BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. M. Paul De Vietien Tampa, FL, Respondent.	DECISION Complaint No. 2006007544401 Dated: December 28, 2010

Respondent participated in private securities transactions without the required written notice and approval, and engaged in undisclosed outside business activities. Held, findings affirmed, sanctions modified.

Appearances

For the Complainant: Richard A. March, Esq. and Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: M. Paul De Vietien, Pro Se

Decision

M. Paul De Vietien appeals the December 3, 2009 Hearing Panel decision, which found that he participated in private securities transactions and engaged in undisclosed outside business activities, in violation of FINRA's rules. The Hearing Panel barred De Vietien for the violations. After a complete and independent review of the record, we affirm the Hearing Panel's findings, but we modify the sanctions imposed. We eliminate the bar, suspend De Vietien for one year, and fine him $16,000 for the private securities transactions and outside business activities.

I. Factual and Procedural Background

A. De Vietien

De Vietien entered the securities industry in May 1983, when he associated with a FINRA member firm as a general securities representative. During the period relevant to the conduct in this case, February through November 2006, De Vietien was registered with FINRA

as a general securities representative at Citigroup Global Markets, Inc. ("Citigroup"). Citigroup discharged De Vietien in December 2006. De Vietien is not currently registered with a FINRA member firm. His most recent association ended in January 2009.

B. Procedural Background

On December 20, 2006, Citigroup filed a Uniform Termination Notice for Securities Industry Registration ("Form U5"), disclosing that De Vietien had been discharged for engaging in outside business activities. FINRA commenced an investigation of De Vietien's conduct upon receipt of the Form U5 filed by Citigroup.

Enforcement filed a two-cause complaint against De Vietien on December 31, 2008. The first cause of action alleged that De Vietien participated in private securities transactions, in violation of NASD Rules 3040 and 2110, because he promoted and facilitated investments to four individuals – AP, DP, JL, and JB – without the required written notice and approval.[1] The second cause of action alleged that De Vietien violated NASD Rules 3030 and 2110 because he engaged in undisclosed outside business activities. De Vietien filed an answer to the complaint, arguing that his conduct did not violate FINRA's rules.

A three-day hearing took place in Chicago, Illinois, in June 2009. The Hearing Panel issued its decision on December 3, 2009, finding that De Vietien violated FINRA's rules as alleged in the complaint. This appeal followed.

C. University Oakwoods Apartments

In early 2006, De Vietien's daughter, Mary Zavala ("Zavala"), identified a real estate investment opportunity – that 335 condominium units of a 450-unit complex, the University Oakwoods Apartments, were available for sale. Zavala approached De Vietien about purchasing the units, which were located in Tampa, Florida. At the time, Zavala was a licensed real estate agent in Florida, held a community association manager's license, and had experience rehabilitating foreclosed properties. De Vietien resided and worked in Fort Wayne, Indiana. After the purchase, Zavala and her husband, Christian Zavala (together, the "Zavalas"), would hold, upgrade, and manage the units, or immediately resell the property for a quick profit.

On April 25, 2006, Zavala executed a contract to purchase the 335 units.[2] Zavala agreed to a purchase price of $8.9 million. The seller required a nonrefundable deposit of $100,000 upon execution of the agreement and set a mandatory closing date of May 30, 2006. The real estate contract permitted an extension of the closing date for up to four months, or September 30, 2006, if Zavala remitted a nonrefundable deposit of $50,000 for each month's extension.

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1 We discuss the rules in effect when the conduct occurred.

2 Zavala purchased the apartments as an individual, not as a corporate buyer.

1. The University Oakwoods Offering

Zavala needed capital to fund the purchase of the condominium units. To that end, De Vietien and the Zavalas formed University Oakwoods LLC ("University Oakwoods") in May 2006, to facilitate the purchase of the condominium units. University Oakwoods offered 8,000 units of Class A membership interests for a "cash capital contribution" price of $189 per unit (the "Offering"). If all the Class A membership interests were sold, the Offering would raise $1.512 million.[3] In exchange for the capital contribution, purchasers of University Oakwoods' Class A membership interests became members of the company and shared in a pro rata portion of the company's profits and losses.

Zavala prepared marketing materials to solicit purchasers for the Offering. The marketing materials contained photographs of the property, comparable property data, and forecasts. The marketing materials also included a Subscription Agreement (the "Subscription Agreement"), which provided detailed information about University Oakwoods' finances and management and the Offering.[4] The Subscription Agreement explained that investors "should carefully review the Due Diligence Materials before making an investment in this Offering."[5] The Subscription Agreement also cautioned,

> **THE UNITS OFFERED HEREBY CONSTITUTE "SECURITIES" UNDER THE SECURITIES ACT OF 1933 (THE "SECURITIES ACT"), THE FLORIDA SECURITIES AND INVESTOR PROTECTION ACT, AS AMENDED (THE "FLORIDA ACT") AND OTHER STATE SECURITIES LAWS.**

2. University Oakwoods' Managing Members

University Oakwoods was comprised, in total, of 10,000 membership interests. There were 8,000 units of Class A membership interests made available through the Offering, 1,000 Class B membership interests held by University Oakwoods' "managing members," and an additional 1,000 Class B units, which the managing members had the option to purchase for $189 per unit. University Oakwoods' managing members purchased their 1,000 Class B membership interests for a collective capital contribution of $2,000.

