

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 03-115

June 12, 2003

BARBARA ROCHELLE KAPLAN  
FORMER REGISTERED REPRESENTATIVE

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**Effected improper post-execution allocation of trades; caused violations of Exchange Rule 410 by failing to provide required information to order room personnel; caused a violation of Rule 440 and SEC Reg. 240.17a-3 and a-4 by causing her employer's books and records to be inaccurate; caused a violation of Rule 405 by failing to disclose essential facts of an account; caused a violation of Rule 345 by regularly performing the duties of a registered representative while she was not registered; caused violation of Rule 401 by performing duties customarily performed by a registered representative without being blue-sky registered; violated Rule 345.12 by making misstatements on Forms U-4; violated Rule 476(a)(10) by making a misstatement on an application filed with the Exchange; and violated Rule 477 by failing to comply with the Exchange's request for information – Consent to censure, one year bar and \$100,000 fine.**

**Appearances:**

For the Division of Enforcement  
Joy A. Weber, Esq.  
Kathleen M. Toner, Esq.

For the Respondent  
Greg M. Rzepcynski, Esq.

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An Exchange Hearing Panel met to consider a Stipulation of Facts and Consent to Penalty entered into between the Exchange's Division of Enforcement and Barbara Rochelle Kaplan, a former registered representative with CIBC World Markets, Inc. ("CIBC" or the "Firm"), Morgan Stanley Dean Witter Inc. ("Morgan Stanley") and A.G. Edwards & Sons Inc. (A.G. Edwards"). Without admitting or denying guilt, Kaplan consents to findings by the Hearing Panel that she:

- I. Engaged in conduct inconsistent with just and equitable principles of trade in that, on one or more occasions, she effected improper post-execution allocation of trades in a manner which she knew, or should have known, would result in more favorable execution prices being allocated to the account of her relative to the detriment of an account with public investors.
- II. Caused violations of Exchange Rule 410 in that, on one or more occasions, she failed to provide required information regarding customer names and/or account numbers to order room personnel for order instructions she gave to them prior to orders being transmitted to and executed on the Floor of the Exchange.

- III. Caused a violation of Exchange Rule 440 and Regulation §240.17a-3 and 17a-4 of Securities Exchange Act of 1934 when, on one or more occasions, she caused her member firm employer's books and records to be inaccurate in that they failed to contain required information in connection with order entry and trade executions.
- IV. Caused a violation of Exchange Rule 405, when, on one or more occasions, she failed to disclose the essential facts of an account she serviced.
- V. Caused a violation of Exchange Rule 345 in that, on one or more occasions, she regularly performed the duties customarily performed by a registered representative while she was not registered with, qualified by, and found acceptable by the Exchange to do so.
- VI. Caused a violation of Exchange Rule 401 when, on one or more occasions, she performed the duties customarily performed by a registered representative without being blue-sky registered in the state in which two of the accounts she service resided.
- VII. Violated Exchange Rule 345.12 in that, on one or more occasions, she made misstatements and/or omissions on Forms U-4 that she filed in connection with her employment with certain Exchange member firms.
- VIII. Violated Exchange Rule 476(a)(10) in that, on one or more occasions, she made a misstatement or omission of fact on applications/submissions filed with the Exchange.
- IX. Violated Exchange Rule 477 in that she failed to comply with the Exchange's requests for information.

For the sole purpose of settling this disciplinary proceeding, and without admitting or denying guilt, the Division of Enforcement and Kaplan stipulate to the following:

### **Background and Jurisdiction**

1. Kaplan was born on March 24, 1946.
2. Kaplan entered the securities industry in 1970 and was employed by CIBC from November 1998 to April 1999, by Morgan Stanley from April 1999 to February 2003 and by A.G. Edwards from February 4, 2003 to February 14, 2003. She is currently employed by a non-member.
3. On or about May 14, 1999, the New York Stock Exchange (the "Exchange") received a Uniform Notice of Termination (hereinafter the "Form U-5") from CIBC, which indicated that Kaplan had been "permitted to resign" on April 16, 1999. The Form U-5 stated, in essence, that at the time of her resignation she was under investigation for facilitating the allocation of certain transactions that had been executed at a more favorable price for the individual account of a relative rather than to the account of an

investment partnership controlled by this relative but in which other investors were participating.”

