

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MICHAEL TIMOTHY DOLAN
(CRD No. 1209079),

Respondent.

Disciplinary Proceeding
No. 2013039306601

Hearing Officer–KBW

HEARING PANEL DECISION

December 8, 2017

For participating in five private securities transactions without providing the required prior written notice to his firm, Respondent is suspended from association with any FINRA member in any capacity for 60 calendar days, fined \$5,000 and ordered to pay costs. The Hearing Officer dissents as to the sanctions imposed on Respondent.

Appearances

For the Complainant: Robert D. H. Floyd, Esq., Frank D. Mazzarelli, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Daniel J. Supalla, Esq., Briggs and Morgan, P.A.

I. Introduction

The Department of Enforcement alleged that between October 2012 and October 2013 Respondent Michael Timothy Dolan participated in a total of five sales of membership interests in a hedge fund (“the Fund”) to six individuals without providing written notice to his firm as required by NASD Rule 3040. NASD Rule 3040(a) provided that an associated person must give written notice to his or her firm before participating in any manner in a private securities transaction and that the notice must describe in detail the nature of the proposed transaction and the associated person’s proposed role in the transaction.¹

Dolan admits that he did not provide written notice to his firm and that the membership interests (the “Fund Interests”) were securities, but he maintains that he did little more than refer potential investors to the Fund Interests and his conduct therefore did not constitute participation in the sales of the Fund Interests within the meaning of NASD Rule 3040.

¹ NASD Rule 3040(b). NASD Rule 3040 was in effect when the transactions at issue here occurred. FINRA Rule 3280 superseded Rule 3040 on September 21, 2015.

After careful consideration of the evidence and arguments of the parties, for the reasons set forth below, the Panel concludes that Dolan violated NASD Rule 3040 and FINRA Rule 2010 by participating in private securities transactions without providing prior written notice to his firm. A majority of the Panel further concludes that, under the circumstances of this case, the appropriate sanctions for Dolan's misconduct are suspension from association with any FINRA member in any capacity for 60 calendar days and a fine of \$5,000.

II. Findings of Fact

A. Dolan's Background

Dolan entered the securities industry in 1983. In 1989, Dolan became employed by a predecessor of Dougherty & Company (the "Firm"), where he is currently registered.² Since 1989, Dolan has worked as an account representative in the Firm's Minneapolis office.³ Dolan specializes in fixed income securities and handles both institutional and retail customer accounts.⁴ He has about 350 retail clients, including about 35 who are accredited.⁵ He is registered as a General Securities Representative (Series 7), an Agent (Series 63), and an Investment Advisor (Series 65).⁶

B. The Fund and RE

The Fund was founded by RE in 2010 and was based in Minneapolis. During the relevant period, the Fund claimed to provide investors with exposure to a diverse portfolio of publicly traded, small- and mid-capitalization equity investments.⁷ The stated objective of the Fund was "to produce consistent, double-digit annual returns through long and short investments in growth oriented, small and mid-cap equities."⁸

At all relevant times, the Fund was operated and managed by RE through an investment advisor (the "Fund Advisor").⁹ Before starting the Fund, RE had been a research analyst in the Twin Cities area for 18 years.¹⁰ RE and Dolan are friends and have known each other since about

² Complaint ("Compl.") ¶¶ 2-3; Answer ("Ans.") ¶¶ 2-3; Stipulations ("Stip.") ¶¶ 1-2. Because Dolan remains registered with a FINRA member, he is subject to FINRA jurisdiction. He is therefore subject to FINRA's rules. *See* FINRA Rule 0140 (stating that FINRA's rules apply to all members and persons associated with a member and that associated persons have the same duties and obligations as a member under FINRA's rules).

³ Hearing Transcript ("Tr.") 24; Complainant's Exhibit ("CX")-3, at 1; CX-7, at 3; CX-13, at 2; CX-15, at 3; Joint Exhibit ("JX")-1, at 3, 6.

⁴ Tr. 33, 37, 42.

⁵ Tr. 110-11.

⁶ JX-1, at 7.

⁷ Compl. ¶ 4; Ans. ¶ 4; Stip. ¶ 4; Tr. 55.

⁸ CX-1, at 1.

⁹ Compl. ¶¶ 5-6; Ans. ¶¶ 5-6; Stip. ¶ 6.

¹⁰ Tr. 28; CX-8, at 39.

2000. Since November 2003, RE has had a retail account with Dolan at the Firm.¹¹ This account generated net commissions of about \$20,000 for Dolan between 2003 and 2012.¹²

In 2011, the Fund Advisor opened an account at the Firm. The Firm assigned the Fund Advisor's account to DS, an institutional broker at the Firm whom Dolan had introduced to RE, the Fund founder and manager. Dolan has never been the assigned representative for the Fund Advisor.¹³ In connection with trading in the Fund Advisor's account, however, between January 2013 and July 2014, the Firm (at RE's direction) paid Dolan net commissions totaling about \$25,000.¹⁴

C. Dolan's Conduct

The Panel assesses Dolan's communications and other conduct leading up to the five transactions to determine if Dolan participated in the sales for the purpose of Rule 3040. In determining the appropriate sanctions, if any, the Panel also assesses other conduct of Dolan that relates to the Fund Interests. Specifically, the Panel reviews Dolan's communications with RE, the six investors who purchased Fund Interests, and one individual who did not invest.

1. Dolan's Communications with RE

In May 2011, the Fund began to sell Fund Interests to accredited investors as part of an exempt offering made under Regulation D of the Securities Act of 1933.¹⁵ As Dolan was aware, the stated minimum investment that the Fund would accept from an outside investor was \$250,000.¹⁶

In the summer of 2012, RE, the Fund manager, sent some of the Fund's performance summaries to Dolan and asked him to look into getting the Firm to authorize its representatives to sell Fund Interests.¹⁷ Dolan was impressed by the summaries and introduced RE to Firm management. Firm management and RE discussed the possibility of RE managing a proprietary hedge fund for the Firm or developing some other type of mutually beneficial business relationship, but the discussions did not result in any further business relationship between RE and the Firm.¹⁸ The Firm did not approve the Fund Interests for sale by Firm representatives.¹⁹

¹¹ Compl. ¶ 9; Ans. ¶ 9; Stip. ¶ 12; Tr. 28-30; CX-3; CX-4, at 1; CX-10, at 2.

¹² Tr. 30-31; CX-3, at 1.

¹³ Compl. ¶ 7; Ans. ¶ 7; Stip. ¶¶ 8, 10; Tr. 41-42, 50; CX-4, at 1-2.

¹⁴ Compl. ¶ 8; Ans. ¶ 8; Stip. ¶ 11; Tr. 191-92; CX-4, at 1-2.

¹⁵ Stip. ¶ 13.

¹⁶ Tr. 67; CX-5, at 2.

¹⁷ Tr. 102-03; CX-10, at 2.

