

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 05-113

September 30, 2005

FRANK J. FURINO  
FORMER FLOOR CLERK

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**Violated Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 promulgated thereunder, and Exchange Rule 476(a)(5) in that he used a facility of a national securities exchange to engage in an act, practice or course of business which operated as a fraud or deceit on other persons in connection with the purchase or sale of securities by disclosing to a third party confidential information relating to orders received from customers of his member organization employer, which was then used to trade ahead of and/or along with those customer orders, without the customers' consent, to the detriment of the customer orders and for the benefit of the third party; engaged in conduct inconsistent with just and equitable principles of trade in that while on the Floor of the Exchange, he: (a) disclosed to a third party confidential information relating to orders received from customers of his member organization employer in exchange for payment, (b) aided a third party to improperly trade ahead of and/or along with customer orders his member organization employer was representing, without the customers' consent, to the detriment of the customer orders and to the benefit of the third party; engaged in acts detrimental to the interest or welfare of the Exchange in that he: (a) disclosed to a third party confidential information relating to orders received from customers of his member organization employer in exchange for payment, and (b) aided a third party to improperly trade ahead of and/or along with customer orders his member organization employer was representing, without the customers' consent, to the detriment of the customer orders and for the benefit of the third party – Consent to censure and permanent bar.**

**Appearances:**

For the Division of Enforcement  
Steven J. Brostoff, Esq.  
Craig P. Hammond, Esq.  
Felix M. Hester, Esq.

For the Respondent  
Douglas T. Burns, Esq.  
Randy S. Zelin, Esq.

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A Hearing Panel of the New York Stock Exchange, Inc. ("Exchange") met to consider a Stipulation of Facts and Consent to Penalty entered into between the Exchange's Division of Enforcement ("Enforcement") and Frank J. Furino ("Respondent"), a former registered employee

with Jefferies Execution Services, Inc. (the “Firm”). Without admitting or denying guilt, Respondent consented to a finding by the Hearing Panel that he:

- I. Violated Section 10(b) of the Securities Exchange Act of 1934 (the “1934 Act”), Rule 10b-5 promulgated thereunder, and Exchange Rule 476(a)(5) in that, on at least 58 occasions, he used a facility of a national securities exchange to engage in an act, practice or course of business which operated as a fraud or deceit on other persons in connection with the purchase or sale of securities by disclosing to a third party confidential information relating to orders received from customers of his member organization employer, which was then used to trade ahead of and/or along with those customer orders, without the customers’ consent, to the detriment of the customer orders and for the benefit of the third party.
- II. Engaged in conduct inconsistent with just and equitable principles of trade in that, on at least 58 occasions while on the Floor of the Exchange, he:
  - A. Disclosed to a third party confidential information relating to orders received from customers of his member organization employer in exchange for payment.
  - B. Aided a third party to improperly trade ahead of and/or along with customer orders his member organization employer was representing, without the customers’ consent, to the detriment of the customer orders and to the benefit of the third party.
- III. Engaged in acts detrimental to the interest or welfare of the Exchange in that, on at least 58 occasions while on the Floor of the Exchange, he:
  - A. Disclosed to a third party confidential information relating to orders received from customers of his member organization employer in exchange for payment,
  - B. Aided a third party to improperly trade ahead of and/or along with customer orders his member organization employer was representing, without the customers’ consent, to the detriment of the customer orders and for the benefit of the third party.

For the sole purpose of settling this disciplinary proceeding, Enforcement and Respondent stipulate to certain facts, the substance of which follows:

### **Background and Jurisdiction**

1. Respondent was born in March 1956. He entered the securities industry in or about August 1984 as an employee of a then-member firm, where he remained until September 1997. In December 1997, he became employed as a clerk on the Floor of the Exchange with Lawrence Helfant LLC (“Helfant”), a predecessor entity of the Firm until his termination on February 10, 2005.

