

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Market Regulation,

Complainant,

vs.

Gregory Richard Imbruce
New Canaan, CT,

Respondent.

DECISION

Complaint No. 2008012137601

Dated: March 7, 2012

Respondent purchased securities in a secondary public offering from a participating underwriter, after he sold the subject securities short during the restricted period. Held, findings affirmed, sanctions modified.

Appearances

For the Complainant: Dawn Faris, Esq., James Nixon, Esq., Department of Market Regulation,
Financial Industry Regulatory Authority

For the Respondent: Gregory Richard Imbruce, Pro Se

Decision

Gregory Richard Imbruce appeals a FINRA Hearing Panel decision issued on January 7, 2011. The Hearing Panel found that Imbruce willfully violated Rule 105 of Regulation M of the Securities Exchange Act of 1934 (“Exchange Act Rule 105”) and NASD Rule 2110 because he purchased securities in a secondary public offering from a participating underwriter, after he sold the subject securities short during the restricted period. The Hearing Panel censured Imbruce, fined him \$50,000, and suspended him in all capacities for 30 business days for the violation. After an independent review of the record, we affirm the Hearing Panel’s findings of liability, but modify the sanctions imposed. We eliminate the censure, reduce the fine to \$5,000, and decrease the length of the suspension to 10 business days.

I. Factual Background

The facts giving rise to the violation alleged in this case occurred over a two-day period, November 14 and 15, 2007, and focus primarily on the instructions that Imbruce gave to a trader, Peter Berkowitz.

A. Imbruce

Imbruce entered the financial services industry in February 1993, when he obtained a position as a financial analyst at an investment bank. Between February 1993 and February 2006, Imbruce worked as a financial and investment analyst at various private equity groups, as a high-yield research analyst at a FINRA firm, and as a managing director at an investment bank.¹

In March 2006, Imbruce registered through former FINRA firm, Bernard L. Madoff Investment Securities LLC (“Madoff Securities”), as a general securities representative and an equity trader. Imbruce remained associated with Madoff Securities until March 2008, when the firm filed a Uniform Termination Notice for Securities Industry Registration (“Form U5”) to terminate his registrations through the firm.² Imbruce has not associated with another FINRA firm since leaving Madoff Securities.

B. Berkowitz

Berkowitz’s only employment in the financial services or securities industries has been with Madoff Securities. Berkowitz joined Madoff Securities in 2001, as a summer intern between his sophomore and junior years in college. Berkowitz obtained a second internship with the firm in 2002, and joined the firm as a full-time “assistant trader” in August 2003. Berkowitz registered through Madoff Securities as a general securities representative and an equity trader in October 2003. Berkowitz remained associated with Madoff Securities until March 2008, when the firm filed a Form U5 terminating his registrations with the firm.³

C. Imbruce Manages Madoff Securities’ Energy Portfolio

Imbruce and Berkowitz were paired and placed on Madoff Securities’ proprietary trading desk when Imbruce joined the firm in March 2006.⁴ Andrew Madoff and Edward Coughlin supervised the proprietary trading desk during the relevant period.

¹ In April 2001, Imbruce associated with a FINRA firm, and registered as a general securities representative, when he joined Jefferies & Company, Inc. as a high-yield research analyst.

² Imbruce ceased all work for Madoff Securities in November or December 2007, at which point, he began working exclusively for Madoff Energy Holdings LLC (“Madoff Energy”). Madoff Energy is a private equity fund, which makes direct investments in oil and gas wells. Imbruce stated that he and Andrew Madoff formed Madoff Energy in February 2007, and that he remained at Madoff Energy until January or February 2009.

³ Berkowitz transitioned to Madoff Energy in or around November 2007. He remained at Madoff Energy until August 2008.

⁴ A firm engages in proprietary trading when the firm trades securities or other investment products, utilizing its own capital, in order to earn a profit for itself. *See generally The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change, As Modified By Amendment No. 1*

Coughlin testified that the proprietary trading desk employed 27 traders and had 18 different “strategies.” He explained that each strategy traded in a specific industry, maintaining a combination of long and short positions in the stock of companies within that industry.⁵ Coughlin asserted that all strategies had a “mandate” to maintain their portfolio’s long and short positions in a manner that resulted in market neutrality. Indeed, he testified that it was his responsibility to ensure that all strategies adhered to the market neutrality mandate.⁶

Coughlin explained that Madoff Securities staffed each strategy with one portfolio manager and one assistant trader. He testified that Imbruce served as the portfolio manager, and Berkowitz as the assistant trader, for Madoff Securities’ energy portfolio. Coughlin also explained that Imbruce and Berkowitz, as portfolio manager and assistant trader, respectively, each had distinct roles and responsibilities with regard to the energy portfolio.

Coughlin testified that Imbruce, as portfolio manager, was responsible for the energy portfolio’s investment decisions. Imbruce not only chose the portfolio’s investments, but also determined what specific stocks to purchase, sell, or short sell, the timing of the purchases and sales of investments, the extent to which a hedge was required, and, if a hedge was necessary, the appropriate hedge allocation.

Coughlin explained that Berkowitz, as the assistant trader, followed the lead of, and took his instruction from, the portfolio manager, Imbruce. Berkowitz provided Imbruce with research regarding specific companies in the energy industry to inform Imbruce’s purchase and sales decisions. Berkowitz prepared spreadsheets to assist Imbruce’s analysis of the energy portfolio’s risk. Berkowitz also executed trades.

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Thereto, Amending NASDAQ’s Membership Application Rules, Exchange Act Rel. No. 56917, 2007 SEC LEXIS 2864, at *2-3 (Dec. 6, 2007).

