N E W Y O R K S T O C K E X C H A N G E L L C

<u>NYSE HEARING BOARD DECISION 08-33</u> **June 17, 2008**
PAUL EDWARD MURIN, JR.
ALLIED MEMBER

* * *

Violated NYSE Rule 476(a)(6) in that he permitted execution of variable annuities switches that were unsuitable for customers and violated NYSE Rule 342 in that he failed to reasonably supervise execution of variable annuities switches by his firm – Censure, two-year supervisory bar, a requirement to take and pass supervisory exams and $50,000 fine.

Appearances:

For the Division of Enforcement
Susan Light, Esq.
Danielle I. Schanz, Esq.
Steven M. Tanner, Esq.
Howard L. Kneller, Esq.
Jeremy Bloom, Esq.

For Respondent Murin
Ted S. Helwig, Esq.
Amy E. Gibson Lum

* * *

A Hearing Panel on behalf of the New York Stock Exchange LLC ("NYSE" or the "Exchange") considered a Charge Memorandum issued by NYSE Regulation, Inc.'s Division of Enforcement ("Enforcement") against Paul Edward Murin, Jr. an allied member and President, CEO and a partner of David A. Noyes & Co., Inc. (the "Firm"). The Firm is a member organization of the NYSE. Murin was charged with having:

I. Violated NYSE Rule 476(a)(6) by engaging in conduct inconsistent with just and equitable principles of trade in that, on one or more occasions, he permitted the execution of variable annuities switches on behalf of customers of his member firm employer that were unsuitable in view of the customers' investment objectives, investment experience and/or financial resources.

II. Violated NYSE Rule 476(a)(6) by engaging in conduct inconsistent with just and equitable principles of trade in that, on one or more occasions, he instructed one or more employees of his member firm employer to falsify certain books and records of such firm in connection with a regulatory examination.

III. Violated NYSE Rule 342 in that he failed to reasonably supervise the execution of variable annuities switches by his member firm employer on behalf of certain customers of such firm.

Murin filed an answer and denied a majority of the allegations and each of the respective charges issued against him.

Based on the pleadings,[*] the evidence and argument presented at the hearing, the Hearing Panel made the following findings:

Background and Jurisdiction

1. Paul Edward Murin, Jr. was born in 1946. Since 1978, Murin has been the President, CEO, and a partner of the Firm. During the period October 1, 1999 through December 31, 2001 (the "Relevant Period") and through the present, Murin was also a member of the Firm's board of directors. He was first employed by the Firm in 1968. Murin was a member of the New York Stock Exchange from 1978 through December 2005 and remains an allied member of the NYSE. Murin owns approximately thirty-one percent of the shares of the Firm's stock and is the Firm's largest shareholder. Murin was not the registered representative of record for any of the variable annuity transactions at issue in this matter.

2. In an examination report dated December 28, 2001 (the "Special Examination Report"), which was sent to the Firm, the NYSE's Division of Member Firm Regulation ("MFR") noted, among other things, that the Branch Office Manager (the "BOM") and certain other registered representatives at the Branch, were executing annuity "switches," i.e., the purchase of an annuity with the proceeds of the sale of an existing annuity, on behalf of certain of the Firm's customers. MFR further noted that a number of those switches were not in the economic interest of the customers and that the Firm was inadequately supervising such switches.

3. By letter dated May 2, 2002, which was addressed to the Firm's Chairman of the Board and also sent to Murin, both the Firm and Murin were notified that the NYSE had commenced an investigation concerning certain of the exceptions contained in the Special Examination Report.

4. Thereafter, Murin, represented by counsel, provided information and testimony in connection with the NYSE's investigation.

Annuity Sales, Switches and Supervision

Introduction

5. The Branch was opened in 1996. At all relevant times, the Branch was comprised of fewer than eight registered representatives and included, at certain times, the BOM,

[*] See attached Appendix A and Appendix B.

as well as three of his brothers and/or half-brothers, their father and other registered representatives unrelated to the BOM.

6. During the Relevant Period, the BOM and certain of the other registered representatives at the Branch recommended the execution of variable annuity switches on behalf of customers.