2. Respondent became a registered employee of the Firm in May 1999 when he obtained his Series 25 license. He later obtained his Series 7A license in November 2004.
3. On or about February 25, 2005, the Firm filed a Uniform Termination Notice for Securities Industry Registration (Form U-5), reporting that Respondent had been terminated on February 10, 2005.
4. Respondent is not currently employed in the securities industry.
5. By letter dated February 24, 2005, which he received, Enforcement notified Respondent that it was investigating his conduct in connection with his employment with the Firm or its predecessor entities, during the period 2000 through 2001.
6. On or about September 12, 2005, Respondent pleaded guilty to criminal charges of conspiracy to commit securities fraud in violation of Section 10(b) of the 1934 Act and Rule 10b-5 thereunder, among other things.

### **Overview**

7. As set forth in detail below, during the period August 2000 through December 2001, Respondent violated federal securities laws and Exchange Rules by participating in a fraudulent scheme with an individual associated with a non-member broker-dealer, in which Respondent communicated confidential information concerning his member firm employer's customers' orders to such third party who used the information to trade ahead of and/or along with those customer orders in exchange for cash payments.

### **Respondent's Duty Not to Disclose Confidential Information**

8. As a Floor Clerk, Respondent was responsible for, among other things, taking orders from customers of the Firm, communicating the orders received to brokers on the Floor for execution, and preparing records of those orders including Floor reports. Respondent was also responsible for relaying information back to the Firm's customers concerning execution of their orders.
9. Customers have an expectation that when they transmit orders for execution to a member organization engaged in Floor brokerage activities, such as the Firm, employees of the Firm involved in the order execution process, like Respondent, will not communicate their order information to someone who plans to trade based on that information.
10. The Firm's compliance manual required, among other things, that all employees "not accept a gratuity or undisclosed compensation from a client" and "not have any interest in a client's account."

11. The Firm's policy statement concerning prohibitions on insider trading required, among other things, that "no [Firm] employee should divulge confidential client information to individuals other than Firm employees. No [Firm] employee shall use confidential information of a client for personal benefit, for the benefit of the [Firm] or for the benefit of another client."
12. Respondent, an employee of the Firm, was required to adhere to the terms of the compliance manual and the policy statement, and act in accordance with standard industry practice.

### **Respondent's Participation in the Fraudulent Scheme**

13. Section 10(b) of the 1934 Act makes it unlawful for any person "[t]o use or employ, in connection with the purchase or sale of any security ..., any manipulative or deceptive device... ."
14. Rule 10b-5 promulgated under Section 10(b) of the 1934 Act states, in pertinent part:
 

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, ...

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.
15. Exchange Rule 476(a)(5) prohibits employees of member firms, among others, from engaging in "fraud or fraudulent acts."
16. From approximately August 2000 through December 2001 (the "Relevant Period"), Respondent participated in a fraudulent scheme with an individual associated with a non-member broker-dealer (the "Day Trader"). Through this scheme, Respondent, in breach of his duty to the Firm's customers, and in breach of his duty to the Firm, communicated confidential information concerning the Firm's customer orders to the Day Trader, for the purpose of having the Day Trader trade ahead of and/or along with those customer orders. In exchange for the confidential information, the Day Trader compensated Respondent through undisclosed cash payments.
17. During the Relevant Period, Respondent regularly provided the Day Trader information about large orders that customers had transmitted to the Firm for execution, but that the Firm had not yet executed.
18. Respondent typically called the Day Trader from the Floor of the Exchange and informed the Day Trader of the security, limit price, if any, quantity and side of the market associated with certain large customer orders.

