

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 56613 / October 4, 2007

Admin. Proc. File No. 3-12416

In the Matter of the Application of  
  
PERPETUAL SECURITIES, INC.,  
YOUWEI P. XU,  
and  
CATHY Y. HUANG  
1603 - 7300 Yonge Street  
Thornhill, Ontario L4J7Y5  
Canada

For Review of Disciplinary Action Taken by  
  
NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY  
PROCEEDINGS

Violation of Conduct Rules

Failure to Observe Just and Equitable Principles of Trade

Failure to Provide Requested Information

Former member of registered securities association and principals operated a securities business while firm's membership was suspended, and executive vice president responded to association's request for information untimely and incompletely. Held, association's findings of violations are sustained and sanctions it imposed are modified.

APPEARANCES:

Youwei P. Xu, for Perpetual Securities, Inc.

Youwei P. Xu, pro se.

Cathy Y. Huang, pro se.

Marc Menchel, Alan B. Lawhead, James S. Wrona, and Vickie R. Olafson, for NASD.

Appeal filed: September 13, 2006

Last brief received: February 5, 2007

I.

Perpetual Securities, Inc. ("Perpetual" or "the Firm"), a former NASD member, 1/ Youwei P. Xu, the Firm's President, Chief Executive Officer, principal, and part owner, and Cathy Huang, its Executive Vice President, Chief Financial Officer, Limited Principal -- Financial and Operations ("FINOP"), principal, and part owner 2/ (collectively "Applicants") appeal from NASD disciplinary action. 3/ NASD expelled the Firm from NASD membership for operating a securities business while suspended, in violation of NASD Conduct Rule 2110; 4/ barred Xu and Huang for violating NASD Rule 2110 by allowing the Firm to operate while suspended; and barred Huang for violating NASD Rules 8210 5/ and 2110 by failing to respond timely and fully to NASD requests for information. We base our findings on an independent review of the record. 6/

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1/ The Firm filed a Form BDW withdrawing its membership on December 16, 2003.

2/ Xu and Huang are married to each other.

3/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 72 Fed. Reg. 42,190 (Aug. 1, 2007) (SR-NASD-2007-053). Because the disciplinary action here was taken before that date, we continue to use the designation NASD.

4/ NASD Conduct Rule 2110 obliges members and associated persons to "observe high standards of commercial honor and just and equitable principles of trade."

5/ NASD Investigations Rule 8210 requires NASD members and associated persons to provide information and documents to NASD in the course of an investigation, among other events.

6/ Applicants have attached many pages of documents to each of their briefs. A substantial number of these are already in the record. With respect to the remainder, as a discretionary matter, we have decided to admit the documents.

Applicants have also filed three motions requesting that the Commission hear oral

(continued...)

## II.

A. The Suspension Order

On November 14, 2000, a Perpetual customer won an arbitration award against the Firm. However, as of June 18, 2002, the Firm had not paid the award. On that date, NASD notified Perpetual that its membership would be suspended for failure to pay the arbitration award. <sup>7/</sup> Perpetual appealed the suspension (the "Suspension Proceeding"). On November 25, 2002, NASD's Office of Hearing Officers ("OHO") issued a decision (the "Suspension Order") finding that Perpetual had violated NASD Arbitration Rule 10330(h) by failing to pay the award and suspending the Firm's NASD membership until the award was paid.

OHO served the Suspension Order on the attorney who represented Perpetual in the Suspension Proceeding, Kevin Tung. Tung promptly applied to the Commission on November 29, 2002 for review of the decision and for a stay of the Suspension Order. <sup>8/</sup> OHO also sent copies of the Suspension Order to the Firm, although it sent them to an address in Forest Hills, New York that Applicants had previously notified the Central Registration Depository ("CRD") was no longer current and a post office box in Holmdel, New Jersey. When it became aware of its error, OHO sent an additional copy of the Suspension Order to the Firm at an updated street address in Holmdel, New Jersey by overnight courier and first-class mail. The record includes a Federal Express confirmation that the material was delivered to the Firm's Holmdel street address on December 3, 2002.