¹⁸ Tr. 102-03, 109-10; CX-4, at 2-3; CX-10, at 2-3.

¹⁹ Stip. ¶ 26.

Throughout the summer, RE shared with Dolan additional information regarding the performance of the Fund, indicated a desire to grow the Fund, and asked Dolan whether he would purchase Fund Interests. At that time, Dolan did not purchase Fund Interests because he did not have sufficient funds available to purchase the interests. He also did not refer anyone to the Fund because he viewed the Fund as having not yet developed a sufficient track record.²⁰

Dolan's view changed in the fall of 2012. On October 5, 2012, RE emailed Dolan copies of three letters from the Fund to its investors: its annual letter for 2011 and letters for the first and second quarters of 2012 (collectively, "October 2012 Fund Materials"). Each of the letters described the Fund as having outperformed the benchmarks selected by RE.²¹

At about the same time, Dolan performed due diligence on the Fund. He contacted:

- Jefferies & Co. and confirmed that they were the prime broker and custodian for the Fund;
- the Fund's third party administrator and confirmed that they independently prepared statements for investors reflecting the Fund's performance; and
- an accounting firm based in Minnesota and confirmed that they audited the Fund's financials.²²

In addition, Dolan was familiar with the large Minneapolis-based law firm that the Fund identified as its legal counsel.²³

Shortly thereafter, Dolan began recommending that potential investors consider the Fund as a potential investment.²⁴ Dolan had no agreement with RE or the Fund to refer potential investors and was not directly compensated for making referrals to the Fund.²⁵ Dolan did not provide oral or written notice to the Firm of his role in the sale of Fund Interests.²⁶

On December 12, 2012, in response to an email from Dolan saying that he had just talked to an investor about the Fund and needed to get information on the Fund to the investor, RE

²⁰ Tr. 57-58; CX-10, at 3.

²¹ CX-8, at 1-10.

²² Tr. 130; CX-10, at 3. The above description is based on Dolan's Rule 8210 response, which the attorney who was then representing him, DR, had prepared. Dolan testified that he met with DR to discuss the questions that were posed in a Rule 8210 request and the appropriate responses. Dolan and DR reviewed at least two drafts of the Rule 8210 response letter before DR submitted it to FINRA, and Dolan was comfortable with the letter when DR submitted it. Tr. 214. Although Dolan's due diligence as described in his hearing testimony was less extensive than described above, the Panel credits the statements in Dolan's Rule 8210 response. Tr. 55-56, 61.

²³ Tr. 55-56.

²⁴ CX-10, at 3, 5.

²⁵ Stip. ¶ 24; CX-10, at 5.

²⁶ Tr. 237-38 (The Panel infers the absence of oral notice to the Firm from Dolan's testimony that the Firm learned of Dolan's role in the sale of the Fund Interests from a review of his emails.).

emailed Dolan a summary of the Fund's performance through the third quarter of 2012 ("3Q2012 Performance Summary"), four recent investor letters, and a copy of the Fund's subscription agreement (collectively, "December 2012 Fund Materials").²⁷ The 3Q2012 Performance Summary showed that the Fund had earned 74.88% since inception, compared to increases of 23.86% for the Russell 2000, 31.56% for NASDAQ, and 26.24% for the S&P 500.²⁸

On February 26, 2013, Dolan sent RE the email addresses "of the people I currently have in your fund [(GN, DDS, JZ, and AH)]" and stated that he would let RE know "what [AH] says."²⁹ Dolan testified that this email reflected a "poor choice of words" and it would have been more accurate to say that these are the people whom Dolan had referred to RE.³⁰

In July 2013, RE emailed Dolan a document summarizing the Fund's performance through the second quarter of 2013 ("2Q2013 Performance Summary"), which indicated that the Fund continued to outperform the benchmarks selected by RE.³¹ Dolan testified that RE emailed this performance summary to him because RE thought that he would want to know how the Fund was performing because he had referred customers to the Fund.³²

In the fall of 2013, RE wanted to grow the Fund.³³ On October 11, 2013, RE emailed Dolan a draft fact sheet on the Fund, asking Dolan for his thoughts, and mentioning that he "would love to get [AH and TH] or others going more."³⁴

About a week later, RE emailed Dolan the final version of the fact sheet, as well as the Fund's letter to investors for the third quarter of 2013 and a performance summary updated to reflect the third quarter of 2013 (collectively, "October 2013 Fund Materials").³⁵

2. Dolan's Communications with Fund Investors

Dolan recommended that seven individuals (including two couples) consider purchasing Fund Interests. Six of those individuals purchased Fund Interests for a total of \$850,000.

Dolan's communications with the seven individuals regarding the Fund Interests occurred between October 2012 and October 2013. Many of his communications with the seven individuals were by email. All of Dolan's email communications were sent from the Firm's

²⁷ CX-8, at 9, 11-33.

²⁸ CX-8, at 12.

²⁹ CX-8, at 34.

³⁰ Tr. 83, 199-200.

³¹ CX-8, at 35-36.

³² Tr. 85-86.

³³ Tr. 88.

³⁴ Tr. 88-89; CX-8, at 37-39. The record does not establish whether Dolan provided RE with any comments on the draft fact sheet.

³⁵ CX-8, at 40-45.

email system. The emails automatically included Dolan's standard signature block identifying him as a Senior Vice President of the Firm and the Firm's standard waiver language stating, among other things, that the Firm and its affiliates reserved the right to monitor all emails.³⁶ In October 2013, the Firm discovered his emails and instructed him to stop communicating with customers regarding the Fund.

As set forth below, Dolan did far more than merely refer individuals to the Fund. He facilitated transactions and commented favorably on the Fund's performance and RE's abilities.

a. GN

GN, a retired business owner, was trustee for a family trust that was a client of Dolan at the Firm.³⁷ As set forth below, GN made two purchases of Fund Interests.

Shortly after receiving the October 2012 Fund Materials from RE, Dolan discussed the Fund with GN. Dolan gave GN background information regarding the Fund's structure and told GN about RE, including that RE had been director of research at an institutional firm and that RE was well informed, thorough, smart, and a good investor. Dolan also said that if GN wanted to learn more, Dolan could connect him with RE.³⁸ On October 8, 2012, Dolan emailed the October 2012 Fund Materials to GN and stated that he would call GN "next week."³⁹ Dolan subsequently put GN in touch with RE.⁴⁰

A few months later, in January 2013, Dolan sent two emails to GN, one transmitting a subscription agreement for the Fund and one transmitting instructions for wiring funds to the Fund's escrow account.⁴¹ Shortly thereafter, GN purchased \$200,000 in Fund Interests.⁴²

In July 2013, Dolan sent an email to GN transmitting the 2Q2013 Performance Summary and stating that RE "will get out his letter in a couple of days but I thought you would like to see his #'s ---- there [*sic*] great!"⁴³ Dolan testified that he sent the 2Q2013 Performance Summary to GN because he wanted to keep GN informed.⁴⁴

On October 20, 2013, Dolan forwarded to GN the email from RE dated October 19, 2013, and the October 2013 Fund Materials.⁴⁵ In his forwarding email to GN, Dolan commented

³⁶ Tr. 79, 101, 198-99; CX-9; CX-12; CX-14; CX-16; CX-18.

