

FINANCIAL INDUSTRY REGULATORY AUTHORITY¹
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MARC WINTERS
(CRD No. 4053113)

Respondent.

Disciplinary Proceeding
No. E102004083704

Hearing Officer – AWH

HEARING PANEL DECISION

February 7, 2008

Registered representative improperly obtained contingent deferred sales charge waivers for customers selling Class B mutual fund shares by falsely claiming that those customers were disabled, in violation of NASD Conduct Rules 2110 and 3110. Respondent is suspended from associating with any FINRA member in any capacity for 30 business days and fined \$30,000. Respondent also assessed costs.

Appearances:

Paul A. Hare, Esq., and Christina J. Kang, Esq., for the Department of Enforcement.

Mitchell J. Albert, Esq., for Marc Winters.

DECISION

Procedural History

On November 29, 2006, the Department of Enforcement filed a Complaint

¹ As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD.

against Marc Winters, alleging that, in order to obtain contingent deferred sales charge waivers for certain of his customers, he misrepresented that those customers were disabled, and thereby caused his member firm's books and records to contain false and misleading information with regard to those customers, in violation of NASD Conduct Rules 2110 and 3110. Winters filed a Response to the Complaint and a request for a hearing. On September 26, 2007, a hearing was held in Los Angeles, California, before a Hearing Panel composed of the Hearing Officer and two current members of the District 2 Committee.

Findings of Fact²

The Respondent

Marc Winters began his second career when he first entered the securities industry in September 1999. He became associated with UBS Financial Services, Inc. ("UBS"), and first registered with FINRA as a General Securities Representative through UBS in December 1999.³

On September 3, 2004, UBS filed a Form U5, stating that Winters had been terminated on August 9, 2004, for violating "UBS policy on providing accurate customer information relating to mutual fund sales." On August 26, 2004, Winters became registered as a General Securities Representative with Wedbush Morgan Securities, Inc. ("Wedbush"), where he is currently registered.

² References to the Department of Enforcement's exhibits are designated C-; Factual Stipulations, as Stip._; and the transcript of the hearing, as Tr._.

³ Tr. 46-48; C-1; Stip. ¶ 1.

Winters has no disciplinary history with FINRA or any other state or federal securities regulator.⁴

The Violations

The essential facts are not in dispute. From the outset of FINRA's investigation, Winters admitted that during his employment with UBS, he used the firm's electronic mutual fund order entry system to claim waivers of a contingent deferred sales charge ("CDSC") for customers selling Class B mutual fund shares by falsely claiming that those customers were disabled. From March 2003 through December 2003, Winters obtained CDSC waivers, totaling \$14,882.46, for 14 customers in connection with 42 mutual fund redemptions by falsely representing on UBS's electronic order entry system that those customers were disabled. Those customers intended to redeem the mutual fund shares whether or not the CDSC was waived. Most reinvested the proceeds in bonds.⁵

Context of the Violations

During the time Winters obtained the CDSC waivers, he had roughly 200 customers with \$50 million in assets under management. After Winters had been at UBS for about two years and at some time before he sought the waivers, he had a conversation with another broker at UBS in which Winters mentioned that a client of his did not want to pay the CDSC to get out of a mutual fund. The other

⁴ C-1; Stip. ¶¶ 2-5.

⁵ Stip. ¶¶ 6, 7, 10-81; Tr. 66, 68. Thirteen of the redemptions involved CDSC waivers of \$5 to just under \$100.

broker said, “Oh, that’s no problem. Just put down that he’s disabled.” From this conversation, Winters assumed that doing so was “just kind of a standard thing that was done at times.” He also learned that two or three other brokers in the office were also obtaining disability waivers for non-disabled customers.⁶

The failure to adhere to CDSC waiver requirements was not restricted to the UBS branch office where Winters was located. As a result of a FINRA examination into CDSC disability waivers at UBS, the firm conducted a surveillance review which disclosed that 40 UBS Financial Advisors had five or more mutual fund transactions involving death or disability waivers in 2003. At least half of those financial advisors had deficient documentation of death or disability, did not respond to the inquiry, or admitted that customers were not disabled. Two, not including Winters, were terminated, and a review of other brokers was ongoing. Seven brokers became the subject of Form U5 filings by UBS.⁷

At the time Winters obtained CDSC waivers for his customers, UBS had a code of conduct that required its representatives to adhere to the highest level of integrity and responsibility.⁸ The UBS compliance manual also had a policy

⁶ Tr. 38, 49-51, 68; C-3, p. 58-59, 76.