⁵ A “long position” involves the “purchase of securities or commodities in anticipation of rising prices.” *Black’s Law Dictionary* 953 (7th ed. 1999). Conversely, a “short position” relates to securities or commodities sold in anticipation of a fall in price. *Id.* at 1384. The term “short sale” applies to “any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.” *SEC Regulation SHO – Regulation of Short Sales*, 17 C.F.R. § 242.200(a) (2011). Short sellers typically earn profits on the difference between the price of shares sold and the lower price of the shares purchased to “pay back” the borrowed shares. *See Black’s Law Dictionary*, at 1339.

⁶ Imbruce testified that Coughlin was his direct supervisor. Imbruce also stated that Coughlin had de facto control over the proprietary trading desk, and it was Coughlin’s responsibility to review all proprietary trading activity. At the hearing, Coughlin denied having such compliance or supervisory oversight. Coughlin testified that Andrew Madoff supervised the traders, and David Kugel, a compliance officer at Madoff Securities, was responsible for compliance matters related to the firm’s proprietary trading.

D. Imbruce's Short Selling Instructions to Berkowitz

On November 14, 2007, Imbruce left New York to attend a Bank of America energy industry conference in Florida.⁷ Imbruce and Berkowitz each testified that Imbruce called Berkowitz at Madoff Securities on the morning of November 14, 2007, prior to his flight to Florida, to discuss the risk position of the energy portfolio. They also each agree that the conversation concerned short selling a stock in the energy portfolio to reduce the portfolio's risk exposure, and maintain the portfolio's market neutrality, while Imbruce was out of the office. From this point, Imbruce's and Berkowitz's versions of the conversation deviate.⁸ Imbruce summarized his instructions to Berkowitz as follows:

The morning of November 14, 200[7], I had a brief phone conversation with Mr. Berkowitz prior to departing for the [c]onference and asked him to short \$500,000 in value of any energy stock in order to reduce our then current \$500,000 net long position so that we were 'market neutral' during the week I was out of the office

Berkowitz stated that Imbruce instructed him to short sell 10,000 shares of a specific stock, ATP Oil & Gas Corporation ("ATPG").⁹ Berkowitz summarized Imbruce's instructions to him as follows:

On the morning of November 14, 2007, Mr. Imbruce was scheduled to attend the Bank of America Energy Conference and wanted to reduce the exposure of our portfolio by shorting a stock. Mr. Imbruce instructed me to short 10,000 shares of ATPG

E. ATPG Activity in the GD Account

Madoff Securities assigned each portfolio manager a proprietary trading account for his or her stock selections. Imbruce's trading account at Madoff Securities was named the GD account. All of the short sale orders at issue in this case were placed in the GD account and executed on November 14, 2007, while Imbruce was out of the office. Berkowitz submitted all of the short sale orders.

The GD account held no position in ATPG on the morning of November 14, 2007. At 1:44 p.m., Berkowitz submitted an order to Bank of America to short sell 10,000 shares of ATPG for the GD account. By 3:29 p.m., the GD account maintained a short position of 8,151 shares of

⁷ Imbruce was out of the office from November 14, through November 26, 2007.

⁸ Imbruce and Berkowitz each provided on-the-record testimony in this matter, in addition to written responses to Market Regulation's requests for information. Imbruce testified at the hearing. Berkowitz did not appear at the hearing. *See infra* Part II.

⁹ ATPG is a Texas-based corporation, engaged in the acquisition, development, and production of oil and natural gas properties in the Gulf of Mexico, the United Kingdom, and the Dutch sectors of the North Sea.

ATPG. Berkowitz testified that, at 3:40 p.m., with only 20 minutes left in the trading day, he became “frustrated” because Bank of America had executed only 8,151 shares of the 10,000 ATPG share order that he had submitted.¹⁰ Berkowitz testified that, at that point, he decided to enter the remaining short sale orders through BATS Trading, Inc. and NASDAQ Single Book. By 3:41 p.m., the GD account was short 10,251 shares of ATPG. Berkowitz testified that he “overshot” his 10,000-share target and entered ATPG purchase orders through BATS Trading and NASDAQ Single Book to ensure that the GD account’s short position in ATPG was 10,000 shares.

In total, on November 14, 2007, the GD account sold 10,300 shares of ATPG short at prices between \$52.00 and \$53.30 per share, and purchased 300 shares of ATPG at prices between \$52.05 and \$52.13. At the end of the trading day, the GD account’s total short position in ATPG was 10,000 shares.

F. ATPG Holds a Secondary Public Offering

ATPG filed a prospectus with the Commission on November 14, 2007. The prospectus was part of an amended registration statement that ATPG filed with the Commission using a “shelf” registration process.¹¹ ATPG filed a supplement to the prospectus with the Commission on November 15, 2007. The prospectus supplement stated that ATPG intended to initiate a secondary public offering of 5 million shares of common stock at a price of \$47.00 per share.¹² ATPG’s secondary public offering was priced after the market closed on November 14, 2007.¹³

¹⁰ Berkowitz stated that Imbruce directed him to have Bank of America execute the short sale orders because he was attending the company’s energy industry conference. Imbruce refuted Berkowitz’s testimony, asserting that Berkowitz had recommended the use of Bank of America to handle the order.

¹¹ “In a shelf registration, the registration statement is filed, but the securities are put on the shelf until the manner and date of the offering are determined.” Thomas Lee Hazen, *The Law of Securities Regulation* § 3.8, at 119 (2d ed. 1994). Under the shelf registration process, ATPG could offer to sell securities in one or more offerings. *See id.* Each time ATPG intended to sell securities pursuant to the prospectus, it was required to file a prospectus or prospectus supplement with the Commission, providing specific information about the current offering. *See id.*

¹² “The first time an issuer conducts a public offering of its securities, the offering is referred to as an initial public offering. Subsequent offerings by the issuer are referred to as follow-on offerings or repeat offerings. A secondary public offering is an offering of securities held by security holders, for which there already exists trading markets for the same class of securities as those being offered.” *Short Selling in Connection with a Public Offering*, Exchange Act Rel. No. 54888, 71 Fed. Reg. 75002, 75003 n.12 (Dec. 13, 2006).