7. Many annuities, including those sold at the Branch, have "surrender" fees that are assessed if the purchaser of the annuity decides to "cash in" the investment within a certain number of years after they are purchased. Such fees may constitute in excess of eight percent or more of the investment principal if the annuity is redeemed during the first year after it is purchased. Thereafter, such fees usually decrease, typically by one percent each year.

8. As a result of, among other things, the aforementioned surrender fees, annuities are generally viewed as long-term investments.

The Regulatory Timeline

NASD Notice to Members 96-86 (December 1996)

9. In December 1996, NASD Regulation, Inc. ("NASD Regulation") issued Notice to Members 96-86, which reminded members that variable annuities are subject to NASD suitability requirements. NASD members and associated persons were reminded that they "… have a fundamental responsibility for dealing fairly with their customers."

10. The Notice to Members also contained this pertinent warning: "Finally, NASD Regulation is aware of the practice whereby a registered representative replaces a customer's existing variable contract with a new variable contract that doesn't improve the customer's existing position, but generates a new sales commission for the registered representative. Such a replacement practice designed merely to generate new sales commissions for the registered representative would be prohibited by NASD Conduct Rules requiring that members and registered representatives deal fairly with customers."

11. The suggested routing of the Notice to Members included senior management. Thus, Murin was on notice that he was required to supervise the execution of variable annuity switches at the Branch in order to determine the suitability of those transactions.

NYSE Examination (January 1998)

12. From January 12 through January 28, 1998, the NYSE conducted an examination of the Firm which included the Firm's Chicago headquarters as well as the Branch. On March 17, 1998, the NYSE sent Murin an examination report which required a response within 30 days.

13. The NYSE's examination report found that, of the sixty-six annuity contracts sold at the Branch during the period of October 1, 1997 through December 31, 1997 twenty-three were switches in which the customers incurred surrender charges. The twenty-three switches represented sixty-four percent of the total dollar value generated for that period. In at least four instances, the previous annuity had been solicited by the same registered representative.

14. The examination report found that the Firm violated NYSE Rule 342 by, among other things, failing to have in place appropriate written procedures to (1) ascertain whether the customers understood the penalties for switching and (2) evidence the suitability of annuities purchased by the Firm's customers.

Securities and Exchange Commission Examination (May 1998)

15. On May 22, 1998, the Midwest Regional Office of the Securities and Exchange Commission ("SEC") wrote to Murin concerning a recent examination of the Firm. The SEC noted that the deficiencies found by the NYSE and the NASD with respect to the Branch's supervision of annuity switches had not been corrected. The letter indicated that those deficiencies "… are brought to your attention for immediate corrective action.…"

NASD Notice to Members 99-35 (May 1999)

16. In May 1999, the NASD issued Notice to Members 99-35, which reminded members of their responsibilities regarding the sale of variable annuities. The Notice to Members identified areas of concern that NASD Regulation expected to be addressed by members. The Notice to Members described variable annuities as long-term investments for retirement and noted that the suitability analysis under the NASD Rules was particularly complex for such products due to their myriad features.

17. Among other things, the Notice to Members suggested that member firms develop an exchange or replacement analysis document that would be completed for all switches. The exchange or replacement analysis would explain the benefit of replacing one variable annuity contract with another. The Notice to Members made clear that the document should be signed by the customer, the registered representative, and the registered principal.

18. The Notice to Members also suggested that member firms consider developing compliance systems to monitor and identify registered representatives whose clients had a particularly high rate of variable annuity replacements or rollovers, so that the firms could investigate the suitability of such switches.

19. The suggested routing of the Notice to Members included senior management and registered representatives.

NYSE Disciplinary Action HPD 99-132 (September 1999)

20. In David A. Noyes & Co., Inc., Decision 99-132 (NYSE Hearing Board Sept. 22, 1999) the NYSE took formal disciplinary action against the Firm. In that decision, the Firm consented to a finding that it violated NYSE Rule 342 by failing to provide for and maintain appropriate supervisory procedures pertaining to the purchase, sale and transfer of annuity products by its registered representatives and further consented to a penalty of a censure, a $60,000 fine and an undertaking that pertained to a non-annuity topic.