⁷ Tr. 30-31; C-6. The FINRA investigation found that, although the mutual fund prospectuses at issue required documentation of a claimed death or disability, the mutual fund distributors did not require such documentation to allow a requested waiver to go through. Tr. 33.

⁸ C-9.

prohibiting false or misleading entries in the firm's books and records.⁹

After the waivers at issue were obtained, Winters was approached by a supervisor in his Branch Office who asked for proof of clients' disabilities. Winters immediately admitted to her that he could not provide such proof because they were not disabled. Winters believed the issue ended with that conversation because there was no follow-up. However, a few months later, Winters was called to the Office Manager's office where he had a conversation with an attorney for UBS. After that conversation, he assumed that he would be terminated by UBS for obtaining the waivers. Randy Grossblatt, the Office Manager, contacted the UBS Regional Director in an effort to save Winters' job. However, he was not successful.¹⁰

Winters' Employment at Wedbush

Through a "head hunter," Winters was introduced to Wedbush, where he interviewed and was employed as a general securities representative. Before he was hired, both the head hunter and Winters disclosed the circumstances of his termination from UBS. Winters brought with him to Wedbush approximately 80 to 85 percent of his UBS clients. At the time of the hearing, Winters had 1,062 clients and about \$67 million in assets under management.¹¹

Robert W. Woods is the branch manager at the Wedbush office where

⁹ C-9, pp. 3-4.

¹⁰ Tr. 39-43, 79.

¹¹ Tr. 43-44, 87.

Winters is employed. Woods has been Winters' supervisor for the past three years and is one of those in the office who was responsible for hiring Winters. In Winters' first year of employment, he was under heightened supervision by Woods. Wedbush is a regional firm. Most of its brokers are older, have been trained at other firms, and have their own customers and their own style of business.¹²

Woods testified that he found Winters to be a very thorough, hard working individual who has earned his trust and to whom he would refer accounts that needed special handling. He stated that Winters was a superb broker, one of the few that he has known or dealt with personally with whom he would consider investing his own money. He was asked whether, if Winters remains in the securities business under his supervision, he would be putting his own career on the line. Woods' explained that Winters' clients were primarily friends, referrals, and family connections that he has had over the years prior to coming to Wedbush and who have received a high degree of personal service from Winters. Woods testified that, because of the type of individual Winters is, and the type of conservative business that he does, his career would not be put at risk by Winters' continued employment in the office.¹³ Considering his demeanor and tone, the

¹² Tr. 87-88.

¹³ Tr. 82-89, 95-96. In his summation, counsel for Enforcement misinterpreted Woods' testimony as asserting that Woods "really wouldn't go on the line for Mr. Winters." Tr. 120. The Hearing Panel clearly understood Woods' testimony to be an endorsement of Winters' character, and that Winters' continued employment would not be a threat to Woods' career or reputation.

Hearing Panel finds Woods' testimony to be very credible. His testimony was not a "soft-soap," or overly effusive. His assessment of Winters' character and performance was sober and measured.

Discussion

NASD Conduct Rule 2110 articulates a "broad ethical principle," rather than specific acts that are prohibited. The focus of NASD rules is the "professionalization of the securities industry."¹⁴ To that end, NASD Conduct Rule 2110 obliges an associated person¹⁵ to "observe high standards of commercial honor and just and equitable principles of trade."¹⁶ Falsifying records submitted to FINRA or maintained in a member firm's official records is inconsistent with that obligation, and the obligation under Conduct Rule 3110 to make and preserve accurate book and records.¹⁷ Submitting false information about customers to mutual funds, in order to obtain sales charge waivers to which those customers would not otherwise be entitled, is a violation of NASD Conduct Rule 2110.¹⁸ Even if the goal were to benefit the customers and not enrich

¹⁴ *Department of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, *11 (NAC June 2, 2000).

¹⁵ General Provision 0115 extends the obligations of Conduct Rule 2110 to associated persons, as well as members.

