

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C01030004
v.	:	
	:	Hearing Panel Decision
TAD ENRIQUE MIHALOPOULOS, SR.	:	
(CRD No. 2035916)	:	Hearing Officer - SW
3360 Cheryl Court	:	
Tracy, CA 95376,	:	
	:	Dated: April 26, 2004
Respondent.	:	

The Hearing Panel barred Respondent for violating NASD Conduct Rule 2110 by: (i) providing misleading information to his customers regarding contingent sales charges; and (ii) providing misleading information to his employer regarding his disclosure of the contingent sales charges to his customers.

Appearances

David A. Watson, Esq., Regional Counsel, and Lewis T. Egan, Esq., Regional Chief Counsel, San Francisco, California, for the Department of Enforcement.

Jeffrey A. Feldman, Esq., San Francisco, California, for Tad Enrique Mihalopoulos, Sr.

DECISION

I. Introduction

The NASD Department of Enforcement (“Enforcement”) filed the Complaint in this proceeding against Respondent Tad Enrique Mihalopoulos, Sr. (“Respondent”) on February 24, 2003. The two-count Complaint alleges that Respondent violated NASD Conduct Rule

2110 by: (i) providing customers with investment order authorization forms that contained misleading representations regarding the contingent deferred sales charges applicable to their purchases; and (ii) providing investment order authorization forms to his employer, Westfin Securities Corporation (“Westfin Securities”), signed by the customers, which falsely represented that Respondent had accurately disclosed the contingent deferred sales charges to his customers. Respondent filed an Answer in which he contended that any misrepresentations were the result of carelessness because he was overworked and did not have sufficient support from Westfin Securities.

The Parties presented evidence to a Hearing Panel, consisting of the Hearing Officer and two current members of the District 1 Committee, in San Francisco, California, on October 8, and 9, 2003.¹

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

Respondent is currently associated with ADP Broker-Dealer, Inc. (“ADP”) and was associated with ADP at the time that Enforcement filed the Complaint in this proceeding on February 24, 2003.² (CX-1, p. 2). Accordingly, NASD has jurisdiction over Respondent.

B. Background.

¹ References to the testimony set forth in the transcript of the October 8 and 9, 2003 Hearing on Sanctions will be designated as “Tr. p.” References to Respondent’s exhibits will be designated as “RX-,” and references to Enforcement’s exhibits will be designated as “CX-.”

² Respondent became registered with ADP as an investment company and variable contracts products representative on September 14, 1999, and as a general securities representative on June 25, 2001. (CX-1, p. 3). Before ADP, Respondent was registered with Westfin Securities as an investment company and variable contracts products representative and as a general securities representative. (CX-1, p. 4).

The primary facts are undisputed. Westfin Securities was a broker-dealer, related to Western Financial Savings Bank, that offered mutual funds and annuities to its customers, who were in many cases also bank customers. (Tr. pp. 249-250). Beginning in 1993, Respondent worked as a bank employee of Western Financial Savings Bank before switching to Westfin Securities in late 1996. (Tr. pp. 168-169). Respondent testified that he routinely identified potential broker-dealer clients from a list of bank customers whose certificates of deposit were maturing. (Tr. p. 146).

When Respondent sold shares of a mutual fund or an annuity to a customer, he would complete an investment order authorization (“IOA”) form in triplicate—a carbon copy with three parts. (Tr. p. 57). The IOA form included the sales charges or contingent surrender deferred sales charges (“CDSC schedule”) associated with the particular security, and contained the dated signatures of the customer, the registered representative, and the registered principal.³ (CX-5).

Respondent generally completed the IOA form, signed it, and directed the customer to sign the form. (Tr. p. 72). Respondent would then detach a copy of the IOA form and give it to the customer. (Tr. p. 57; CX-5). Respondent would file a second copy of the IOA form in the customer’s file at the branch office, and would send the third copy, a white copy, of the

³ The IOA form also included: (i) the name of the customer, the name of the registered representative, and the branch number; (ii) an acknowledgement for the customer to initial that the mutual fund or variable annuity was not FDIC insured and that the value of the investment could fluctuate; and (iii) the amount and name of the security to be purchased or sold.