¹³ ATPG’s secondary public offering was priced in an “overnight deal,” after the close of the market on November 14, 2007, and prior to the company’s filing of the supplemental prospectus on November 15, 2007. *See Short Selling in Connection with a Public Offering*, Exchange Act Rel. No. 56206, 72 Fed. Reg. 45094, 45097 (Aug. 10, 2007) (explaining that an overnight deal occurs when an offering commences after the close of regular trading hours on the

ATPG's secondary public offering also was conducted on a firm commitment basis.¹⁴ The two participating underwriters for the offering – Howard Weil Incorporated and Johnson Rice and Company LLC – each were severally obligated to purchase all shares not sold in the offering, to a maximum of 2.5 million shares per underwriter. ATPG's underwriting agreement underscored this point and stated:

[ATPG] agrees to issue and sell to the Underwriters an aggregate of 5,000,000 Firm Shares [E]ach Underwriter agrees, severally and not jointly, to purchase from [ATPG] all of the Firm Shares. The purchase price to be paid by the Underwriters to [ATPG] for the Firm Shares shall be \$45.35 per share.

G. Imbruce Purchases ATPG in the Secondary Public Offering

Imbruce had a relationship with two salesmen at Johnson Rice, dating back to 2005. The salesmen, Scott Brown and Craig Dermody, had assisted Imbruce in the past by providing him with research and, more recently, personally invested with him to drill oil wells.¹⁵

Dermody contacted Imbruce on the afternoon or evening of November 14, 2007, to solicit Imbruce's participation (on behalf of Madoff Securities) in ATPG's secondary public offering.¹⁶ Imbruce stated that he initially was hesitant to purchase the shares because he did not have ATPG's prospectus or access to Madoff Securities' informational databases to research the company.

On November 14, 2007, at 5:06 p.m., Imbruce submitted an indication of interest on behalf of Madoff Securities to purchase 10,000 shares of ATPG in the secondary public offering.¹⁷ Imbruce testified that he acquiesced, and submitted the indication of interest, because Johnson Rice was having a difficult time locating purchasers for ATPG's shares.

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day of the offering's pricing). "Regular trading hours" are between 9:30 a.m. and 4:00 p.m., Eastern Standard Time. *See SEC Regulation NMS – Regulation of the National Market System*, 17 C.F.R. § 242.600(b)(64) (2011).

¹⁴ "Firm commitment underwriting" occurs when the underwriter agrees to buy all the shares to be issued and remain financially responsible for any securities not purchased. *See* Donald C. Langevoort, *Securities Regulation* § 4(A)(1), at 212-214 (2d ed. 1997).

¹⁵ Brown and Dermody each invested \$75,000 with Imbruce to drill oil wells in Texas.

¹⁶ Brown and Dermody each testified that they learned that Johnson Rice was one of the lead underwriters for ATPG's secondary public offering on November 13, 2007.

¹⁷ To purchase shares in a secondary public offering, a prospective buyer submits an indication of interest to the underwriter for a certain quantity of shares. *See SEC v. Colonial Inv. Mgmt. LLC*, 659 F. Supp. 2d 467, 471 (S.D.N.Y. 2009), *aff'd*, 381 F. App'x 27 (2d Cir. 2010). An indication is only a request for shares and is not binding. *Id.*

Dermody called Imbruce on the morning of November 15, 2007, to inform him that he had been allocated 10,000 shares in the secondary public offering.¹⁸ Imbruce accepted the allocation.¹⁹ Dermody or Craig then called Berkowitz to inform him that Imbruce had purchased 10,000 shares of ATPG. Berkowitz acknowledged the transaction and entered the purchase in Madoff Securities' internal system.

Imbruce's purchase of ATPG on November 15, 2007, coupled with the short sales on November 14, 2007, enabled Madoff Securities to realize a profit of \$58,721.26.

II. Procedural Background

This case stems from an investigation of the Department of Market Regulation's Reporting Group, which initiated an investigation of the participants in ATPG's secondary public offering after market surveillance indicated a spike in short sales of ATPG's stock prior to the company's offering. As part of the investigation, Market Regulation staff issued an inquiry letter to Madoff Securities in November 2008, requesting information concerning the firm's short sales of ATPG and the circumstances surrounding the firm's allocation of shares in the company's secondary public offering.²⁰ Madoff Securities response disclosed Imbruce's involvement in the transactions.

¹⁸ Secondary public offerings typically are priced after the market closes, on a date selected as the "pricing date." See *Colonial Inv. Mgmt.*, 659 F. Supp. 2d at 471. On the next trading day after the pricing date, before the market opens, shares are allocated to the buyers that have made an indication of interest. *Id.* Each buyer is notified of the number of shares that he or she has been allocated, and the buyer must accept or reject the allocation. *Id.*

¹⁹ Imbruce admitted that he did not speak to Berkowitz or anyone else at Madoff Securities *before* accepting the allocation of ATPG shares on the morning of November 15, 2007. Imbruce testified, however, that he contacted Coughlin at Madoff Securities immediately *after* he accepted the allocation to obtain approval to purchase the shares. Imbruce stated that he obtained Coughlin's approval at that time. Coughlin refuted Imbruce's testimony, asserting that Imbruce never requested, or obtained, permission to participate in ATPG's secondary public offering.

²⁰ Imbruce and Berkowitz each testified that they learned that the short sales and purchase of ATPG potentially violated Exchange Act Rule 105 in November 2008, when Madoff Securities received FINRA's request for information. Imbruce testified that he did not instruct Berkowitz to short sell ATPG, never asked Berkowitz what stock he had decided to short sell, and did not review the energy portfolio positions when he returned from vacation. Imbruce explained that, when he returned to the office, his desk was moved, he was transitioned fully to Madoff Energy, and Madoff Securities was in the process of "unwinding" the energy portfolio. Berkowitz testified that he did not know that Imbruce's purchase of ATPG was part of a secondary public offering because Madoff Securities processed purchases from secondary public offerings in the same manner as a regular stock purchases.

