

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

**ARTHUR H. GUTERDING, JR.
(CRD No. 1053453),**

Respondent.

**Disciplinary Proceeding
No. C02050045**

Hearing Officer - AWH

DEFAULT DECISION

October 5, 2005

Formerly registered representative fined \$5,000 and suspended from association with any member in any capacity for one year for exercising discretion over customer accounts without obtaining written acceptance of the accounts as discretionary by his firm, in violation of NASD Conduct Rules 2510 and 2110.

Appearances:

Sylvia M. Scott, Esq., for the Department of Enforcement.

No appearance by or for Arthur H. Guterding, Jr.

DECISION

Background

The Department of Enforcement ("Enforcement") issued a Complaint and Notice of Complaint on June 3, 2005, alleging that Arthur H. Guterding, Jr. ("Guterding" or "Respondent") exercised discretion over 43 customer accounts without receiving prior written acceptance of the accounts as discretionary by his firm, in violation of NASD Conduct Rules 2510 and 2110. Although, on July 29, 2005, Guterding responded by letter to Enforcement, he did not file an Answer to the original Complaint or to the Second Notice of Complaint and Complaint that was issued on July 6, 2005, nor did he

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request a hearing.¹ On August 8, 2005, Enforcement notified Guterding of its plan to file a motion for entry of a default decision by September 6, 2005 because he had not answered the Complaint.² On August 29, 2005, Enforcement filed its Motion for Entry of Default and Default Decision. Guterding did not respond to the motion. Accordingly, pursuant to Procedural Rules 9215(f) and 9269, the motion will be granted, and the allegations in the attached Complaint will be deemed admitted.

Findings of Fact³

The Respondent

Guterding was first registered as a General Securities Representative through an NASD member firm in 1982. From January 22, 2001, to September 19, 2003, Guterding was registered with NASD through member firm A.G. Edwards & Sons, Inc. ("A.G. Edwards"). On September 18, 2003, A.G. Edwards filed a Form U-5, terminating Guterding's registration for "violation of firm policy and industry rules." Guterding is not currently registered through any NASD member firm.

Exercise of Discretion Without Written Acceptance by Firm

In March 2001, A.G. Edwards placed Guterding on special supervision due to, among other things, customer complaints alleging unauthorized trading while associated

¹ The envelope containing Guterding's letter provided a return address in Spokane, Washington ("the Spokane address"). The letter itself stated that Guterding was retired and living in Italy, and provided an e-mail address for correspondence. The letter did not include an Answer to the Complaint, but it asserted that Guterding "would expect that [NASD] can find an expeditious and fair resolution to this issue since there were no commissions generated by exchanging the Rydex Fund."

² The notification was sent to Guterding's addresses of record, to the Spokane address, and to the e-mail address provided in Guterding's letter.

³ The findings of fact are based on the admitted allegations in the Complaint, the Declaration of Sylvia M. Scott in Support of Motion for Entry of Default and Default Decision, and the ten exhibits attached thereto.

with a prior employer. On March 20, 2001, Guterding signed a Letter of Acknowledgement for A.G. Edwards which included a statement admitting that he understood he was prohibited from exercising discretionary power in customer accounts. The prohibition remained in effect during the entire period of his employment with A.G. Edwards.

Nevertheless, unknown to A.G. Edwards, Guterding persuaded 43 customers to sign Limited Trading Authorization forms granting him discretion to trade Rydex Funds. Without submitting the forms to A.G. Edwards or otherwise obtaining his firm's prior written acceptance of the accounts as discretionary, Guterding placed over 150 Rydex Fund trades in his customers' accounts on or about March 14 and 31, 2003, April 9, 2003, and June 4, 9, and 11, 2003.⁴

Service of the Complaint

On June 3, 2005, the Department of Enforcement sent the Notice of Complaint and Complaint to Guterding by certified and first class mail to his residential address as listed in the Central Registration Depository ("CRD") and to another address obtained by NASD staff. The mailings sent to the CRD address were returned by the U.S. Postal Service with a label containing the Spokane address. The mailings were marked "Notify Sender of New Address" and "Return to Sender-Unclaimed." The mailing sent to the second address by certified mail was returned marked "Return to Sender-Insufficient Address" and the one sent by first class mail was not returned.

On July 6, 2005, Enforcement sent a Second Notice of Complaint and Complaint to Guterding at the same two addresses, plus the Spokane address. The mailings sent to

⁴ In his signed statement and response to Rule 8210 requests, Guterding admitted his exercise of discretion in these accounts.

the CRD address were returned marked "Return to Sender-Forward Time Exp" and the mailings sent to the second address were also returned marked "Return to Sender-Insufficient Address." The return receipt for the mailing sent by certified mail to the Spokane address was signed by "Terri Millspaugh," and the mailing sent by first class mail to the same address was not returned.

