UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 65235 / August 31, 2011

Admin. Proc. File No. 3-13932

In the Matter of the Application of RICHARD G. CODY c/o Stephen Z. Frank, Esq. P.O. Box 129 North Conway, NH 03860 For Review of Disciplinary Action Taken by FINRA	ORDER DENYING MOTION FOR RECONSIDERATION

I.

On May 27, 2011, we issued an opinion (the "Opinion") sustaining the findings of violations and sanctions imposed by FINRA on Richard G. Cody, formerly a registered representative associated with Leerink Swann & Co. The Opinion found that Cody recommended unsuitable trading in customer accounts, sent misleading account summaries and information to customers, and failed to timely disclose two customer settlement agreements. The Opinion sustained FINRA's sanctions, which suspended Cody from associating with any FINRA member firm for one year, fined him $27,500, and assessed costs.

On June 20, 2011, Cody filed a motion seeking reconsideration. Cody's request for reconsideration focuses on the Opinion's findings that he violated NASD Rule 2310 which requires that, in recommending the purchase, sale, or exchange of any security to a customer, a member must have reasonable grounds for believing that the recommendation is suitable for that customer based on the facts, if any, disclosed by the customer as to his other securities holdings and the customer's financial situation and needs. The Opinion held that Cody violated Rule 2310 by: (i) recommending that his customers invest in securities issued by a Credit Suisse First Boston Mortgage Securities Corp. IndyMac Manufactured Housing Passthru (the "Credit Suisse Securities") without conducting a reasonable investigation of the Credit Suisse Securities; (ii) recommending purchases of three non-investment grade securities to a customer who "was retired, needed to preserve principle, requested low-risk investments, and needed immediate income to cover living expenses"; and (iii) recommending an excessive level of trading in customer accounts in which the customers had not expressed interest in short-term or speculative trading.

II.

We review Cody's request for reconsideration under Rule of Practice 470.[1] Under that rule, a motion for reconsideration "shall briefly and specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought."[2] Reconsideration is an extraordinary remedy[3] designed "to correct manifest errors of law or fact, or to permit the presentation of newly discovered evidence."[4] Under Rule 470, we do not grant reconsideration to consider arguments previously addressed or authority previously available,[5] and will only consider additional evidence if "the movant could not have known about or

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[1] 17 C.F.R. § 201.470.

[2] *Id.* Cody's filings in support of his motion for reconsideration fail to meet the deadline and length requirements set forth in our Rules of Practice. A motion for reconsideration of a Commission opinion shall "be filed within 10 days after service of the order," and such motion, together with any accompanying brief and pleadings incorporated by reference, may not exceed 7,000 words. 17 C.F.R. §§ 201.470(b), 154(c). Cody filed three separate motions requesting an extension of the deadline to June 30, 2011. Although the Commission extended the deadline to June 20, 2011, Cody's requests for further extension were denied under our "policy of strongly disfavoring" extension requests. *See* 17 C.F.R. § 201.161(b)(1). Cody filed a motion for reconsideration on June 20, 2011. He also filed a separate "Memorandum of Issues for Reconsideration" on July 1, 2011. We construe this July 1, 2001 filing as a brief in support of his motion, and have considered the arguments therein, even though the submission was untimely and violated the length limitations described above.

[3] *See Bowman Trans., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 294-95 (1974) (stating that "there is sound basis for adhering to [the Court's] practice of declining to require reopening of the record, except in the most extraordinary circumstances"); *see also* Rules of Practice, Securities Exchange Act Rel. No. 35833 (June. 23, 1995), 60 Fed. Reg. 32,738, 32,780 ("A motion for reconsideration is intended to be an exceptional remedy.").

[4] *Perpetual Sec., Inc.*, Exchange Act Rel. No. 56962 (Dec. 13, 2007), 92 SEC Docket 472, 473; *see also Laminaire Corp.*, Exchange Act Rel. No. 56789 (Nov. 15, 2007), 91 SEC Docket 3221, 3223.