Market Regulation filed a one-cause complaint against Imbruce on February 25, 2010. The complaint alleged that Imbruce violated Exchange Act Rule 105 and NASD Rule 2110 because he purchased shares of ATPG in a secondary public offering from Johnson Rice, a participating underwriter, after he sold the company's stock short during the restricted period. A two-day hearing took place in New York in October 2010. Imbruce, Coughlin, and a deputy director from Market Regulation testified at the hearing.

Market Regulation also presented excerpts of Berkowitz's on-the-record testimony at the testimony at the hearing. On March 11, 2008, Madoff Securities filed a Form U5 on behalf of Berkowitz, terminating his registration with the firm. Because Berkowitz did not associate with another FINRA firm after leaving Madoff Securities, and no amendments were made to his Form U5, FINRA did not have jurisdiction over Berkowitz after March 11, 2010.²¹ Although Market Regulation requested that Berkowitz voluntarily appear and testify at the hearing, he declined to do so. Market Regulation therefore designated videotaped excerpts of Berkowitz's on-the-record testimony to be introduced and played at the hearing. The Hearing Panel admitted the videotaped excerpts over excerpts over Imbruce's objection.

The Hearing Panel issued its decision in January 2011, finding that Imbruce violated Exchange Act Rule 105 and NASD Rule 2110, as alleged in the complaint. In so holding, the Hearing Panel found that Berkowitz's on-the-record testimony was credible, that Imbruce's on-the-record and hearing testimony was not credible, and that Imbruce had instructed Berkowitz to short sell 10,000 shares of ATPG. The Hearing Panel censured Imbruce, fined him \$50,000, and suspended him in all capacities for 30 business days.

III. Legal Findings

A. Exchange Act Rule 105

Exchange Act Rule 105 prohibits a short seller from purchasing securities from an underwriter participating in an offering, if the short sale occurred during the rule's restricted period, typically the five business days prior to pricing. *See* 17 C.F.R. § 242.105(a) (2011).²²

²¹ Persons who are no longer registered with a FINRA firm remain subject to FINRA's jurisdiction for two years after the termination of their association with a firm. *See* FINRA's By-Laws, Art. V, Sec. 4. The filing of an amendment to a notice of termination, however, begins a new two-year period of jurisdiction. *Id.*

²² Exchange Act Rule 105 provides, in full:

- (a) **Unlawful Activity.** In connection with an offering of equity securities for cash pursuant to a registration statement . . . filed under the Securities Act of 1933 ("offered securities"), it shall be unlawful for any person to sell short the security that is the subject of the offering and purchase the offered securities from an underwriter or broker or dealer participating in the offering if such

The rule protects the efficient and fair operation of the securities markets by limiting certain short sale transactions that are effected prior to the pricing of an offering. *See Short Selling in Connection with a Public Offering*, Exchange Act Rel. No. 56206, 72 Fed. Reg. 45094 (Aug. 10, 2007); *Short Sales in Connection with a Public Offering*, Exchange Act Rel. No. 26028, 53 Fed. Reg. 33455, 33455-56 (Aug. 31, 1988) (adopting release for temporary rule).

While it is evident that Exchange Act Rule 105 applies with equal force to initial *and* secondary public offerings, the Commission has expressed particular concern over the impact of manipulative short selling on secondary public offerings, the variety of offering which is at issue in this case. *See Short Selling in Connection with a Public Offering*, 72 Fed. Reg. at 45096. The Commission explained:

Generally, . . . secondary [public] offerings are priced at a discount to a stock's closing price prior to pricing. This discount provides a motivation for a person who has a high expectation of receiving offering shares to capture this discount by aggressively short selling just prior to pricing and then covering the person's short sales at the lower offering prices with securities received through an allocation.

Id.

B. Exchange Act Rule 105 Applies Irrespective of Short Seller's Intent

The Commission stressed that aggressive and manipulative short selling prior to the pricing of a secondary public offering allows a "short seller . . . to avoid market risk and . . . guarantee a profit." *Id.* The Commission also noted that "[s]uch activity can exert downward pressure on market prices for reasons other than price discovery . . . result in lowered offering prices and therefore reduced offering proceeds to issuers and selling security holders." *Id.*; *see Short Sales*, Exchange Act Rel. No. 50103, 69 Fed. Reg. 48008, 48009 (Aug. 6, 2004) (explaining that pre-pricing short sales artificially distort market prices for securities, prevent market from functioning as independent pricing mechanism, and erode integrity of offering price).

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short sale was effected during the period ("Rule 105 restricted period") that is the shorter of the period:

- (1) Beginning five business days before the pricing of the offered securities and ending with such pricing; or
- (2) Beginning with the initial filing of such registration statement . . . and ending with the pricing.

17 C.F.R. § 242.105(a).

To reinforce the seriousness of the prohibited conduct (and avoid arguments of ambiguity in this area), the Commission imposed an “absolute prohibition” that forbids any person that effected restricted period short sales from purchasing the offered securities. *Short Selling in Connection with a Public Offering*, 72 Fed. Reg. at 45094. Upon implementing this blanket ban, the Commission explained that Exchange Act Rule 105 is prophylactic, provides a bright line demarcation of proscribed conduct, and applies irrespective of a short seller’s intent.²³ *id.*

C. Application of Exchange Act Rule 105

With the parameters of Exchange Act Rule 105 established, we turn to the application of the rule in this case.

1. The Short Sales Occurred During the Restricted Period

The short sales at issue in this case were made during the restricted period. The restricted period for ATPG’s secondary public offering began on November 8, 2007, and ended on November 14, 2007, five business days later.²⁴ The short sales in this case occurred on the final day of the restricted period, November 14, 2007.