IOA form to the home office of Westfin Securities via interbranch mail for principal approval.⁴

(Tr. pp. 57, 72; CX-5).

From July 1996 to July 2000, Robert Condon was the compliance officer and operations manager of Westfin Securities, and he routinely approved and initialed the

⁴ The home office white copy of the IOA form can be distinguished from the copy of the IOA form provided to the customers because it contained the initials of a principal of Westfin Securities. (Tr. pp. 57-58).

IOA forms as principal. (Tr. pp. 54, 73). Mr. Condon testified that it was the policy of Westfin Securities to place a registered representative on heightened supervision if he noted that a representative had sent in an IOA form for approval with an incorrect CDSC schedule on more than two or three occasions. (Tr. pp. 74-75).

Mr. Condon testified that during 1998, Respondent was one of the representatives who became subject to such heightened supervision.⁵ (Tr. p. 100). While under heightened supervision, in addition to sending the white copy of the IOA form to the home office via interbranch mail, the registered representative was required for a period of thirty days to fax a copy of the customer's signed IOA form and a copy of the page of the relevant prospectus that showed the correct CDSC schedule to the home office. (Tr. p. 75). Mr. Condon believed that if the representative had to go through the process of photocopying the page of the prospectus, the representative would note if he had made a mistake, and he would rectify the mistake himself, including having the customer sign a correctly completed IOA form. (Tr. pp. 74-75).

Respondent worked for Westfin Securities or Western Financial Savings Bank from September 1993 to July 15, 1999. (CX-1, p. 4). After Respondent voluntarily terminated his association with Westfin Securities in 1999, a number of customers called Westfin Securities to liquidate the securities that they had purchased from Respondent. (Tr. p. 55). In examining the customers' requests, Westfin Securities noted seven different accounts in which the IOA

⁵ Respondent did not remember being placed under heightened supervision. (Tr. p. 203). There was no evidence presented as to when in 1998 Respondent became subject to the heightened supervision.

form that had been provided to the customer differed from the copy of the IOA form provided to Westfin Securities' home

office. (Tr. pp. 62-66, 70). The CDSC schedules on the customers' IOA forms were blank or incomplete. (Tr. p. 56). Westfin Securities settled with the seven customers by paying the surrender charges for the customers and permitting them to liquidate their investments. (Tr. pp. 62-66, 70).

1. Customers ND and HD

On December 12, 1996, Respondent sold \$150,022.60 of Class B shares of Oppenheimer Limited Term Government Mutual Fund ("Oppenheimer Limited") to customers ND and HD. (CX-3; CX-6, p. 2). Respondent provided customers ND and HD with a copy of the IOA form, which incorrectly indicated that the Class B shares were not subject to CDSC charges, i.e., the CDSC schedule on the IOA form was blank. (CX-4). During the same time, Respondent provided Westfin Securities with the white copy of the IOA form signed by customers ND and HD. That copy had been completed, after the customers signed it, to correctly show a CDSC schedule of: (i) 4% in Year 1; (ii) 3% in Year 2; (iii) 2% in Year 3; and (iv) 1% in Year 4. (CX-5). Accordingly, Westfin Securities' white copy of the IOA form falsely indicated to Westfin Securities that Respondent had provided the correct CDSC schedule to customers ND and HD. (CX-5).

2. Customer RW

In March 1998, Respondent sold \$41,615.44 Class B shares of Oppenheimer Limited to customer RW. (CX-14; CX-15). Respondent provided customer RW with a copy of the IOA form, which misrepresented to RW that the shares were subject to a 4% contingent sales charge in year one only. (CX-15). During the same period, Respondent provided Westfin Securities with a copy of the IOA form signed by customer RW.

Respondent completed the white copy of the IOA form, after the customers signed it, to correctly show the contingent deferred sales charges of: (i) 4% in Year 1; (ii) 3% in Year 2; (iii) 2% in Year 3; (iv) 2% in Year 4; and (v) 1% in Year 5. (CX-16). Accordingly, Westfin Securities' white copy of RW's IOA form falsely indicated that Respondent had provided the correct CDSC schedule to customer RW. (Id.).