4. The individual referred to in paragraph 3 is a relative of Kaplan’s and is hereinafter referred to as the “Relative” and the Relative’s individual account as the “Account.” The Partnership account referred to in paragraph 3 is for an investment partnership of ABCD (hereinafter the “Partnership”) and the account for the Partnership is hereinafter referred to as the “Partnership Account”.
5. CIBC acted as an executing broker for the Partnership Account, which was a Delivery Versus Payment/Receipt Versus Payment (“DVP/RVP”) prime brokerage account. The relevant period for the transactions referred to hereinafter is November 18, 1998 through April 16, 1999 (the “relevant period”), when Kaplan was employed by CIBC.
6. By letter dated February 17, 2000, which Kaplan received, the Enforcement notified Kaplan that she was the subject of an investigation into the matter described in the Form U-5. Thereafter, Kaplan appeared with counsel and testified before the Exchange.

### **Violative Conduct**

7. During the period November 18, 1998 through April 16, 1999, Kaplan, on approximately 375 occasions, effected improper post-execution allocation of trades in a manner which she knew, or should have known, would result in more favorable prices being allocated to the account of her relative to the detriment of an account with public investors. The benefit to the Account from the allocations of these executions totaled in excess of \$450,000. Kaplan failed to identify by name or account number the identity of the customers for whom trades were being entered and executed. Further, Kaplan caused her member firm’s books and records to be inaccurate regarding trade entry and execution; failed to disclose the essential facts of an account she serviced; performed the duties of a registered representative without Exchange or blue-sky approval; made misstatements or omissions of fact on Form U-4 submissions filed with the Exchange; and failed to comply with the Exchange’s request for information.

### **Post-Execution Allocations**

8. During the relevant period, Kaplan’s two largest accounts were the Account and the Partnership Account. The remainder of Kaplan’s business involved a small number of family-related accounts for herself and her husband, Individual Retirement Accounts for herself and her husband, and a handful of other accounts that were relatively inactive.
9. During the relevant period, the Relative and CD were the two general partners of the Partnership who, along with multiple public investors, had interests in the Partnership Account. The Relative and, to a lesser extent, traders for ABCD gave orders to Kaplan for the Partnership Account.

10. Both the Account and the Partnership Account were actively traded. The number of transactions in the Partnership Account ranged from a monthly low of eight transactions in November 1998 to a monthly high of approximately 95 transactions in April 1999. The number of transactions in the Account ranged from a monthly low of approximately 95 in November 1998 to a monthly high of approximately 700 in December 1998. The combined gross commissions from the two accounts for the approximately five months encompassed in the relevant period were approximately \$793,269 with approximately \$155,240 representing commissions paid by the Partnership Account.
11. The Account, a margin account, had substantial equity, with long market value ranging from a low month-end value on or about February 26, 1999 of \$191,010,135, with a debit balance of \$110,680,823, to a high month-end value on or about December 31, 1998 of approximately \$245,074,038, with a debit balance of \$148,129,032.
12. Since the Partnership Account was a DVP/RVP prime brokerage account, for the most part securities were delivered out. However, the monthly account statements at CIBC did reflect net buy transactions executed at CIBC that ranged from \$15,900,016 in November 1998 to \$19,040,443 in April 1999, and net sell transactions executed at CIBC of \$5,840,039 in November 1998 to \$4,544,387 in April 1999.<sup>1</sup>
13. Exchange Rule 410(a)(1) states in essence and in pertinent part that every order transmitted directly or indirectly by a member or organization to the Floor, shall make a record of every order reflecting the name and amount of the security, the terms of the order, the time when it was so transmitted, and the time at which a report of execution was received. Rule 410 also states in essence and in pertinent part that a member or organization is to make a record of every order prior to its execution reflecting the name or designation of the account for which such order is to be executed and that no change in the account name or designation shall be made without the written approval of a designated supervisor.
14. During the relevant period, the Firm's written procedures tracked the requirement of Exchange Rule 410 and stated in relevant part that: "When entering an order, the registered representative must indicate either the customer's name or account number. Any change in the name of the account made subsequent to the entry of an order must be approved by a supervisory person via a trade correction form."
15. During the relevant period, on numerous occasions, the Relative gave Kaplan orders to purchase and sell the same securities on the same day for the Account and the Partnership Account.