³⁷ Stip. ¶ 14; CX-7.

³⁸ Tr. 104-06; CX-9, at 1.

³⁹ CX-9, at 1.

⁴⁰ Tr. 101.

⁴¹ CX-9, at 9-21.

⁴² Stip. ¶ 15.

⁴³ CX-9, at 22-23.

⁴⁴ Tr. 116.

⁴⁵ CX-9, at 24-30.

that RE had “delivered great results again” and suggested that Dolan and GN talk “to see if you could add more money to” the Fund.⁴⁶ Dolan asked GN whether he could add more money to the Fund because RE was trying to grow the Fund and had reached out to Dolan.⁴⁷

Two days later, after trying unsuccessfully to reach RE to obtain guidance on how to purchase Fund Interests by check, GN sent an email asking Dolan for “info to send check and I will go for another \$100,000.00.”⁴⁸ Later that day, Dolan emailed RE to inform him that (1) GN had decided to purchase another \$100,000 in Fund Interests, and (2) “I need the check instructions so he can send a check right away.”⁴⁹ Dolan emailed GN the next day relaying RE’s thanks for GN’s “commitment to his fund” and conveying instructions on how GN could purchase the Fund Interests by check.⁵⁰ Shortly thereafter, GN purchased an additional \$100,000 in Fund Interests.⁵¹

b. DDS

DDS, a former CPA and business owner, has been a customer of Dolan at the Firm for approximately 20 years.⁵² DDS had a number of investment activities, including co-owning a business with JZ (husband of SZ, another Dolan customer), investing in other companies in which DDS had an active role, investing in real estate, and owning stock in public companies.⁵³ Also, DDS invested in bonds through his account with Dolan at the Firm.⁵⁴ As set forth below, DDS made one purchase of Fund Interests.

On a number of occasions, DDS had mentioned to Dolan that he was always looking for a broad range of investment ideas.⁵⁵ In December 2012, Dolan told DDS about the Fund. Dolan explained that RE was smart and suggested that DDS talk to RE.⁵⁶ Dolan then emailed RE to let him know that he had just talked to a potential investor about the Fund. He told RE that they needed to get information regarding the Fund to the potential investor.⁵⁷ Later that day, RE emailed the December 2012 Fund Materials to Dolan.⁵⁸ Dolan then forwarded RE’s December

⁴⁶ CX-9, at 24.

⁴⁷ Tr. 118.

⁴⁸ Tr. 91-92; CX-9, at 31.

⁴⁹ CX-8, at 50.

⁵⁰ CX-9, at 32.

⁵¹ Stip. ¶ 16.

⁵² Stip. ¶ 20; Tr. 78, 139, 263; CX-13.

⁵³ Tr. 263-64.

⁵⁴ Tr. 263.

⁵⁵ Tr. 78, 140, 265-67.

⁵⁶ Tr. 78, 265, 276, 279; CX-14, at 1.

⁵⁷ CX-8, at 9.

⁵⁸ CX-8, at 11.

12 email (with the enclosed December 2012 Fund Materials) to DDS.⁵⁹ In his email forwarding the December 2012 Fund Materials to DDS, Dolan requested that DDS review the materials and then contact him.⁶⁰ On December 17, DDS responded that the Fund's returns "are most impressive," and asked for background information on the Fund, including its size, goals, and management team.⁶¹

Dolan then arranged for DDS to meet RE for breakfast on December 21, 2012.⁶² Either Dolan or DDS invited JZ, another customer of Dolan and the former co-owner of a business with DDS, to join the breakfast meeting.⁶³ Dolan started the breakfast meeting by introducing RE to DDS and JZ as a good judge of investments.⁶⁴ RE then made a presentation.⁶⁵ DDS and JZ questioned RE about his background and his level of expertise.⁶⁶ DDS formed a very favorable impression of RE based on the meeting.⁶⁷ Among other things, DDS was impressed that RE had served on a parish finance committee with a priest whom DDS held in high regard.⁶⁸

During the breakfast meeting, DDS learned that while working as an analyst RE had covered a Minneapolis company whose chief financial officer was a friend of DDS.⁶⁹ Before purchasing Fund Interests, DDS called the company's CFO, who stated that RE was one of the smartest analysts who covered the company.⁷⁰

DDS purchased \$250,000 in Fund Interests at the end of 2012.⁷¹ DDS does not recall asking Dolan for advice on whether he should invest in the Fund.⁷²

In early March 2013, DDS asked Dolan for an update on background information he had requested from RE. Dolan told RE that DDS would like to see a document that set forth information regarding the Fund such as the Fund's objective and the identity of the Fund's custodian, prime broker, third party administrator, auditor, and legal counsel.⁷³ Dolan emailed

⁵⁹ CX-14, at 1-25.

⁶⁰ CX-14, at 1.

⁶¹ CX-14, at 26.

⁶² Tr. 305-06; CX-14, at 28; CX-16, at 23.

⁶³ Tr. 265.

⁶⁴ Tr. 280.

⁶⁵ Tr. 228

⁶⁶ Tr. 228, 267.

⁶⁷ Tr. 269.

⁶⁸ Tr. 269.

⁶⁹ Tr. 267.

⁷⁰ Tr. 140-41, 267-68.

⁷¹ Stip. ¶ 21; Tr. 278.

⁷² Tr. 271.

⁷³ Tr. 146-47; CX-14, at 30.

DDS saying that he had talked to RE about DDS's desire to obtain this information and expected that RE would now have time to provide that information to DDS and assuring DDS, "I'll be on him [RE]!!!"⁷⁴

On July 17, 2013, Dolan emailed the 2Q2013 Performance Summary to DDS, saying that he thought that DDS would like to see the Fund's numbers, and commenting "there [*sic*] great!"⁷⁵ Dolan testified that he emailed the 2Q2013 Performance Summary to DDS to keep him in the loop.⁷⁶ However, by then, DDS was receiving more detailed information directly from RE so that email had little or no impact on DDS.⁷⁷

Later in the year, one day after receiving the October 11 email in which RE said he would love to get AH and TH "or others going more," Dolan sent an email to DDS stating that Dolan wanted to discuss the Fund with DDS and asking DDS to call him.⁷⁸

In 2015 or 2016, RE closed the Fund to outside investors, and DDS's Fund Interests were liquidated.⁷⁹ DDS was satisfied with the Fund's performance.⁸⁰ Neither Dolan nor RE ever represented to DDS that the Fund was being offered through the Firm. DDS did not view the Fund Interests as being offered through the Firm because Dolan did not represent that they were being offered through the Firm.⁸¹

c. JZ and SZ

SZ was a client of Dolan at the Firm and her husband, JZ, had written authority to trade in SZ's account.⁸² Most of the investments in SZ's account at the Firm are bonds.⁸³ As set forth below, JZ and SZ made one purchase of Fund Interests.

