

**NASD
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Complainant,

v.

JAYME A. KURTYKA,
Registered Representative
(CRD No. 1171623)

Respondent.

**Disciplinary Proceeding
No. CAF040067**

Hearing Officer David M. FitzGerald

**ORDER ACCEPTING OFFER OF
SETTLEMENT**

Date: February 16, 2005

INTRODUCTION

Disciplinary Proceeding No. CAF040067 was filed on August 24, 2004, by the Department of Enforcement of NASD ("Complainant"). Respondent Jayme A. Kurtyka ("Kurtyka") submitted an Offer of Settlement ("Offer") to Complainant on January 7, 2005. Pursuant to Code of Procedure Rule 9270(e), the Complainant and the National Adjudicatory Council ("NAC") Review Subcommittee or the Office of Disciplinary Affairs ("ODA") have accepted the uncontested Offer. Accordingly, this Order **now** is issued pursuant to Code of Procedure Rule 9270(e)(3). The findings, conclusions and **sanctions** set forth in this Order are those stated in the Offer as accepted by the Complainant and **approved** by the NAC.

Under the terms of the Offer, Respondent **has consented**, without admitting or denying the allegations of the Complaint, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of NASD, or to which NASD is a party, to the entry of

findings and violations consistent with the allegations of the Complaint, and to the imposition of the sanctions set forth below, and fully understands that this Order will become part of Respondent's permanent disciplinary record and may be considered in any future actions brought by NASD.

BACKGROUND

Kurtyka entered the securities industry in June 1984 as a General Securities Representative of a former member of NASD. Kurtyka became registered with Donaldson, Lufkin & Jenrette Securities Corp., n/k/a Pershing LLC ("Member") on November 2, 1993 in the same capacity. Kurtyka was registered with the Member in such capacity until July 10, 2002. Kurtyka is currently registered with another member of NASD in the same capacity, and has no disciplinary history.

FINDINGS AND CONCLUSIONS

It has been determined that the Offer be accepted and that findings be made as follows:

1. In or about December 1998, Kurtyka solicited MK, who was 57 years old at the time, to open a securities account ("Securities Account") with the Member. MK's account-opening forms, which were completed by Kurtyka, showed that her annual income as a real estate sales person was \$30,000 and that her liquid net worth was \$625,000. MK told Kurtyka that her liquid net worth was the result of a recent, large inheritance from her aunt. MK's investment objectives were listed on the account-opening forms as income, long-term growth and occasional short-term trading with moderate risk exposure. MK deposited approximately \$663,000 in cash and securities into her Securities Account with the Member. This amount was almost all of MK's liquid net worth. Kurtyka was responsible for servicing the Securities Account for MK.

2. In or about January 1999, Kurtyka recommended that MK invest in ISG Investment Partners I Limited Partnership ("ISG I" or "Partnership"). ISG I was an investment vehicle designed to pool investments of public investors, who would become limited partners of ISG I. The general partner of ISG I was ISG Management, LLC ("Management"). Kurtyka acted as the portfolio manager of ISG I and made all investment decisions for ISG I throughout the period of its operation from in or about March 1999 through in or about June 2002. ISG I was required to pay an annual management fee of 1% of net assets, and a performance-based fee of 20% of each limited partner's share of net profits to Management. Kurtyka received 50% of the annual management fee. Kurtyka received 68% of the performance-based fee assessed for the Partnership's performance in 1999, the only profitable year for ISG I.

3. In or about March 1999, MK transferred \$400,000 from her Securities Account to ISG I. In total, sixteen limited partners invested a total of \$6,536,940.80 in ISG I.

4. Kurtyka began trading ISG I in or about March 1999. The trading for ISG I from in or about March 1999 to in or about June 2002, included: purchasing and selling equity securities outright and on margin; selling equity securities short on margin; purchasing and selling puts and calls on margin; and purchasing \$500,000 of a private placement, which was not publicly traded. While Kurtyka purchased and sold securities in many market sectors, he focused ISG I's investments in the technology, telecommunications and pharmaceutical sectors. In addition, at times up to 20% of ISG I's assets were invested by Kurtyka in a single equity security position. Kurtyka received the following amounts as management fees from ISG I: \$22,820 for 1999; \$36,605.50 for 2000 and \$3,171 for 2001. ISG I only made a profit in 1999, so the Partnership was only charged a performance-based fee in 1999, and Kurtyka received \$448,290 of the total performance-based fee of \$655,721.