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[3] The amounts raised in the Offering would fund the down payment, closing costs, and reserves. The remainder of the property purchase price would be financed through a mortgage.

[4] Zavala hired an attorney, John Giordano ("Giordano"), to assist with the formation of University Oakwoods and the negotiation of the purchase agreement for the condominium units. Giordano prepared the Subscription Agreement.

[5] The Subscription Agreement defined "Due Diligence Materials" as including the Subscription Agreement and University Oakwoods' Articles of Organization, Operating Agreement, and Business Plan. University Oakwoods' "Business Plan" set forth "the current financial operations of the property . . . , [an] estimate of the future income to be derived from the project and other items relevant to [the] purchase of the property."

The only difference between the Class A and Class B membership interests was that the Class B membership interests had voting rights. The Subscription Agreement emphasized this point, stating that the four managing members were "solely responsible for the management of the company."

De Vietien and the Zavalas were three of University Oakwoods' four managing members. The fourth managing member was Jack Moore ("Moore"), an individual whom De Vietien knew socially.[6] De Vietien testified that he brought Moore into University Oakwoods as Chief Operations Officer because Moore owned two apartment complexes in Indianapolis, Indiana, and had experience purchasing and managing apartment buildings.

3. The Managing Members' Executive Compensation

Each of the managing members received "executive compensation." The Subscription Agreement disclosed that, prior to closing, De Vietien would receive a monthly management fee of $2,000 for identifying the project and assisting in the acquisition, closing, and ownership of the property. The Zavalas would receive a monthly management fee of $5,000 for these services. These management fees would cease upon closing of the real estate transaction.

After the closing, the managing members were entitled to a management fee equal to 10 percent of University Oakwoods' net operating income. The Zavalas would receive 70 percent of that fee, and De Vietien and Moore would split the remaining 30 percent. De Vietien and Moore also would receive an hourly consulting fee, "from time to time," as needed. If De Vietien or Moore provided consulting services, each would be compensated at an hourly rate of $37.50, plus out of pocket expenses.

De Vietien and Zavala also would split a two percent commission, as the real estate agents on the transaction. At the closing, De Vietien would receive $53,400 in commissions, and Zavala would earn commissions of $178,000. The Subscription Agreement also explained that University Oakwoods reserved the right to use and compensate De Vietien and Zavala as real estate agents if the property was resold after the closing.[7]

D. De Vietien Promotes and Facilitates the Sales of University Oakwoods' Class A Membership Interests

De Vietien promoted and facilitated the sales of University Oakwoods' Class A membership interests to four individuals – AP, JL, DP, and JB. The four investors, together, made a cash capital contribution of $855,189 to University Oakwoods.[8]

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[6] Moore did not testify at the hearing.

[7] The record suggests that De Vietien never received any of these management fees, consulting fees, or commissions.

[8] The parties stipulated, and the Hearing Panel found, that JB, JL, AP, and DP invested approximately $844,000 in University Oakwoods. Our review of the documentary evidence in the record, however, establishes that the total amount of the investment from the four investors

[Footnote continued on next page]

1. AP and JL

De Vietien became AP's financial advisor in 1983, while he was associated with another FINRA firm.[9] De Vietien contacted AP about the Offering. AP, in turn, told his medical practice partner, JL, about the investment opportunity. In February or March 2006, De Vietien met with JL and AP at their medical practice offices in Fort Wayne, Indiana. During that meeting, De Vietien provided JL and AP with information about University Oakwoods and the Offering. JL testified that he had several meetings with De Vietien and Moore before investing because he was "hesitant" about participating in the Offering. JL and AP each subsequently invested $194,670 in University Oakwoods and obtained 1000 Class A membership interests of the company.

2. DP

De Vietien contacted AP's former spouse, DP, about the University Oakwoods Offering. De Vietien had served as DP's financial advisor since 1983. DP testified that, in early June 2006, De Vietien contacted her about an "opportunity in Tampa, Florida" that he wanted her to consider. DP met with De Vietien and Moore near her residence in Fort Wayne, Indiana to learn more about University Oakwoods. After that meeting, DP invested $311,472 in University Oakwoods, obtaining 1600 Class A membership interests of the company.

3. JB

DP told JB's wife about University Oakwoods. JB's wife encouraged JB to invest in the Offering. De Vietien and JB met at JB's home in Fort Wayne, Indiana, in June 2006. JB testified that De Vietien presented him with marketing materials, including pictures and maps of the property and comparable property data. JB invested $154,377 in University Oakwoods. He obtained 793 Class A membership interests.

E. University Oakwoods Fails

University Oakwoods encountered significant problems securing a mortgage to purchase the apartment complex.[10] While trying to sort through these financial difficulties, University

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was $855,189. Although we typically honor stipulations, because the stipulated amount of the investment is not consistent with the documentary evidence in the record, we rely upon the supportable figure of $855,189 for purposes of our analysis. *See Joseph Abbondante*, Exchange Act Rel. No. 53066, 2006 SEC LEXIS 23, at *10 n.12 (Jan. 6, 2006), *aff'd*, 209 F. App'x 6 (2d Cir. 2006) (explaining that stipulations should not be upheld when they are inconsistent with evidence).

[9] AP did not testify at the hearing.