In the fall of 2012, JZ expected to receive a substantial payment in connection with the sale by DDS and JZ of the business that they had co-owned. One of JZ's advisors recommended that he diversify his investments. JZ mentioned to Dolan that he was interested in making an investment using the anticipated payment and asked for a referral.⁸⁴ Dolan then referred JZ to RE.⁸⁵ JZ learned of RE from Dolan.⁸⁶

⁷⁴ Tr. 146-47; CX-14, at 30. The record does not establish what steps, if any, Dolan took as a result of this email exchange.

⁷⁵ CX-14, at 32-33.

⁷⁶ Tr. 148.

⁷⁷ Tr. 273.

⁷⁸ CX-8, at 37; CX-14, at 35. The record does not establish whether DDS called Dolan in response to this email.

⁷⁹ Tr. 274.

⁸⁰ Tr. 274-75.

⁸¹ Tr. 275.

⁸² Stip. ¶ 22; Tr. 96-97, 152; CX-15.

⁸³ Tr. 304.

⁸⁴ Tr. 307, 315-16.

In advance of the December 21 breakfast meeting that Dolan had arranged for DDS, Dolan emailed JZ most of the December 2012 Fund Materials (everything but the Fund's letter to investors for the first quarter of 2012).⁸⁷ JZ attended the breakfast meeting, at which Dolan introduced RE as a good judge of investments.⁸⁸ After the meeting, JZ was inclined to invest in the Fund.⁸⁹

Shortly after the breakfast meeting, JZ spoke at a Christmas party with CS, who had previously worked with RE at an institutional brokerage firm.⁹⁰ CS spoke very favorably about RE and said that RE was someone whom JZ could trust.⁹¹ This conversation influenced JZ to invest in the Fund.⁹²

JZ also spoke about investing in the Fund with DDS, who had formed a favorable impression of the Fund.⁹³

Before the end of 2012, JZ and SZ decided to invest in the Fund.⁹⁴ During the period between the breakfast meeting and the investment, Dolan took no steps to encourage them to make the investment.⁹⁵

JZ and SZ purchased \$100,000 in Fund Interests in December 2012.⁹⁶ They decided to pay for most of their purchase of Fund Interests with funds that were available in SZ's account at the Firm.⁹⁷ They requested that Dolan send them a form by which they could request that the Firm wire \$97,000 from SZ's account to the Fund and asked how they could pay another \$3,000 to the Fund by check.⁹⁸ On December 27, 2012, Dolan emailed SZ a form to request that the Firm wire \$97,000 to the Fund and provided her the mailing address for the check.⁹⁹

⁸⁵ Tr. 316.

⁸⁶ Tr. 316.

⁸⁷ CX-16, at 1-22.

⁸⁸ Tr. 280.

⁸⁹ Tr. 305-08.

⁹⁰ Tr. 318-19.

⁹¹ Tr. 308, 318-19.

⁹² Tr. 309.

⁹³ Tr. 314.

⁹⁴ Tr. 314.

⁹⁵ Tr. 314.

⁹⁶ Stip. ¶ 23.

⁹⁷ Tr. 312-13.

⁹⁸ Tr. 154-56.

⁹⁹ CX-16, at 24-26.

About six months later, on June 10, 2013, Dolan emailed wire transfer instructions to JZ, advising JZ that he could call RE if he had any questions.¹⁰⁰ On July 17, 2013, Dolan emailed JZ the 2Q2013 Performance Summary, saying that he thought that JZ would like to see the Fund's numbers, and commenting "there [*sic*] great!"¹⁰¹

JZ and SZ ceased being investors in the Fund when RE closed the Fund to outside investors.¹⁰² They were satisfied with the Fund's performance.¹⁰³

JZ did not view the Fund Interests as being offered through the Firm because he had asked Dolan for a referral and was only looking for a referral.¹⁰⁴

d. AH and TH

AH and her husband TH have been customers of Dolan at the Firm since about 2007.¹⁰⁵ AH and TH invested a relatively small portion of their assets through their account with Dolan, all in municipal bonds.¹⁰⁶ As set forth below, AH and TH made one purchase of Fund Interests.

TH first heard of the Fund in the fall of 2012 from JZ, who was a friend. JZ commented that RE planned to invest a substantial amount of his own money in the Fund, which TH considered as a positive factor.¹⁰⁷

Later that fall, Dolan called AH or TH and recommended that they look into the Fund as a possible investment vehicle.¹⁰⁸

About two weeks after Dolan received the December 12, 2012 email from RE, Dolan relayed the December 2012 Fund Materials to AH. In his transmittal email, Dolan explained that he wanted AH to take a look at the Fund. He also mentioned that JZ had recently heard a presentation on the Fund and could be a good resource for her.¹⁰⁹

Before AH and TH purchased Fund Interests, Dolan and AH discussed the Fund.¹¹⁰ Dolan explained what a hedge fund was and how RE would manage the Fund, commented that the Fund had generated good results, and stated that he had known RE both personally and

¹⁰⁰ CX-16, at 28. The record does not establish the circumstances that resulted in Dolan sending this email.

¹⁰¹ CX-14, at 32-33.

¹⁰² Tr. 315.

¹⁰³ Tr. 315.

¹⁰⁴ Tr. 315.

¹⁰⁵ Stip. ¶ 17; Tr. 97, 284.

¹⁰⁶ Tr. 284-85.

¹⁰⁷ Tr. 286-89, 291.

¹⁰⁸ Tr. 299.

¹⁰⁹ Tr. 123-25; CX-12, at 1-23.

¹¹⁰ Tr. 134-35.

professionally and thought that RE was smart, thorough, and a good investor.¹¹¹ AH told Dolan that she would like to meet with RE, and Dolan set up a meeting on a Saturday morning at her home.¹¹² At the meeting, Dolan introduced RE to AH and TH, explaining that he had known RE for years and RE had a successful track record as an analyst.¹¹³ RE then talked about his investment history and the Fund.¹¹⁴ TH formed the impression that RE would operate the Fund in a conservative and thoughtful manner.¹¹⁵

Before AH and TH decided to purchase Fund Interests, TH talked to JZ about RE and the Fund. JZ, whom TH held in high regard, indicated that he thought that the Fund was a good opportunity and said he was going to invest in the Fund.¹¹⁶

Dolan followed up with AH and TH about a month or two after the meeting, which prompted AH and TH to decide to invest in the Fund.¹¹⁷ Dolan did not, however, pressure AH and TH to invest in the Fund.¹¹⁸

In late 2012 or early 2013, AH telephoned Dolan and asked him if he could send her instructions on how to wire funds to purchase Fund Interests.¹¹⁹ On January 2, 2013, Dolan emailed her the instructions, which he obtained from the subscription agreement that RE had emailed to him.¹²⁰

Within two months of that email, AH and TH purchased \$200,000 in Fund Interests.¹²¹ TH understood that the Fund Interests were not being offered through the Firm because RE made it clear that the Fund was separate from the Firm.¹²²

In late February 2013, RE told Dolan that he had not received AH's subscription agreement.¹²³ On February 24, 2013, Dolan relayed this information to AH, offered to send another subscription agreement and date the agreement January 1, 2013, and asked her to give

¹¹¹ Tr. 106, 134-35. (When asked what he told AH about RE, Dolan answered that he told AH "the same story that I told you before." Before giving this answer, Dolan had testified that he told GN that RE was well-informed, smart, and a good investor.)