21. Specifically, the Firm consented to a finding that, during the period of October 1, 1997 through December 31, 1997, it failed to supervise its annuity products business in that it (1) did not maintain written procedures relating to annuity products that provided clear guidance to its registered representatives with respect to their compliance responsibilities; (2) did not maintain written procedures with respect to the supervision of its annuity products business; (3) did not maintain written procedures pertaining to the review of its annuity products business for use during Branch office inspections; (4) did not have procedures in place to monitor the number of annuity transfers effected by the Firm's registered representatives or the number or frequency of annuity transfers completed by its customers: (5) permitted its registered representatives to submit annuity contracts and transfer applications to issuing annuity companies without first having been reviewed by a supervisor for completeness, accuracy and suitability; and (6) maintained no master listing of annuity transfers and therefore, generated no exception reports, including reports to capture multiple purchases or sales to one customer or reports indicating excessive transfers by customers or registered representatives.

NASD Examination (February 2000)

22. On February 29, 2000, NASD Regulation staff conducted an exit interview at the Firm following a routine cycle examination. Murin was present at that interview. The examiners found that the Firm lacked a consistent and adequate supervisory system at the branch level for the review of switches. The examiners reviewed twenty-nine variable annuity transactions for the period of December 1 through December 31, 1999. They found that the Firm failed to provide evidence of written approval by a principal for all twenty-nine of those transactions. They also found fifteen of the transactions to be unsuitable. Finally, the examiners found that the Firm failed to prepare and maintain adequate written supervisory procedures concerning switches and suitability.

NASD Letter of Caution (May 2000)

23. On May 19, 2000, NASD Regulation sent Murin a Letter of Caution based on certain findings in the February 2000 examination report. Specifically, the Letter of Caution identified the Firm's failure to evidence written principal approval for twenty-nine out of twenty-nine variable annuity transactions as a repeat violation.

NASD Notice to Members 00-44 (July 2000)

24. In July 2000, NASD Regulation issued Notice to Members 00-44, which focused on retail sales of variable annuities to individuals. The Notice to Members identified areas of concern that NASD Regulation expected to be considered by member firms in developing and implementing appropriate supervisory procedures. The Notice to Members advised registered representatives to carefully consider whether variable annuity switches were in the best interests of their customers. The Notice to Members also encouraged member firms to adopt procedures for the review of replacement recommendations in order to ensure that they were suitable, and to engage in monitoring to prevent improper and excessive switches. Finally, the Notice to Members reiterated the guidance articulated in Notice to Members 99-45 (June 1999) regarding the adoption and implementation of supervisory systems and procedures by member firms.

SEC Examination (February 2001)

25. On February 16, 2001, the Midwest Regional Office of the SEC wrote to Murin concerning a recent examination of the Firm. That examination found that, for the year ended September 30, 2000, sixty-three percent of the Branch's revenues were earned from the sale of insurance products. The majority of that revenue came from the sale of one hundred and ninety-two variable annuities; one hundred and twelve, or fifty-nine percent, were switches. Of those one hundred and twelve, seventy-one (sixty-four percent) had been held for twenty-four months or fewer and forty-six had been replaced in a previous exchange by the Firm. In most cases the replaced contracts were held for short periods of time, often fewer than twenty-four months.

26. The SEC examiners found that customer records were incomplete and did not contain sufficient information to assess whether the switches were suitable. They also found that many of the cited reasons for making switches were inaccurate. The examiners found that the Firm failed to comply with the guidelines in Notice to Members 96-86, and that, as a result, certain customer accounts were excessively traded without improving the economic position of the customers.

27. The SEC examiners noted that, despite entering into a Stipulation and Consent with the NYSE in 1999 regarding, inter alia, the Firm's failure to implement procedures for generating exception reports, the Firm still was not generating exception reports as of November 2000.

28. The SEC examiners also identified certain supervisory lapses at the Branch including the failure to supervise the BOM and the fact that the Branch's customer new account information continued to be incomplete despite two citations by the NYSE.