[10] De Vietien, JB, and JL each testified that Moore was responsible for securing financing for the purchase.

Oakwoods exercised all four extension options. After all four extensions had expired, the sellers agreed to give University Oakwoods two final extensions of a week's duration at a cost of $15,000 per extension. In total, University Oakwoods gave the sellers $330,000 in nonrefundable deposits – $100,000 as consideration for the purchase agreement, $200,000 for the first four extensions, and $30,000 for the last two extensions.

De Vietien updated the investors monthly about the status of the mortgage and closing.[11] As the closing date approached, and the probability of obtaining financing became more tenuous, De Vietien contacted the investors to determine whether they would provide additional capital and use their personal lines of credit to guarantee the mortgage. The investors refused. At this point, at least three of the four investors were ready to extricate themselves from involvement with University Oakwoods. JB, JL, and DP each testified that they contacted De Vietien to end their membership in University Oakwoods and collect the remainder of their investment. De Vietien, however, refused to return their money. De Vietien verified this fact, testifying that he refused to return the money because "an attorney in Indianapolis" advised him that he should close on the property to avoid being sued by the sellers and to prevent the investors from losing their entire investment.

JB, JL, AP, and DP obtained counsel to compel De Vietien, the Zavalas, and University Oakwoods to return the remainder of their investment. The matter settled in March 2007.[12] By the time the matter settled, University Oakwoods had expended nearly $430,000 of the investors' funds on nonrefundable deposits, appraisal fees, legal fees, and compensation to De Vietien and the Zavalas.[13] The investors each lost approximately half of their investments. JB lost $70,547 on the investment, JL and AP each lost $88,953, and DP lost $147,257.

F. De Vietien's Outside Business Activities

De Vietien served as University Oakwoods' "Financial Officer." In that capacity, he was responsible for University Oakwoods' books and records, the preparation of the company's financial statements, and the preparation and filing of its tax returns. University Oakwoods' Subscription Agreement disclosed that De Vietien would receive an annual fee of $30,000 to perform these services. De Vietien, however, did not receive the entirety of these fees.

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[11] These updates also included information on the status of property renovations, relevant changes to the neighborhood, and financial projections related to the operation of the complex.

[12] De Vietien, the Zavalas, University Oakwoods, and the four investors entered into a settlement agreement, which provided for the mutual release of all claims.

[13] De Vietien received $16,000 for bookkeeping and accounting services. The Zavalas had been compensated about $33,000.

II. Discussion

A. Private Securities Transactions

NASD Rule 3040 prohibits associated persons from participating in private securities transactions in any manner without prior written notification to the member firm. NASD Rule 3040(a), (b). Where, as here, the associated person is to receive selling compensation, the representative must give prior written notice to, *and* receive written approval from, the firm before engaging in the transactions. NASD Rule 3040(c)(1).

1. The Class A Membership Interests Are Securities

NASD Rule 3040 applies to "*any* securities transaction" outside the regular course or scope of an associated person's employment with a member. NASD Rule 3040(e)(1) (emphasis added). De Vietien's promotion and sale of the University Oakwoods membership interests were outside the scope of his employment with Citigroup.[14] The issue before us, then, is whether the Class A membership interests in University Oakwoods, a limited liability company, constitute securities. We conclude that they are.

The test for investment contracts guides our analysis of whether the membership interests are securities under the Securities Act of 1933 and the Securities Exchange Act of 1934 (collectively, the "Acts"). *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946) (explaining that the term investment contract "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits"); *see also United States v. Leonard*, 529 F.3d 83, 87 (2d Cir. 2008) (applying the investment contract analysis to examine whether investment "units" in limited liability film companies are securities); *SEC v. Parkersburg Wireless LLC*, 991 F. Supp. 6, 8 (D.D.C. 1997) (applying the investment contract test to determine whether "memberships" in a wireless cable limited liability company constitute securities).[15]

To establish the existence of an investment contract, and consequently a security, there must be: (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 Howey*, 328 U.S. at 298-99 (instructing that the test should be construed broadly as to afford the investing public a full measure of protection).

Our consideration of the facts before us suggests that we may immediately dispense with two of these four factors. The record demonstrates that JB, JL, AP, and DP made an investment of money, and did so with an expectation of profits. The record establishes that each investor

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[14] De Vietien stipulated to this fact. Charles Singer ("Singer"), De Vietien's Citigroup supervisor during the relevant period, also testified to this point, stating that the membership interests "definitely [were not] . . . partnership[s] that we marketed through our firm."

[15] The definition of a security under the Acts is virtually identical and may be considered the same. *See United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 847 n.12 (1975).

provided money and, in return, received a proportional number of Class A membership interests. *See Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 560 (1979) (to qualify as an investment, the purchaser must give up some tangible and definable consideration in return for an interest in the enterprise); *Parkersburg*, 991 F. Supp. at 8 (finding that members' payment of $10,000 to the limited liability company fulfilled the requirement for an investment).

