NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. DEMETRIOS ZOULOUFIS (CRD No. 2805419), 37 Meyer Avenue Valley Stream, NY 11580 Respondent.	Disciplinary Proceeding No. CLI030011 Hearing Officer – JN **HEARING PANEL DECISION** June 7, 2004

Respondent violated Rule 2110 by extending three $100 credits to a customer without supervisory approval. For this misconduct, he was suspended for thirty days and fined $300.

Appearances

For the Complainant: Mark C. Catana, Esq. and Jay M. Lippman, Esq.

For the Respondent: Michael P. Gilmore, Esq.

DECISION

I. Introduction and Background

On May 5, 2003, the Department of Enforcement filed a Complaint against Respondent Demetrios Zouloufis, alleging that he had improperly issued three $100 credits to a customer, in violation of Rule 2110's mandate for high standards of commercial honor and just and equitable principles of trade. The Hearing Panel, composed of an NASD Hearing Officer and two members of NASD District Committee No. 10, conducted hearings on December 19 and 30, 2003; January 15, 2004; and February 17, 2004.

The parties presented a total of six witnesses. Enforcement introduced twenty-nine exhibits (CX-1 – CX-29), and Respondent introduced twenty-six (RX-1 – RX-26). Two exhibits, which arose out of Panel requests, are referred to with the prefix "PX." A "Joint Stipulation" is referred to as "JX-1." Pages of the December and January hearing transcripts are cited with the prefix "I Tr." Pages of the February transcript are cited with the prefix "II Tr."

At the time of the events in issue, Respondent, with four years of industry experience and no disciplinary history, was employed by T. D. Waterhouse Investor Services, Inc. ("Waterhouse") as a General Securities Representative. On November 24, 2000, December 12, 2000, and again on January 3, 2001, Respondent requested the issuance of three $100 credits to customer MC's Waterhouse account. Each such credit effectively placed $100 in her account. He then caused the firm to issue checks to the customer, thereby transferring those $100 credits directly to her. Thereafter, on January 16, 2001, Zouloufis requested a fourth $100 credit, which was reversed by the firm.

Respondent was dating MC during the time in question, and she is still his girlfriend. Zouloufis contends that his primary purpose in initiating the credits was to persuade the customer's father to invest $150,000 with Waterhouse. MC's father testified before the Panel and generally corroborated Respondent. Enforcement urges that Respondent's initiation of the credits violated Rule 2110's mandate for high standards of commercial honor and just and equitable principles of trade.

II. Discussion

A. Liability

The Complaint sets out three bases for liability under Rule 2110. First, it alleges that "Respondent issued the credits without Waterhouse's knowledge, authorization and consent" (Complaint, par. 9). Second, Enforcement alleges that because "[n]one of the credits was related

to commission adjustments, interest adjustments or reversal of fees," Zouloufis violated firm policies which limited credits to those categories (Id. pars. 5, 9). Finally, the Complaint alleges that "Respondent did not have a legitimate business reason to issue any of the Credits" (Id. par. 10). The Panel next discusses those theories in that order.

1) Failure to obtain supervisory approval for the credits

Associates in Respondent's department had authority to initiate credits on their own, so long as the amount did not exceed $100 per credit; any credit over that amount required managerial approval (I Tr. 51-52, 119, 120, 269, 297-99). It is true that each of the credits involved here was for $100. But in the particular circumstances of this case, the Panel concludes that high standards of commercial honor should have led the Respondent to consult with a supervisor before creating the credits in MC's account.

First, Respondent was dating the customer, and others in the office knew of that relationship (I Tr. 115, 244). Second, he chose to spread the credits out – $100 at a time over a three-week period. Even assuming that he was trying to attract the father's money to the firm, there was no apparent reason for this schedule of separate $100 payments over the period in question. A reasonable person looking at these facts could draw the inference that Respondent was moving money from the firm to his girlfriend and was breaking the money into $100 segments to circumvent the requirement for supervisory approval.

Avoiding the appearance of impropriety is a significant aspect of maintaining high ethical standards. See Dist. Bus. Conduct Committee v. Mayer Amsel, No. C10930016, 1995 NASD Discip. LEXIS 215 at *53 (NBCC, June 26, 1995), where a Respondent's extreme carelessness contravened high standards of commercial honor. As there stated: "in an industry where registered persons have access to customer funds and securities, it is imperative that even the appearance of impropriety be avoided." Waterhouse's own Code of Conduct stressed the

importance of avoiding the appearance of conflicting interests and advised associates to consult with supervisory and other firm personnel concerning anticipated conduct or potential conflicts (CX-6, pp. 76-77). Respondent himself candidly acknowledged that, in hindsight, he should have consulted with his manager and that he had been "a little overzealous" in trying to execute four credits (I Tr. 598, 600).