3. Customer WF

On April 10, 1998, Respondent sold \$118,947.14 Class B shares of Oppenheimer Limited to customer WF. (CX-19). Respondent provided customer WF with a copy of the IOA form, which misrepresented to WF that the shares were only subject to 4% contingent sales charge in year one. (CX-18). During the same time period, Respondent provided Westfin Securities with a copy of the IOA form signed by customer WF that Respondent had completed, after the customer signed it, to correctly show the contingent deferred sales charges of: (i) 4% in Year 1; (ii) 3% in Year 2; (iii) 2% in Year 3; (iv) 2% in Year 4; and (v) 1% in Year 5. (CX-19). Accordingly, Westfin Securities' white copy of WF's IOA form falsely indicated that Respondent had provided the correct CDSC schedule to customer WF. (Id.).

In a second transaction with customer WF, on June 5, 1998, Respondent sold \$100,219.06 Class B shares of Oppenheimer Strategic Income Mutual Fund. (CX-20). Respondent provided WF with the pink copy of the IOA form, which misrepresented to WF that the shares were subject to a contingent sales charge of 5% in Year 1 and 4% to Year

1.5.⁶ (CX-20). During the same time period, Respondent provided Westfin Securities with a copy of an IOA form signed by WF that Respondent had completed, after the customer signed it, to correctly show the contingent deferred sales charges of: (i) 5% in Year 1; (ii) 4% to Year 1.5; (iii) 4% in Year 2; (iv) 3% in Year 3; (v) 3% in Year 4; (vi) 2% in Year 5; and (vii) 1% in Year 6. (CX-21). Accordingly, Westfin Securities' white copy of WF's IOA form falsely indicated that Respondent had provided the correct CDSC schedule to customer WF. (Id.).

4. Customer AF

On June 29, 1998, Respondent sold \$95,000 Class B shares of Oppenheimer Limited to customer AF. (CX-34). Respondent provided customer AF with a copy of the IOA form, which misrepresented to AF that the shares were subject only to a two-year contingent sales charge, i.e., 5% in Year 1 and 4% in Year 2. (Id.). During the same time period, Respondent provided Westfin Securities with a copy of the IOA form signed by customer AF, which Respondent had completed, after the customer signed it, to correctly show the contingent deferred sales charges of: (i) 5% in Year 1; (ii) 4% in Year 2; (iii) 3% in Year 3; (iv) 3% in Year 4; (v) 2% in Year 5, and (vi) 1% in Year 6. (CX-35). Accordingly, Westfin Securities' white copy of AF's IOA form falsely indicated that Respondent had provided the correct CDSC schedule to customer AF. (Id.).

5. Customer GP

On December 23, 1998, Respondent sold \$34,459.78 Class B shares of

⁶ In Year 1.5, the sales charge was understood to be applicable during the first six months following year one.

Oppenheimer Limited to customer GP. (CX-10). Respondent provided customer GP with a copy of the IOA form, which misrepresented to GP that the shares were subject only to a two-year contingent sales charge, i.e., 4% in Year 1 and 3% in Year 2. (CX-10). During the same time period, Respondent provided Westfin Securities with a copy of the IOA form signed by customer GP that Respondent had completed, after the customer signed it, to correctly show the contingent deferred sales charges of: (i) 4% in Year 1; (ii) 3% in Year 2; (iii) 2% in Year 3; (iv) 2% in Year 4; and (v) 1% in Year 5. (CX-11). Accordingly, Westfin Securities' white copy of GP's IOA form falsely indicated that Respondent had provided the correct CDSC schedule to customer GP. (Id.).

6. Customer BB

On February 16, 1999, Respondent sold \$40,000 Class B shares of Oppenheimer Limited to customer BB. (CX-22; CX-23). Respondent provided customer BB with a copy of the IOA form, which misrepresented to BB that the shares were subject only to an eighteen-month contingent sales charge, i.e., 4% in Year 1 and 3% to Year 1.5. (CX-23). During the same time period, Respondent provided Westfin Securities with a copy of the IOA form signed by customer BB, which Respondent had completed, after the customer signed it, to correctly show the contingent deferred sales charges of: (i) 4% in Year 1; (ii) 3% to Year 1.5; (iii) 3% in Year 2; (iv) 2% in Year 3; (v) 2% in Year 4; and (vi) 1% in Year 5. (CX-24). Westfin Securities' copy of BB's IOA form falsely indicated that Respondent had provided the correct CDSC schedule to customer BB. (Id.).

