BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of	DECISION
Department of Enforcement,	Complaint No. C8A990017
Complainant,	Dated: September 1, 2000
vs.	
David L. Foran, Royal Oak, Michigan,	
Respondent.	

Where general securities and financial and operations principal misdirected mutual fund trail commissions away from member firm's "house account" to his own commission account, held that respondent converted firm funds and acted unethically and in contravention of Conduct Rule 2110; Foran suspended for two years, required to requalify, and fined $35,000.

This matter was appealed by David L. Foran ("Foran"). Under review is a December 3, 1999 decision of an NASD Regulation, Inc. ("NASD Regulation") Hearing Panel. We find that Foran violated Conduct Rule 2110 by converting commission funds from the house account of Bentley-Lawrence Securities, Inc. ("Bentley"), the member firm with which Foran was associated, to his own commission account. We suspend Foran for two years, require him to requalify, and fine him $35,000. We also affirm the Hearing Panel's imposition of $2,728.75 in costs.

Background

The Department of Enforcement ("Enforcement") filed the complaint in this matter after receiving an amended Form U-5 Uniform Notice of Termination ("Form U-5") on behalf of Foran from Bentley, in which Bentley disclosed that at the time of Foran's termination, Foran was under review for misdirecting house mutual fund trail commissions into his own commission account.

From December 1987 through November 1995, Foran was associated with Bentley and was registered as a general securities representative and general securities, financial and operations, and municipal securities principal. In 1995 (the period relevant to the complaint), Foran served as Bentley's executive vice president and financial and operations principal. In 1995, he also held a seven percent ownership interest in the firm and was a director of the firm. Foran is not currently registered, although he is associated in an unregistered capacity with a member firm.

This case involves Foran's directing of mutual fund trail commissions[1] from Bentley's house account to his own commission account. Throughout the course of this proceeding, Foran admitted that, between January and November 1995, he redirected more than $5,000 in mutual fund trail commissions from Bentley's house commission account to his own commission account.[2] Foran argued that, given the circumstances of his relationship with Bentley, this case involved nothing more than a disagreement between Bentley officers and denied that his conduct violated Conduct Rule 2110. Our review therefore is limited to a consideration of whether Foran's transfer of trail commissions from the house account to his own account constituted a violation of Conduct Rule 2110 and whether, as the Hearing Panel found, Foran's conduct constituted conversion.[3]

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[1] Trail commissions are fees paid to broker-dealers by mutual fund companies to compensate the broker-dealers for providing personal service and maintenance to shareholder accounts. In re Louis Feldman, 52 S.E.C. 19 (1994). Trail commissions paid to a firm are considered firm assets. Feldman, supra. Broker-dealer firms generally apportion trail commissions to the registered representatives at the firm who have serviced the mutual fund accounts at issue.

[2] The complaint also alleged that Foran posted fictitious commissions and commissions belonging to other Bentley registered representatives to his account. The Hearing Panel found that the evidence was inconclusive as to whether any of the commissions that Foran admitted having posted to his account belonged to other firm representatives or whether any were fictitious and that, in any event, given the finding that Foran converted firm funds, it did not matter if some of those funds might have been payable to firm representatives. We affirm the Hearing Panel's findings in this regard.

[3] The Hearing Panel found that Foran converted in excess of $5,000 from Bentley. The Hearing Panel did not make a finding as to the precise amount of funds that Foran converted. Bentley calculated that Foran had misappropriated $5,747.46, and Foran repaid this amount to the firm. Throughout the course of this proceeding, Enforcement alleged that Foran had misappropriated slightly different amounts. (The final amount that Enforcement alleged was $5,599.82.) All of the calculations indicated, and Foran did not dispute, that Foran redirected to his own commission account in excess of $5,000 in commissions. The Hearing Panel concluded that Foran had converted "more than $5,000" and determined that it was not necessary to make a more precise finding. We agree. Based on the record before us, we find that Foran converted in excess of $5,000 and, based on Foran's own admissions and the fact that he repaid the misappropriated funds, we do not find it necessary to make a

Facts

In 1987, Foran met Bentley president Richard Coskey ("Coskey") when both individuals were working at another broker-dealer. Coskey founded Bentley in October 1987. In December of that year, he hired Foran as Bentley's executive vice president and financial and operations principal. Throughout Foran's tenure at Bentley, Foran was responsible for all financial, operational and back office management. He also was responsible for posting commissions, including mutual fund trail commissions, and he had one assistant who also posted commissions.[4] Although Foran initially held no ownership interest in Bentley, by 1995, he had acquired a seven percent ownership interest in the firm and at some time prior to 1995, he had invested $25,000 in Bentley.[5]