[5] *Manuel P. Asensio*, Exchange Act Rel. No. 62645 (Aug. 4, 2010), 99 SEC Docket 30990, 30991 (citing *KPMG Peat Marwick LLP*, Order Denying Request for Reconsideration, 55 S.E.C. 1, 3 n.7 (2001)*, petition denied*, 289 F.3d 109 (D.C. Cir. 2002)); *see also Fundamental Portfolio Advisors, Inc.*, Order Denying Motion for Reconsideration, Exchange Act Rel. No. 51725 (May 23, 2005), 85 SEC Docket 1754, 1756 n.5.

adduced [such evidence] before entry" of the Opinion.[6] In addition, we look to "settled principles of federal court practice establish[ing] that a party may not seek rehearing of an appellate decision in order to advance an argument that it could have made previously but elected not to . . . or to 'shift position and present an issue which was previously conceded.'"[7]

Cody's claims do not meet the rigorous standards for reconsideration. The Opinion found, based on a *de novo* review of the record, that the preponderance of the evidence established the suitability violations and supported the sanctions. Although Cody disputes the Opinion's factual findings and FINRA's credibility determinations, he does not demonstrate manifest error in those findings. He also disputes the Opinion's analysis of the FINRA rule, but does not establish any manifest error of law. Instead, Cody's request for reconsideration repeats and reformulates arguments that were rejected in the Opinion, reasserts previously abandoned arguments, and inappropriately cites previously available authority or evidence to make or supplement new arguments.

For instance, in seeking reconsideration of the Opinion's conclusion that he lacked a reasonable basis for recommending the Credit Suisse Securities, Cody claims that the Opinion "did not apply the information that Cody knew." He does not, however, point to any record evidence demonstrating error in the Opinion's conclusion that he failed to "understand the risks and rewards inherent in [his own] recommendation." Cody now suggests that the credit rating alone established a reasonable basis for his recommendation because "Financial Regulators and market participants rely on credit ratings." In support of this argument, he also cites general ratings agency statements. However, Cody offers these claims for the first time in seeking reconsideration, and offers no explanation for his failure to make these arguments or to provide support for them in his original briefs to us.[8]

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[6] *Perpetual Sec.*, 92 SEC Docket at 473 (quoting *Feeley & Willcox Asset Mgmt. Corp.*, 56 S.E.C. 1264, 1269 n.18 (2003)).

[7] *KPMG*, 55 S.E.C. at 3 n.7 (2001) (internal citations omitted).

[8] As we have held, reconsideration is properly denied when respondents cite arguments and authority in a motion for reconsideration that could have been, but were not, developed in the original appeal briefs. *See supra* note 7; *Laurie Jones Canady*, 54 S.E.C. 255 (1999) (denying motion for reconsideration citing an argument that was not addressed by respondent in briefs submitted to the Commission as part of the original appeal), *petition denied*, 230 F.3d 362 (D.C. Cir. 2000); *Rockies Fund, Inc.*, Exchange Act Rel. No. 56344 (Aug. 31, 2007), 91 SEC Docket 1418, 1424 n.21 ("[H]aving failed to cite this authority at an earlier time, respondents may not rely on it" in a motion for reconsideration); *see also KPMG*, 289 F.3d at 120 (stating that "[a]n argument cannot be merely hinted at to be raised; it must be 'pressed' to be preserved"); 17 C.F.R. § 201.450(b) (requiring briefs to succinctly state "each [claimed] exception to the findings or conclusions being reviewed").

(continued...)

Moreover, as the Opinion stated, Cody previously conceded before FINRA that "in the end suitability is his responsibility." The Opinion also concluded that, as a securities professional, Cody "had an independent obligation to ensure that he understood" the securities before recommending them to his customers. We see no basis for altering this conclusion.

Cody also seeks reconsideration of the Opinion's conclusion that his recommendation of bonds that had been rated speculative and highly speculative were unsuitable for a customer who "was retired, needed to preserve principle, requested low-risk investments, and needed immediate income for monthly withdrawals to cover living expenses." Cody now argues that his recommendations were appropriate because "he was very familiar" with the issuers of the securities. FINRA previously rejected his claim that securities issued by "household name" issuers were necessarily suitable for this particular customer in light of "the risk that [the customer] was able and willing to take." Cody did not address FINRA's analysis of his "household name" defense in his briefs to the Commission, and his motion offers no basis for reconsidering that determination.[9]