The record also supports that the investors participated in the Offering because they expected to earn a profit from that original investment. *See Forman*, 421 U.S. at 852 (explaining that there is an expectation of profits where the investor is attracted solely by the prospects of a return on his investment); *SEC v. Edwards*, 540 U.S. 389, 394 (2004) (profits mean income or return and includes dividends, periodic payments, or the increased value of the investment).[16] We therefore focus our analysis on whether there was a common enterprise, and whether profits would have derived solely from the efforts of others.

a. Common Enterprise

Courts have considered three types of commonality to determine whether there is a common enterprise – horizontal commonality, broad vertical commonality, and strict vertical commonality. *See Joseph F. Reese*, Initial Decisions Rel. No. 142, 1999 SEC LEXIS 917, at *17-19 (May 6, 1999) (explaining that the circuit courts differ on whether "horizontal," "broad vertical," or "strict vertical" commonality suffice to meet the common enterprise requirement). All three variations are present here.

The record establishes horizontal commonality because the "fates of all investors in [the limited liability company] were bound together with the profit or loss of the entire group." *Parkersburg*, 991 F. Supp. at 8. The Subscription Agreement disclosed that, when JB, JL, AP, and DP made their investments, their funds collectively would go toward the purchase of the apartment complex, and thereafter, each investor would receive a proportion of the return on either the resale or operation of the complex.[17] The pooling of JB's, JL's, AP's, and DP's

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[16] De Vietien testified about his expectation that University Oakwoods would generate profits for the investors. De Vietien projected profits to the investors based upon back-up purchase offers on the property, estimated that the annual net cash flows from the project could reach 25 percent of the investment, and presented the investors with comparative market analyses, showing the potential for profits. The investors similarly expected profits. JB and JL each testified that they invested because the enterprise held the promise of a "return" or "profit." JL also testified that AP encouraged him to invest in University Oakwoods because "the person he worked with very closely as his financial advisor was putting together a real estate transaction in Florida, and that he anticipated a very, very good rate of return." Finally, DP testified that she invested because she wanted to diversify her portfolio and receive a continuous "income stream" from the investment.

[17] For example, JL testified that, he viewed his investment as an "opportunity to buy a large apartment complex with the expectation it would either become upgraded rentals . . . or that the property would be improved somewhat and sold in very short order to make a profit." He further explained that, he expected a "proportion of [a] return based on my percentage of partnership – and [if] it was a long-term [venture] . . . ongoing returns; or if [it] was a short-term [venture], then whatever percentage of the sales proceeds."

investments, together with the pro rata distribution of returns based upon University Oakwoods' profits or losses, satisfies horizontal commonality. *See id.* (finding horizontal commonality where the members of the limited liability company would receive a pro rata share of the revenues generated from the company's operations); *SEC v. Life Partners, Inc.*, 87 F.3d 536, 544 (D.C. Cir. 1996) (stating that the core elements of horizontal commonality are pooling and profit and loss sharing).

There is broad vertical commonality because the fortuity of JB's, JL's, AP's, and DP's investments collectively were dependent upon the promoters', i.e., the managing members', expertise. *See Long v. Shultz Cattle Co.*, 881 F.2d 129, 140-41 (5th Cir. 1989). In the instant case, none of the investors had expertise in the Florida real estate market. Indeed, none of the investors even lived in Florida. Each of the investors resided in Fort Wayne, Indiana, and necessarily would rely fully on University Oakwoods' managing members to manage, operate, or resell the property. *See id.* at 140-41 (stating that the investors' collective reliance on the promoter's expertise demonstrates the necessary interdependence for broad vertical commonality); *see also Parkersburg*, 991 F. Supp. at 8 (finding vertical commonality existed where the investors' success or failure was linked inextricably to the success or failure of the corporation).

The record also establishes strict vertical commonality. Under the strict vertical commonality formulation, there is a common enterprise if the fortunes of the investor are tied to those of the promoter. *See Brodt v. Bache & Co.*, 595 F.2d 459, 460-61 (9th Cir. 1978) (strict vertical commonality requires that the investor and the promoter be involved in some common venture). In this case, if University Oakwoods succeeded, the investors and promoters (the managing members) would *all* share in the profits. The Subscription Agreement disclosed that the managing members not only were entitled to a management fee equal to 10 percent of University Oakwoods' net operating income, but also noted that the managing members retained ownership of 11 percent of the company, even if all the available membership interests were sold in the Offering. *See Long*, 881 F.2d at 140-41 (explaining that strict vertical commonality requires a direct correlation between the promoter's success or failure and the investors' profits or losses, and is exemplified where the promoter shares in the profits of the venture).[18]

b. Profits Solely from the Efforts of Others

The evidence in the record demonstrates that the investors' profits, if any, would have come through the entrepreneurial or managerial efforts of others. *See Forman*, 421 U.S. at 852; *Williamson v. Tucker*, 645 F.2d 404, 423 (5th Cir. 1981) (considering whether joint venture interests are securities, and noting that "a general partnership in which some agreement among the partners places the controlling power in the hands of certain managing partners may be an investment contract with respect to the other partners"); *SEC v. Glenn W. Turner Enter., Inc.*,

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[18] Prior to the Offering, the four managing members owned 100 percent of University Oakwoods – De Vietien owned 41 percent, the Zavalas owned 39 percent, and Moore owned 20 percent. After the Offering (if all the membership interests were sold), the managing members would retain 11.12 percent ownership of the company – De Vietien would own 4.56 percent, the Zavalas would own 4.34 percent, and Moore would own 2.22 percent.

474 F.2d 476, 482 (9th Cir. 1973) ("[T]he efforts made by those other than the investor [must be] the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.").