As of January 1995, Foran received $3,000 per month as compensation for his service as operations manager. In addition to managing Bentley's operations, Foran also serviced his own accounts (for which he received an additional 70 percent payout on commissions) and house accounts (for which he did not receive additional compensation). Foran testified that the time demands associated with his servicing the house accounts and conducting the firm's back office operations left little time for him to service his own customers and that he ultimately lost many of his customers for this reason. Starting in January 1995, at the end of each month, Foran moved commissions from the Bentley house account to his own commission account.[6] Foran felt that, as an officer, director and part-

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more precise determination as to the exact amount that Foran converted.

[4] RN assisted Foran until June 1995. Thereafter, KH assisted Foran.

Each month Bentley received commission statements from mutual fund companies. The statements listed the trail commissions that would be paid to the firm that month. Foran and/or his assistant reviewed each commission statement and posted the commissions to Bentley's commission accounts in the firm's internal computer system. (Bentley maintained separate commission accounts for each registered person and one commission account for the house.) Since the firm did not reassign customer accounts when registered representatives left the firm, trail commissions for mutual fund accounts for customers whose account representatives had left Bentley were assigned to the Bentley house commission account. Commissions posted to the house account generally increased the firm's capital position.

[5] As of 1995, Coskey held an 81 percent ownership interest in the firm; Dennis Columbus ("Columbus") held a 12 percent interest; and Foran held a seven percent interest. All three were directors of the firm, but Columbus' responsibilities were somewhat limited. Coskey and Foran were the main principals at the firm and were responsible for day-to-day management and operations.

[6] Foran did not discuss these commission transfers with Coskey or Columbus, and his assistants were unaware of his actions. Foran also did not enter specific notations on the firm's books

owner of the firm, he was entitled to compensate himself for the work that he did for the house customer accounts.[7] Foran believed that this was an appropriate way to give himself the additional compensation that he felt he deserved.[8]

Foran did not discuss with Coskey or Columbus his decision to provide himself with additional compensation. Foran indicated that he and Coskey made independent decisions in their assigned areas of responsibility and that they did not discuss their decisions with each other. Foran also indicated that by 1995 his relationship with Coskey had become strained and that he disagreed with Coskey's handling of certain firm expenses and liabilities. Coskey testified that, had Foran asked for additional compensation, he (Coskey) would have denied the request, particularly since Bentley had come upon financial difficulties.[9]

In June or July 1995, Coskey began to suspect Foran's actions. Coskey conducted an examination of the firm's commission accounts and, when he compared them to the monthly mutual fund statements, immediately concluded that Foran had been posting house commissions to his own commission account.[10] Coskey nevertheless did not confront Foran and allowed the practice to

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to document the transfers.

[7] Foran did not "match up" the work that he did for the house accounts with specific trail commissions that the firm received. Foran testified that at the end of each month he simply decided how much additional compensation he felt that he deserved for all of his work that month and then transferred trail commissions from the house account to cover that amount.

[8] Foran was able to transfer commissions from the house account to his own commission account without leaving an obvious trail because the computer system that Bentley used in early 1995 did not provide for an audit trail. When an entry was deleted, it disappeared from the system. Sometime in the late Summer or early Fall of 1995, Bentley upgraded its computer system to enable the firm to maintain an audit trail. Thereafter, deleted entries no longer disappeared from the system.

[9] In late 1994, Bentley had encountered net capital problems that resulted in Coskey's infusing additional capital of $30,000 into the firm. Coskey testified that he had asked Foran and Columbus also to contribute additional capital to the firm, but neither one did so.

[10] Coskey testified that he also had concluded that, in addition to house commissions, Foran had posted other representatives' commissions and fictitious commissions to his commission account. When Foran repaid Bentley the commissions at issue, however, Coskey deposited the money into the firm's account and never reimbursed the other firm representatives from whom Foran allegedly had taken commissions. In this regard, Foran testified that prior to 1995, he had established a policy at Bentley (with Coskey's tacit approval) whereby commissions of $2.50 or less would be credited to the house account instead of individual representatives' accounts. Subsequently, the policy was extended (again with Coskey's tacit approval) to commissions of $5 or less (collectively, "the Five Dollar Policy").

continue until November 1995. On November 15, 1995, Coskey and Columbus confronted Foran. Foran admitted that he had transferred commissions to his own account, contended that he had been entitled to do so, agreed to repay Bentley $5,747.46, and immediately resigned.[11]