In seeking reconsideration of the excessive trading findings, Cody offers various explanations for the frequent trading reflected in the record. However, the FINRA Hearing Panel questioned Cody about this level of trading, and found his testimony "evasive and inconsistent on several topics" and that "the explanations he offered for his actions were unconvincing." It specifically observed that, "when questioned about his trading by the Panel, Cody offered generalizations to the effect that he was trading to grow the value of the accounts and increase their yields, but was unable to offer any specific colorable explanation of how his trades were designed to achieve those goals." As the Opinion noted, "[t]he credibility determination of an initial fact finder is entitled to considerable weight and deference" and the Opinion did not find substantial evidence for overcoming FINRA's credibility determinations. Having failed to offer credible explanations for his trading, Cody's attempts to reformulate previously rejected

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[8](...continued)

We deny reconsideration under such circumstances to encourage parties to file briefs that fully support their arguments and address opposing arguments in the first instance, and thereby ensure that our opinion is based on fully developed arguments by the parties. *See Canady*, 54 S.E.C. at 257 ("Underlying this position is the concern that, otherwise, the opposing party would not have the opportunity to establish relevant facts that might affect the applicability of" a defense asserted for the first time in a motion for reconsideration); 17 C.F.R. § 201.470(b) (stating that opposing parties are not permitted to file responses to motions for reconsideration "unless requested by the Commission").

[9] *See KPMG Peat Marwick*, 55 S.E.C. at 3 n.7 (finding respondent was "foreclosed from resurrecting an argument as part of a motion for reconsideration" when the respondent "made and lost" the argument before an administrative law judge and then "abandoned [the argument] on review" in its Commission appeal). The Opinion also addressed and rejected Cody's claim that the customer's withdrawals justified the risks posed by these recommendations.

explanations or to offer new post hoc rationalizations at this late stage are not an appropriate basis for reconsideration.

Cody also urges reconsideration of his trading activity, arguing that the excessive trading analysis should have taken into account different customer accounts or a different time frame. However, Cody does not challenge the Opinion's findings that, for both accounts and periods at issue, Cody controlled the relevant trading and the customers were not interested in short-term trading or speculation. Moreover, the Opinion previously rejected his claims that the excessive trading analysis focused on "an inappropriately abbreviated timeframe" and that "his trading levels in [the] accounts were appropriate as part of a 'family plan.'"

The Opinion also addressed the various procedural challenges Cody raises in his request for reconsideration, including his objections to FINRA's investigation and the FINRA complaint, and his claims that he was inappropriately denied the opportunity to introduce expert testimony and other documentary evidence. He does not offer reason to revisit the Opinion's conclusions.

Nor does Cody establish a basis to reconsider remand of the proceeding. Cody claims that the Opinion "acknowledged [that] the underlying data could have been faulty" and "acknowledged the need for additional documentation." However, he does not address the Commission's analysis finding that he failed to "establish[] that any of the additional documentary evidence that he sought would have aided in his defense," that the Commission "is not bound to admit or consider expert testimony," and that "Cody has not substantiated a need for expert testimony." Cody has not demonstrated error in these findings,[10] and remanding under these circumstances would undermine both the fairness and the efficiency of these proceedings and improperly circumvent the finality of our review of the disciplinary process.[11] We do not find reconsideration merited.

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[10] Cody indicates that he delayed presenting or describing additional, unspecified, exonerating evidence because he "believed it would be inappropriate to provide such new information [in the appeal] . . . which was a reason for Cody's request to remand." However, under Rule 450(b), in a disciplinary proceeding reviewed by the Commission, a party disputing "the admission or exclusion of evidence" is required to set forth "the substance of the evidence admitted or excluded . . . in the brief, in an appendix thereto, or by citation to the record." 17 C.F.R. § 200.450(b).

[11] *See Feeley & Willcox*, 56 S.E.C. at 1270 (declining reconsideration to adduce or incorporate new evidence that was available before the Commission's opinion issued, finding that "there are fairness as well as efficiency concerns that would be implicated were we to accept the material at this point"); *Rockies Fund, Inc.*, 91 SEC Docket at 1420 (finding that a motion for reconsideration that was "based on a reworking of arguments and facts previously considered and rejected by the Commission and the Court of Appeals" was "an inappropriate attempt to avoid the finality of the Commission's administrative process.").

Therefore, IT IS ORDERED that the motion for reconsideration filed by Richard G. Cody be, and it hereby is, denied.

By the Commission.

Elizabeth M. Murphy
Secretary