29. The letter stated that "[i]mmediate and meaningful remedial action must be taken by your Firm to assure that recommendations are made only when the registered

representative and his superior have sufficient knowledge regarding a customer's financial and other relevant information. Please inform us as to what actions you intend to take to remedy this situation." The letter also noted that "[t]he deficiencies and/or violations of law described above are brought to your attention for immediate corrective action…."

NYSE Examination (March 2001)

30. NYSE examiners met with Murin and others during an exit interview on March 8, 2001. In a written examination report dated April 2, 2001**,** the examiners found that the supervision of annuity switches at the Branch did not comply with NYSE Rule 342.

NASD Letter of Caution (May 2001)

31. On May 30, 2001, NASD Regulation sent Murin a Letter of Caution which related to an examination that concluded on February 14, 2001. The Letter of Caution noted that the Firm failed to follow its own supervisory procedures concerning annuity switches. Eight out of twenty-one transactions did not reflect the required approval.

NYSE Examination (November 2001)

32. On November 12, 2001, NYSE examiners conducted an exit interview by conference call relating to a November 2001 examination of the Firm. Murin participated in the call. On December 28, 2001, MFR issued the Special Examination Report which found that forty-two percent of the revenue earned by the Branch for the period of January 1, 2001 through April 30, 2001 was from the sale of variable annuities.

33. Twenty-two of the twenty-four variable annuity transactions executed during that period (ninety-two percent) were switches. Nineteen of the twenty-two switches replaced contracts that had been held for fewer than twenty-four months. Seventeen of the twenty-two exchanges resulted in an eight percent surrender charge, while the registered representatives for those transactions received a commission of approximately six percent on each exchange.

34. The Special Examination Report found that most of the customers "did not benefit from the switches" and "were actually economically disadvantaged by them." It concluded that the registered representatives did not act in the best interests of those customers, and that the Branch's supervisory procedures and internal controls were not adequate.

The Firm's Adoption and Enforcement of Written Procedures Concerning Annuities

35. The inadequacy of the Firm's supervisory procedures regarding annuities was addressed in the March 1998 NYSE examination report, the May 1998 SEC examination report, the September 1999 disciplinary proceeding by the NYSE and

the February 2000 NASD examination report. The NASD also issued its second Notice to Members on that topic in May 1999. During that time the Firm did not implement any written annuity procedures.

36. In March 2000 – two years after Murin and the Firm received the March 1998 NYSE examination report – the Firm finally implemented written procedures regarding the supervision of annuity transactions (the "March 2000 Procedures").

37. The March 2000 Procedures mandated, inter alia, the following multi-part approval process with respect to variable annuity switches effectuated at the Firm:

a. First, all annuity switches were required to be approved by a Branch Office Manager before they were submitted to the issuing company.

b. Second, where the surrender charge of an annuities contract (1) exceeded $5,000, or (2) was three percent or more of the investment principal, the transaction had to be further approved *prior* to submission to the issuing company by the Firm's Insurance Department Manager ("IM") or National Director of Marketing ("DM").

c. Third, "if any funds [were] withdrawn within the first two years and [were] being reinvested," further approval as set forth above was required. (Emphasis in original.)

38. A copy of the March 2000 Procedures was sent to the Branch via e-mail at or about the time they were adopted. The procedures were also discussed during a visit by the Firm's IM and DM to the Branch in early March 2000. The Branch was further made aware of such procedures during a weekly compliance meeting that was held on or about March 6, 2000.

39. The March 2000 Procedures were also discussed during internal Firm compliance audits of the Branch that occurred in or about September of 2000 and November of 2001.

40. While the Firm thus had written annuity procedures in place as of March 2000, those procedures contained large gaps that the BOM and the Branch were able to exploit. The March 2000 Procedures did not include the mechanisms necessary to determine whether they were being followed. In addition, the procedures did not require heightened monitoring of all switches executed by the Firm. Only the switches that met the criteria noted in sub-paragraphs 41(b) and (c) above were subject to additional approval. Finally, the BOM, who was a primary seller of annuity switches and a producing Branch Office Manager, was effectively his own supervisor.

41. As discussed at paragraphs 28-32, supra, the SEC notified the Firm by a letter dated February 16, 2001, that its supervisory procedures regarding annuities transactions remained deficient.