In his July 29, 2005, letter to Enforcement, Guterding acknowledged receipt of the Second Notice of Complaint. Accordingly, Guterding had constructive, as well as actual, knowledge of the Complaint.

Discussion and Conclusions

Jurisdiction

Article V, Section 4 of the NASD By-Laws provides for a two-year period of retained jurisdiction over a registered person after the effective date of the individual's termination of registration. During this period of retained jurisdiction, NASD may file a complaint based upon conduct that occurred while the individual was registered with a member firm. NASD has jurisdiction to bring this proceeding because the alleged misconduct occurred in the period between March 2003 and June 2003, while Guterding was registered with A.G. Edwards, and the service of the Complaint occurred within the two-year period following the September 19, 2003, termination of his registration.

Respondent's Default

Enforcement properly served the Complaint on Guterding by sending it to his CRD address and the two other addresses via first class and certified mail. Pursuant to NASD Procedural Rule 9134, those mailings establish that he had valid constructive notice of the Complaint. By his communication to Enforcement, he also acknowledged

actual notice of it. Because he failed to file an Answer to the Complaint, Procedural Rules 9215(f) and 9269 authorize the entry of a default decision against him.

Accordingly, all the allegations against Guterding are deemed admitted.

Discretionary Transactions Without Written Authorization

The Complaint alleges that Guterding violated Conduct Rules 2510 and 2110 by exercising discretion in customer accounts without first obtaining his firm's written acceptance of the accounts as discretionary. NASD Conduct Rule 2510(b) provides that no registered representative shall exercise any discretionary power in a customer account unless such customer has given prior written authorization to the stated individual *and* the member firm has given written acceptance of the account as a discretionary account.

Here Guterding effected over 150 discretionary transactions in 43 customer accounts on six days during the spring of 2003. His signed Letter of Acknowledgement confirms that he knew his employer prohibited him from exercising discretion. Although he had the requisite customer consent to trade Rydex Funds on a discretionary basis, he deliberately failed to present the consent forms to his firm for acceptance, thereby concealing his exercise of discretionary trading. Accordingly, Guterding violated Conduct Rule 2510, as well as Conduct Rule 2110's ethical obligation to observe "high standards of commercial honor and just and equitable principles of trade."⁵

Sanctions

Enforcement seeks a fine of \$5,000 and at least a one-year suspension, asserting that Guterding's discretionary trading in defiance of his firm is so egregious that it

⁵ See Stephen J. Gluckman, Exchange Act Release No. 41,628, 1999 SEC LEXIS 1395, at *22 (July 20, 1999) (noting the "long-standing and judicially-recognized policy that a violation of another Commission or NASD rule or regulation . . . constitutes a violation of Conduct Rule 2110") (citations omitted).

warrants a suspension in excess of the NASD Sanction Guidelines. For the unauthorized exercise of discretion in customer accounts, the Sanction Guidelines recommend a fine in the range of \$2,500 to \$10,000, and, in egregious cases, a suspension in any or all capacities for 10 to 30 business days.⁶

Although all 43 customers had granted Guterding written discretionary authority, his firm expressly prohibited him from exercising such authority. Guterding had signed an acknowledgement admitting that he was aware of the prohibition, yet he disregarded his firm's directive and thereby exposed A.G. Edwards to undue risk. This conduct demonstrates a knowing and willful disregard of Conduct Rule 2510(b). Moreover, his exercise of discretion with respect to over 150 trades is quantitatively egregious. Because Guterding has a history of customer complaints that led to his placement under special supervision, his exercise of discretion under these circumstances is a very serious violation that warrants a sanction that exceeds the recommendation in the Guidelines.⁷ Accordingly, the Hearing Officer will impose a fine of \$5,000 and suspend Guterding from associating with any NASD member firm in any capacity for one year for violating Conduct Rules 2510(b) and 2110.

Conclusion

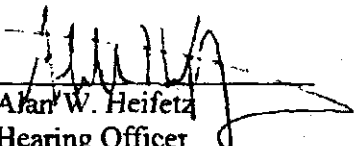
Arthur H. Guterding, Jr. is fined \$5,000 and suspended from associating with any member in any capacity for one year for discretionary trading in customer accounts without his firm's acceptance of the accounts as discretionary, in violation of NASD Conduct Rules 2510(b) and 2110. The suspension shall become effective on a date set by

⁶ NASD SANCTION GUIDELINES, p. 90 (2005).

⁷ Guterding's CRD record reflects at least two customer complaints that predate his employment with A.G. Edwards.

NASD, but not earlier than 30 days after the date this decision becomes the final disciplinary action of NASD. except that if this decision becomes the final disciplinary action of NASD, the suspension shall become effective with the opening of business on November 7, 2005, and end at the close of business on November 6, 2006. The fine shall become due and owing upon Guterding's re-entering the securities business.

SO ORDERED.