5. In MK's Securities Account, **from** in or about March 1999 to in or about June 2001, Kurtyka recommended transactions **resulting** in a heavy concentration in the technology, telecommunications and pharmaceutical sectors. For example, by the end of October 1999, 20.40% of MK's Securities Account and 19.11% of the ISG I account were invested in 24/7 Media Inc., meaning that at that time almost **40%** of MK's funds were invested in a single company. In addition, from in or about **March** 1999, to in or about July 2001, Kurtyka recommended and placed most of the **purchases** of securities for MK's Securities Account on margin. The amount margined was as high **as \$260,536.66**, when the equity of the account at that time was only \$209,018.94, and at the **end** of February 2001, the debit balance of MK's Securities Account was \$90,093, with a **total asset** value of only \$19,166. The total margin interest charged on MK's Securities Account **was \$29,746.72**.

6. From in or about January 1999, **through** in or about August 2001, Kurtyka recommended and effected **purchases or sales of securities** transactions for MK's Securities Account, including purchasing securities on **margin**, and in or about March 1999, Kurtyka recommended and effected the **purchase of \$400,000** worth of ISG I. Such recommendations and purchases and sales were made by Kurtyka **without** having a reasonable basis for believing that the recommendations and resultant transactions **were** suitable for MK, based upon MK's age, total net worth, liquid net worth, investment **experience**, financial situation and investment objectives.

7. From in or about January 1999, **until** in or about August 2001, Kurtyka exercised discretion in the Securities Account of MK **without** obtaining: written authorization from MK to handle the Securities Account as a discretionary account; and written acceptance of the Securities Account as a discretionary account by the Member.

8. Kurtyka prepared, or caused to be prepared, and mailed, or caused to be mailed, to the 16 limited partners of ISG I a form letter dated January 2000 (“January 2000 Form Letter”). Since the January 2000 Form Letter was mailed to more than one customer, the material is considered “sales literature” as that term is defined under NASD Conduct Rule 2210.

9. The January 2000 Form Letter, which Kurtyka prepared, or caused to be prepared, and mailed, or caused to be mailed, is not fair and balanced and omits material facts or qualification, which caused the form letter to be misleading or contained exaggerated, unwarranted or misleading statements or claims, in that the January 2000 Form Letter:

- A. Claimed that the fund gained just over 66.2% on a “time-weighted” basis from March through December 1999, and on a “dollar-for-dollar” basis, \$1.00 invested in March became \$1.62 by year-end. The letter disclosed that the performance numbers are net of everything but the performance-based fee. Since the performance-based fee was 20% of each limited partner’s allocated share of the profits, including unrealized gains, the amount of the fees should have been disclosed, or the performance numbers should have considered these fees.
- B. Contained the statement that “Hot issue IPOs have not been a material part of the Partnership’s performance, to date, but considering our access to [the Member’s] flow, those issues are at our disposal,” implied that the fund can profit from “hot IPOs” at will and belies the risk and volatility inherent in purchasing IPOs.

10. The January 2000 Form Letter also compared ISG I’s performance against that of the S&P 500 Index, the Dow Jones Industrial Average, and the Russell 2000 Index, but failed to contain a fair and balanced presentation in that it failed to disclose the material differences between the general nature of the fund’s portfolio and the indexes. This violates the Rule’s

requirement that comparisons must provide a **fair** and balanced presentation including any material differences between the subjects of **comparison**.

Based on the foregoing, Respondent Jayme A. **Kurtyka** violated NASD Rules 2110, 2210, 2310, IM-2310-2 and 2510 as alleged in the Complaint.

Based on these considerations, the sanctions **hereby** imposed by the acceptance of the Offer are in the public interest, are sufficiently remedial to **deter** Respondent Kurtyka from any future misconduct, and represent a proper discharge **by NASD**, of its regulatory responsibility under the Securities Exchange Act of 1934.

SANCTIONS

It is ordered that Respondent Jayme A. Kurtyka **be**:

1. Suspended from association with any member of NASD in any capacity for 30 days;
2. Fined \$17,500; and,
3. Required to requalify by **examination** as a Series 7 General Securities Representative within **90 days** after the date of this Order, or he will cease to act in such capacity **until** he has requalified as a Series 7 General Securities Representative.

The sanctions imposed herein shall be effective **on** a date set by NASD staff.

SO ORDERED.

NASD

By: Carlotta A. Romano *ERW*
Carlotta A. Romano
Senior Vice President and Regional Director
on **behalf** of the Director of ODA, pursuant to
delegated authority