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<sup>1</sup>As the Partnership Account at CIBC was only one of many executing brokerage accounts for the Partnership, the monthly account statements did not reflect the total long market value and portfolio value as that would have had to include all accounts with other executing brokers utilized by ABCD and would be reflected on statements created by the prime broker.

16. While at CIBC, Kaplan advised her supervisors and order room personnel that both the Account and the Partnership Account were the Relative's accounts.
17. After receiving such orders from the Relative, Kaplan telephoned the order room and gave the order room personnel instructions to buy and sell certain securities. With few exceptions, Kaplan did not identify to order room personnel the name of the customer or the account number for which the orders were being placed prior to the orders being transmitted to the Floor of the Exchange. The orders were transmitted to the Floor of the Exchange, usually via SuperDot, without the Firm's records reflecting the account number or name of the customer for whom the order was being transmitted and executed.
18. After giving order room personnel instructions, Kaplan called the order room for execution reports. After receiving the details of executions, including a breakdown by the various prices at which the orders had been executed, Kaplan instructed the order room personnel on how to allocate the securities between the Account and the Partnership Account.
19. In addition, on one or more occasions, before the end of a trading day, Kaplan also reallocated previously allocated securities without creating any written record of the desired change(s) on a change of account designation i.e. trade correction form and without obtaining supervisory approval.
20. A comparison of execution prices for approximately 375 executions of the same securities purchased and sold for the Account and the Partnership Account on approximately 60 trade dates during the relevant period, revealed that the Account received more favorable execution prices totaling over \$450,000.
21. For example, on trade date December 8, 1998 (settlement date December 11, 1998), the following sell allocations were made between the Account and the Partnership Account in Circuit City Stores Inc. ("CC") securities:

**The Account**

200 shares @ 41.500  
 10,000 shares @ 41.5000  
 7,700 shares @ 41.6250  
 2,100 shares @ 41.6250  
 10,000 shares @ 41.8750  
 10,000 shares @ 42.5000  
 10,000 shares @ 42.5000  
 4,500 shares @ 42.5000  
 10,000 shares @ 42.6250  
 5,000 shares @ 42.6250  
 5000,000 shares @ 42.6875  
 10,000 shares @ 42.7500

**Partnership Account**

3,000 @ 39.875  
 3,000 @ 40.5625  
 10,000 @ 41.000

22. The tickets and statements for the Partnership Account reflect that this account received an average price of \$40.7070 for the 16,000 shares allocated to this account. Based on the executions described above, each individual execution allocated to the Partnership Account was lower than any of the executions allocated to the Account. As indicated in paragraph 21 above, the Account received all of the 13 more favorable prices than the Partnership Account regarding the sale of XYZ securities on trade date December 8, 1998.
23. Also, for example, on trade date December 11, 1998 (settlement date December 16, 1998), the following buy allocations were made between the Account and the Partnership Account in UVW securities:

<u>The Account</u>	<u>Partnership Account</u>
10,000 @ 93.7500	5,000 @ 95.7500
10,000 @ 94.4375	3,000 @ 96.125
3,200 @ 95.4375	2,000 @ 96.375
6,800 @ 95.5000	

24. The tickets and statements for the Partnership Account reflect that this account received an average price of 95.9875 for the 10,000 shares allocated to this account. Based on the executions described above, each individual execution allocated to the Partnership Account was higher than any of the executions allocated to the Account. As indicated in paragraph 23 above, the Account received more favorable buy executions than the Partnership Account in UVW securities on trade date December 11, 1998.
25. Kaplan knew or should have known that on numerous occasions while she was employed at CIBC during the relevant period, she was allocating more favorable execution prices to the Account and disadvantaging the investors participating in the Partnership Account.