Control of University Oakwoods rested with the four managing members – De Vietien, the Zavalas, and Moore. De Vietien stipulated to this point, agreeing that "[t]he University Oakwoods apartment complex was to be managed by Jack Moore, Mary Zavala, and Christian Zavala. None of the investors were to play a role in managing it."[19]

The Subscription Agreement reinforced this point. The agreement stated, "managing members are *solely* responsible for the management of the company," and further explained that, "with few exceptions the members purchasing the Class A [u]nits in this Offering will take no part in the management and will have no voice in the operations of the company." The agreement also noted that the purchasers of the Class A membership interests acquired *nonvoting* units.

The documentary and testimonial evidence also supports that the venture's success or failure would derive from the efforts of others. The record establishes that the investors had no role in the formation, management, or operations of University Oakwoods or the apartment complex, had no expertise in real estate or the Florida real estate market, and were geographically distant from the complex. *See Leonard*, 529 F.3d at 90 (finding that investors' lack of experience and geographic dispersion made them dependent on the centralized management of the promoter); *Parkersburg*, 991 F. Supp. at 9 (same). Our analysis of the facts presented leads us to conclude that De Vietien, the Zavalas, and Moore controlled University Oakwoods and the apartment complex, and that responsibility for the venture's success or failure rested with them.

De Vietien suggests that his preliminary discussions with DP about potential renovations at the complex, JB's one-time visit to the apartments, and the investors' purported requests for Class B managing membership interests support that the investors had control of the enterprise, and accordingly, that profits would not derive from the efforts of others.[20] His argument is

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[19] Throughout these proceedings, De Vietien has tried to distance himself from University Oakwoods, suggesting that he had no role in the formation, management, or operation of the company or apartment complex. As an initial matter, De Vietien's involvement (or alleged lack thereof) has no bearing on the consideration of whether the Class A membership interests are securities. The relevant inquiry is whether the *investor* had involvement in the company or complex. Moreover, the evidence in the record refutes De Vietien's contention. The Subscription Agreement, University Oakwoods' Operating Agreement, and De Vietien's updates to the investors all suggest that he was intimately involved with University Oakwoods and developments at the complex.

[20] De Vietien testified at the hearing below, and reasserts on appeal, that DP was added as a managing member of University Oakwoods. De Vietien attempted to corroborate this statement at the hearing by offering a document, which listed DP's name among University Oakwoods' managing members. The Hearing Panel rejected the document as untimely and prejudicial. *See* NASD Rule 9263 (stating that Hearing Officers "may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial"). We find not only that the document,

[Footnote continued on next page]

spurious. As an initial matter, we note that each of these events occurred *after* De Vietien promoted and facilitated the investors' purchases of the membership interests. As such, these events have no bearing on whether the Class A membership interests were securities when De Vietien promoted and facilitated the sales. We also find that these events, even if true, do not rise to the level of involvement required to conclude that that the investors controlled University Oakwoods. *See Williamson*, 645 F.2d at 424 (stating that there is an investment contract when the participants "are so dependent on a particular manager that they cannot replace him or otherwise exercise ultimate control"); *SEC v. Int'l Loan Network, Inc.*, 968 F.2d 1304, 1308 (D.C. Cir. 1992) (there is an investment contract where profits are expected to accrue "predominantly from the efforts of others").[21]

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The Class A membership interests at issue in this case involved an investment of money in a common enterprise with profits to come solely from the efforts of others. *See Howey*, 328 U.S. at 301. The interests therefore are securities within the meaning of the Acts, and De Vietien's sales of the interests are private securities transactions within the meaning of NASD Rule 3040.[22]

2. De Vietien Participated in the Transactions Without the Required Written Notice and Approval

Not only do we find that the sales of the membership interests constitute private securities transactions, but we also conclude that De Vietien participated in the transactions. De Vietien solicited the investors. *See Meadows v. SEC*, 119 F.3d 1219, 1225 (5th Cir. 1997) ("In the investment context, one who solicits attempts to produce the sale by urging or persuading

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which De Vietien offered on the last day of the hearing during his closing argument, was untimely and unduly prejudicial, but also conclude that the document was not authenticated or otherwise corroborated by documentary or testimonial evidence. To the contrary, DP testified unequivocally that she never had any managerial involvement in University Oakwoods. We find that the Hearing Panel properly excluded the document and that DP was not a managing member of University Oakwoods. *See Dep't of Enforcement v. Strong*, Complaint No. E8A2003091501, 2008 FINRA Discip. LEXIS 19, at *17-18 (FINRA NAC Aug. 13, 2008) (the party arguing abuse of discretion assumes a heavy burden).

[21] DP testified that she spoke to De Vietien about the possibility of her helping to "jump start" the process of renovating the apartments, but stated that nothing came of that conversation. In addition, there is no support for De Vietien's statement that the investors requested managing membership interests. JB, JL, and DP each testified that they did not expect or seek managerial involvement in University Oakwoods.