42. That finding was reiterated in an MFR report sent to Murin on or about April 3, 2001, which indicated, among other things, that the Firm continued to lack appropriate procedures for the supervision of annuity switches executed at the Branch.

43. In May 2001, the Firm again revised its procedures to remove the limiting criteria in sub-paragraphs 41(b) and (c) above and require that all switches receive an additional layer of supervisory approval.

44. The change did not prevent the BOM and the Branch from continuing to circumvent the Firm's annuity approval procedure. In June 2001, the Firm again revised its procedures and announced that it would not pay commissions for switches unless the prior annuity was owned for more than two years or there was no surrender charge involved in the transaction.

45. The June 2001 revisions successfully reduced the number of switches that were executed at the Branch by removing the financial incentive for registered representatives to engage in such transactions. However, the resulting decrease in revenue caused the Firm to close the Branch in 2002.

Murin's Awareness of Violative Conduct

46. In his capacity as the Firm's President and CEO during the Relevant Period, Murin was repeatedly notified in writing by three different regulators of the ongoing misconduct of the BOM and others at the Branch with respect to annuity transactions. Murin knew that the Branch was executing annuity sales and switches that were unsuitable and improperly supervised. He also knew that such violations were not fully corrected from March 1998 until June 2001. It should not have taken over three years to resolve the problem.

47. In addition to the formal notifications discussed above, there were communications within the firm that should have alerted Murin to the pattern of switches and unsuitable trades at the Branch. As early as July 1998, Murin wrote in the minutes of an executive committee meeting that he was aware that the NYSE was writing to and speaking with customers about the switches executed by the Branch.

48. Murin testified during Enforcement's investigation of this matter that, in mid-2001, he noticed "a pattern of multiple [annuity] switches that didn't seem to be appropriate...." Only then did the Firm implement additional enhancements to the March 2000 procedures.

Backdating and Falsification of Documents

49. In April 2001, in connection with an NASD examination, the Firm was asked for copies of approvals for approximately twenty variable annuity switches. In fact, the switches had not been approved but were nonetheless executed.

50. Murin asked two Firm employees, IM and DM, to review the switches that had not been approved. He directed IM and DM to determine whether they would have approved the switches had they been timely presented to them, and if so, to indicate that approval as of the date they performed their review.

51. IM and DM believed that Murin's request was a directive that they backdate approvals for the annuities in question. They responded by refusing to do so, and no approvals were ever created.

52. In fact, Murin did not ask them to backdate documents, but to demonstrate to the NASD that certain of the transactions in questions were suitable and would have been approved had the Firm and the Branch properly complied with the approval procedures.

DECISION

The Hearing Panel unanimously found Murin guilty of Charges I and III and not guilty of Charge II.

Charge I and III

Charges I and III allege that Murin permitted the execution of switches that were unsuitable and failed to reasonably supervise the execution of switches by the Firm. As noted above, Murin was on notice from three regulators that there was a problem with switches at the Branch. It took over three years for the Firm under Murin's leadership to develop and implement an effective strategy to solve the problem. Meanwhile, the situation was permitted to continue because of Murin's failure to exercise effective supervision.

There can be no doubt that many of the switches that were executed during the Relevant Period were unsuitable. The regulators who examined the Firm and the Branch found them to be unsuitable. Enforcement's experts found them to be unsuitable from both a compliance and an economic standpoint. The Hearing Panel also found them to be unsuitable. The misconduct at the Branch was so clear that the unsuitability of the transactions at issue could be ascertained by looking at patterns of trading and viewing individual accounts as a whole, rather than by individual trades. Murin should have been aware of the problems and should have taken effective action within a reasonable period of time. He did not do that.

Variable annuities are long-term investment products that are designed to be held, not switched. By allowing some of the Firm's registered representative to apply a one size fits all strategy designed to benefit the registered representatives rather than their customers, Murin permitted the execution of variable annuities switches that were unsuitable. See Bruce Cohen, Decision 02-137 (NYSE Hearing Board Jun. 26, 2002).