¹¹² Tr. 136-37, 287-88, 299.

¹¹³ Tr. 289.

¹¹⁴ Tr. 289.

¹¹⁵ Tr. 290.

¹¹⁶ Tr. 291-92.

¹¹⁷ Tr. 292-93.

¹¹⁸ Tr. 293-94.

¹¹⁹ Tr. 126-27.

¹²⁰ Tr. 127; CX-12, at 23.

¹²¹ Stip. ¶¶ 18-19; Tr. 300. TH testified that they did not invest any money in the Fund after the initial \$200,000. Tr. 297.

¹²² Tr. 298, 300.

¹²³ Tr. 127.

him a call.¹²⁴ AH responded the same day asking Dolan to send another subscription agreement.¹²⁵

Later in the year, a little more than a week after RE's October 11 email to Dolan stating that he "would love to get [AH and TH] or others going more," Dolan sent an email to AH and TH commenting that RE had "delivered great results again" and asking if they "can add funds at this time."¹²⁶ Dolan and AH then talked and, among other things, discussed the Fund's prime broker, custodian, third party administrator, auditor and legal counsel (all of whom were identified in the fact sheet that Dolan had received from RE on October 19).¹²⁷ AH indicated that she was familiar with the custodian, prime broker, auditor and legal counsel, but not with the third party administrator.¹²⁸ On October 23, 2013, Dolan emailed the fact sheet to AH and stated that he would talk to the third party administrator and then call AH.¹²⁹ Dolan then called the third party administrator.¹³⁰ AH and TH decided not to invest further in the Fund.¹³¹

AH and TH were satisfied with their investment in the Fund. Over the course of two or three years, their investment appreciated from \$200,000 to about \$350,000.¹³²

3. Dolan's Communications with the Customer Who Did Not Invest in the Fund

TS has been a customer of Dolan at the Firm since at least 2005.¹³³ Dolan communicated with TS regarding Fund Interests, but TS did not purchase any Fund Interests.¹³⁴

On July 22, 2013, Dolan emailed the 2Q2013 Performance Summary to TS.¹³⁵ In the transmittal email, Dolan explained that he had been involved with the Fund for three years and had known the portfolio manager for at least 15 years. Dolan said the Fund Interests were "highly recommended!!!" and suggested that they meet with RE to discuss the Fund.¹³⁶ Dolan

¹²⁴ CX-12, at 24.

¹²⁵ Tr. 26; CX-12, at 25. The record does not establish whether Dolan sent another subscription agreement to AH in response to this request.

¹²⁶ CX-8, at 37; CX-12, at 27.

¹²⁷ Tr. 130; CX-8, at 40-42.

¹²⁸ Tr. 130.

¹²⁹ CX-12, at 28.

¹³⁰ Tr. 131. The record does not establish what information, if any, Dolan provided to AH as a result of this call to the third party administrator.

¹³¹ Tr. 297, 301.

¹³² Tr. 298.

¹³³ Stip. ¶ 25; Tr. 161.

¹³⁴ Tr. 161.

¹³⁵ CX-18, at 1.

¹³⁶ CX-18, at 1. Beyond claiming that his statement that he had been involved in the Fund for three years simply reflected "poor wording," Dolan was unable to explain why he had made this statement. Tr. 162-63.

and TS had a short conversation, and TS stated that he was not interested in hedge funds at that time.¹³⁷

Three months later, on October 20, 2013, Dolan sent a follow-up email in which he transmitted materials regarding the Fund, referred to the Fund's "great results," reiterated that he had known RE for 15 years, stated that he considered RE "one of the smartest people I know," and urged TS to meet with RE to discuss the Fund.¹³⁸

Dolan denies that he recommended the Fund to TS. Dolan testified that he was only "recommending a referral for a meeting between" TS and RE, and that his emails to TS were referrals, not recommendations.¹³⁹

4. Dolan Ceases Selling Away Activities After the Firm Discovers His Activities and Instructs Him to Stop Communicating with Investors Regarding the Fund

In October 2013, in the course of reviewing Dolan's emails, Dolan's supervisor learned of his participation in the sale of Fund Interests.¹⁴⁰ The Firm then instructed Dolan to stop communicating with potential investors regarding the Fund, and he did stop.¹⁴¹ The Firm informed Dolan that he had violated its policies against selling away and required him to sign a "Written Warning – Special Supervision Notice" (the "Notice"). In the Notice, the Firm notified Dolan that:

- the Firm would fine him \$25,000, require him to complete special training, and require him to reimburse the Firm for any losses and legal fees from future complaints or disputes associated with his selling away activities;
- he was warned that the conduct described in the Notice violated Firm policies and any future violations of the Notice or any Firm compliance policies by him may constitute cause for termination; and
- he remained subject to this special supervision and warning until further notice from the Firm.¹⁴²

¹³⁷ Tr. 161, 164.

¹³⁸ CX-18, at 3-8.

¹³⁹ Tr. 164-65, 217. When asked at the hearing whether—in light of his statement that the Fund "is highly recommended!!!"—he had recommended the Fund to TS, Dolan testified "that was not his intention. My intention was to talk to him and we never did about this." Tr. 163. Dolan also testified that, while communicating with customers about the Fund, he did not think that he was soliciting the customers to purchase Fund Interests. Tr. 177, 179.

¹⁴⁰ Tr. 237.

¹⁴¹ Tr. 321.

¹⁴² JX-4.