In a second transaction with BB, in February 1999, Respondent sold \$40,000 Class B shares of Oppenheimer California Tax-Free Mutual Fund. (CX-25; CX-26). Respondent

provided customer BB with the pink copy of the IOA form, which misrepresented to BB that the shares were not subject to a contingent sales charge. (CX-25). During the same time period, Respondent provided Westfin Securities with a white copy of the IOA form signed by customer BB that Respondent had completed, after the customer signed it, to correctly show the contingent deferred sales charges of: (i) 5% in Year 1; (ii) 4% in Year 2; (iii) 3% in Year 3; (iv) 3% in Year 4; (v) 2% in Year 5; and (vi) 1% in Year 6. (CX-26). Accordingly, Westfin Securities' white copy of BB's IOA form falsely indicated that Respondent had provided the correct CDSC schedule to customer BB. (Id.).

7. Customer DP

On January 20, 1999, Respondent sold a \$65,936.25 Nationwide Best of America Variable Annuity ("Nationwide America Annuity") to customer DP. (CX-28). Respondent provided DP with a copy of the IOA form, which misrepresented to DP that the annuity was not subject to a contingent sales charge. (Id.). During the same time period, Respondent provided Westfin Securities with a copy of the IOA form signed by customer DP that Respondent had completed, after the customer signed it, to correctly show the contingent deferred sales charges of: (i) 7% in Year 1; (ii) 6% in Year 2; (iii) 5% in Year 3; (iv) 4% in Year 4; (v) 3% in Year 5; (vi) 2% in Year 6; and (vii) 1% in Year 7. (CX-29). Accordingly, Westfin Securities' white copy of DP's IOA form falsely indicated that Respondent had provided the correct CDSC schedule to customer DP. (Id.).

In a second transaction with DP, on March 5, 1999, Respondent sold an additional \$15,000 Nationwide America Annuity to DP. (CX-32; CX-33). Again, Respondent provided DP with a copy of the IOA form, which misrepresented to DP that the shares were

subject only to a one-year contingent sales charge. (CX-32). During the same time period, Respondent provided Westfin Securities with a copy of DP's IOA form that Respondent had completed, after the customer signed it, to correctly show the contingent deferred sales charges of: (i) 7% in Year 1; (ii) 6% in Year 2; (iii) 5% in Year 3; (iv) 4% in Year 4; (v) 3% in Year 5; (vi) 2% in Year 6; and (vii) 1% in Year 7. (CX-34). Accordingly, Westfin Securities' white copy of DP's IOA form falsely indicated that Respondent had provided the correct CDSC schedule to customer DP. (Id.)

In a third transaction with DP five days later, on March 10, 1999, Respondent sold another \$50,000 Nationwide America Annuity to DP. (CX-30; CX-31). Respondent provided DP with a copy of the IOA form, which again misrepresented to DP that the annuity was subject only to a one-year contingent sales charge. (CX-30). During the same time period, Respondent provided Westfin Securities with a copy of the IOA form signed by customer DP that Respondent had completed, after the customer signed it, to correctly show the contingent deferred sales charges of: (i) 7% in Year 1; (ii) 6% in Year 2; (iii) 5% in Year 3; (iv) 4% in Year 4; (v) 3% in Year 5; (vi) 2% in Year 6; and (vii) 1% in Year 7. (CX-31). Accordingly, Westfin Securities' white copy of DP's IOA form falsely indicated that Respondent had provided the correct CDSC schedule to customer DP. (Id.).

C. Respondent Violated NASD Conduct Rule 2110

Count one of the Complaint alleges that Respondent violated NASD Conduct Rule 2110 by providing customers with IOA forms that contained misleading CDSC schedules for their particular security purchases. Count two of the Complaint alleges that Respondent violated NASD Conduct Rule 2110 by providing customer-signed IOA forms to Westfin

Securities that falsely represented that Respondent had accurately completed the CDSC schedules on the IOA forms that he had provided to his customers.