Murin was aware that there was a problem with switches at the Branch no later than March 1998 as a result of the NYSE examination report. It took two years for the Firm to issue the March 2000 Procedures. Unfortunately, those procedures were flawed, and the Branch, which was the

Firm office that was most in need of corrective measures, was able to circumvent them. In May and June 2001, the procedures were revised again and began to be effective. However, it was not until 2002 when the Firm closed the branch that the problem was fully resolved.

By failing to reasonably supervise the execution of switches at the Branch, and also failing to effectively respond to repeated citations by regulators regarding compliance issues, Murin permitted the unsuitable switches to continue. See In the Matter of Gutfreund 51 S.E.C. 93 (Dec. 3, 1992) (supervision by firm president was unreasonable where president failed to follow up to determine whether remedial action had occurred).

Charge II

The Hearing Panel's determination of this charge is largely based on our evaluation of the credibility of witnesses. In addition, we considered the conduct of the witnesses in the days and weeks following the alleged incident. Finally, we considered Murin's possible motivation for directing Firm employees to approve switches after the fact when the NASD had already been told that such approval did not occur in the first instance.

Murin offered testimony by himself and other executives of the Firm about conversations that they participated in or witnessed. IM and DM testified about their conversations with Murin, with each other and with others. The testimony offered by Murin, on the one hand, and IM and DM, on the other, differed dramatically. However, the Panel found all the witnesses to be credible.

The Panel concluded that Murin did not ask IM and DM to act unethically or improperly. Rather, the Panel found that, by asking IM and DM to approve after the fact any switches that would have been approved in the first instance, Murin intended, not to falsify documents, but rather, to show the NASD that some of those transactions might have been approved had they been reviewed in accordance with the Firm's procedures. Thus, although the Firm failed to properly comply with its own approval procedures, some of the trades in question may have been suitable.

The Panel found that IM and DM did not correctly understand what they were being asked to do. They instead concluded that Murin was asking them to falsify retroactive approvals for the switches in question, and responded correctly by refusing to do so.

The Panel could not determine whether IM and DM misunderstood Murin and reacted accordingly or whether Murin was unclear in explaining his intentions. In any event, the Panel found that no misconduct was elicited, and none in fact occurred.

Accordingly, the Hearing Panel found Murin not guilty of Charge II.

PENALTY

In determining an appropriate penalty, the Panel was required to consider a number of factors, including the seriousness of the offense, the corresponding harm to the trading public, the potential gain to Respondents from the violations, the potential for repetition in light of the current regulatory and enforcement regime, and the deterrent value to Respondents and others. McCarthy v. SEC, 406 F.3d 179, 190 (2d Cir. 2005). Other important factors that are routinely used to guide the determination of a penalty include the degree of scienter and the degree to which a respondent has taken responsibility and feels remorse for his actions. See Factors Considered By The New York Stock Exchange Division of Enforcement In Determining Sanctions, Information Memo. 05-77 (Oct. 7, 2005), at 2-3.

Enforcement recommended a penalty of a censure, a two-year plenary bar followed by a two-year supervisory suspension, and a fine of $50,000 for Murin. In support of this proposed penalty, Enforcement cited a number of cases, including Richard Louis Price, Decision 06-180 (NYSE Hearing Board Oct. 6, 2006) and Daniel Roger Leland, Decision 04-155 (NYSE Hearing Board Sep. 30, 2004). In Price, which involved the supervision of stock loan activities, the respondent consented to a penalty of a censure, a two-year bar, a one-year supervisory bar, and a requirement to retake and pass the supervisory exam before being reemployed in a supervisory capacity. The respondent in Leland, which involved the supervision and control of mutual fund trading, consented to penalty of a censure, a one-year supervisory suspension and a total payment of $200,001.

After the close of penalty arguments, Enforcement and counsel for Murin met and negotiated Murin's consent to a penalty of a censure, a one-year supervisory suspension and a fine of $75,000. However, that penalty is not binding on the Hearing Panel and we have determined to reject it.