¹⁶ *DBCC v. Roach*, No. C02960031, 1998 NASD Discip. LEXIS 11, *16 (NBCC Jan. 20, 1998) (citations omitted).

¹⁷ *DBCC v. Sickels*, No. C9A950036, 1997 NASD Discip. LEXIS 23, **10-11 (NBCC Jan. 22, 1997) (citing *Charles E. Kautz*, Exchange Act Release No. 37,072, 1996 SEC LEXIS 994, *7 (Apr. 5, 1996)).

¹⁸ *See, e.g., Department of Enforcement v. Prout*, No. C01990014, 2000 NASD Discip. LEXIS 18, *6 (NAC Dec. 18, 2000) (submitting false information about customers on variable annuity applications).

himself, it was unethical and improper for Winters to falsify the information to accomplish that goal. Entering false disability waiver information in the books and records of a member firm also violates Conduct Rule 3110.¹⁹ Accordingly, Winters violated Conduct Rules 2110 and 3110.

Sanctions

For falsification of records, the FINRA Sanction Guidelines recommend the imposition of a fine of \$5,000 to \$100,000, as well as a bar in egregious cases, or a suspension of up to two years where there are mitigating factors.²⁰ Enforcement requested that the Hearing Panel impose a two year suspension and \$15,000 fine on Winters for his violations. However, the Hearing Panel concludes that mitigating factors do not justify a bar. Given the particular circumstances of this case, the Hearing Panel believes that a substantial fine and a suspension of 30 business days will remediate his misconduct by preventing its reoccurrence, deter others from engaging in similar misconduct, and protect the investing public.

Winters' misconduct was serious, but not egregious or particularly extensive. The economic consequences were modest. He admitted at the outset to UBS, FINRA, and the Hearing Panel that he entered information that he knew was false into the UBS system, understanding that the mutual funds would waive

¹⁹ See, e.g., *Department of Enforcement v. Charles J. Cuozzo, Jr.*, No. C9B050011, (NAC Feb. 27, 2007).

²⁰ FINRA SANCTION GUIDELINES, at 39 (2007 ed.).

fees to which his customers were not entitled. He did not attempt to cover up or justify what he did. He cooperated fully in the investigation. He explained the circumstances under which he acted in a misguided attempt to benefit his customers, not to enrich himself. Although the atmosphere at the office suggested that it was not an unusual practice, Winters realized the seriousness of his actions and did not attempt to excuse his misconduct.

Two additional factors also influence the Hearing Panel in its determination of sanctions. First, Winters' demeanor while testifying convinces the Hearing Panel that his expressions of remorse arising out of repentance for his misconduct are sincere. Second, the credible testimony of his current supervisor demonstrates that Winters is capable of, and demonstrates his ability and willingness to conform his conduct to regulatory requirements.

Although, under other circumstances, the Hearing Panel might consider a longer suspension for the misconduct, it concludes that a shorter suspension will do no significant harm to Winters' clients and his business, and that a substantial fine will offset the length of the suspension, recognize the seriousness of the misconduct, and serve to remediate it. Accordingly, the Hearing Panel will suspend Winters for 30 business days and fine him \$30,000. He will also be assessed costs.

Conclusion

Marc Winters is suspended from associating with any FINRA member in any capacity for 30 business days and fined \$30,000, for violating NASD Conduct Rules 2110 and 3110 as set forth above. He is also assessed costs in the total amount of \$1,949.52, consisting of a \$750 administrative fee and a \$1,199.52 transcript fee.

These sanctions shall become effective on a date set by FINRA, but not earlier than 30 days after this decision becomes FINRA's final disciplinary action in this matter, except that if this decision becomes FINRA's final disciplinary action, Winter's suspension shall begin at the opening of business on April 7, 2008, and end at the close of business on May 16, 2008.

SO ORDERED.

Alan W. Heifetz
Hearing Officer
For the Hearing Panel

Copies to:

Marc Winters (*via overnight courier and first class mail*)
Mitchell J. Albert, Esq. (*via facsimile and first class mail*)
Paul Hare, Esq. (*via electronic and first class mail*)
Christina J. Kang, Esq. (*via electronic and first class mail*)
Mark P. Dauer, Esq. (*via electronic and first class mail*)
David R. Sonnenberg, Esq. (*via electronic and first class mail*)