With respect to count one of the Complaint, Enforcement argued that Respondent intentionally provided the customers with the inaccurate IOA forms to induce the customers to purchase the securities.

Respondent testified that he had no specific recollection of the particular transactions, which occurred in 1996, 1998, and 1999. (Tr. pp. 134, 142, 144, 195). However, Respondent testified that out of “sheer laziness” he failed to complete the customers’ IOA forms. It was only after Respondent provided the customers with the incorrect IOA forms, and when he was in the process of sending the IOA forms to the Westfin Securities home office, that Respondent checked the prospectuses to determine the correct sales contingency fee information for the particular products purchased by the customers.⁷ (Tr. p. 140).

NASD Conduct Rule 2110 states, “A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.” Any conduct that violates the securities laws and regulations or NASD rules also violates NASD Conduct Rule 2110.⁸

In addition, Conduct Rule 2110 also allows NASD to regulate broker/dealers under ethical standards, as well as legal standards.⁹ The principal consideration is whether the

⁷ Respondent testified that one of the reasons that he left Westfin Securities was because of the immense pressure to sell and the accountability for meeting goals not only of the broker-dealer but also of each of the bank branches for which he was responsible. (Tr. pp. 175-176).

⁸ See In re Stephen J. Gluckman, Exchange Act Release No. 41,628, 1999 SEC LEXIS 1395, at *22 (July 20, 1999) (finding that a violation of any SEC or NASD rule constitutes a violation of 2110).

⁹ Dep’t of Enforcement v. Davenport, No. C05010017, 2003 NASD Discip. LEXIS 4 (NAC May 7, 2003).

misconduct “reflects on an associated person’s ability to comply with regulatory requirements necessary to the proper functioning of the securities industry and protection of the public.”¹⁰ Accordingly, misrepresentations and omissions that mislead customers violate Conduct Rule 2110.¹¹

The record shows that Respondent provided the customers with misleading information on the IOA forms. The record further shows that Respondent was aware that he had provided misleading IOA forms to his customers because he corrected the IOA forms before submitting them to Westfin Securities.

The Hearing Panel, therefore, finds that Respondent violated NASD Conduct Rule 2110, as alleged in Count one of the Complaint, by providing misleading IOA forms to seven customers in connection with 11 transactions.

With respect to count two of the Complaint, Enforcement contended that Respondent intentionally provided his employer with the falsified IOA forms to hide the fact that he had provided misleading information to his customers. Respondent admitted that he violated Westfin Securities’ policies. Respondent presented no evidence that he ever attempted to inform Westfin Securities that he had provided incorrect forms to the customers.

The Hearing Panel finds that Respondent intentionally decided to circumvent his firm’s procedures, which were designed to ensure that customers received material information concerning the securities they were purchasing. Accordingly, the Hearing Panel finds that Respondent’s dishonesty to his firm reflects directly on his ability to comply with regulatory

¹⁰ See, James A. Goetz, 53 S.E.C. 472, 477 (1998).

¹¹ See, In re Ramiro Jose Sugranes, Exchange Act Rel. No. 35311, 1995 SEC LEXIS 234 (Feb. 1, 1995).

requirements fundamental to the securities business and to fulfill his fiduciary responsibilities in handling other people's money.

The Hearing Panel, therefore, finds that Respondent violated NASD Conduct Rule 2110, as alleged in Count two of the Complaint, by submitting IOA forms to his employer that incorrectly indicated that he had provided the correct CDSC schedules to his customers.

III. Sanctions

The Sanction Guidelines for intentional or reckless misrepresentations or material omissions of fact, as alleged in count of the Complaint, recommend a fine of \$10,000 to \$100,000 and a suspension in any or all capacities for 10 business days to two years, or in egregious cases, a bar.¹²

With respect to count two of the Complaint, because there are no specific guidelines for filing false reports with an employer, the Hearing Panel looked for guidance to other Sanction Guidelines involving the false reporting of information. The Sanction Guidelines for forgery and falsification of records recommend a fine of \$5,000 to \$100,000 and a suspension of up to two years, or a bar in egregious cases.¹³ The Sanction Guidelines for filing false, misleading, or inaccurate Form U-4s or U-5s recommend a fine of \$2,500 to \$50,000 and a suspension for up to 30 business days, and in egregious cases, a suspension of up to two years or a bar.¹⁴

Enforcement recommended that Respondent be barred for counts one and two of the

¹² NASD Sanction Guidelines, p. 96 (2001).