2. Imbruce Purchased the Subject Securities from a Participating Underwriter

Imbruce purchased 10,000 shares of ATPG on November 15, 2007, the day that he accepted the allocated shares from the company’s secondary public offering. Imbruce also purchased the stock from Johnson Rice, a participating underwriter in ATPG’s offering.²⁵

²³ Imbruce argues that he did not violate Exchange Act Rule 105 because he did not intend to manipulate or depress ATPG’s offering price, and had no motivation to short sell ATPG because he was ineligible to receive a bonus based on the energy portfolio’s performance in 2007. Such considerations have no bearing on whether Imbruce’s conduct violated Exchange Act Rule 105. Exchange Act Rule 105 has no scienter requirement. *See Commission Guidance on Rule 3b-3 and Married Put Transactions*, Exchange Act Rel. No. 48795, 68 Fed. Reg. 65820, 65822 n.22 (Nov. 21, 2003) (interpretation) (“[Exchange Act] Rule 105 . . . does not require a showing of scienter. In adopting [the rule], the Commission made it clear that there was not a requirement to show a specific manipulative intent.”); *Short Selling in Connection with a Public Offering*, Exchange Act Rel. No. 54888, 2006 SEC LEXIS 2849, at *13 n.17 (Dec. 6, 2006) (proposed rule) (“Short sales effected during the Rule 105 restricted period can depress market prices and reduce an issuer’s offering proceeds even if the short seller has no manipulative intent.”).

²⁴ When an offering is priced in an “overnight deal,” after the close of the market on one day and prior to the opening of the market on the next day, the restricted period ends on the “market-close” date. *See generally JC Mgmt., Inc.*, Exchange Act Rel. No. 50092, 2004 SEC LEXIS 1580, at *4 (July 27, 2004) (settlement).

²⁵ Exchange Act Rule 105 applies only to offerings that are conducted on a firm commitment basis. *See* 17 C.F.R. § 242.105(c) (“Excepted Offerings”). Imbruce states that ATPG’s secondary public offering was not conducted on a firm commitment basis because

Imbruce admitted that he purchased the shares, when he provided his written responses to FINRA's requests for information in October 2009, and when he provided his on-the-record and hearing testimony, on January 27, and October 6, 2010, respectively.²⁶

3. Imbruce Short Sold ATPG

Imbruce's primary argument on appeal is that the Hearing Panel improperly held him accountable for the short sales of ATPG that occurred on November 14, 2007. Imbruce states that he was out of the office when the short sales took place and asserts that Berkowitz unilaterally decided to short sell ATPG in his absence. Imbruce testified that he and Berkowitz discussed a plan to balance the energy portfolio and reduce the portfolio's net long position on the morning of November 14, 2007, but noted that the conversation did not result in the selection of a specific stock to short sell. Berkowitz, on the other hand, testified that Imbruce instructed him to short sell 10,000 shares of a particular company, ATPG.

We acknowledge that Imbruce's liability for the violation of Exchange Act Rule 105 in this case turns on this issue, i.e., whether Imbruce is responsible for Berkowitz's short sales. To analyze this issue, and determine whether the short sales are attributable to Imbruce, we consider the Hearing Panel's credibility determinations concerning Imbruce's and Berkowitz's testimony. *See Dennis S. Kaminski*, Exchange Act Rel. No. 65347, 2011 SEC LEXIS 3225, at *31 (Sept. 16, 2011) (stating that credibility findings of initial fact-finder are given considerable weight and deference because such findings are based on hearing witnesses' testimony and observing their demeanor).

The Hearing Panel determined that Imbruce's testimony was not credible and, conversely, found that Berkowitz was a credible witness. After a thorough review of the evidence, we conclude that the record provided the Hearing Panel with a sufficient evidentiary

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Johnson Rice did not have the financial capability to acquire its allotment of shares in the offering. The offering documents in the record, specifically, the underwriting agreement, belie this point, and demonstrate that Johnson Rice was contractually and severally obligated (with Howard Weil, the other participating underwriter) to purchase all shares not sold in ATPG's secondary public offering.

²⁶ On appeal, Imbruce attempts to back away from his role in the purchase of the ATPG shares. For example, Imbruce explains that the "original idea" to purchase ATPG was not his own because Brown and Dermody, the Johnson Rice salesmen, solicited his participation in the secondary public offering. Imbruce also asserts that his supervisor, Coughlin, bore responsibility for the purchase because Coughlin approved his participation in the offering. Finally, Imbruce argues that the purchase was attributable to his assistant, Berkowitz, because Berkowitz acknowledged the transaction and entered the purchase in Madoff Securities' internal system. Imbruce's assertions, even if true, do not diminish his personal role and responsibility for purchasing ATPG. *See Mission Secs. Corp.*, Exchange Act Rel. No. 63453, 2010 SEC LEXIS 4053, at *37 (Dec. 7, 2010) (finding that applicants may not diminish wrongfulness of their actions by claiming that others also engaged in wrongdoing).

basis to find that Imbruce instructed Berkowitz to short sell the 10,000 shares of ATPG. *See Richard G. Cody*, Exchange Act Rel. No. 64565, 2011 SEC LEXIS 1862, at *45 n.35 (explaining that credibility determinations “can be overcome only where the record contains substantial evidence for doing so”) (citations omitted), *appeal docketed*, No. 11-2247 (1st Cir. Oct. 25, 2011). Imbruce’s and Berkowitz’s relative roles at Madoff Securities suggest that Imbruce supervised Berkowitz and, consequently, that Berkowitz took his instruction from Imbruce. The trading activity in the GD account on November 14, 2007, and Berkowitz’s maneuvering to execute the short sale orders, also comports with Berkowitz’s version of events. Finally, and most compelling, Berkowitz sold short 10,000 shares of ATPG and, less than 24 hours later, Imbruce purchased the exact stock, in the exact quantity, from his associates and investing partners at Johnson Rice. We affirm that Berkowitz’s short sales of ATPG are attributable to Imbruce for purposes of Exchange Act Rule 105.²⁷

* * *

The record in this case establishes that Imbruce purchased ATPG in a secondary public offering from a participating underwriter, after he short sold the company’s stock during the restricted period.²⁸ In so doing, Imbruce violated Exchange Act Rule 105 and NASD Rule 2110.²⁹

D. Imbruce’s Procedural and Fairness Arguments

Imbruce asserts several procedural and fairness arguments in this appeal. These arguments do not absolve his violation of Exchange Act Rule 105.