Dolan responded to the Firm that he thought it was okay for him to refer customers to an investment if he was not compensated.¹⁴³ Dolan paid the \$25,000 and completed the special training required by the Firm.¹⁴⁴

III. Conclusions of Law

A. Scope of NASD Rule 3040

NASD Conduct Rule 3040 provides that “[n]o person associated with a member shall participate in any manner in a private securities transaction” unless “[p]rior to participating” he or she provides “written notice to the member . . . describing in detail the proposed transaction and the person’s proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction”¹⁴⁵

The Securities and Exchange Commission (“SEC”) has repeatedly emphasized that Rule 3040 applies to participation “in any manner,” declaring, “Rule 3040’s reach is very broad and encompass[es] the activities of an associated person who not only makes a sale but who participates in any manner in the transaction.”¹⁴⁶ Thus, few limitations have been imposed on the reach of the “participation” element. The SEC has, however, held that an associated person did not participate in a transaction where he did nothing more than refer a customer to an investment opportunity¹⁴⁷ or where there was “both a lapse of time and intervening events” such that there was not a factual connection between the associated person’s activities and the private securities transactions at issue.¹⁴⁸

B. Discussion

To establish that Dolan violated Rule 3040, the record must show that (1) Dolan is a person associated with the Firm, (2) the sale of Fund Interests constituted “private securities

¹⁴³ Tr. 165-73, 238-39.

¹⁴⁴ Tr. 163, 248; JX-4.

¹⁴⁵ Scienter need not be proven to establish a violation. *Alvin W. Gebhart, Jr.*, 58 S.E.C. 1133, 1167-68 (2006), *reversed and remanded in part on other grounds*, 255 F. App’x 254 (9th Cir. 2007). In addition, it is not a defense that an associated person mistakenly believed that the Rule did not apply. *Harry Friedman*, Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at *21 (May 13, 2011).

¹⁴⁶ *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *32-33 & n.22 (Sept. 24, 2015) (quoting *Stephen J. Gluckman*, 54 S.E.C. 175, 182 & n.24 (1999)). *See also Joseph Abbondante*, 58 S.E.C. 1082, 1098 (2006) (“Conduct Rule 3040 is broad in scope and is not limited merely to solicitation of an investment.”), *aff’d*, 209 F. App’x 6 (2d Cir. 2006); *Kenny Akindemowo*, No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *36 (NAC Dec. 29, 2015) (“The NAC and the Commission have interpreted broadly the rule’s phrase, ‘participate in any manner,’ in order to further FINRA’s regulatory purpose.”), *aff’d*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769 (Sept. 30, 2016).

¹⁴⁷ *James W. Browne*, Exchange Act Release No. 58916, 2008 SEC LEXIS 3113, at *34-35 (Nov. 7, 2008). *See also Mark H. Love*, 57 S.E.C. 315, 321 (2004) (emphasizing that an associated person “who does nothing more than refer a customer to another investment opportunity should not ordinarily run afoul of Rule 3040”).

¹⁴⁸ *Browne*, 2008 SEC LEXIS 3113, at *27-28.

transactions,” (3) Dolan “participated” in the transactions, and (4) Dolan failed to provide the Firm with prior written notice of the transactions and his role in them.¹⁴⁹

Dolan does not dispute that he is associated with the Firm,¹⁵⁰ that the sales of Fund Interests constituted “private securities transactions,”¹⁵¹ and that he did not provide the Firm with prior written notice of the transactions and his role in them.¹⁵² Dolan disputes only that his involvement in the sales of the Fund Interests amounts to “participation” under Rule 3040.

Dolan’s involvement in the sales of the Fund Interests constituted “participation” under Rule 3040. In addition to recommending that investors talk to RE about investing in the Fund, Dolan spoke favorably of RE, emailed prospective investors materials discussing the Fund’s performance, arranged meetings or other communications between RE and the investors, commented favorably on the Fund’s performance, participated in meetings with respect to three sets of investors, emailed prospective investors a copy of the Fund’s subscription agreement, and emailed instructions to three sets of investors on how to pay for Fund Interests by check or wire. Furthermore, there was a close factual connection between Dolan’s activities and the sales as the sales occurred shortly after those activities, and there were few (if any) intervening events. In sum, Dolan’s involvement in the sales of the Fund Interests constituted participation because it was much more than a referral and was closely connected to the charged transactions.

Dolan asserts that his conduct does not constitute participation because he received no compensation as a result of customers’ purchases of Fund Interests.¹⁵³ But, as the SEC noted, the text of Rule 3040 “makes it clear that the requirement to provide the member firm employer with written notice of the transaction does not arise only when the representative receives compensation.”¹⁵⁴

Dolan also argues that his conduct does not constitute participation because he did not receive investor funds. The text of Rule 3040 refutes Dolan’s argument; the Rule explicitly

¹⁴⁹ NASD Rule 3040; *Akindemowo*, 2015 FINRA Discip. LEXIS 58, at *35-36.

¹⁵⁰ Article I (rr) of the FINRA’s By-Laws, defines an “person associated with a member” to include “a person who is registered or has applied for registration under the Rules of [FINRA].”

¹⁵¹ Rule 3040 defines a “private securities transaction” as “any securities transaction outside the regular course or scope of an associated person’s employment with a member.” NASD Rule 3040(e)(1). The parties stipulated that the Fund Interests are securities. Stip. ¶ 57. Specifically, the Fund Interests are “investment contracts,” which fall squarely within the definition of a security under the Securities Act of 1933 and the Securities Exchange Act of 1934. *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946) (explaining that there is an investment contract, and consequently a security, where there is (1) an investment of money, (2) in a common enterprise, (3) with an expectation of profits, (4) to come solely from the efforts of the promoter or a third party). *See also Dep’t of Enforcement v. Mielke*, No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *15-16 (NAC July 18, 2014), *aff’d*, 2015 SEC LEXIS 3927. In this instance, each investor invested money in a common enterprise, the Fund, and did so to earn profits, which would be derived exclusively from the investment efforts of RE.

¹⁵² Tr. 245.

¹⁵³ Stip. ¶ 24; Resp’ts Pre-Hearing Br. 9.

¹⁵⁴ *Love*, 57 S.E.C. at 318, 320-21 (broker violated Rule 3040 by introducing customers to firm that invested in IPOs, vouching for that firm’s principal, and making calls to the principal when the customers had difficulty withdrawing their investments from the firm, even though broker received no fee or compensation).

extends to associated persons who “participate in any manner” in a private securities transaction. The Rule is not limited to associated persons who receive investor funds. To impose such a limitation would be inconsistent with the purposes of Rule 3040, which are to ensure that member firms adequately supervise the suitability and due diligence responsibilities of their associated persons, to protect investors from being misled as to employing firms’ sponsorship of transactions that are conducted away from the firms, and to protect employers against investor claims arising from an associated person’s private securities transactions.¹⁵⁵ As the National Adjudicatory Council (“NAC”) has stated, the broad interpretation of the Rule “‘implicitly recognizes’ that investors ‘may give special weight to a broker’s involvement in an investment transaction’ and perceive the transactions ‘as having the broker’s imprimatur.’”¹⁵⁶ These protections can be necessary and these risks can be present, regardless of whether the associated person has received investor funds.