19. After receiving the information about a particular large customer order from Respondent, the Day Trader would typically enter an order through the Firm on the same side of the market and in the same security in expectation of a favorable movement in the stock price as a result of the subsequent execution of the large customer order.
20. The Day Trader received executions on the orders he entered through the Firm ahead of the large customer orders, without the customer's consent, and often at more favorable prices than those subsequently received by the large customer orders.
21. After or while the Firm's Floor brokers executed the large customer order, the Day Trader entered an order through the Firm, on occasion with Respondent's aid, on the opposite side of the market in the same security to either sell the long position he established, or cover his short position.
22. The trades described in paragraph 21 above, would usually close out the Day Trader's position that he had established by trading ahead of the large customer order, often at a profit. At times, the trades described in paragraph 21 were executed against the large customer order he had traded ahead of in establishing his position.
23. The Day Trader engaged in this pattern of trading activity with the aid of Respondent on at least 58 different occasions during the relevant period. In many instances, the Day Trader succeeded in profiting from the short-term change in prices caused by the subsequent execution of the large customer order, often to the detriment of the large customer order. Three examples are described below.

**“ABC” – January 4, 2001**

24. On January 4, 2001, after Respondent received, on the Exchange Floor, a large customer order to sell “ABC” stock, Respondent informed the Day Trader about the order. Thereafter, between 2:57:57 p.m. and 3:01:20 p.m., the Day Trader entered four orders totaling 15,000 shares to sell short “ABC” through the Exchange's SuperDOT system. During the same period, he also entered an order to sell short 7,500 shares of “ABC” through an away market. Before the large customer order received any executions, and in trades reported between 2:58:38 p.m. and 3:01:34 p.m., 13,000 of the 15,000 shares entered through SuperDOT were executed, and all 7,500 shares entered through the away market were executed at an average price of \$54.48 per share.
25. After establishing his 20,500-share short position, the Day Trader transmitted an order to the Exchange Floor, through the Firm, to buy 20,000 shares of “ABC.” In a trade reported at 3:02:30 p.m., the Firm's Floor broker, on behalf of the large customer order, sold 64,100 shares of “ABC” at a price of \$54 per share, an inferior price to the average price received by the Day Trader (\$54.48). As part of the transaction, the Day Trader's buy order, also represented by the Firm's Floor broker,

purchased 20,000 shares from the large customer sell order, the same order ahead of which the Day Trader had just traded. Then, the Day Trader finished covering his short position by entering an order, at 3:04:33 p.m., to buy 500 shares of “ABC” through SuperDOT. In a trade reported at 3:05:20 p.m., all 500 shares were executed at a price of \$54.93 per share. As a result of this trading activity, the Day Trader made a net profit of approximately \$9,344.

**“DEF” – February 15, 2001**

26. On February 15, 2001, after Respondent received, on the Exchange Floor, a large customer order to buy “DEF” stock, Respondent informed the Day Trader about the order. Thereafter, between 9:33:55 a.m. and 9:40:18 a.m., the Day Trader entered eight orders totaling 21,500 shares to buy “DEF” through the Exchange’s SuperDOT system, and transmitted an order to the Exchange Floor, through the Firm, to buy 10,000 shares of “DEF.” Before the large customer order received any executions, and in trades reported between 9:34:41 a.m. and 9:40:24 a.m., all 31,500 shares of the Day Trader’s orders were executed at an average price of \$29.41 per share.
27. After establishing his 31,500-share long position, the Day Trader transmitted an order to the Exchange Floor, through the Firm, to sell 35,000 shares of “DEF.” In a trade reported at 9:41:01 a.m., the Firm’s Floor broker, on behalf of the large customer order, purchased 51,500 shares of “DEF” at a price of \$29.64 per share, an inferior price to the average price received by the Day Trader (\$29.41). As part of the transaction, the Day Trader’s sell order, also represented by the Firm’s Floor broker, sold 35,000 shares to the large customer order, the same order ahead of which the Day Trader had just traded. Then, the Day Trader covered his 3,500-share short position (he bought 31,500 shares and then sold 35,000 shares) by entering two orders, one at 9:41:35 a.m. and the other at 9:42:18 a.m., totaling 3,500 shares to buy “DEF” through SuperDOT. In trades reported at 9:41:58 a.m. and 9:42:37 a.m., respectively, all 3,500 shares were executed at a price of \$29.60 per share. As a result of this trading activity, the Day Trader made a net profit of approximately \$7,281.