²⁷ Imbruce asserts that Exchange Act Rule 105 requires that the *same person* effect the short sale and purchase of the subject securities and, accordingly, he argues that he did not violate Exchange Act Rule 105 because he did not short sell ATPG. Imbruce misunderstands the Exchange Act’s broad, remedial approach to securities regulation. The Exchange Act, by its own terms, prohibits individuals from engaging in unlawful activities by means of other persons. *See* 15 U.S.C. § 78t(b) (2011) (“It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this title or any rule or regulation thereunder through or by means of any other person.”). As discussed above, we have found that Imbruce is responsible for the subject short sales, despite the fact that Berkowitz executed the actual trades. This finding, coupled with our finding that Imbruce purchased ATPG in the company’s secondary public offering from a participating underwriter, is sufficient to establish Imbruce’s violation of Exchange Act Rule 105.

²⁸ Although the Hearing Panel used the term “willful” to describe Imbruce’s violation of Exchange Act Rule 105, we decline to make the finding here. The Hearing Panel did not indicate that it was making a legal finding or mention the consequence of such a finding, i.e., that it would subject Imbruce to statutory disqualification. We decline to inject this issue into this case on appeal, particularly when neither party argued the point.

²⁹ The violation of any Exchange Act rule constitutes a violation of NASD Rule 2110. *See FCS Secs.*, Exchange Act Rel. No. 64852, 2011 SEC LEXIS 2366, at *3 n.2 (July 11, 2011).

1. Jurisdiction

Imbruce states that FINRA lacks jurisdiction to discipline him. To support this argument, Imbruce explains that he ceased all work for Madoff Securities when he transitioned to Madoff Energy in November or December 2007, and that Madoff Securities should have filed his Form U5 with FINRA within 30 days of the end of his employment with the firm, January 2008, at the latest. *See generally* FINRA's By-Laws, Art. V, Sec. 3(a) (firms are required to file Forms U5 no later than 30 days after terminating associated person's registration).

Imbruce adds that Madoff Securities' filing of his Form U5 with FINRA in March 2008, was "false, misleading, and inaccurate," and resulted in FINRA retaining jurisdiction over him until March 2010, when FINRA's jurisdiction should have ended in January 2010. *See generally* FINRA's By-Laws, Art. V, Sec. 4(a) (FINRA retains jurisdiction over associated persons for "two years after the effective date of termination of registration pursuant to Section 3 . . ."). The conclusion of Imbruce's argument is that Market Regulation's complaint, which was filed in February 2010, is untimely, and should be dismissed.

Imbruce's assertions miss the mark. FINRA's two-year period of retained jurisdiction begins on the effective date of the termination of registration, which is the date FINRA *receives* the Form U5 from the firm. *See Donald M. Bickerstaff*, 52 S.E.C. 232, 234 (1995) ("It has long been established that [NASD's] jurisdiction is determined not from the termination of an individual's employment or association with a firm, but from the effective date of termination of the individual's registration, which is the date of the NASD's *receipt* of a Form U5.") (emphasis added). In addition, Madoff Securities' purported late filing of Imbruce's Form U5 has no bearing on the two-year jurisdictional provision in FINRA's By-Laws and its effect on Imbruce. *See Dep't of Enforcement v. Liu*, Complaint No. C04970050, 1999 NASD Discip. LEXIS 32, at *14-15 (NASD NAC Nov. 4, 1999) (explaining that firm's failure to file Form U5 within 30 days does not affect date of individual's termination for purposes of retained jurisdiction). In this case, Madoff Securities filed a Form U5 on behalf of Imbruce in March 2008, and FINRA retained jurisdiction over Imbruce for two years, until March 2010. FINRA properly asserted jurisdiction over Imbruce because Market Regulation's complaint was filed within the prescribed two-year period.³⁰

2. Admission of Berkowitz's Videotaped Testimony

Imbruce argues that the Hearing Panel improperly admitted Berkowitz's videotaped on-the-record testimony. Imbruce's primary concern with the admission of the evidence is that he

³⁰ Imbruce requests that we amend his Form U5 to reflect that his registration with Madoff Securities terminated on December 31, 2007. We deny the request. There is no remedy or grant of authority in FINRA's rules that would permit us to amend Imbruce's Form U5. It is incumbent upon FINRA firms to provide timely, complete, and accurate information on the Form U5. *See* FINRA's By-Laws, Art. V, Sec. 3(a) (firms are required to file Form U5 no later than 30 days after terminating associated person's registration); *FINRA Regulatory Notice 10-39*, 2010 FINRA LEXIS 74, at *3 (Sept. 2010) (explaining that FINRA uses information from Form U5 to identify and sanction individuals who violate FINRA's rules and federal statutes and regulations).

did not have the opportunity to cross-examine Berkowitz during the disciplinary proceedings. Imbruce's inability to cross-examine Berkowitz, however, did not render Berkowitz's videotaped testimony inadmissible.