On November 21, 1995, the parties met to finalize the terms of Foran's resignation. Foran signed a letter of resignation dated November 21, but effective as of November 15. The parties also executed a Termination and Stock Redemption Agreement ("Termination Agreement") dated November 21, 1995, in which the parties referred to the $5,747.46 in commissions as a debt that Foran owed Bentley and noted that Foran had repaid the debt in full. The agreement also included restrictive covenants in which Foran agreed not to divulge the names or addresses of Bentley's clients and employees. Finally, Coskey prepared and signed a letter to Foran dated November 18, 1995 in which he indicated that Bentley would not disclose the commission issue on the Form U-5 that it intended to file on behalf of Foran, but that it reserved the right to amend the Form U-5 if it discovered any misfeasance of which it previously was not aware or if Foran failed to abide by the terms of the Termination Agreement. Foran signed the November 18 letter on November 21 to indicate that he acknowledged and agreed with it.

Coskey filed a Form U-5 on behalf of Foran on November 21. As promised in the November 18 letter, Coskey indicated in the Form U-5 that Foran's termination was voluntary and responded negatively to the question as to whether Foran was under review for wrongful taking of property when he left the firm.

After leaving Bentley, Foran became president of a start-up NASD member firm. During 1996, Foran hired several Bentley representatives. On January 27, 1997, more than 14 months after Foran left Bentley, an attorney representing Bentley and Coskey sent Foran a letter in which he alleged that Foran, by hiring Bentley representatives, had violated the restrictive covenants contained in the Termination Agreement. The letter demanded payment of $10,000 to cover Bentley's damages and threatened that, if Foran failed to pay, Bentley would enforce its rights under the Termination Agreement

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Foran indicated that the Five Dollar Policy was established to ease the burdensome workload of posting commissions manually. Foran also acknowledged that representatives at Bentley were unaware of this policy and that it was not strictly enforced. Like the Hearing Panel, we question the appropriateness of maintaining a firm policy of which firm employees are not aware. In that Enforcement was unaware of the policy and did not reference it in the complaint, however, we make no findings with respect to the policy.

[11] Foran indicated that before being confronted, he had planned to leave Bentley. He stated that, although he agreed to repay Bentley, he never admitted to any wrongdoing and continued to believe that his actions were justified. He also admitted that he would not have repaid Bentley if he had not been confronted by Coskey.

and November 18 letter agreement (regarding amending Foran's Form U-5). In a letter dated January 29, 1997, Foran's attorney denied that Foran had violated the Termination Agreement. On February 2, 1997, Coskey amended the Form U-5 that he had filed regarding Foran to indicate that, when Foran left Bentley, he had been under investigation for the wrongful taking of property and to provide details regarding Foran's taking of house commissions.[12]

Discussion

We find that, by transferring commissions from Bentley's house account to a personal commission account, Foran converted firm funds and violated Conduct Rule 2110.

Conduct Rule 2110 states in its entirety: "A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." Thus, the rule's language requires that two tests be met: (1) the misconduct occurred "in the conduct of" the respondent's business; and (2) the misconduct contravened high standards of commercial honor or violated just and equitable principles of trade. We find that both tests are met here.[13]

Foran's misconduct occurred in the conduct of his business, thereby satisfying the first prong of the test. A registered person's "business" includes his business relationship with his employer, as well as his commercial relationships with his customers. Ialeggio v. SEC, No. 98-70854 (9th Cir. May 20, 1999). Foran's actions related directly to his relationship with Bentley, his employer, and therefore occurred in the conduct of his business.

Foran's misconduct also contravened high standards of commercial honor and just and equitable principles of trade, thereby satisfying the second prong of the test. "[D]isciplinary hearings to require compliance with 'high standards of commercial honor and just and equitable principles of trade' are ethical proceedings; hence the concern is with ethical implications of [a respondent's] misconduct." In re Timothy L. Burkes, 51 S.E.C. 356, 360 (1993), aff'd, Burkes v. SEC, No. 93-70527 (9th Cir. July 25, 1994). We find that Foran acted unethically by obtaining additional compensation from Bentley by transferring firm assets to himself without the knowledge or consent of the firm's other shareholders,

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[12] After receiving a request for more information from the NASD, Coskey subsequently amended the Form U-5 a second time to provide more detail regarding the firm's allegations against Foran. Bentley and Coskey resolved allegations that they had filed a false Form U-5 (when they filed the initial Form U-5) through a Letter of Acceptance, Waiver and Consent ("AWC"), whereby they were censured and fined $5,000, jointly and severally.