C. Conclusion

Thus, Dolan violated NASD Rule 3040 by participating in the sale of Fund Interests without providing prior written notice to the Firm. In violating NASD Rule 3040, Dolan also violated FINRA Rule 2010, which requires adherence to high standards of commercial honor and just and equitable principles of trade.¹⁵⁷

IV. Sanctions

The Panel applies FINRA’s Sanction Guidelines (“Guidelines”) in considering the appropriate sanctions to impose on Dolan.¹⁵⁸ The Guidelines should be applied to further FINRA’s regulatory mission to protect investors and strengthen market integrity.¹⁵⁹ The Guidelines explain that adjudicators should impose sanctions that are remedial and prevent the recurrence of misconduct.¹⁶⁰

Ultimately, however, adjudicators should impose the sanctions that they think are appropriate in the circumstances of the particular case. The Guidelines are “not intended to be absolute.”¹⁶¹ They “do not prescribe fixed sanctions.”¹⁶² The Guidelines specify that based “on the facts and circumstances presented in each case, Adjudicators may impose sanctions that fall

¹⁵⁵ *Love*, 57 S.E.C. at 320; *Dep’t of Enforcement v. Carcaterra*, No. C10000165, 2001 NASD Discip. LEXIS 39, at *8-9 (NAC Dec. 13, 2001).

¹⁵⁶ *Akindemowo*, 2015 FINRA Discip. LEXIS 58, at *37 (quoting *Dep’t of Enforcement v. Love*, No. C3A010009, 2003 NASD Discip. LEXIS 17, at *30, *32 (NAC May 19, 2003), *aff’d*, 57 S.E.C. 315).

¹⁵⁷ A violation of NASD Rule 3040 also constitutes a violation of FINRA Rule 2010. *Akindemowo*, 2015 FINRA Discip. LEXIS 58, at *38 n.18.

¹⁵⁸ FINRA Sanction Guidelines (2017), <http://www.finra.org/industry/sanction-guidelines>.

¹⁵⁹ Guidelines at 1 (Overview).

¹⁶⁰ Guidelines at 3 (General Principle No. 3).

¹⁶¹ Guidelines at 1 (Overview).

¹⁶² Guidelines at 1 (Overview).

outside the ranges recommended and may consider aggravating and mitigating factors in addition to those listed in these guidelines.”¹⁶³ The Guidelines specify that in appropriate circumstances, adjudicators may determine to impose sanctions below the range recommended in an applicable guideline:

Depending on the facts and circumstances of a case, Adjudicators may determine that no remedial purpose is served by imposing a sanction within the range recommended in the applicable guidelines: *i.e.*, that a sanction below the recommended range, or no sanction at all, is appropriate.¹⁶⁴

The Guidelines suggest adjudicators consider sanctions for selling away (private securities transactions) violations in two steps. The first step is to assess the extent of the selling away, including the dollar amount of sales, the number of customers, and the length of time over which the selling away occurred. Where the amount of sales is between \$500,000 and \$1,000,000, an adjudicator should consider a suspension of 6 to 12 months.¹⁶⁵ Here, the sales of Fund Interests to the six individuals totaled \$850,000.

The second step is to examine other factors as described in the Principal Considerations for this type of violation and factors described in the General Principles applicable to all Guidelines.¹⁶⁶ Adjudicators should also consider the Principal Considerations in Determining Sanctions and other case-specific factors.¹⁶⁷

Enforcement recommends that the Panel should suspend Dolan for six months and fine him \$5,000. Dolan argues that if the Panel finds that he violated NASD Rule 3040, the Panel should not suspend him.

A majority of the Panel concludes that it is appropriate to impose a suspension that is less than the recommended six months. Specifically, the Panel majority concludes that it is appropriate to suspend Dolan from associating with any FINRA member in any capacity for 60 calendar days and to fine him \$5,000.¹⁶⁸

In reaching its conclusion regarding the appropriate sanctions, the Panel majority relies primarily on the following factors:

¹⁶³ Guidelines at 1 (Overview).

¹⁶⁴ Guidelines at 4 (General Principle No. 3).

¹⁶⁵ Guidelines at 14.

¹⁶⁶ Guidelines at 14.

¹⁶⁷ Guidelines at 7.

¹⁶⁸ The Hearing Officer dissents from this decision with respect to the sanctions imposed by the Panel majority. In his opinion, the circumstances of this case do not warrant a departure from the range of suspensions that the Guidelines suggest adjudicators consider for the dollar amount of sales in which Dolan participated. Thus, in addition to the \$5,000 fine imposed by the Panel, he would suspend Dolan from associating with any FINRA member in any capacity for six months. Also, he would require Dolan to requalify by examination before again becoming registered in any capacity in the securities industry.

- Dolan did not act maliciously, is not a threat to investors or firms, and genuinely believed that the Fund Interests provided suitable and promising investment opportunities for the customers whom he introduced to the Fund.¹⁶⁹
- At least three of the four sets of investors did not give special weight to Dolan's involvement in the transactions and did not perceive the Fund Interests as having the Firm's imprimatur.
- RE was a legitimate fund manager and the Fund was a legitimate hedge fund.
- The investors to whom Dolan introduced the Fund represented only a small percentage of his retail customers, were wealthy and experienced investors, and performed due diligence on the Fund before purchasing Fund Interests.¹⁷⁰
- The Firm fined Dolan \$25,000 and required him to complete special training.¹⁷¹

The Panel majority also considers factors that relate to the five transactions at issue or the duration of Dolan's conduct. The five transactions at issue totaled \$850,000 and involved six individuals, including two couples.¹⁷² Four of the six were customers of the Firm. One of the other individuals was a trustee for a family trust that was a customer of the Firm, and the other individual was the husband of a customer and had trading authority over his wife's account at the Firm.¹⁷³ Dolan's participation in the sales of Fund Interests extended from October 2012 to October 2013, with most of his relevant activity occurring between October 2012 and early January 2013, in mid-2013, and in October 2013,¹⁷⁴ and he only stopped the activities when the Firm detected them and instructed him to do so.

The Panel majority also considers a number of other factors that relate to Principal Considerations for selling away violations. First, Dolan was not affiliated with the Fund, although he was a friend of RE and received commissions in connection with trading by RE at the Firm and in connection with trading by the Fund Advisor at the Firm.¹⁷⁵ Second, even though Dolan used the Firm's email system and therefore sent emails in connection with the Fund that identified him as a senior vice president of the Firm and contained the Firm's standard waiver language, he did not intend to create an impression that the Firm sanctioned the activity. Third, each of the three customers who testified at the hearing stated that they knew that the Fund

¹⁶⁹ *Dep't of Enforcement v. Noard*, No. 2012034936101, 2017 FINRA Discip. LEXIS 15, at *29-30 (NAC May 12, 2017) (Respondent's misguided attempt to act in a customer's best interest may be mitigating.).

¹⁷⁰ Guidelines at 8 (Principal Consideration No. 18).

¹⁷¹ Guidelines at 5 (General Principle No. 7).

¹⁷² Guidelines at 14 (Principal Consideration No. 2).

¹⁷³ Guidelines at 15 (Principal Consideration No. 8).

¹⁷⁴ Guidelines at 14 (Principal Consideration No. 3).

