

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 96-108

October 2, 1996

GREGORY FISKE WILBUR
FORMER REGISTERED REPRESENTATIVE

* * *

Effected excessive and unsuitable transactions, made material misstatements to his employer, violated Exchange Rule 408(a) by exercising discretion without written authorization, violated Exchange Rule 351(b) by failing to promptly report settlements to his firm and violated Exchange Rule 352(c) by agreeing to share and sharing in losses – Consent to censure and three year bar.

Appearances:

For the Division of Enforcement
Steven F. Korostoff, Esq.
Michael P. Wright

For the Respondent
Eric G. Wallis, Esq.

* * *

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 Gregory Fiske Wilbur, a former registered representative with Kidder Peabody & Co., Incorporated (the "Firm"). Without admitting or denying guilt Mr. Wilbur consented to a finding by the Hearing Panel that he:

- I. Engaged in conduct inconsistent with just and equitable principles of trade by:
 - A. Effecting transactions in the accounts of three customers of his member organization employer that were excessive in size and/or frequency in view of the customers' investment objectives, securities experience, and financial resources in the customers' accounts.
 - B. Effecting transactions in the accounts of three customers of his member organization employer that were unsuitable in view of the customers' investment objectives, securities experience, and financial resources in the customers' accounts.

- C. Making material misstatements to his member organization employer concerning whether he exercised discretion in customer accounts.
- II. Violated Exchange Rule 408(a) by exercising discretionary power in the accounts of nine customers of his member organization employer without first obtaining the written authorization of the customers.
- III. Violated Exchange Rule 351(b) by failing to promptly report to his member organization employer settlements he made with four customers.
- IV. Violated Exchange Rule 352(c) by agreeing to share, and sharing, in losses in the accounts of four customers.

For the sole purpose of settling this disciplinary proceeding and for no other purpose or proceeding, the Division of Enforcement and Mr. Wilbur stipulate to certain facts and Mr. Wilbur stipulates to those facts without admitting or denying any allegations, facts, conclusions or findings contained in the Stipulation of Facts and Consent to Penalty, the substance of which follows:

Background

1. Wilbur was born in October 1934. He entered the securities industry in July 1961 and was approved as a registered representative ("RR") by the Exchange in October 1961. Wilbur was employed by his first firm until that firm was acquired by another firm in February 1970, and was then employed there until its acquisition by the Firm in June 1974. Wilbur remained with the Firm until July 1994, when his employment terminated. Wilbur is not currently employed in the securities industry in a registered capacity. At all times relevant herein, Wilbur was employed in the Firm's Palo Alto, California branch office (the "Palo Alto Branch").
2. On March 17, 1993, the Exchange received a Form RE-3 ("Submission of Required Information Pertaining to ... Registered and Non-Registered Employees ...") from the Firm reporting that it had recently learned that, in November 1990, Wilbur had settled a customer complaint against him without reporting the settlement to the Firm.
3. By letter dated June 22, 1993, which Wilbur received shortly thereafter, Enforcement notified Wilbur that it was investigating certain matters that had occurred at the Firm.

4. On August 16, 1994, the Exchange received a Form U-5 (Uniform Termination Notice for Securities Industry Registration) from the Firm reporting that Wilbur's employment with the Firm had terminated on July 22, 1994.
5. In June 1993, the State of Maryland suspended Wilbur's registration and fined him \$2,000 for his failure to report certain settlements with customers. Upon payment of the fine, Wilbur's registration was reinstated.
6. In February 1996, the State of California denied Wilbur's application for a license to be an investment adviser on the grounds that, among other things, Wilbur had: exercised discretion in customer accounts without the prior written authorization of the customers, recommended the purchase and sale of securities to certain customers without reasonable grounds to believe that the recommendations were not unsuitable for such customers, failed to disclose certain customer complaints to the Firm, and privately settled those complaints.

The O Account

7. LO opened a cash account with Wilbur in October 1986 (the "O Account"), when she was 80 years old. Prior to opening the account, O had no securities experience. O's annual income at the time she opened the O Account was approximately \$25,000, and her net worth was approximately \$250,000.
8. O's primary investment objectives were to preserve her savings and to generate a modest return without risk. O opened an account with Wilbur because his family was very prominent in the Stanford University ("Stanford") community, and because her close friend JK had trusted him to handle her account.
9. At the time she opened the O Account, O told Wilbur that she was a widow, on a fixed income, who lived alone in a small apartment. O also told Wilbur that she had no business experience or understanding of the stock market, and that she therefore was relying on him to make all the investment decisions in the account. Wilbur assured O that he would take good care of her money and meet her investment goals.