[22] Our independent analysis and application of the investment contract test lead us to conclude that the membership interests are securities. Nevertheless, we also consider it persuasive that the Subscription Agreement contained a prominent restrictive legend, identifying the interests as securities under both federal and state law.

another to act."). He explained the venture, introduced the investors to the managing members, and provided marketing materials to encourage them to invest in University Oakwoods. De Vietien prepared financial forecasts and comparative market data to show University Oakwoods' potential profitability. He scheduled and attended meetings and conference calls with them to encourage them to participate in the Offering. And, once the investors had committed to participating in the Offering, De Vietien facilitated the investors' payments, ensuring that the payments were properly endorsed and remitted to the company's escrow account. *See Abbondante*, 2006 SEC LEXIS 23, at *29-30 (finding that respondent participated in private securities transactions, where the respondent solicited and provided information about the investment, and influenced the investors' decision to invest); *Stephen J. Gluckman*, 54 S.E.C. 175, 182 (1999) (noting that "the reach of Conduct Rule 3040 is very broad, encompassing the activities of 'an associated person who not only makes a sale but who participates "in any manner" in the transaction'").

Because De Vietien admits that he failed to provide Citigroup with the required written notice, or obtain Citigroup's written approval, to participate in these transactions, we find that he violated NASD Rules 3040 and 2110. *See Gluckman*, 54 S.E.C. at 185 ("[A] violation of another Commission or NASD rule or regulation, including Conduct Rule 3040, constitutes a violation of Conduct Rule 2110.").[23]

In so holding, we reject De Vietien's contention that he did not violate NASD Rule 3040 because he was "told by the attorney who drafted the [limited liability company] agreement that [the Class A membership interests were] not . . . securit[ies]." We emphasize, first, that the pleaded cause of action in this case is not a scienter-based violation and, consequently, that advice of counsel is not available as a defense. *See Dist. Bus. Conduct Comm. v. Goldsworthy*, Complaint No. C05940077, 2000 NASD Discip. LEXIS 13, at *35-36 (NASD NAC Oct. 16, 2000) (advice of counsel is only available as a defense when scienter is an element of the offense), *aff'd*, Exchange Act Rel. No. 45926, 2002 SEC LEXIS 1279 (May 15, 2002).

We also conclude that De Vietien's claim of reliance on counsel is unsupported. First, the Subscription Agreement disclosed in bold, capitalized lettering that the Class A membership interests constituted securities. Second, Giordano, the attorney that prepared the Offering documents and Subscription Agreement and purportedly gave De Vietien the legal advice at issue, testified at the hearing that he "would be surprised if my advice . . . was that it was not a security." Finally, De Vietien testified, and Giordano corroborated, that they did not discuss this matter until January 2007, well after De Vietien had participated in the private securities transactions. De Vietien failed, from the threshold, to establish any potential advice of counsel defense.

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[23] De Vietien was entitled to selling compensation in connection with his sales of the membership interests. *See* NASD Rule 3040(e)(2). He therefore had to obtain Citigroup's written approval to participate in the transactions. De Vietien received expense reimbursements and securities (in the form of his already owned membership interests). In addition, if the venture had proved successful, he also would have earned commissions (as the real estate agent on the transaction), the right to acquire securities (the right to obtain additional membership interests as a managing member), and the right to participate in University Oakwoods' profits.

B. Undisclosed Outside Business Activities

De Vietien's own admissions demonstrate that he violated NASD Rule 3030.[24] De Vietien stipulated that, (1) between June and November 2006, he provided University Oakwoods with bookkeeping and accounting services, (2) received approximately $16,000 for the services, and (3) did not provide Citigroup with written notification of the activities. In so doing, De Vietien engaged in undisclosed outside business activities and violated NASD Rules 3030 and 2110. *See Micah C. Douglas*, 52 S.E.C. 1055, 1059 (1996) (finding that respondent's failure to notify his member firm of outside business activities constituted a violation of FINRA's rules); *Dist. Bus. Conduct Comm. v. Cruz*, Complaint No. C8A930048, 1997 NASD Discip. LEXIS 62, at *96 (NASD NBCC Oct. 31, 1997) (explaining that NASD Rule 3030's reach extends to all outside business activities, not just securities-related activities).[25]

C. Sanctions

The Hearing Panel imposed a unitary sanction, a bar, for the two violations at issue. For the reasons discussed below, we eliminate the bar, and impose a one-year suspension and $16,000 fine.

We find that it is appropriate under the facts presented to aggregate De Vietien's private securities transactions and outside business activities to assess sanctions.[26] The two violations in this case stem from a single source of misconduct, De Vietien's undisclosed involvement with University Oakwoods. Because the violations are related, and any resulting sanctions would be designed and tailored to deter the same underlying misconduct, we impose a unitary sanction. *See Dep't of Enforcement v. Fox & Co. Invs., Inc.*, Complaint No. C3A030017, 2005 NASD Discip. LEXIS 5, at*37 (NASD NAC Feb. 24, 2005) ("where multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate to achieve NASD's remedial goals"), *aff'd*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822, at *36 (Oct. 28, 2005).

To determine sanctions for private securities transactions, FINRA's Sanction Guidelines ("Guidelines") state that 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

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[24] NASD Rule 3030 governs outside business activities, and prohibits a person associated with a member from accepting compensation from any other person as a result of any business activity outside the scope of the associated person's employment with the member, unless the associated person provides prompt written notice to the member.

[25] A violation of NASD Rule 3030 constitutes a violation of just and equitable principles of trade, NASD Rule 2110. *See Wanda P. Sears*, Exchange Act Rel. No. 58075, 2008 SEC LEXIS 1521, at *19 n.28 (July 1, 2008).