A securities professional must be sensitive to the appearance of impropriety. Zouloufis was careless in failing to have recognized the unfortunate appearance inherent in crediting this customer's account and in failing to have consulted with his supervisor. In the Panel's view, that conduct violates Rule 2110's requirement for high standards of commercial honor.

2) Limitations on issuance of credit

Enforcement alleges that Zouloufis "was not authorized to issue credits … for any reason other than commission adjustments, interest adjustments, and reversal of fees, without approval of a Manager"; that the instant credits were not for any of those three purposes; and that Respondent's conduct violated Rule 2110. This claim hinges on the allegation that associates who chose to generate credits were somehow limited by those three purposes.

The Department relies on a Waterhouse policy which states: "[a]ssociates can approve adjustments to commissions, fees as well as margin and money market interest up to $100.00. Adjustments for these transactions over $100 require manager approval" (CX-5, p. 69). On its face, that policy applies to adjustments in commissions, interest, or fees. It does not say that those three items are the exclusive bases for creation of customer credits. The evidence demonstrates that they were not.

Waterhouse's records showed numerous instances where associates, including those in Respondent's department, generated "accommodation credits" or "credits in lieu of voucher" for customer accounts (RX-19; PX-2). The department manager explained that an

"accommodation" credit is "a very general, very broad category that you're giving a customer a credit for some type of accommodation they've had, some issue or problem," and that a "credit in lieu of voucher" did not necessarily fit the three categories upon which Enforcement relies (I Tr. 217; II Tr. 152).

Respondent's immediate manager agreed that documents referring to credits for the three purposes were "not necessarily exhaustive to all issues relating to issuance of credits"; that such documents were "more ... a general reference guide"; and that certain credits given by other brokers did not fit within the three categories (I Tr. 91, 181, 217). The vice-president in charge of Respondent's department agreed that there were "numerous instances" where credits could be given for purposes beyond the three categories (I Tr. 302). The manager of the Long Island branch, where customer MC had her account, agreed that there were "many, many reasons" why a broker could request credits for a customer account, including "transfer of assets" (I Tr. 821) – a reason that Zouloufis articulated and that obviously differs from commissions, interest, or fees.

The Panel concludes that Enforcement failed to prove by a preponderance of the evidence that Waterhouse brokers were limited to commissions, interest, or fees in generating customer credits. That Respondent's purpose differed from those three categories did not establish that he had exceeded some supposed firm policy and thereby violated Rule 2110.

3) No legitimate business reason

The Complaint alleged that "Respondent did not have a legitimate business reason to issue any of the Credits" (par. 10). In the Panel's view, the Department again failed to carry the burden of proving that Zouloufis likely had no legitimate business purpose.

As noted, the Respondent repeatedly explained that his primary motivation in giving the credits was to promote future business for Waterhouse from the customer's father, who had $150,000 to invest. MC's father expected to net $150,000 in separation pay upon his retirement.

He testified that he knew and trusted Respondent, who was the broker for two daughters and who was dating one of them; that he had decided to invest the money with Zouloufis at Waterhouse; and that Zouloufis would accommodate him for bringing his assets to the firm by putting some money in his daughter's account (II Tr. 10-11, 13-14, 21, 23, 28-30, 32, 43, 45). He had received the necessary paperwork to open the account, but changed his mind after Waterhouse terminated Respondent (II Tr. 21, 23, 30).

The Panel saw and heard the customer's father and was impressed with his testimony. He was a veteran police officer with many years of experience. He did not appear to be a person inventing a story to protect his daughter's boyfriend. The Panel agrees with Enforcement counsel, who described the father as "an extremely credible witness" and found no reason to suggest that "he was telling us anything other than the truth" or had "not been completely forthright with us" (II Tr. 250, 252).

Moreover, Respondent's testimony as to his motivation was consistent with his contemporaneous response to the branch manager when the credits were first questioned. The manager testified that upon his e-mail inquiry as to the credits, Zouloufis promptly replied that he was "working with a family member to transfer funds to" Waterhouse (I Tr. 791, 803). Respondent's e-mail response to that inquiry – that he was sending the father's paperwork to the branch manager – (CX-28; Tr. 427-28) was also consistent.[1]

Having considered all of the testimony, the Panel is persuaded that Respondent initiated the credits to MC primarily to attract her father's money.

