

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 04-152

September 28, 2004

MICHAEL FASCIGLIONE
FORMER BRANCH OFFICE MANAGER

* * *

Violated Exchange Rule 342.16 by failing to supervise activities of a registered representative; violated Exchange Rule 405(2) by failing to supervise accounts serviced by a registered representative; caused violations of Exchange Rule 410(a) by failing to ensure proper authorization of account designation changes; violated Exchange Rule 352(c) by causing reimbursement of losses; caused a violation of Exchange Rule 351(d) by failing to notify the Firm of a customer complaint – Consent to censure, two month bar, and an undertaking to re-take qualifying exams.

Appearances:

For the Division of Enforcement
Joy A. Weber, Esq.
Sharon Tilove-Navatta, Esq.

For the Respondent
Ruthann G. Niosi, 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 Michael Fasciglione, a former branch office manager with Josephthal & Co., Inc. (the "Firm"). (The Firm was subsequently acquired by Fahnestock & Co., Inc. and is now known as Oppenheimer & Co., Inc.) Without admitting or denying guilt, Mr. Fasciglione consents to findings by the Hearing Panel that he:

- I. Violated Exchange Rule 342.16 by failing to discharge his duties and obligations in connection with the supervision and control of the activities of an employee related to the business of his employer.
- II. Violated Exchange Rule 405(2) by failing to discharge his duties and obligations in connection with the supervision of accounts serviced by a registered representative under his control.
- III. Caused violations of Exchange Rule 410(a) in that he failed to ensure that account designation changes to orders in two customer accounts were authorized by a duly qualified individual who was personally informed of the essential facts relative thereto.

- IV. Violated Exchange Rule 352(c) in that he caused reimbursement of losses in two customer accounts.
- V. Caused a violation of Exchange Rule 351(d) in that he failed to notify his member firm employer of the complaint of a customer of his member firm employer.

For the sole purpose of settling this disciplinary proceeding, and without Mr. Fasciglione admitting or denying any of the facts set forth herein, the Division of Enforcement and Mr. Fasciglione stipulate to certain facts, the substance of which follows:

Background and Jurisdiction

1. Michael Fasciglione ("Fasciglione") was born on March 8, 1966. He entered the securities industry in 1988 and was employed with various non-member firms from September 1988 to July 1998. He was with the Firm from August 1998 to April 2004 and has been with a non-member firm since May 2004.
2. Fasciglione became licensed as branch office manager while employed at the Firm and served as the branch manager of the Firm's Great Neck, New York branch office from January 2000 to May 2001. Fasciglione was a producing branch manager and continued to service customer accounts until he voluntarily terminated employment with the Firm in April 2004.
3. Fasciglione is presently employed as a financial consultant at a non-member firm.
4. In December 2001, the Exchange's Division of Member Firm Regulation ("MFR") referred to Enforcement alleged violations of numerous Exchange rules by the Firm and its employees which were uncovered during an April 2001 annual sales practice examination of the Firm (the "Exam") (See Hearing Panel Decision 03-126).
5. The Exam findings, which were detailed in MFR's Report of Examination dated June 22, 2001, included Fasciglione's failure to provide proper supervision and control of former registered representative Bryan Patrice ("Patrice") (see Exchange Hearing Panel Decision 02-7) and the account of a customer (hereinafter, Customer "A").
6. The Exam also included findings regarding Fasciglione's handling of two customer accounts (hereinafter, Customers "B" and "C").
7. By letters dated January 4, 2002 and September 23, 2002, Enforcement notified Fasciglione that it was investigating the foregoing Exam findings.
8. Thereafter, Fasciglione provided information and, represented by counsel, appeared and testified before Enforcement.

Summary of Violative Conduct

9. During the period from 2000 through 2001, while he was a producing branch office manager, Fasciglione failed to adequately review an active account serviced by a registered representative under his supervision in violation of Exchange Rules 324.16 and 405(2). Fasciglione also committed sales practice violations in two customer accounts he serviced by failing to ensure that account designation changes were properly approved and by causing reimbursement of losses. Fasciglione also caused a violation of Exchange Rule 351(d) by failing to properly notify his member firm employer of a customer complaint.