**“XYZ” – March 13, 2001**

28. On March 13, 2001, after Respondent received, on the Exchange Floor, a large customer order to purchase “XYZ” stock, Respondent informed the Day Trader about the order. Thereafter, between 10:00:45 a.m. and 10:04:17 a.m., the Day Trader entered seven orders totaling 25,000 shares to buy “XYZ” through the Exchange’s SuperDOT system. Before the large customer order received any executions, and in trades reported between 10:00:56 a.m. and 10:04:34 a.m., all 25,000 shares of the Day Trader’s orders were executed, at an average price of \$60.86 per share.
29. After establishing his 25,000-share long position, the Day Trader transmitted an order to the Exchange Floor, through the Firm, to sell 25,000 shares of “XYZ.” In a trade reported at 10:05:15 a.m., the Firm’s Floor broker, on behalf of the large customer order, purchased 68,200 shares of “XYZ” at a price of \$61.10 per share, an inferior

price to the average price received by the Day Trader (\$60.86). As part of the 68,200-share transaction, the Day Trader's sell order, also represented by the Firm's Floor broker, sold 25,000 shares to the large customer order, the same order ahead of which the Day Trader had just traded. As a result of this trading activity, the Day Trader made a profit of approximately \$5,906.

30. In exchange for access to the Firm's order flow information, Respondent received cash payments from the Day Trader that were not disclosed to the Firm.

### **DECISION**

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

### **PENALTY**

In considering the appropriateness of a penalty, the Hearing Panel considers the seriousness of the offense, the corresponding harm to the trading public, the potential gain to the broker for disobeying the rules, the potential for repetition in light of the current regulatory and enforcement regime, and the deterrent value to the respondent and others. McCarthy v. SEC, 406 F.3d 179, 190 (2d Cir. 2005), reh'g denied.

By disclosing confidential customer information and engaging in a fraudulent scheme, Respondent not only violated the trust of his customers and employer, but also undermined public trust in the market. His conduct was not an isolated instance, but rather repeated at least 58 times over the course of fifteen months. The seriousness of the offense is underscored by the criminal responsibility that he has acknowledged for his conduct. Respondent engaged in the misconduct for monetary gain, receiving illegal payments from the Day Trader in exchange for the confidential information. The temptation to compromise the integrity of customer information for personal gain must be met with a penalty sufficient to deter such violations.

In support of the agreed upon penalty of a censure and permanent bar, Enforcement cites the following Exchange precedents: In re Stephen Badalamente, Decision 04-172 (N.Y.S.E. Hearing Panel Nov. 12, 2004); In re Robert Ross Altman, Decision 00-61 (N.Y.S.E. Hearing Panel Apr. 20, 2000); In re Ethan Heston Weitz, Decision 00-62 (N.Y.S.E. Hearing Panel Apr. 20, 2000); and In re Ronald Joseph Etergino, Decision 00-63 (N.Y.S.E. Hearing Panel Apr. 20, 2000). In all of these cases, the respondent was censured and permanently barred for violating Section 10(b) of the 1934 Act and Rule 10b-5 thereunder and for failing to comply with an Exchange request for information and testimony. Two additional cases from outside the Exchange support the penalty of a censure and permanent bar for insider trading alone: Dep't of Market Regulation v. Geraci, Complaint No. CMS020143, 2004 WL 2891525 (N.A.S.D.R. N.A.C. Dec. 9, 2004); and In re Robert Bruce Lohmann, Exchange Act Release No. 48092, 80 S.E.C. Docket 1545, 2003 WL 21468604 (June 26, 2003).

In view of the above findings, the Hearing Panel, by unanimous vote, imposed the penalty consented to by Respondent of a censure and a permanent bar from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization.

For the Hearing Panel

Chief Hearing Officer  
Panelists:  
Rosemarie T. Azzarello  
Robert Gross