[13] Rule 115 indicates that persons associated with a member shall have the same duties and obligations under the NASD's Rules as members. Thus, the ethical standards imposed on members in Rule 2110 apply equally to persons associated with members.

officers and directors. He converted the firm's money to his own use and benefit, and his reasons for doing so do not excuse his misconduct.

Foran's primary defense was that he acted in "good faith." He argued that, given the responsibilities regarding house accounts that he had assumed and in the absence of written firm policies regarding the posting of trail commissions, he was entitled to receive a portion of the house commissions as compensation, particularly because of his position as an officer, director and co-owner of Bentley.[14] We reject this defense and do not find that Foran acted in good faith. Foran testified that trail commissions belonging to registered persons who had left the firm would be posted to the house account, and Foran confirmed that commissions in the house account were firm assets. Indeed, both Foran and his assistants routinely posted the commissions at issue first to the house commission account before Foran subsequently redirected those commissions to his own commission account without entering any notations into the firm's books to document the transfer.[15] Foran's failure openly to post the commissions at issue to his own account in the first instance, his failure to advise Coskey of his actions, and his failure to advise his assistants of his actions support our conclusion that he did not really believe himself to be entitled to these commissions under the firm's procedures and that he did not intend for other individuals at the firm to observe his actions.[16]

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[14] Foran contended that he was responsible for back office operations and posting commissions and that he was not required to confer with Coskey on every management decision that he made. He suggested that his appropriation of house commissions was tantamount to a commission-related management decision that he did not have to discuss with Coskey. Foran's contention is contradicted, however, by his own admission that when he developed the Five Dollar Policy (according to which Foran credited Bentley with individual representatives' commissions equal to or less than $2.50 and, later, $5), he discussed it, albeit briefly, with Coskey and obtained his agreement.

[15] During the months of September and October 1995, after Coskey had upgraded the computer system so as to provide for an audit trail, Foran appeared to have posted firm commissions directly into his own account, rather than posting them first to the house account. If he had continued his procedure of first posting into the house account after the revision of the computer system, he would have left an audit trail of the commission transfers. Foran's efforts in this regard to avoid leaving an audit trail provide further support for our finding that he acted in bad faith.

[16] Foran contended that he never tried to hide his conduct from Coskey or others at Bentley. The evidence belies this claim. At the outset, we note that Foran never told anyone that he was directing house commissions to his own account and, during most of 1995, he only redirected the commissions after he and his assistant had posted them to the house account. During most of 1995, the firm's computer system enabled Foran to do so without leaving an audit trail. Indeed, when Foran learned that Coskey had retained a consultant to update the system, he expressed displeasure and thereafter installed a password onto his computer (although KH continued to have access to the commission posting system on her own computer). Furthermore, KH testified that in September and

Furthermore, the fact that Foran was an officer and director of Bentley does not lend support to his defense. As a general matter, employees (and independent contractors) of member firms, including officers, do not have the right, absent a clear grant of authority, to transfer firm assets to themselves because they decide that they are entitled to greater compensation.[17] Foran owned only seven percent of the outstanding shares of Bentley. He was not the sole owner or even a majority shareholder of the firm. Foran admitted that he did not discuss the commission transfers with or seek approval from Coskey or Columbus, the other two officers, directors and owners of the firm. Coskey contended that Foran did not have authority to unilaterally redirect house commissions to himself, and Foran did not suggest that he affirmatively had been granted such authority in writing or had been given specific

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October 1995 (after the computer system had been updated), Foran input commission information from the major mutual fund companies himself, without her assistance.

As noted above, see n. 15 supra, the record also suggests that, after the computer upgrade, Foran posted house commissions directly to his account (rather than first posting them to the house account) in order to avoid detection. Additionally, in late Summer or early Fall of 1995, when KH uncovered on two consecutive month-end dates discrepancies between the amount of commissions that the firm had received and the amount of commissions that it had credited to representatives (including Foran), she brought the discrepancies to Foran's attention. Foran instructed her to disregard the discrepancies. He indicated that resolving the discrepancies would require too much work and suggested that she "write them off." In our view, the evidence clearly indicates that Foran never intended for his actions to be transparent.