¹³ Id. at 43.

¹⁴ Id. at 77-78.

Complaint. With respect to count two of the Complaint, Enforcement stated that Respondent intentionally provided misleading information to his employer. With respect to count one of the Complaint, Enforcement argued that the Hearing Panel should infer that Respondent intended to provide misleading information to his customers, based on Respondent having provided misleading information to seven customers in 11 separate transactions. In addition, Enforcement argued that Respondent has a relevant prior disciplinary history because Respondent received a letter of caution for his failure to disclose to a customer in 1996 the difference in sales loads between Class A shares of a mutual fund and Class B shares of a mutual fund. (CX-42).

With respect to count two of the Complaint, Respondent admitted that he provided the false information to his employer. With respect to count one of the Complaint, Respondent testified that he was not intentionally attempting to mislead his customers about the sales charges. (Tr. p. 180). Respondent also argued that he was not attempting to harm his customers or his employer and that he is not a danger to the investing public.¹⁵

The Hearing Panel agrees with Enforcement that Respondent's issuance of the IOA forms involved a single course of conduct. Based on his demeanor, the Hearing Panel finds that Respondent was credible when he testified that he was not deliberately attempting to deceive his customers. The two customers who testified did not recall discussing the sales charges with Respondent.¹⁶

¹⁵ In the four years that Respondent has worked for ADP, after leaving Westfin Securities, he has not had any customer complaints. (RX-5).

¹⁶ The two customer witnesses who testified at the Hearing, ND and GP, initially contacted Westfin Securities to complain about the nature of the security that they had purchased rather than about the inconsistent information concerning the CDSC schedules on the IOA forms. (CX-6; CX-12). Customer ND

However, the IOA form required Respondent to provide his customers with information about the sales charges. Respondent made no efforts to send a correct IOA form to his customers when he was on notice that the form was incorrect on the same day or within one day of the transaction. On three separate occasions, January 20, 1999, March 5, 1999, and March 10, 1999, Respondent provided customer DP with inaccurate information concerning the contingent deferred sales charges of a single product, the Nationwide America Annuity.

In addition, the Hearing Panel finds that Respondent intentionally hid from his employer that he had not made complete disclosures to his customers. Respondent's decision on 11 separate occasions to deliberately circumvent Westfin Securities' procedures, which provided assurance that its customers would receive complete information about the securities that they purchased, is egregious. The Hearing Panel

complained because he did not realize that the Class B shares of Oppenheimer Limited were securities. (Tr. p. 30). Customer GP complained because the Class B shares of Oppenheimer Limited were not earning the 6% rate of return that he expected. (Tr. p. 221).

finds that this egregious conduct does present a danger to the investing public. Accordingly, the Hearing Panel determined that Respondent should be barred for counts one and two of the Complaint.

IV. Conclusion

Based on the evidence submitted at the Hearing, the Hearing Panel bars Respondent for violating NASD Conduct Rule 2110 by providing misleading IOA forms to both his customers and his employer. Respondent is also assessed \$2,823.80 for the cost of the Hearing, consisting of a \$750 administrative fee and the \$2,073.80 cost of the transcripts.

The costs are due and payable when and if Respondent seeks to return to the securities industry. The bar will become effective immediately upon this Decision becoming the final disciplinary action of NASD.¹⁷

HEARING PANEL

by: Sharon Witherspoon,
Hearing Officer

Dated: Washington, DC
April 26, 2004

Copies to:

Tad Enrique Mihalopoulos, Sr. (via Federal Express and first class mail)
Jeffrey A. Feldman, Esq. (via facsimile and first class mail)
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¹⁷ The Hearing Panel has considered all of the arguments of the Parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.