Failure to Supervise

10. As branch manager, Fasciglione's responsibilities included the review of trades made in the branch each day, review of active account exception reports sent to the branch, and supervision of the sales activities of registered representatives at the Great Neck branch including Patrice.
11. In January 2000, Customer A opened an account with Patrice. Customer A was 37 years old, disabled, single with three dependents, and had a high school education and one year of prior investment experience when he opened the account.
12. Customer A's stated investment objectives on the Firm's new account documents were "growth" and "trading." His stated annual income of \$315,000 and estimated liquid net worth of approximately \$2 million were known to Patrice and Fasciglione to represent the proceeds of a personal injury settlement stemming from a vehicular accident that left Customer A permanently disabled and wheelchair-bound.
13. The use of margin was not authorized on Customer A's new account form.
14. Fasciglione approved Customer A's new account form.
15. Customer A initially deposited \$2,150,000 in the account, which was used to purchase Federal Home Loan Bank notes. In March 2000, the notes were redeemed and Patrice began an aggressive strategy of buying speculative non-dividend yielding securities on margin. As an example, between March and December 2000, Patrice bought 40,000 shares of a particular stock at prices ranging from \$1.47 to \$6.00; 30,000 shares of another stock at prices ranging from \$2.75 to \$3.00; and 9,150 shares of another stock at prices ranging from \$35 to \$61.
16. On March 20, 2000 alone, there were purchases of 15 different mutual funds for Customer A's account on a solicited basis in amounts that were just below breakpoint sales load discounts.
17. The Firm's April 1, 2000 monthly active account exception report listed the following information for Customer A's account: profit and loss by percentage of (-58.64%)

and by dollar of (-\$255,044); turnover of 29.01 for the year-to-date or 13.4 annualized; monthly commissions of \$71,306 or 56% of the broker's gross commissions.

18. By the end of May 2000, Customer A's margin debit balance reached \$1,524,528. The account began receiving margin calls in or about May 2000.
19. Pursuant to the Firm's policies and procedures, the branch office manager was responsible for reviewing accounts appearing on monthly active account exception reports that were distributed to each branch.
20. Branch managers were responsible for taking appropriate action to ensure that clients whose accounts were listed on monthly active account exception reports were trading within their limits and in accordance with their stated investment objectives, and branch managers were recommended to contact clients to discuss active accounts.
21. Although Customer A's account appeared six times on the monthly active account exception report, and although Fasciglione initialed his review of the April 1, 2000 active account report on Customer A's account, described above, Fasciglione did not speak with Customer A, verify that the margin balance in Customer A's account was understood by and suitable for the customer, or otherwise ensure that adequate supervisory attention was given to the review of Customer A's account activity until Patrice's employment at the Firm was terminated.
22. In addition, the Firm's policies and procedures prohibited the sale of mutual fund shares to prospective investors for an amount just below the point at which sales charges would be reduced on quantity transactions, unless the client was made aware of the economic consequences of such a purchase.
23. To enforce this policy, the Firm's procedures required, among other things, that certain information be memorialized on mutual fund order tickets, including whether break points were discussed with the client, and required branch office managers to ensure compliance with these procedures prior to approving an order ticket.
24. The mutual fund order tickets for the 15 purchases in Customer A's account on March 20, 2000 did not bear any indication that break points were discussed with this customer.
25. Although Fasciglione initialed the stack of mutual fund order tickets for the Great Neck branch office for March 20, 2000, he failed to detect or follow-up on these orders in Customer A's account to ensure compliance with the Firm's foregoing policies and procedures concerning mutual fund sales.
26. In December 2001, Customer A filed an NYSE arbitration claim against Patrice and the Firm for unauthorized trading, which was settled for \$1,671,000.

**Improper Account Designation Changes,
Failure to Report Complaint, and
Reimbursing Customer Losses**

27. During November and December 2000, in his role as a registered representative servicing customer accounts, while continuing the role of branch office manager, Fasciglione executed several transactions in the joint account of Customers B and C (the "Joint Account") and Customer B's IRA, liquidating holdings in individual stocks to purchase mutual funds.
28. Customer C complained to Fasciglione by telephone about these trades in early January 2001, alleging that Customer B, her mother, did not understand these transactions.
29. In response, Fasciglione cancelled four of the disputed trades that were unprofitable and re-billed those trades to the Firm's branch error account.
30. Fasciglione signed the error reports and correction notices himself, without the written approval of a qualified person in violation of Exchange Rule 410(a) and Firm policy.
31. Fasciglione caused the losses resulting from the above cancellations to be charged against his monthly commissions, thereby causing reimbursement of the customers' losses in violation of Exchange Rule 352(c).
32. The Firm's policies and procedures required branch office managers who were also active financial consultants to submit copies of all correction notices to the Firm's Director of Branch Operations for review and forwarding for appropriate action. Each original error report was to be forwarded to the Director of Branch Operations.
33. The Firm's policies and procedures prohibited any individual from being delegated supervisory authority to approve his or her own work.
34. The Firm's policies and procedures also required all verbal and written client complaints to be forwarded to the Firm's Compliance Department for recording and reporting purposes.
35. Fasciglione failed to report Customer C's verbal complaint to the Firm and approved his own work as branch office manager by signing correction notices and error reports without proper supervisory review.

DECISION

The Hearing Panel, in accepting the Stipulation of Facts and Consent to Penalty, found Mr. Fasciglione 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 Mr. Fasciglione of a censure; a two month plenary bar from membership, allied membership, approved person status, and from employment or association in any capacity with any Exchange member or member organization; and an undertaking to re-take qualifying exams before undertaking any securities supervisory position in the future.

For the Hearing Panel

Milton M. Stein
Hearing Officer