The Hearing Panel, by unanimous vote, imposed the penalty of a censure, a two-year supervisory bar, a requirement to retake and pass the appropriate supervisory exams before holding a supervisory position, and a fine of $50,000. All of Murin's misconduct involved supervisory lapses and inattention. We therefore consider it appropriate that his penalty address supervision. Murin's violations were acts of omission, not commission. By failing to act promptly, Murin damaged his Firm and impacted customers adversely. With respect to customers, we have considered the decision in the matter of the firm David A. Noyes & Co., Inc, Decision 05-98 (NYSE Hearing Board, Nov. 9, 2005). In that decision, which also involved these violations regarding the trading and supervision of variable annuities, the Firm consented to a penalty of a censure, a total payment to the NYSE of $550,000, the majority of which was for customer restitution, and the implementation of settlement and customer restitution procedures. In addition, the Firm consented to an undertaking that it would retain an outside consultant to review and report on the firm's policies, procedures and practices relating to the sale and supervision of variable annuities. We believe that the penalty we have imposed is appropriate and remedial, taking into account the record before us. This penalty will force Murin to focus

his attention on supervision if he returns to a supervisory position, which is in the best interests of Murin, the Firm and its customers.

For the Hearing Board

Vincent F. Murphy - Hearing Officer
Panelists:
Marguerite M. Crane
Richard Groendyke

Appendix A

NEW YORK STOCK EXCHANGE LLC
HEARING BOARD

In the Matters of NYSE Disciplinary Proceedings :

Against :

PAUL EDWARD MURIN, JR. :

ORDER ON RESPONDENT PAUL EDWARD MURIN'S MOTION TO EXCLUDE HEARSAY EVIDENCE

By motion dated April 5, 2006 (the "Motion"), Respondent Paul Edward Murin requested that all hearsay evidence concerning alleged conversations between Respondent Murin and two individuals who were employees of his firm at the relevant times be excluded from the Hearing. The Division of Enforcement ("Enforcement"), in its memorandum dated April 19, 2006, opposed the Motion. Respondent Murin submitted a reply memorandum, dated April 24, 2006 (the "Reply") in further support of the Motion. Taking into consideration all of the parties' pleadings, the Motion is denied.

It is well-settled that the NYSE Hearing Board is not bound by the Federal Rules of Evidence in conducting its proceedings. See Nicholaou v. SEC, No. 94-3990, 1996 WL 140339, at *1 (6th Cir. Mar. 27, 1996) (noting that NYSE hearing panel was not required to apply Federal Rules of Evidence since "[n]othing" in those Rules "indicates that they are applicable in self-regulatory proceedings" such as those before an NYSE hearing panel).[1] The Securities and Exchange Commission has recognized:

> SRO proceedings are "informal" when compared to "formal" proceedings in federal and state courts where rules of evidence and procedure apply. For example, [i]n SRO proceedings, hearing panels have great latitude in permitting evidence and testimony from witnesses that might be excluded on relevance and hearsay grounds before other tribunals.

[1] The cases cited by Respondent Murin in his Reply, namely, Tome v. United States, 513 U.S. 150, 157 (1995), United States v. Hooks, 848 F.2d 785, 796 (7th Cir. 1988), and Evans v. Port Authority of New York and New Jersey, 192 F. Supp. 2d 247, 263 n. 121 (S.D.N.Y. 2002), are all based on the Federal Rules of Evidence, and they are thus inapposite.

Rita H. Malm, Exchange Act Release No. 34-35000, 58 S.E.C. Docket 131, 1994 WL 665963, at *8 n. 37 (Nov. 23, 1994). In his Reply, Respondent Murin concedes that the "federal rules of evidence do not automatically apply in NYSE proceedings … ." Reply at 1.

The Commission has repeatedly held that:

> [H]earsay statements may be admitted in evidence and, in an appropriate case [before an NYSE Hearing Panel], may form the basis for findings of fact.