[26] *See FINRA Sanction Guidelines* 4 (2007) (General Principles Applicable to All Sanction Determinations, No. 4) (discussing when aggregation may be appropriate), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

away occurred.[27] The Guidelines also direct us to consider 10 other principal considerations applicable to selling away violations.[28] For private securities transactions involving sales between $500,000 and $1 million, the Guidelines recommend, as a starting point, a fine between $5,000 and $50,000, and a suspension between six months and one year.[29] De Vietien facilitated sales of $855,189, an amount toward the midpoint of the relevant range.

For engaging in undisclosed outside business activities, the Guidelines recommend a fine of $2,500 to $50,000.[30] The Guidelines also recommend a suspension of up to 30 business days when the outside business activities do not include aggravating conduct.[31] Where there is aggravating conduct, however, the Guidelines suggest a suspension of up to one year, and in egregious cases, a longer suspension, or a bar.[32] With these parameters to guide our analysis, we analyze the evidence of aggravating and mitigating conduct presented in the record.

We consider it aggravating that De Vietien benefitted from the outside business activities.[33] He earned $16,000 for his bookkeeping and accounting services. We also consider that De Vietien's selling away resulted in significant *potential* gain, both monetary and otherwise. De Vietien held 41 percent of University Oakwoods' voting membership interests, in addition to the option to purchase additional units. He served as University Oakwoods' Financial Officer and thought that his work for University Oakwoods would result in employment and additional income.[34] De Vietien also was entitled to management fees and commissions as a real estate agent on the transaction. De Vietien stood to gain significantly if his selling away was successful. His potential gain aggravates the misconduct.

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27 *See id.* at 15-16 (Private Securities Transactions).

28 *See id.* at 15-16. We also consider the "Principal Considerations," which are applicable to every disciplinary case. *See id.* at 6-7.

29 *See id.* at 15. The Guideline also suggests that we consider the respondent's financial benefit, and if appropriate, fine away any ill-gotten gain. *See id.*; *see also id.* at 5 (General Principles Applicable to All Sanction Determinations, No. 6) (instructing adjudicators to consider the respondent's financial benefit).

30 *See id.* at 14 (Outside Business Activities).

31 *See id.*

32 *See id.*

33 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 17), 15 (Principal Considerations in Determining Sanctions, No. 5) (considering the respondent's potential for monetary or other gain).

34 De Vietien testified, "I was hoping it would be successful and that I could get some extra income from it, you know, running the books, being the Chief Financial Officer, the CFO, doing accounting work. I mean it would have been a part-time job."

We juxtapose De Vietien's gain with the investors' significant losses.[35] JB, JL, AP, and DP lost nearly $400,000 through De Vietien's sales, and their purchases, of the membership interests. These substantial losses present a serious aggravating factor. We also find it troubling that De Vietien obstinately withheld the return of the investors' investments, and solicited additional funds from the investors, although it was becoming ever more evident that the venture was going to fail.

De Vietien's concealment of the private securities transactions and outside business activities from Citigroup is aggravating.[36] Singer, De Vietien's Citigroup supervisor during the relevant period, testified that he told De Vietien that he could not receive compensation for activities unrelated to his work at Citigroup. In late 2005, De Vietien obtained his Florida real estate license. Singer told De Vietien, at that time, that he should have obtained Citigroup's permission to obtain the license. He also advised De Vietien that Citigroup prohibited representatives from engaging in any outside business activities, including real estate transactions. After that conversation, De Vietien assured Singer that his only intention was to refer real estate business to his daughter, Zavala. Singer stated that he approved De Vietien's "referral" work, with the understanding that De Vietien would not receive any compensation "in any fashion, no kickbacks." That De Vietien would continue to involve himself with University Oakwoods, in the face of such clear instructions to the contrary, is serious aggravating misconduct.

Instead of ending his involvement with University Oakwoods (or seeking approval to participate in the venture), De Vietien undertook specific measures to ensure that Citigroup never learned of his activities. De Vietien instructed the investors to send "any correspondence concerning this transaction . . . to my fax at home . . . or to my daughter's fax in Tampa . . . ." De Vietien stressed this point, explaining that the investors should not send any University Oakwoods-related correspondence to Citigroup because "[s]ending this [correspondence] to [Citigroup] jeopardizes my employment." De Vietien completed an annual compliance questionnaire during the relevant period, on May 31, 2006, asserting falsely that he participated in no private placements or outside business activities. De Vietien also disavowed his involvement with University Oakwoods when Singer initially confronted him with evidence of the misconduct.[37] These acts of concealment are aggravating, and weigh in favor of significant sanctions.

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[35] *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 11), 16 (Principal Considerations in Determining Sanctions, No. 7) (considering whether the misconduct resulted in injury to the investing public).

[36] *See id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 10, 15), 15 (Principal Considerations in Determining Sanctions, Nos. 10, 13) (considering whether the respondent concealed the misconduct and/or sold away after being instructed not to do so).