Alan W. Heifetz
Hearing Officer

Copies to:

Via First Class Mail & Overnight Courier
Arthur H. Guterding, Jr.

Via First Class & Electronic Mail
Sylvia M. Scott, Esq.
Rory C. Flynn, Esq.

NASD OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

v.

ARTHUR H. GUTERDING, JR.
(CRD No. 1053453),

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Disciplinary Proceeding
No. C02050045

Hearing Officer -

COMPLAINT

Upon information and belief, Complainant alleges as follows:

1. Arthur H. Guterding, Jr. ("Respondent") was associated with A.G. Edwards & Sons, Inc. ("AGE" or "firm") from on or January 22, 2001 through September 18, 2003 as a General Securities Representative. NASD has jurisdiction to file this Complaint pursuant to Article V, Section 4 of its By-Laws.

CAUSE OF COMPLAINT

**Violations of Conduct Rules 2510(b) and 2110
(Discretion Without Written Authorization
and Unethical Conduct)**

2. Paragraph number 1 is realleged and incorporated herein by reference.

3. In March 2001, shortly after joining AGE, Respondent was placed on special supervision due to, among other things, customer complaints at his prior firm alleging unauthorized trading. In that regard, Respondent signed a Letter of Acknowledgement on or about March 20, 2001 that was submitted to AGE. The Letter of Acknowledgement stated that Respondent understood that he was prohibited from, among other things, exercising

discretionary power in customer accounts. Respondent was prohibited from exercising discretionary power during the entire time he was associated with AGE.

4. In contravention of the prohibition from exercising discretion in customer accounts, Respondent exercised discretion with respect to approximately 43 AGE customers in connection with a trading strategy involving Rydex Funds. The discretionary trading occurred on or about March 14 and 31, 2003, April 9, 2003, and June 4, 9 and 11, 2003 and involved over 150 Rydex Fund transactions. Additionally, Respondent had all 43 customers sign Limited Trading Authorization forms giving him discretion to trade Rydex Funds despite the fact that he knew, or should have known, that he was prohibited from obtaining discretionary power. Respondent did not submit the Limited Trading Authorization forms to AGE and AGE did not approve of the discretionary power that Respondent exercised in these customer accounts, which are detailed in Schedule A, attached hereto and incorporated herein.

5. By reason of the foregoing, Respondent violated Conduct Rules 2510(b) and 2110.

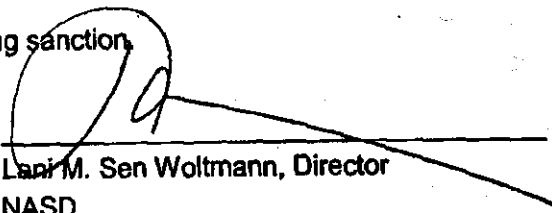
PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. An order imposing sanctions upon the Respondent in accordance with NASD Rule 8310;
- C. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and

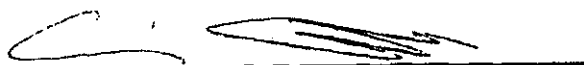
D. An order imposing any other fitting sanction.

Date: June 3, 2005



Lani M. Sen Woltmann, Director
NASD
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Los Angeles, CA 90071
(213) 229-2300; Fax: (213) 617-3299

Date: June 3, 2005



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(202) 974-2874

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Department of Enforcement
NASD
525 Market Street, Suite 300
San Francisco, CA 94105
(415) 882.1200

SCHEDULE A

	<u>Name</u>	<u>Account #</u>	<u>Date Authorization Signed</u>
1	JOG		01/31/2003
2	TS		02/01/2003
3	WIC		02/01/2003
4	RH		02/02/2003
5	JF		02/03/2003
6	MB		02/03/2003
7	WIS		02/03/2003
8	BW		02/04/2003
9	GK		02/04/2003
10	RN		02/04/2003
11	WES		02/04/2003
12	JH		02/05/2003
13	MA		02/05/2003
14	CN		02/06/2003
15	SS		02/06/2003
16	TA		02/06/2003
17	AM		02/09/2003
18	HEH		02/10/2003
19	CM		02/11/2003
20	HAH		02/11/2003
21	WILS		02/12/2003
22	HT		02/15/2003
23	ED		03/05/2003
24	JP		03/06/2003
25	SP		03/06/2003
26	DG		03/13/2003
27	RW		03/25/2003
28	DB		03/30/2003
29	RB		03/31/2003
30	WILC		04/13/2003
31	AG		04/20/2003
32	DS		04/25/2003
33	RS		04/27/2003
34	EC		04/28/2003
35	CC		04/30/2003
36	BC		05/08/2003
37	BB		05/15/2003
38	RS		05/26/2003
39	EP		05/29/2003
40	JAG		06/30/2003
41	CS		09/15/2003
42	FA		Undated
43	SM		Undated
44	SO		Undated

RS signed the form twice (5/26/03 and 4/27/03).