clark violated Rule 3040, as charged.

The remaining charge against Clark is that he provided false information on the Form U-4 that he signed when he became associated with AIS. The Form U-4 stated, falsely: "I was not involved in the sale of promissory notes, nor compensated, with LJC Consulting Corporation." (CX 5.) Clark says he did not include these statements on the Form U-4; instead, he claims AIS must have placed them on the Form U-4 without his knowledge. Although Clark's signature appears on the Form U-4 directly below the false statements, Clark says he did not see them when he signed, either because he did not read the Form U-4 or because he signed it in blank and AIS later added the statements.

Clark's testimony in that regard is not credible. AIS had no reason to include the false statements on the Form U-4; in contrast, Clark had an obvious motive for continuing to deny, falsely, his involvement in LJC and the sale of the notes, particularly since he was continuing his involvement after becoming associated with AIS. The fact that the false statements on the Form U-4 were consistent with the false statements that Clark made to HTK offers additional support for the Hearing Panel's conclusion that Clark, not AIS, was responsible for the false statements on the Form U-4. In any event, Clark was required to ensure that the Form U-4 that he signed was accurate. As the National Adjudicatory Council explained in rejecting a contention similar to Clark's:

> We agree with the Hearing Panel that [the respondent] violated Conduct Rule 2110 because he either provided inaccurate information on the … Form U-4 or allowed [the firm] to file a form containing inaccurate information. … It is axiomatic that the person who provides information for a regulatory filing and executes that filing is responsible for ensuring that the information contained therein is accurate. See In re Robert E. Kauffman, 51 S.E.C. 838, 840 (1993) ("Every person submitting registration documents has the obligation to ensure that the information printed therein is true and accurate."), aff'd sub nom, Kauffman v. SEC, 40 F.3d 1240 (3d Cir. 1994).

Department of Enforcement v. Howard, No. C11970032, 2000 NASD Discip. LEXIS 16 at *30-31 (NAC Nov. 16, 2000), aff'd, Exch. Act Rel. No. 46269, 2002 SEC LEXIS 1909 (July 26, 2002), appeal pending, No. 02-1939 (1st Cir. Aug. 2, 2002); see also, Department of Enforcement v. Walker, No. C10970141, 2000 NASD Discip. LEXIS 2 at *21 (April 20, 2000) (the respondent "was responsible for the accuracy of the information included in the [Form U-4] as evidenced by the attestations he signed that the information contained in [the Form U-4] was true and complete").

Therefore, the Hearing Panel finds that Clark violated Rule 2110 by providing false information on his Form U-4, as charged.

4. Sanctions

For violations of Rule 3040, the Sanction Guidelines recommend, in egregious cases, a suspension of up to two years, or a bar. NASD Sanction Guidelines at 19 (2001 ed.) The Hearing Panel found that this is a highly egregious case.

It is important that registered representatives comply with Rule 3040. The rule ensures that investors who deal with NASD members and associated persons receive the protections to which they are entitled under the securities laws and regulations. In this case, because Clark did not comply with the Rule, the investors – most of whom were customers of HTK or Penn Mutual – did not receive those protections.

Clark's failure to abide by Rule 3040 is particularly troubling because HTK specifically determined that its representatives were not permitted to sell the notes. Although Clark claims he was not aware of HTK's determination, his testimony on this point, as on others, is not credible. He began selling the notes during the same month that Katchen sent his letter to HTK's compliance department, and Katchen's testimony that he gave Clark a copy of HTK's letter disapproving sale of the notes is supported by a copy of the letter with his hand-written note to Clark. Shortly after HTK prohibited the sale of the notes by HTK representatives, Clark formed LJC in his wife's name to effect the sales. When Katchen advised Clark in February 1999 that he had to stop all involvement in the sale or renewal of the notes, Clark nevertheless continued. He then lied to HTK and Penn Mutual about his involvement, claiming that the sales were made by his wife through LJC without his involvement, and when he became associated with AIS he again failed to advise the firm, in writing, that he was involved in the sale of notes, in spite of his experience with HTK. These facts establish an obdurate refusal to abide by the requirements of Rule 3040. Clark has never accepted responsibility for his misconduct, which took place over a lengthy period of time while he was associated with two NASD members and after he had received specific warnings that his conduct was improper. His refusal to comply with the Rule led to serious injury to customers, and to HTK and Penn Mutual.[6] Under these circumstances, the Hearing Panel concludes that for his violations

[6] Clark's claim that he did not know about the restrictions on private securities transactions imposed by Rule 3040 is not mitigating. Registered representatives are required to know and abide by the rules. Furthermore, Clark was repeatedly told that he could not participate in the sale of the notes, but refused to listen.

of Rule 3040, Clark should be barred from associating with any NASD member in any capacity.

For filing a false, misleading or inaccurate Form U-4, the Sanction Guidelines recommend, in egregious cases a suspension of up to two years or a bar. As relevant considerations in setting sanctions, the Guidelines list the nature and significance of the information at issue and whether the misconduct resulted in harm to any person. The Hearing Panel finds that this is an egregious case.

The SEC has held:

> A material misrepresentation on a Form U-4 is a serious offense. Form U-4 is used by the NASD and other self-regulatory organizations, as well as by state regulators and broker-dealers, to determine the fitness of applicants for registration as securities professionals. The candor and forthrightness of applicants is critical to the effectiveness of this screening process.

Thomas R. Alton, 52 S.E.C. 380, 1995 SEC LEXIS 1975 (Aug. 4, 1995), aff'd, 105 F.3d 664 (9th Cir. 1996) (Table). In this case, the false statements on the Form U-4 denied his actions in violation of Rule 3040 while at HTK, and were consistent with the false statements he made to HTK during its investigation. After becoming associated with AIS and submitting the false Form U-4, Clark continued his involvement in the sale of the notes, in violation of Rule 3040. Under these circumstances, the Panel concludes that a bar is also the appropriate sanction for this violation.

5. Conclusion

Respondent Brian J. Clark (1) participated in private securities transactions, for compensation, without providing prior written notification to and obtaining prior written permission from two NASD member firms with which he was associated, in violation of Rules 3040 and 2110; and (2) submitted a Form U-4 to become registered with an NASD member that contained false information, in violation of Rule 2110. For these violations, he is barred from associating with any NASD member in any capacity; in light of the bars, no fines are imposed. He is ordered, however, to pay costs in the total amount of $2,925.90, which includes a $750 administrative fee and hearing transcript costs of $2,175.90. These sanctions shall become effective on a date set by NASD, but not sooner than 30 days after this decision becomes the final disciplinary action of NASD, except that if this decision becomes NASD's final disciplinary action, the bar shall become effective immediately.[7]

HEARING PANEL

By: David M. FitzGerald
Hearing Officer

Copies to:

Brian J. Clark (via overnight and first class mail)
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Rory C. Flynn, Esq. (electronically and via first class mail)

[7] The Hearing Panel has considered all of the arguments of the parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.