[1] Enforcement argued that Respondent should not have initiated the credits because there had not been a commitment to bring in the father's money (II Tr. 251, 278). Waterhouse's Long Island branch manager testified that although it would have been better practice to await the funds, there was no company rule or policy that precluded issuance of the credit before the new money actually arrived (I Tr. 793, 824, 826-28).

B. Sanctions

Enforcement urged a two-year suspension, arguing that the totality of the conduct was analogous to conversion, a form of misconduct discussed in the NASD Sanction Guidelines (II Tr. 295-96). The Complaint did not allege conversion. Moreover, as the Panel has found, Respondent initiated the credits in large part to encourage the customer's father to invest $150,000 with Waterhouse. Although such a commitment might have ultimately helped him, his primary motivation was to benefit the firm, and not to appropriate its assets to enrich himself or his customer-girlfriend. Indeed, he was seeking to enhance the firm's assets. In these circumstances, the conduct is unlike conversion and the Department's analogy fails.

There is no relevant analogous provision in the Guidelines, and the decision as to sanctions must turn on the particular circumstances of record. In the totality of the circumstances, the Panel believes that Respondent's mistake – failing to consult with supervisors before issuing the credits – warrants relatively light sanctions.

The misconduct did not violate any Waterhouse policy or rule pertaining to the issuance of credits. The firm offered no training on the subject, and there were no prior warnings by a supervisor.[2] Though it would have been better practice to await the deposit of the anticipated new money before initiating the credits, there was no rule or policy that prevented Zouloufis from acting before the money arrived.

The firm's policy required supervisory approval for credits exceeding $100. Zouloufis issued separate credits of $100 each, apparently seeking to avoid that requirement. Evasive conduct is especially inappropriate in an industry that emphasizes the importance of compliance with statutes, rules, and policies. But he was motivated by a legitimate effort to attract new business, a valid consideration for a young broker who wanted to grow with Waterhouse.

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[2] See NASD Sanction Guidelines, "Principal Considerations," pp. 9-10.

Moreover, dividing credits into parts to circumvent the $100 limit, however improper in appearance, was a technique used by other brokers in Respondent's department (PX-2, pp. 383, 385; II Tr. 148, 149, 152).

This case does not involve numerous acts, a pattern of misconduct, or an extended period of time (Guidelines, pp. 9-10). The credits involved one customer, and the prospect of additional business from her father. It occurred over a relatively brief period (about seven weeks). Nor was there any injury to the investing public or other market participants (Id.).

When questioned by supervisors, Respondent promptly acknowledged creation of the credits. Respondent's conduct ultimately cost the firm $300. But Zouloufis saw that cost as potentially bringing in $150,000 to Waterhouse, which then would not have sustained any "loss." Moreover, even before any NASD involvement, Respondent had offered to refund the money to the firm.

Zouloufis failed to perceive that giving credits to a customer he was dating created an improper appearance, especially where nothing in her trading activity warranted credits, and the personal relationship was known to some co-workers. His insensitivity certainly reflected carelessness – particularly under a Code of Conduct that suggests supervisory consultation about appearance questions – but was not the equivalent of a deliberate plot to enrich a customer at the firm's expense (Id.).

The Panel also notes that Zouloufis was successful and well regarded at Waterhouse, where he received salary increases, bonuses, and favorable performance reviews. Finally, he was candid with the Panel in acknowledging that, in hindsight, he should have consulted supervisors before initiating the credits.

Considering all of the above factors, the Panel concludes that Respondent should serve a 30-day suspension and pay a fine of $300, an amount equal to the firm's loss.[3]

III. Conclusion

Respondent violated Rules 2110 by failing to obtain supervisory approval for the issuance of credits to a customer. For that violation, he is suspended in all capacities for 30 business days and fined $300. These sanctions shall become effective on a date set by NASD, but not earlier than 30 days after this decision becomes the final disciplinary action of NASD, except that if this decision becomes the final disciplinary action of NASD, the suspension shall begin at the opening of business on Monday, August 2, 2004 and end at the close of business on September 13, 2004.

HEARING PANEL

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Jerome Nelson
Hearing Officer

Dated: June 7, 2004
Washington, DC

Copies to: Demetrios Zouloufis (*via overnight and first class mail*)
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[3] The Hearing Panel 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.