10. O deposited approximately \$90,000 in the O Account at or about the time the account was opened, and later made additional deposits totaling approximately \$95,000 in the account. O signed a margin loan agreement in April 1987.
11. During the period October 1986 through March 1994, there was a substantial amount of short term trading in various growth stocks, on margin, in the O Account. Many of the securities purchased in the account were over-the-counter ("OTC") stocks that were not ranked by Standard & Poor's Corporation ("S&P"). These stocks included A Oil and Gas, B Corp, C Oil & Gas, Micro D and E.
12. A number of the securities referred to in paragraph 11 above were bought and sold within relatively short periods of time. In addition, at various times, Wilbur established short positions in F, Advanced G, Applied H, and I in the O Account.
13. In November 1987, at a time when the net equity in the O Account was approximately \$173,723, there was a concentrated position of approximately 68,500 shares of E (purchased on margin) with a market value of approximately \$214,062, or approximately 123% of the account's net equity. This position comprised approximately 52% of the total market value of the securities held in the account at that time.
14. In October 1990, at a time when the net equity in the O Account was \$125,244, there was a concentrated position of 52,000 shares of J Information Systems (purchased on margin) with a market value of approximately \$312,000, or approximately 249% of the account's net equity. This position represented approximately 90% of the total market value of the securities held in the account at that time.
15. During the period October 1986 through March 1994, Wilbur effected purchases of securities totalling approximately \$2,398,362 in the O Account. The average net equity in the account during this period was approximately \$169,044, and there were realized losses of approximately \$119,408 in the account.
16. During the period October 1986 through March 1994, the O Account had an annualized turnover rate of approximately 2 and a cost/equity maintenance factor ("CEMF") (annualized) of approximately 14%. (The CEMF is the ratio of commissions, fees and margin interest to equity. The CEMF represents the rate of return an account would need to earn in

order to break-even.) During the period November 1986 through December 1987, however, the O Account had an annualized turnover rate of approximately 7.4 and an annualized CEMF of approximately 21.7%. Stated another way, the account would have had to earn a rate of return of 21.7% on a yearly basis to break-even. During the period October 1986 through March 1994, the margin debit balance in the O Account was, at times, as high as \$250,000 and the margin interest in the account totalled approximately \$97,000. (The turnover rate is calculated by dividing the total purchases in an account by the average net equity in the account. To annualize a turnover rate, the number twelve (the number of months in a year) is divided by the number of months in the relevant time period, and the resulting number is then multiplied by the actual turnover rate.)

17. Wilbur initiated each of the transactions that took place in the O Account during the period October 1986 through March 1994. Approximately 80% of these transactions were entered by Wilbur on a discretionary basis. While Wilbur had O's oral authorization to enter transactions on a discretionary basis in the O Account, he did not have her written authorization to do so.
18. During the period October 1986 through March 1994, the trading in the O Account was excessive in size and/or frequency in view of the customer's investment objectives, securities experience, and financial resources in the customer's account.
19. During the period October 1986 through March 1994, the trading in the O Account was unsuitable in view of the customer's investment objectives, securities experience and financial resources in the customer's account.
20. In late 1993, K, O's friend, told O that she had become concerned about Wilbur's handling of her (K's) account. Consequently, O and K met with an attorney (the "Attorney") to obtain help in determining what had transpired in their accounts. After consulting the Attorney, O complained to the Firm in March 1994, and the Firm subsequently settled with O for approximately \$230,000.

The K Account

21. K opened an account with Wilbur in or about October 1982 (the "K Account"). K, who was born in 1934, worked for Stanford University Hospital at all times relevant herein.