In any event, even if Foran had not endeavored to conceal his misconduct, we would still find his actions to be unethical. "[R]egistered persons are expected to adhere to a standard higher than 'what they can get away with.'" In re Leonard John Ialeggio, 52 S.E.C. 1085, 1088 (1996), aff'd mem., Ialeggio v. SEC, No. 98-70854 (9th Cir. filed on May 20, 1999). Even if the evidence did not demonstrate that Foran affirmatively sought to conceal his actions, he admits that he did not advise Coskey, Columbus or his assistants of his plan to increase his personal compensation, even when he was directly questioned about a discrepancy.

[17] The fiduciary relationship of the corporate officer to the corporation forbids any act by which the corporate assets are wrongfully diverted from corporate purposes. Therefore, an officer drawing a corporate check payable to himself and endorsing and cashing it must account for the funds. Additionally, if an officer is owner of all but even one share of stock, the officer cannot use the corporation's assets to pay individual debts without the consent of the other shareholder. Indeed, directors and officers who misappropriate funds are liable to the corporation, even if they own substantially all of the stock of the corporation. Fletchers Cyc. Corp., §§ 1102-1103 (Perm. Ed. 1994).

authorization to transfer commissions to his account. Indeed, the record suggests that Foran knew that if he had requested Coskey's permission, it would have been denied. In transferring commissions to himself, Foran acted solely out of self-interest and in a manner contrary to the interests of Bentley. By doing so, he violated Conduct Rule 2110. Cf. Feldman, supra (part-owner, vice president and general principal's request for bulk transfer of mutual fund accounts to another broker-dealer with whom principal was soon to become associated, without authorization of current member firm, was unethical and violated Conduct Rule 2110 (formerly known as Article III, Section 1 of NASD Rules of Fair Practice)); In re Philip S. Wilson, 48 S.E.C. 511 (1986) (managing partner's conversion of substantial amount of funds from an account belonging to the member firm with which he was associated violated just and equitable principles of trade); In re Michael T. McAuliffe, 48 S.E.C. 86, 87 (1985) ("Entrusted to transact business on behalf of [his] firm, [respondent] breached his fundamental duty of loyalty to his employer by benefitting himself and others at his employer's expense.").

Turning to Foran's other defenses, we note that Foran sought to excuse his actions by asserting that he did not misappropriate customer funds and that no customers were harmed by his actions. Conduct Rule 2110 is not limited to securities-related conduct involving firm customers; instead, it covers all unethical business-related conduct, including misconduct that did not result in customer harm. See In re Eliezer Gurfel, Exchange Act Rel. No. 41229 (Mar. 30, 1999) (registered representative of member firm who forged name of firm president on commission checks payable to the firm and converted the proceeds to his own use violated Rule 2110), aff'd, No. 99-1199 (D.C. Cir. Mar. 7, 2000); In re James A. Goetz, Exchange Act Rel. No. 39796 (Mar. 25, 1998) (respondent who improperly obtained a donation for his daughter's private school tuition from his member firm's matching gifts program by misrepresenting that he had contributed personal funds violated Rule 2110); In re Leonard J. Ialeggio, 52 S.E.C. 1085 (1996) (associated person who improperly obtained reimbursement for country club initiation fees from his employer firm violated Rule 2110), aff'd mem., Ialeggio v. SEC, (9th Cir. filed on May 20, 1999); In re Timothy L. Burkes, 51 S.E.C. 356 (1993) (representative who persuaded back-office employee to credit him for commissions to which he was not entitled violated Rule 2110), aff'd mem., 29 F.3d 630 (9th Cir. July 24, 1994).

Foran also argued that this matter is nothing more than an internal firm dispute regarding the proper allocation of commissions and that the Hearing Panel erred in treating it as a theft. In support of this argument, he noted that the initial Form U-5 that Coskey had filed did not disclose this incident. We reject this argument. The fact that the initial Form U-5 did not mention Foran's conversion of firm funds does not mean that the conversion did not occur. See Gurfel, supra (fact that Form U-5 reflecting Gurfel's termination from a member firm did not disclose Gurfel's commission of forgery rejected as evidence that the forgery did not occur in light of other record evidence). Foran left Bentley when Coskey confronted him and accused him of stealing firm commissions. Foran admitted that he repaid the commissions only because Coskey confronted him and that he otherwise would not have done so. The concept of an "internal dispute" suggests that Coskey was aware of Foran's actions and that Foran openly transferred the commissions. To the contrary, Foran made an effort to conceal his actions from Coskey, and he left the firm when his misconduct was exposed. These actions are not consistent with

the actions of a person engaged in an internal dispute over the allocation of commissions. Furthermore, regardless of whether this incident may be categorized as an internal dispute, for the reasons stated above, we find that Foran acted unethically and in bad faith and that his conduct violated Rule 2110.