As a general matter, the formal rules of evidence do not apply in FINRA disciplinary proceedings. *See* FINRA Rule 9145(a). In addition, in circumstances where a witness is unavailable, his or her videotaped hearsay statement not only may be admitted into evidence, but also may constitute the sole basis for findings of fact. *See, e.g., Dist. Bus. Conduct Comm. v. Dambro*, Complaint No. C3A910051, 1992 NASD Discip. LEXIS 92, at *25-26 (NASD NBCC June 22, 1992) (affirming admission of videotaped testimony, and stating that it is "NASD's policy generally . . . to act liberally in the introduction of evidence."), *aff'd*, 51 S.E.C. 513 (1993).

In this case, Berkowitz was unavailable when the hearing occurred. Although he did not appear at the hearing, he previously provided FINRA with sworn, videotaped, on-the-record testimony. Berkowitz's testimony was consistent with his prior written statements to FINRA and corroborated by other evidence contained in the record. Under these circumstances, we conclude that the Hearing Panel properly admitted Berkowitz's videotaped testimony. *See Harry Gliksman*, 54 S.E.C. 471, 480-81 (1999) (finding that affidavit, which was corroborated by other record evidence, was admissible because it was probative and reliable), *aff'd*, 24 F. App'x 702 (9th Cir. 2001); *Charles D. Tom*, 50 S.E.C. 1142, 1145 (1992) (setting forth test for admission of hearsay evidence).

3. Baker Hostetler Documents

Imbruce also questions the accuracy and completeness of documents that FINRA staff received from Madoff Securities' court-appointed trustee in bankruptcy, Baker Hostetler LLP. In February 2010, FINRA staff sent Baker Hostetler a request for information concerning Madoff Securities' trading in ATPG in October and November 2007. FINRA staff also sought information related to the supervision of various operations at Madoff Securities during the relevant period.

When Baker Hostetler responded to FINRA's request for information in March 2010, the firm explained that the ongoing civil and criminal investigations and proceedings involving Madoff Securities left Baker Hostetler with limited access to Madoff Securities' books and records. Baker Hostetler's response attached two documents as responsive – a trade detail of Madoff Securities' positions in ATPG in October and November 2007, and Madoff Securities' "Compliance Guide to Trading and Market Making."

The Hearing Panel, however, did not rely on any of the documents or information that Baker Hostetler provided. In this regard, we deem Imbruce's argument moot. We also find that the available evidence in the record establishes Imbruce's violation of Exchange Act Rule 105. The record in this case contains ample documentation from ATPG, Johnson Rice, Bank of America, BATS Trading, and NASDAQ Single Book. This documentary evidence, coupled with Imbruce's and Berkowitz's depictions of the events giving rise to this case, are sufficient to establish the violation at issue.

IV. Sanctions

For violating Exchange Act Rule 105, the Hearing Panel censured Imbruce, fined \$50,000, and suspended him in all capacities for 30 business days. There are no Sanction Guidelines (“Guidelines”) related to violations of Exchange Act Rule 105.³¹ Although there is no specific guidance for this rule, we look to the Guidelines for violations of FINRA Rule 5130, “Restrictions on the Purchase and Sale of Initial Equity Public Offerings,” to assist our formulation of sanctions in this case. FINRA Rule 5130 places certain limitations on the purchase and sale of new issue securities, and similar to Exchange Act Rule 105, protects the integrity of the public offering process by ensuring that FINRA members make bona fide purchases and sales of newly offered securities at fair offering prices. *See NASD Notice to Members 03-79*, 2003 NASD LEXIS 90, at *3 (Dec. 23, 2003). Under the circumstances presented here, we conclude that the Guidelines for violations of FINRA Rule 5130 are analogous, and provide useful metrics for the analysis of Imbruce’s conduct.³²

The Guidelines for violations of FINRA Rule 5130 recommend a fine between \$1,000 to \$15,000, if the respondent is the restricted buyer.³³ The Guidelines also contemplate a suspension of the restricted buyer in any and all capacities for up to 30 business days.³⁴ In egregious cases, the Guidelines recommend a longer suspension of up to two years, or a bar, and a fine up to three times of the amount of the “transaction profit.”³⁵ Among other factors, the Guidelines direct adjudicators to consider whether the respondent has any interest in the restricted account, and whether the respondent engaged in misconduct for the purpose of improperly conferring financial benefit on another person or entity.³⁶ Within these parameters, we consider the “General Principles Applicable to All Sanction Determinations” and the “Principal Considerations in Determining Sanctions,” which we apply in every disciplinary case.³⁷

³¹ *See FINRA Sanction Guidelines* (2011), <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf> [hereinafter *Guidelines*].

³² *See Guidelines*, at 1 (Overview) (“For violations that are not addressed specifically, [a]djudicators are encouraged to look to the guidelines for analogous violations”), 23 (Restrictions on the Purchase and Sale of Initial Equity Public Offerings Violations).

³³ *See Guidelines*, at 23.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See id.* at 2-5 (General Principles Applicable to All Sanction Determinations), 6-7 (Principal Considerations in Determining Sanctions).

We begin our analysis with the factors presented in the Hearing Panel's decision, then turn to the mitigation arguments that Imbruce has presented on appeal.³⁸ The Hearing Panel found that Imbruce's conduct was intentional because he instructed Berkowitz to short sell ATPG.³⁹ Consistent with the Hearing Panel's credibility determinations in this area, we too find that Imbruce's conduct was intentional, which is an aggravating factor.

The Hearing Panel found that Imbruce failed to acknowledge his role in the conduct.⁴⁰ We do not agree with the Hearing Panel's finding. During the proceedings below, Imbruce readily admitted that he unilaterally decided to purchase the shares of ATPG in the secondary public offering and highlighted his failures with regard to the short sales. In this context, we do not view Imbruce's discussion of Berkowitz's, Coughlin's, and Madoff Securities' relative roles in the transactions as an attempt to shift blame improperly for the violation. *Cf. Scott Epstein*, Exch. Act Release No. 59328, 2009 SEC 2009 SEC LEXIS 217, at *73 (Jan. 30, 2009) (finding that respondent's blame-shifting arguments demonstrate failure to accept responsibility for own actions), *aff'd*, 416 F. App'x 142 App'x 142 (2010).