22. At the time she opened the K Account, K had an annual income of \$40,000, a net worth of \$500,000, and an investment objective of income with safety.
23. K told Wilbur, at the time she opened the K Account, that her investment goals were to build a retirement account that would produce a steady income without jeopardizing her principal. K also told Wilbur that she had no real investment experience or understanding of the securities markets.
24. In August 1983, K received an inheritance from her mother in the form of blue chip securities with a market value of approximately \$233,000. K deposited the inheritance into the K Account. (Prior to this deposit, there was less than \$20,000 in the K Account.)
25. K had her husband divorced in 1986. After the divorce, K told Wilbur that she had received (and continued to live in) the house that she and her husband had owned, and that she was receiving a portion of her husband's pension, on a monthly basis, as part of the divorce settlement.
26. During the period January 1986 through the end of 1993, Wilbur purchased a total of approximately \$6,753,100 worth of securities in the K Account. During this period, the average net equity in the account was approximately \$161,876, and there were losses of approximately \$244,500 in the account.
27. During the period January 1986 through the end of 1993, the annual turnover rates and CEMFs for the K Account were as follows:

<u>Year</u>	<u>Turnover</u>	<u>Cost/Equity</u>
1986	0.8	0.5%
1987	4.7	14.2%
1988	7.0	12.1%
1989	1.4	14.5%
1990	2.1	18.7%
1991	13.8	30.3%
1992	7.2	22.7%
1993	1.9	9.4%

The annualized turnover rate for the K Account for this entire period was approximately 5, and the account's annualized CEMF for the period was approximately 15%.

28. The majority of the securities purchased in the K Account during the period referred to in paragraphs 26 and 27 above were OTC stocks that were not ranked by S&P, were held in the account for short periods, and provided little dividend income to K. Wilbur also heavily leveraged the K Account, with the margin debit balance in the account often ranging between \$150,000 and \$250,000. The account's margin interest during this period totalled approximately \$82,735.
29. Wilbur also caused the K Account to be heavily concentrated, at various times, in large positions in J, E, and other OTC securities, as follows:

<u>Security Description</u>	<u>Mo/Yr</u>	<u>Shares Of Security Owned</u>	<u>Market Value Of Shares Of Security</u>	<u>Total Net Equity In Account</u>	<u>% Of Market Value Of Security To Total Net Equity In Account</u>	<u>% Of Market Value of Security To Total Value Of Securities In Account</u>
J	01/91	27,730	\$166,380	\$ 89,267	186.38%	81%
Q	03/91	12,300	\$132,225	\$134,809	98.08%	41%
E	11/87	37,600	\$117,500	\$214,228	54.84%	26%
R	11/91	10,000	\$145,000	\$194,070	74.71%	34%
D	09/87	10,000	\$ 96,250	\$386,261	24.91%	28%

(The numbers in this chart are approximations.)

30. K considered Wilbur to be her friend, as well as her stock broker. During the period of time in which Wilbur handled the K Account, K and Wilbur met regularly for lunch, where they would discuss, among other things, the general status of her account.
31. K often questioned Wilbur about the status of the K Account, and Wilbur regularly assured her that she did not need to concern herself with the account, since he would handle matters.
32. Wilbur initiated each of the transactions that took place in the K Account during the period January 1986 through the end of 1993. A majority of these transactions were entered by Wilbur on a discretionary basis. While Wilbur had K's oral authorization to enter transactions on a discretionary basis in the K Account, he did not have her written authorization to do so.

33. During the period January 1986 through the end of 1993, the trading in the K Account was excessive in size and/or frequency in view of the customer's investment objectives, securities experience, and financial resources in the customer's account.
34. During the period January 1986 through the end of 1993, the trading in the K Account was unsuitable in view of the customer's investment objectives, securities experience and financial resources in the customer's account.
35. In late 1993, K began to have reservations about Wilbur's handling of her account. As described above, K and O consulted the Attorney. K complained to the Firm in March 1994, and the Firm subsequently settled with K for approximately \$250,000.

The E Account

36. AE opened a cash account with Wilbur in March 1985 (the "E Account"). She was 30 years of age at the time, and was a student at Stanford. E suffered from anorexia.
37. Prior to opening the E Account, E had no investment experience.
38. At the time E opened her account, she made a deposit of approximately \$25,000. Thereafter, E deposited additional money in the account on various occasions.
39. At the time the E Account was opened, Wilbur told E that he would manage her account with her best interests in mind. E thereafter relied on Wilbur to select stocks which were consistent with her investment objectives of safety and growth. During the period the account was open (March 1985 through April 1989), E received periodic telephone calls from Wilbur during which he assured her that her account was doing "just fine".
40. During the period March 1985 through April 1989, there was a significant amount of short term trading in various growth and speculative stocks in the E Account. Most of these stocks did not pay dividends and were not ranked by S&P. The stocks purchased in the E Account during this period included C, D, E and K Inc.
41. At certain times during the period referred to in paragraphs 39 and 40 above, Wilbur also established short positions in F and G in the E Account. The E Account began trading on margin in or about September 1986. Thereafter, the margin debit balance in the account often ranged between \$40,000 and \$75,000, and margin interest in the account totalled approximately \$11,000.