¹⁷⁵ Guidelines at 14 (Principal Consideration No. 5).

Interests were not offered through the Firm.¹⁷⁶ Fourth, Dolan did not provide oral notice to the Firm of the proposed transactions.¹⁷⁷ Fifth, the extent of Dolan's participation in the sales of the Fund Interests was limited. Although Dolan did more than merely refer customers to the Fund Interests, he did not sell the interests directly to customers.¹⁷⁸ Sixth, Dolan did not recruit other registered individuals to sell Fund Interests.¹⁷⁹ Seventh, although Dolan did not notify the Firm of his selling away activity and the Firm was unaware of Dolan's selling away activity until October 2013, Dolan did not attempt to mislead the Firm about the existence or nature of that activity.¹⁸⁰

The Panel majority also considers two additional factors that relate to the Principal Considerations applicable to all violations. Dolan knew that he had not provided notice to the Firm of the transactions.¹⁸¹ Dolan participated in five private securities transactions involving Fund Interests.¹⁸²

The Panel majority considers that Dolan exposed the Firm to the risk of litigation if investors lost money on the Fund Interests. He sent emails using the Firm's email system. He did not inform prospective investors that the Firm had not approved the Fund Interests for sale, was not supervising his involvement in the sales of the Fund Interests, and had not authorized him to introduce prospective investors to the Fund.

The Panel majority also considers that Dolan could reasonably have anticipated that the customers would invest more than \$500,000 in the Fund. Dolan recommended the Fund Interests to at least one customer of the Firm (TS) who did not purchase the interests. Also, given that Dolan was aware of the \$250,000 minimum investment requirement and given the wealth of the customers whom he referred to the Fund; he could reasonably have anticipated that each of the customers would invest substantial sums in the Fund.

Precedent precludes the Panel majority from treating as mitigating several factors raised by Dolan. First, Dolan testified that his failure to provide written notice to the Firm resulted from a good faith understanding that his role in the sales of the Fund Interests did not constitute participation in the sales within the meaning of Rule 3040.¹⁸³ Second, Dolan's customers did not

¹⁷⁶ Guidelines at 14 (Principal Consideration No. 6). The Panel recognizes that the absence of misleading conduct is not mitigating. *Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *43 n.54 (Jan. 9, 2015).

¹⁷⁷ Guidelines at 15 (Principal Consideration No. 9).

¹⁷⁸ Guidelines at 15 (Principal Consideration No. 11).

¹⁷⁹ Guidelines at 15 (Principal Consideration No. 12).

¹⁸⁰ Guidelines at 15 (Principal Consideration No. 13).

¹⁸¹ Guidelines at 8 (Principal Consideration No. 13).

¹⁸² Guidelines at 8 (Principal Consideration No. 17).

¹⁸³ See *Dep't of Enforcement v. Friedman*, No. 20040083501, 2010 FINRA Discip. LEXIS 10, at *30-31 (NAC July 26, 2010) ("[I]gnorance of FINRA rules is not mitigating for purposes of sanctions."), *aff'd*, 2011 SEC LEXIS 1699.

incur a financial loss on the Fund Interests.¹⁸⁴ Third, there has been no finding that the Fund Interests involve a violation of federal or state securities laws or federal, state, or self-regulatory organization (“SRO”) rules.¹⁸⁵ Fourth, Dolan has not been the subject of any other prior disciplinary proceedings.¹⁸⁶ Fifth, Dolan did not receive any compensation from the Fund or RE as a direct result of his customers’ purchases of Fund Interests.¹⁸⁷

The record does not support treating as mitigating three additional factors raised by Dolan. Accordingly, the Panel did not treat as mitigating Dolan’s expression of remorse at the hearing,¹⁸⁸ Dolan’s cooperation with the FINRA investigation,¹⁸⁹ and Dolan’s cooperation with the Firm’s investigation.¹⁹⁰

V. Order

For violating NASD Rule 3040 and FINRA Rule 2010 by participating in private securities transactions without providing the required prior written notice to his Firm, Respondent Michael Timothy Dolan is suspended from associating with any FINRA member in any capacity for 60 calendar days and fined \$5,000. Dolan is also ordered to pay hearing costs in the amount of \$3,965.51, which includes an administrative fee of \$750 and hearing transcript costs of \$3,215.51.

If this Decision becomes FINRA’s final disciplinary action, the suspension shall become effective with the opening of business on Monday, February 5, 2018. The fines and assessed

¹⁸⁴ The SEC has stated that because the focus is “on the welfare of investors generally” and because where an associated person fails to provide notice to his firm that he is participating in a private securities transaction, customers are harmed in that they are deprived of the firm’s supervision of their investments, regardless of whether the investors suffered financial harm. *Mielke*, 2015 SEC LEXIS 3927, at *63. *See also Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *26 (Feb. 24, 2012).

¹⁸⁵ *Friedman*, 2011 SEC LEXIS 1699, at *31 n.29 (absence of such a finding is not mitigating).

¹⁸⁶ *See John B. Busacca, III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *64 n.77 (Nov. 12, 2010), *aff’d*, 449 F. App’x 886 (11th Cir. 2011) (lack of prior disciplinary history is not a mitigating factor).

¹⁸⁷ *See Keith D. Geary*, Exchange Act Release No. 80322, 2017 SEC LEXIS 995, at *30-31 (Mar. 28, 2017) (lack of personal gain is not a mitigating factor for sanctions purposes).

¹⁸⁸ At the hearing, Dolan continued to maintain that he did not participate in the sales of the Fund Interests within the meaning of Rule 3040. Accordingly, the Panel views his expression of remorse as regret that his conduct had triggered firm discipline and a FINRA disciplinary proceeding.

¹⁸⁹ The Panel did not consider this factor to be mitigating because the record does not establish that Dolan “provided FINRA with any more than the assistance that was required of him under FINRA rules.” *Dep’t of Enforcement v. Neaton*, No. 2007009082902, 2011 FINRA Discip. LEXIS 13, at *31 n.33 (Jan. 7, 2011). *See also, e.g., Keith D. Geary*, Exchange Act Release No. 80322, 2017 SEC LEXIS 995, at *34 (Mar. 28, 2017) (“[N]othing in that testimony or elsewhere in the record indicates that [respondent] took any steps beyond complying with FINRA’s rules requiring him to cooperate with staff inquiries [I]t is not mitigating that he did not delay the investigation, conceal information, or otherwise mislead the investigators.”), *appeal docketed*, No. 17-9522 (10th Cir. May 24, 2017).

¹⁹⁰ The Panel did not consider this factor to be mitigating because the record does not establish that Dolan provided the Firm with any more assistance than necessary to retain his employment.

costs shall be due on a date set by FINRA, but not less than 30 days after this Decision becomes FINRA's final disciplinary action in this proceeding.



Kenneth B. Winer
Hearing Officer
For the Hearing Panel

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