The Hearing Panel also concluded that Imbruce's conduct presented the potential for for monetary gain for him and resulted in actual monetary gain for Madoff Securities.⁴¹ While we agree that the conduct resulted in actual profit for Madoff Securities,⁴² the case of of potential gain for Imbruce is less clear. In 2007, Madoff Securities compensated Imbruce Imbruce with 25 percent of profits that the energy portfolio generated, but only after the portfolio's net profits reached \$2 million. Coughlin and Imbruce each testified that, when the subject transactions occurred, the energy portfolio was not expected to reach \$2 million in profits, given the portfolio's then-current performance.

On a related note, Madoff Securities was in the process of closing the energy portfolio in late 2007. Imbruce, Berkowitz, and Coughlin testified that Imbruce and Berkowitz were transitioned to Madoff Energy in November or December 2007, and that Madoff Securities was in the process of "unwinding" the energy portfolio at that time. Indeed, Imbruce testified that, when he returned from vacation on November 26, 2007, he began working exclusively for Madoff Energy. As we contemplate the energy portfolio's poor performance and unwinding in 2007, we find the evidence of Imbruce's potential monetary gain in this case is lacking.

³⁸ On appeal, Market Regulation reiterates the bases supporting the Hearing Panel's sanctions and asserts that the sanctions that the Hearing Panel imposed should be affirmed.

³⁹ *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

⁴⁰ *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 2).

⁴¹ *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 17), 23 (Restrictions on the Purchase and Sale of Initial Equity Public Offerings Violations).

⁴² The record establishes that Madoff Securities earned \$58,721.26 in profits from the short sales and purchase of ATPG that occurred in this case.

Turning to the mitigation arguments that Imbruce has offered on appeal, we conclude that the evidence is not mitigating and has no bearing on our sanctions analysis. The absence of disciplinary history,⁴³ the expenses Imbruce has incurred to defend himself in these disciplinary proceedings,⁴⁴ his lack of current employment in the securities industry,⁴⁵ and the reputational harm that he purportedly has suffered as a result of these disciplinary proceedings do not mitigate the circumstances presented in this case.⁴⁶

As we consider the totality of the aggravating and mitigating evidence presented, that this case involves a one-time event that culminated over a two-day period in 2007,⁴⁷ and accordingly favor sanctions toward the lower end of the Guidelines for FINRA Rule 5130.⁴⁸ The Guidelines recommend a fine between \$1,000 to \$15,000, and suspension in all capacities for up to 30 business days.⁴⁹ We find that a \$5,000 fine, and suspension in all capacities for 10 business days, is sufficiently remedial under the presented.⁵⁰

⁴³ See *Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006) (explaining that absence of disciplinary history is not mitigating).

⁴⁴ See *Jason A. Craig*, Exchange Act Rel. No. 59137, 2008 SEC LEXIS 2844, at *27 (Dec. 22, 2008) (rejecting applicant's request to consider costs to litigate FINRA disciplinary proceeding as basis to lessen sanctions).

⁴⁵ See *Dep't of Enforcement v. Vines*, Complaint No. 200600556540, 2009 FINRA Discip. LEXIS 16, at *19-20 (FINRA NAC Aug. 25, 2009) (rejecting request for credit for time spent out of industry).

⁴⁶ Imbruce suggests that the publication of our decision will inextricably connect him to Madoff Securities, and consequently, cause him reputational harm. We doubt that is the case. It was Imbruce's employment with Madoff Securities, not this disciplinary proceeding, which links him to the firm. Cf. *Dep't of Enforcement v. Jordan*, Complaint No. 2005001919501, 2009 FINRA Discip. LEXIS 15, at *53-54 (FINRA NAC Aug. 21, 2009) (rejecting argument that harm to respondent's personal and business reputation should warrant a reduction in sanctions).

⁴⁷ See *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, Nos. 8, 9).

⁴⁸ See *id.* at 23.

⁴⁹ *Id.*

⁵⁰ In November 1999, FINRA issued an amended censure policy. See *NASD Notice to Members 99-91*, 1999 NASD LEXIS 121, at *1 (Nov. 1999). Under the amended policy, FINRA does not censure associated persons or firms when a suspension is imposed. *Id.* at *6-7. Consistent with this policy, we eliminate the censure that the Hearing Panel imposed in the proceedings below.

V. Conclusion

Imbruce violated Exchange Act Rule 105 and NASD Rule 2110 because he purchased securities in a secondary public offering from a participating underwriter, after he sold he sold the subject securities short during the restricted period. For this violation, we fine Imbruce \$5,000 and suspend him in all capacities for 10 business days. We affirm the Hearing Panel's order to pay costs of \$3,903.70.⁵¹ We have considered, and reject without discussion, all other arguments of the parties.⁵²

On behalf of the National Adjudicatory Council,

Marcia E. Asquith,
Senior Vice President and Corporate Secretary

⁵¹ Imbruce requests an award of all legal fees and expenses incurred in this disciplinary proceeding. We decline the request. There is no basis to reimburse Imbruce's legal fees or expenses. The Hearing Panel found, and we affirmed, that Imbruce violated the Commission's and FINRA's rules, and we assessed the level of sanctions and costs that we deemed appropriate under the circumstances presented. *See FINRA* Rule 8330 (associated persons "*shall bear* such costs of the proceeding as the [a]djudicator deems fair and appropriate under the circumstances.") (emphasis added); *N. Woodward Fin. Corp.*, Exchange Act Rel. No. 60505, 2009 SEC LEXIS 2796, at *22 (Aug. 14, 2009) (rejecting respondents' request for expenses because FINRA was justified in bringing the disciplinary proceeding).

⁵² Pursuant to FINRA 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.