42. In December 1987, at a time when the net equity in the E Account was approximately \$38,156, there was a concentrated position in the account of approximately 10,000 shares of E with a market value of approximately \$28,750 (purchased on margin), or approximately 75.34% of the account's net equity. This position represented 56% of the total market value of the securities in the E Account at the time and exposed the account to significant risk.
43. During the period March 1985 through April 1989, Wilbur purchased a total of \$927,772 worth of securities in the E Account. The average net equity in the E Account during this period was approximately \$45,870, and the trading in the account during this period generated commissions of approximately \$18,000 and resulted in losses of approximately \$32,000.
44. The annualized turnover rate and CEMFs in the E Account during this period were as follows:

<u>Year</u>	<u>Turnover</u>	<u>Cost/Equity</u>
1985	4.3	Unavailable
1986	2.0	10.0%
1987	5.4	22.6%
1988	7.8	16.7%
1989	2.8	26.0%

The annualized turnover rate for the E Account for the entire period March 1985 through April 1989 was approximately 5, and the CEMF for this period was approximately 15%. (With respect to 1985 and 1989, the trading in question occurred during only parts of the year. The turnover rate for 1985, and the turnover rate and CEMF for 1989, are annualized figures.)

45. During the period March 1985 through April 1989, approximately 45% of the positions in the E Account were held for less than 30 days.
46. Wilbur initiated each of the transactions in the E Account during the period March 1985 through April 1989. Approximately 80% of these transactions were entered by Wilbur on a discretionary basis. While Wilbur had E's oral authorization to enter transactions on a discretionary basis in the E Account, he did not have her written authorization to do so.
47. During the period March 1985 through April 1989, the trading in the E Account was excessive in size and/or frequency in view of the customer's investment objectives, securities experience, and financial resources in the customer's account.

48. During the period March 1985 through April 1989, the trading in the E Account was unsuitable in view of the customer's investment objectives, securities experience and financial resources in the customer's account.
49. In or about September 1990, E was hospitalized. At that time, E's mother learned that there were losses in the account which totalled over \$30,000.
50. In or about October 1990, Wilbur agreed to pay (and subsequently paid) E approximately \$120,000 in settlement of the E matter. Wilbur, however, did not report this settlement to the Firm.
51. Exchange Rule 352(c) ("Rule 352(c)") provides that "No member, member organization, ... registered representative or officer shall, directly or indirectly, ... (ii) share or agree to share in any losses, in any customer's account or of any transaction effected therein." By entering into the aforementioned settlement agreement with E, Wilbur violated Rule 352(c).
52. In addition, by failing to promptly report the settlement with E to the Firm, Wilbur violated Exchange Rule 351(b) ("Rule 351(b)"), which requires "[e]ach member associated with a member organization and each ... registered or non-registered employee of a member or member organization" to promptly report certain specified matters to the member organization.

The M Account

53. ESM, who was 40 years old at the time, opened an account with Wilbur in or about August 1975 (the "M Account").
54. During the period January 1983 through September 1985, the trading in the M Account consisted of active trading in various growth stocks, including L, M, N, P, C, and other securities, much of which was done on margin. In addition, interests in various limited partnerships, including among others, ABC Income and DEF Oil & Gas, were purchased in the M Account during this period.
55. During the period referred to in paragraph 54 above, there were approximately 150 transactions (including purchases and sales) in the M Account. Approximately 20% of these transactions were entered by Wilbur on a discretionary basis, without the written authorization of M.
56. In or about January 1986, M's brother, J, Esq., an attorney, met with Wilbur to discuss the investments in the M Account.

57. J told Wilbur, in substance, that he was concerned about the quality of the securities that Wilbur had purchased in the M Account. J proposed that Wilbur settle the matter by paying M approximately \$981,000, which represented what J said that the account would be worth if Wilbur had invested M's money prudently. J further proposed that, as part of the resolution of the matter, M should transfer to Wilbur the various limited partnership interests that he had purchased in the M Account over the years, which totalled approximately \$500,000.
58. Wilbur agreed to settle the matter on these terms, and subsequently obtained a second mortgage on certain properties that he owned and also borrowed money from his family in order to pay the agreed-upon settlement amount to M.
59. Wilbur, however, did not report the settlement to the Firm.
60. By entering into the settlement of the M matter and failing to report the settlement to the Firm, Wilbur violated Rules 352(c) and 351(b).