Keith Springer, Exchange Act Release No. 34-45439, 76 S.E.C. Docket 2189, 2002 WL 220611, at *6 (Feb. 13, 2002). See also Kevin Lee Otto, Exchange Act Release No. 34-43296, 73 S.E.C. Docket 751, 2000 WL 1335346, at *4 (Sept. 15, 2000) (in administrative proceedings, hearsay evidence "may even constitute the sole basis for findings of fact"); Harry Gliksman, Exchange Act Release No. 34-42255, 71 S.E.C. Docket 767, 1999 WL 1211765, at *5 (Dec. 20, 1999) (same); Carlton Wade Fleming, Jr., Exchange Act Release No. 34-36215, 60 S.E.C. Docket 523, 1995 WL 539462, at *2 (Sept. 11, 1995) (same). In deciding what weight, if any, to give such evidence, the Panel evaluates the evidence's probative value and reliability and the fairness of its use. Springer, 2002 WL 220611, at *6. In conducting its evaluation, the Panel considers, among others, the following factors: the possible bias of the declarant; the type of hearsay at issue; whether the statements are signed and sworn to (rather than anonymous, oral, or unsworn); whether the statements are contradicted by direct testimony; whether the declarant was unavailable to testify; and whether the hearsay is corroborated. Id.; Otto, 2000 WL 1335346, at *4.

The Motion is hereby denied. Hearsay evidence will be allowed at the Hearing and may be referred to in Pre-Hearing Briefs. This does not preclude counsel, during cross-examination and closing arguments and in any written submission, from challenging the probative value and reliability and the fairness of the use of any hearsay evidence, based on the illustrative factors listed above.

SO ORDERED

Dated: April 27, 2006

Peggy Kuo
Chief Hearing Officer

Copy sent by electronic mail to:

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NEW YORK STOCK EXCHANGE LLC
HEARING BOARD

In the Matters of NYSE Disciplinary Proceedings

Against

PAUL EDWARD MURIN, JR.

ORDER ON RESPONDENTS' MOTION TO TAKE PRE-HEARING TESTIMONY

By motion dated March 28, 2006 (the "Motion"), Respondent Paul Edward Murin requested permission to take deposition testimony of three individuals (the "Witnesses"). The Division of Enforcement ("Enforcement"), in its memorandum dated April 10, 2006, opposed the Motion. Respondent Murin also submitted a reply memorandum in further support of the Motion. Taking into consideration all of the parties' pleadings, the Motion is denied.

Respondents do not cite, and the Office of the Hearing Board is unaware of, any precedent for the type of pre-hearing discovery that Respondents are seeking. To the contrary, precedent from the U.S. Securities and Exchange Commission suggests that this type of discovery is generally not available in non-judicial, administrative proceedings (similar to this one), particularly where, as here, the applicable rules do not expressly provide for such discovery. See Coopers & Lybrand, Release No. APR-260, 52 S.E.C. Docket 409, 1984 WL 144477 (Oct. 26, 1984) (denying motion for depositions insofar as Securities and Exchange Commission's Rules of Practice did not provide for depositions); Cohen Goren Equities, Inc., Release No. APR-128, 1974 SEC LEXIS 3592 (Jan. 10, 1974) (same).

Among the "fair procedure[s]" of the NYSE, as required by Section 6(b)(7) of the Securities Exchange Act of 1934, NYSE Rule 476(d) specifies that Respondent and his representatives have the right to be present at the hearing, to produce witnesses and any other evidence, to examine witnesses produced, and to cross-examine witnesses produced by, or favorable to, the opposing party. Moreover, NYSE Rule 476(c) provides that a respondent may request "documents or records in the possession of the Exchange which are material to the preparation of the defense," and such documents may include transcripts of any on-the-record testimony that Enforcement has obtained from the Witnesses or any other individual who has provided relevant on-the-record testimony, as well as any non-privileged notes of any interviews with, and any relevant documents obtained from, those individuals. In addition, although the NYSE Rules are silent on the

issue, Respondents are free to contact and interview any person who agrees to speak with them or their representatives, including the Witnesses.

Reviewing courts have recognized that a hearing officer in an administrative proceeding has "wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed." See, e.g., Silverman v. CFTC, 549 F.2d 28, 33 (7th Cir. 1977) (citations omitted) (noting that there is "no basic constitutional right to pre-trial discovery in administrative proceedings"). However, in this instance, we will not compel the Witnesses to be subjected to a pre-hearing deposition before being required to testify again at the hearing.

Accordingly, Respondents' request to have the Office of the Hearing Board compel the Witnesses to appear for pre-hearing testimony is denied.

SO ORDERED

Dated: May 1, 2006

Peggy Kuo
Chief Hearing Officer

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