Foran's covert appropriation and conversion to his own use of Bentley's commissions "reflect directly on [his] ability both to comply with regulatory requirements fundamental to the securities business and to fulfill his fiduciary responsibilities in handling other people's money . . . . This business-related misconduct is actionable under NASD Rules as unethical conduct." Goetz, supra at 6-7. In sum, we find that Foran converted funds that belonged to Bentley, that he sought to conceal his misconduct, and that he acted in bad faith, in violation of Conduct Rule 2110.

Sanctions. The Hearing Panel barred Foran and fined him $35,000 (due and payable only if and when Foran seeks readmission into the securities industry). Based on the unique facts and circumstances of this case, we reduce the bar to a two-year suspension from associating with any member firm in any capacity, impose a requirement to requalify by examination before acting in any capacity requiring registration, and impose a $35,000 fine, due and payable upon issuance of this decision. We also affirm the Hearing Panel's imposition of $2,728.75 in costs.[18]

As the SEC has acknowledged, "[t]he securities business presents a great many opportunities for abuse and overreaching, and depends heavily on the integrity of its participants." Burkes, supra at

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[18] The monetary sanction is consistent with the applicable guideline in the NASD Sanction Guidelines ("Guidelines"). See Guidelines (1998 ed.) at 34 (Conversion or Improper Use of Funds or Securities). The two-year suspension is below the range recommended in the Guidelines. Although we find Foran's misconduct to be egregious, based on the unique circumstances of this case, we also find that a two-year suspension and requirement to requalify, accompanied by a significant fine (calculated as recommended by the Guidelines as five times the amount converted plus $10,000), are of sufficient moment so as to prevent the recurrence of similar misconduct by Foran or others.

Foran contended that the Hearing Panel erred in referring to the applicable guideline because one of the two rules and the interpretive release referenced in the guideline address misuse of customer funds or securities. We do not agree. The guideline itself does not indicate that its use must be restricted to conversion or misuse of customer funds. While one of the two rules and the interpretive release referenced in the guideline address misuse of customer funds, the remaining rule referenced in the guideline (Conduct Rule 2110) is not limited to conduct involving customer (rather than firm) funds. In any event, the "Overview" section of the Guidelines indicates that, for violations that are not addressed specifically in the Guidelines, adjudicators are encouraged to look to the Guidelines for analogous violations. Cf. Gurfel, supra (in case involving respondent's conversion of firm commissions, NAC and Securities and Exchange Commission ("SEC") relied on guideline for conversion or improper use).

360. Foran's misconduct strikes at the heart of Rule 2110 -- unethical behavior -- and the sanctions that we impose must recognize the severity of his misconduct.

Turning first to the principal considerations listed in the Guidelines, we note that Foran did not accept responsibility for his actions or attempt to repay the firm until he was confronted by Coskey. Indeed, Foran admitted that he would not have returned the commissions if Coskey had not requested that he do so. Once confronted, Foran immediately admitted his actions, repaid the firm, and cooperated with Enforcement staff's investigation of the matter. His misconduct, however, persisted over the course of nearly one year, and he attempted to conceal his actions or, at a minimum, he did not act openly. His actions resulted in a loss of capital to the firm (which he restored by repaying the funds that he converted) and financial gain to himself.[19]

Accordingly, Foran is suspended for two years from associating with any member firm in any capacity, required to requalify before acting in any capacity requiring qualification, and fined $35,000. We also affirm the Hearing Panel's imposition of $2,728.75 in costs.[20]

On Behalf of the National Adjudicatory Council,

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Joan C. Conley, Senior Vice President and Corporate Secretary

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[19] Foran also cited as a mitigating factor that his misconduct did not result in customer harm. We do not find this to be mitigating. See Gurfel, supra (repayment of commissions and fact that no customer funds were involved rejected as mitigating factors); Ialeggio, supra (fact that firm rather than customer funds were misused is rejected as mitigating factor). Additionally, Foran cited as mitigating the fact that Bentley had no policies or guidelines that addressed reassigning commissions. We reject this as mitigating. While it may be true that the firm had not developed written policies to address commission assignments, Foran's conduct still was unethical. Even without guidance from the firm, he should have known that he could not simply take whatever money that he wanted from Bentley under the guise that he was responsible for commission payments. Cf. Ialeggio, supra (standard of conduct in the securities industry must be higher than whatever registered person "can get away with").

[20] We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.