Applicants assert that, beginning in November 2002, the Firm had closed its New York office, and was in the process of shutting down. According to the Firm's records, however, between December 1, 2002, and January 14, 2003, Perpetual continued to transact both retail and proprietary securities business, even though its membership had been suspended. The record reflects that Applicants earned at least \$1,895 from securities business during the relevant period. According to Perpetual's clearing firm, during this time, Perpetual's customers used Perpetual's facilities to access the clearing firm's trading programs and could neither call nor

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<sup>6/</sup> (...continued)  
argument in this proceeding. The Office of General Counsel, acting by delegated authority, denied the first two of these motions by order of December 19, 2006. Pursuant to Rule of Practice 451, 17 C.F.R. § 201.451, we have determined that the decisional process will not be significantly aided by oral argument.

<sup>7/</sup> The Suspension Proceeding was commenced pursuant to Article VI, Section 3 of the NASD By-Laws and Procedural Rule 9510 et seq. On June 28, 2004, the rules relating to non-summary proceedings for failure to comply with an arbitration award were reenacted as Rule 9554.

<sup>8/</sup> The Commission denied the stay and ultimately dismissed the appeal. See Perpetual Sec., Inc., 56 S.E.C. 1008 (2003).

access the clearing firm's internet trading programs directly. <sup>9/</sup> In a letter to NASD staff dated March 3, 2004, Huang stated that she had specific responsibility for "[a]rranging clients' orders through internet clearing firm's platform."

On January 14, 2003, during an NASD on-site audit, NASD staff informed Xu and Huang that NASD had suspended Perpetual's membership, whereupon Xu and Huang ceased operations and notified the Firm's clearing broker of the suspension. NASD reinstated Perpetual's membership in May 2003, after Perpetual satisfied the arbitration award. The NASD staff's audit exit letter in May noted that it appeared that the Firm had operated while suspended and stated that the staff had referred the matter to NASD's Department of Enforcement ("Enforcement") for possible disciplinary action.

#### B. The Information Requests

On February 19, 2004, in connection with the investigation of Perpetual's possible operation while suspended, NASD sent an information request pursuant to NASD Rule 8210 to Huang at the Firm's Holmdel, New Jersey post office box address listed in the CRD, as well as her home address listed in the CRD. NASD sought, by February 27, 2004, information about the Firm's employees, their duties, and their roles in appealing the Suspension Order to the Commission, as well as copies of the Firm's written supervisory procedures. On March 8, 2004, NASD received Huang's incomplete response, in which she answered some, but not all, of NASD's questions and failed to attach any documents. <sup>10/</sup> In her response, Huang listed the Holmdel, New Jersey post office box address as the return address on her response. Huang also listed the Holmdel, New Jersey post office box as her return address when she submitted an April 3, 2004, Wells statement on behalf of the Firm, Xu, and herself.

On March 18, 2004, NASD sent a second information request pursuant to Rule 8210 to the Holmdel, New Jersey post office box address seeking account and telephone records as well as additional information with a deadline of March 31, 2004. Huang did not respond. NASD sent Huang a third request on April 7, 2004, seeking most of the same information with a deadline of April 14, 2004. In a separate letter, NASD informed Huang that it had not received a response to the March 18, 2004 request.

Huang did not respond to either the March 18 or April 7 request until August 6, 2004, after NASD initiated this proceeding. Huang claimed that her response was delayed because the mail sent to the Holmdel, New Jersey post office box was forwarded to another address in

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<sup>9/</sup> Once the clearing firm was notified of the Firm's suspension, it allowed Perpetual's customers to call the clearing firm directly or to access its trading programs via the internet.