The H Accounts

61. C and MH (the "Hs") are sisters and, at all times relevant herein, resided in Woodside, California. The Hs opened individual cash accounts with Wilbur in or about July 1984 (the "H Accounts").
62. During the period July 1984 through December 1989, the activity in the H Accounts consisted of short term trading in various growth and speculative stocks, on margin. These stocks included J, E, L, N, P, and other OTC securities. In addition, the Hs purchased various limited partnerships.
63. During the period referred to in paragraph 62 above, there were approximately 35 and 60 transactions (including purchases and sales) in the accounts of C and MH, respectively. Approximately 40% of the transactions in the H Accounts during this period were entered by Wilbur on a discretionary basis, without the written authorization of the customers.
64. In or about December 1989, the Hs complained to Wilbur's branch office manager ("BOM"), about Wilbur's handling of their accounts.
65. Shortly thereafter, BOM and Wilbur decided that Wilbur should enter into settlements with C and MH for their losses, plus interest, in amounts totalling approximately \$100,000 and \$60,000, respectively, and Wilbur did so.

66. Neither BOM nor Wilbur reported the settlements with the Hs to the Firm at or near the time the settlements occurred. In 1993, however, BOM disclosed the H settlements to the Firm.
67. By entering into the aforementioned settlements with the Hs and failing to report these settlements to the Firm, Wilbur violated Rules 352(c) and 351(b).

**Discretionary Trading in
the Accounts of Other Customers**

68. While employed by the Firm, Wilbur handled the accounts of customers EV ("V"), ("K"), and Dr. Z ("Z")
69. V's account was opened in March 1980, and activity in the account continued until June 1988. A total of at least 100 transactions were entered in V's account during this period, and Wilbur effected each of these transactions on a discretionary basis. While Wilbur has stated that he had V's oral authorization to enter transactions on a discretionary basis in V's account, he did not have her written authorization to do so.
70. K opened his account with the Firm in September 1977 and continued to use Wilbur as his RR until in or about July 1994. On one or more occasions during this period, Wilbur effected transactions on a discretionary basis in K's account. While Wilbur has stated that he had K's oral authorization to enter transactions on a discretionary basis in K's account, he did not have K's written authorization to do so.
71. In addition, on one or more occasions during the period Z's account with the Firm was open (May 1976 to December 1990), Wilbur effected transactions on a discretionary basis in Z's account. While Wilbur had Z's oral authorization to enter transactions on a discretionary basis in Z's account, he did not have Z's written authorization to do so.

Material Misstatements to the Firm

72. As set forth above, during the period relevant herein, Wilbur effected transactions on a discretionary basis in the accounts of various customers, without the customers' prior written authorization.
73. On at least one occasion during the period relevant herein, Wilbur's BOM, asked Wilbur whether he was exercising discretion in any customer accounts, and Wilbur falsely replied that he was not.

74. In addition, on several occasions during the period relevant herein, a member of the Firm's compliance staff asked Wilbur if he was exercising discretion in any customer accounts, and Wilbur falsely replied that he had only exercised time and price discretion, and not any other form of discretion, in customer accounts.

Firm Discipline

75. In April 1993, after the Firm had become aware that Wilbur had failed to report certain customer settlements to it, the Firm disciplined Wilbur by, among other things, censuring him, suspending him without pay for a period of 60 days (effective July 12, 1993), requiring that he re-take and pass the Series 7 Examination (the Qualification Examination for General Securities Registered Representative) before returning to work, and barring him from handling accounts of individuals, except for (a) accounts of customers with independent investment advisers acceptable to the Firm, (b) accounts of or controlled by sophisticated venture-capital investors, as determined by the Firm, and (c) Wilbur family accounts. (Wilbur passed Series 7 examination on September 2, 1993).

DECISION

The Hearing Panel, in accepting the Stipulation of Facts and Consent to Penalty found Mr. Wilbur 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. Wilbur of a censure and a bar for three years 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

Vincent F. Murphy
Hearing Officer