[37] DP contacted the Citigroup offices, seeking information about her investment. Information concerning DP's call came to the attention of Singer, who confronted De Vietien. Singer asked De Vietien whether he had a real estate investment outside Citigroup or had "client monies" involved in a real estate investment outside the firm. Singer testified that De Vietien answered "no," that he had no involvement in any such investments. Singer added that De Vietien was "very vague" about University Oakwoods when initially confronted, and "[t]hat, you

[Footnote continued on next page]

We consider, but reject, De Vietien's argument that he reasonably relied on counsel's advice to engage in the selling away.[38] De Vietien states that Giordano's representations led him to believe that the membership interests were not securities, and consequently, that he could participate in the transactions without the required notice and approval. De Vietien's contention is unsupported. Giordano's testimony and the Subscription Agreement itself belie De Vietien's argument. De Vietien had no basis to support his purported belief that the interests were not securities. It was therefore unreasonable for De Vietien to participate in the transactions without notifying Citigroup or obtaining Citigroup's approval. *See Dep't of Enforcement v. Fergus*, Complaint No. C8A990025, 2001 NASD Discip. LEXIS 3, at *46-47 (NASD NAC May 17, 2001) (rejecting respondent's argument that his reliance on counsel was a mitigating factor because the reliance was not reasonable), *aff'd sub nom.*, *Frank Thomas Devine*, Exchange Act Rel. No. 46746, 2002 SEC LEXIS 2780, at *1 (Oct. 30, 2002).

As we fashion sanctions for the misconduct presented, we consider the small number of investors, four, and note that only two of the four investors, AP and DP, were De Vietien's Citigroup customers.[39] We also consider that De Vietien told the investors (and the investors understood) from the outset that University Oakwoods and the real estate transaction were in no way related to De Vietien's employment at Citigroup. The Subscription Agreement disclosed,

> **This offering is not being made by [De Vietien] in his capacity as a registered representative of [Citigroup]. [Citigroup] has not reviewed the merits of this Offering and will have no liability to you for any claim that you may have against [De Vietien] or [University Oakwoods].**

JL also testified forcefully to this point, "I have to tell you he was very careful from the very outset. [De Vietien] let me know that [his involvement with University Oakwoods] wasn't a [Citigroup] deal, that he was doing this on the side."

Our balancing of the aggravating and mitigating evidence suggests that the bar that the Hearing Panel imposed is excessive. *See Dane S. Faber*, Exchange Act Rel. No. 49216, 2004

[cont'd]

know, he wasn't completely honest with us on – with all of us on that day." Singer, however, also stated that, once De Vietien was terminated, he was very forthcoming about University Oakwoods and the real estate transaction.

[38] *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 7) (considering whether respondent demonstrated reasonable reliance on competent legal advice).

[39] *See Guidelines*, at 16 (Principal Considerations in Determining Sanctions, No. 8) (considering the involvement of firm customers). JL also was a customer of Citigroup, but was not De Vietien's customer at the firm. JL never disclosed to De Vietien that he was a Citigroup customer, and De Vietien testified that he did know that JL was a firm customer at the time of the investment. The Hearing Panel made no finding on this issue. We credit this point to De Vietien's favor.

SEC LEXIS 277, at *27 (Feb. 10, 2004) (explaining that sanctions should not be excessive or oppressive). Sanctions are designed to be remedial, to deter future misconduct and improve business standards in the securities industry.[40] We, similar to the Hearing Panel below, find that De Vietien's misconduct is significant and serious, but not egregious. This finding, coupled with the Hearing Panel's failure to explain its basis for imposing a bar, leaves us unable to reconcile the Hearing Panel's bar with the evidence of aggravating and mitigating evidence presented in the record.

We therefore have reformulated the sanctions, using the Guidelines' recommended range of sanctions as our guide. For participating in private securities transactions, the Guidelines recommend a suspension between six months and one year for the level of selling away at issue here.[41] The Guidelines for undisclosed outside business activities similarly suggest a suspension of up to one year, where the activities involve aggravating conduct.[42]

Our review of the record and analysis of the facts suggest that there is no reason to go beyond the Guidelines' recommended ranges. Because we are mindful that private securities transactions and outside business activities are of serious concern, and that the careful monitoring of such transactions and activities carries important protections for member firms and investors, we favor a one-year suspension, a suspension that falls at the high end of the relevant ranges. *See Philippe N. Keyes*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631, at *14-15 (Nov. 8, 2006) (explaining that violations of NASD Rule 3040 are serious, "depriv[ing] investors of a member firm's oversight and due diligence, protections they have a right to expect").

It is also appropriate to fine away the financial benefit that De Vietien derived from his involvement in the outside business activities, i.e., the $16,000 that he earned from the bookkeeping and accounting services. Accordingly, we suspend De Vietien for one year in all capacities and fine him $16,000 for participating in private securities transactions and engaging in undisclosed outside business activities.

III. Conclusion

De Vietien violated FINRA's rules because he participated in private securities transactions without the required written notice and approval, and engaged in undisclosed outside business activities. For these violations, we suspend De Vietien for one year in all

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40 *See Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 1).

41 *See id.* at 15.

42 *See id.* at 14. We consider De Vietien's monetary gain and concealment of the activities as aggravating conduct related to the outside business activities violation.

capacities and fine him $16,000.[43] We have considered, and reject without discussion, all other arguments of the parties.[44]

On behalf of the National Adjudicatory Council,

Marcia E. Asquith

Marcia E. Asquith
Senior Vice President and Corporate Secretary

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43 The Hearing Panel imposed no costs.

44 Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.