### Misstatements to the Exchange

26. Exchange Rule 345.12 states, in pertinent part, that: “Applications for all natural persons required to be registered with the Exchange shall be submitted to the Exchange on the Uniform Application for Securities Industry Registration or Transfer Form (“Form U-4”). Rule 345.12 further states that: “The information contained on Form U-4 must be kept current and shall be updated by the filing with the Exchange of an amendment to that form.”
27. As stated above in paragraph 6, on or about February 17, 2000, Kaplan received a letter from Enforcement notifying her that she was the subject of an investigation.
28. On or about August 1, 2000 Kaplan filed an application on Form U-4 in connection with her employment with Morgan Stanley.

29. 28. Question 14G(2) of the Form U-4 asked, in pertinent part: “ Have you been notified, in writing, that you are now the subject of any investigation that could result in a “yes” answer to any part of 14A, B, C, D, or E?” Question 14E(4) asks: “Has any self-regulatory organization or commodities exchange ever disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?” Kaplan replied “no” these questions.
30. On or about February 4, 2003, Kaplan completed an application on Form U-4 in connection with her employment with A.G. Edwards, which asked the identical questions as set forth in paragraph 29 above. Kaplan replied “no” to these questions as well.
31. Kaplan’s “no” reply to question 14G(2) on the Form U-4 filed in connection with her employment with Morgan Stanley and A.G. Edwards constitutes misstatements to the Exchange as she had been advised on or about February 17, 2000 by letter from Enforcement that she was the subject of an Exchange investigation.
32. Further, Kaplan’s “no” reply to Question 14E(4) on the Form U-4 she filed in connection with her employment with A.G. Edwards also constitutes a misstatement to the Exchange as Enforcement had advised her in December 2002, through her then counsel, that Enforcement intended to bring formal disciplinary proceedings against her that could result in her suspension from the securities industry.

### **Broker Registration Violations**

33. Exchange Rule 345(a) states, in pertinent part, that no member or member organization shall permit any natural person to perform regularly the duties customarily performed by a registered representative unless such person shall have been registered with and qualified by, and is acceptable to the Exchange.
34. The Exchange approved Kaplan’s registration as a registered representative with CIBC on December 21, 1998.
35. From approximately November 18, 1998 to December 21, 1998, Kaplan performed the duties customarily performed by a registered representative without first being registered, qualified and found acceptable by the Exchange to perform such duties.

### **Broker Registration Violations and Bad Business Practice**

36. During the relevant period, the Firm’s records reflected the Relative’s address as being in New Jersey. The Partnership Account’s address on the Firm’s records was reflected as also being in New Jersey.
37. During the relevant period, Kaplan was required to be “blue-sky” registered in each state where clients whose accounts she serviced resided.

38. While Kaplan's registration in New Jersey was being processed, the Firm assigned the servicing of the Account and the Partnership Account to a supervisor and to Kaplan's assistant.
39. Beginning on or about November 18, 1998, Kaplan, disregarding the Firm's arrangements, began servicing the Account and the Partnership Account even though her "blue-sky" registration with the State of New Jersey was not approved until January 20, 1999.
40. In servicing the Account and the Partnership Account prior to being registered in New Jersey, as described in paragraphs 36 through 39 above, Kaplan subjected her member firm employer to rescission of any/or all transactions in these accounts, which could have resulted in considerable liability to the Firm.

#### **Failure to Cooperate**

41. On September 27, 2002, October 4, 2002 and February 27, 2003, Enforcement requested that Kaplan provide Enforcement with certain information including, among other things, a list of investors participating in the Partnership and Partnership Account. To date, Kaplan has failed to comply with the Exchange's requests.

#### **DECISION**

The Hearing Panel, in accepting the Stipulation of Facts and Consent to Penalty, found Ms. Kaplan guilty as set forth above by unanimous vote.

#### **PENALTY**

In view of the above findings, the Hearing Panel, by unanimous vote, imposed the penalty consented to by Ms. Kaplan of a censure and a one year bar from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization, and a \$100,000 fine.

For the Hearing Panel

Edward W. Morris, Jr.  
Chief Hearing Officer