<sup>10/</sup> For example, Huang did not provide responsive answers to NASD's questions regarding the circumstances under which the Firm decided to appeal the Suspension Order to the Commission or regarding the date of that decision.

Buffalo, New York that aggregated Applicants' mail and periodically forwarded it to them at their current address in Canada. As of February 16, 2005, the only address reflected in the CRD was the New Jersey post office box, not the Buffalo or Canadian addresses.

C. The Hearing Process

On June 29, 2004, Enforcement initiated these proceedings against Applicants by mailing a complaint to them at their CRD addresses. 11/ On September, 7, 2004 Applicants filed a timely answer and counter-complaint charging NASD staff with fraud and misconduct with respect to an alleged Firm net capital deficiency in December 2003, the service of the Suspension Order, and the initiation of this proceeding. 12/

Deputy Chief Hearing Officer David Fitzgerald scheduled a telephonic pre-hearing conference for September 23, 2004. The notice of hearing warned the parties that failure to appear could result in a default. By consent of the parties, the conference was rescheduled to October 21, 2004. On October 12, 2004, the Hearing Officer denied Applicants' motions to dismiss and to assert a counter-claim, as well as their request for discovery directed at their allegations of impropriety by NASD staff. The Hearing Officer concluded that OHO did not have authority to review allegations of misconduct by NASD staff and referred Applicants to NASD's Ombudsman. 13/

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11/ Applicants argue that NASD's District Director for Region 9 initiated this proceeding and assert that he had "no standing to file a complaint[,] but he filed the complaint in this proceeding" for the purpose of "escap[ing] his misconduct." In accordance with NASD Rule 9212(a)(1), an Enforcement attorney signed the complaint at issue here, on behalf of Enforcement. The addition of the District Director's signature to the complaint does not affect the complaint's validity.

12/ Applicants asserted below and to us that NASD ordered the Firm to suspend its operations on December 15, 2003 because of a net capital deficiency. Applicants had thirty days from the filing of a notice of the action with the Commission under Section 19(d)(2) of the Securities Exchange Act of 1934, 15 U.S.C. § 78s(d)(2), to raise objections to NASD's actions, which Applicants did not do. The record does not contain sufficient information to enable us to evaluate the alleged net capital deficiency.

13/ NASD created the Office of the Ombudsman, a position within NASD's Department of Internal Review, in 1996. NASD Notice to Members 96-45, NASD Appoints Ombudsman (July 1996). The Office of the Ombudsman provides a forum for members to voice their concerns of unfair practices or disparate treatment by the staff. NASD has stated that complaints regarding decisions made or actions taken by the staff that are "inconsistent, biased, or result in disparate treatment" may be directed to the Office of the Ombudsman. NASD Notice to Members 98-30, NASD Office of the Ombudsman Clarifies its Role (Mar. 1998).

On October 14, 2004, the Hearing Officer denied Applicants' requests for discovery concerning OHO's attempt to transmit the Suspension Order to the Firm on or about November 25, 2002. The Hearing Officer found that, since there was no dispute that OHO served the Suspension Order on Applicants' attorney in the Suspension Proceeding, the November 2002 mailing of the complaint to the Firm was not relevant. The Hearing Officer also granted Applicants' request to reschedule the conference in early December to permit Xu to receive treatment for glaucoma, rescheduling the conference to December 10, 2004.

On October 25, 2004, Applicants moved to disqualify Hearing Officer Fitzgerald alleging "bias," "unfair prejudice," and "conflict of interest." <sup>14/</sup> Applicants claimed that Fitzgerald was involved in OHO's defective service of documents on them and favored Enforcement. On November 5, 2004, Hearing Officer Fitzgerald, without commenting on Applicants' allegations, informed the parties that the matter had been reassigned to Hearing Officer Sharon Witherspoon.

On both December 7 and 8, 2004, Applicants moved to adjourn the conference indefinitely because of Xu's "advanced glaucoma" and Huang's arthritis, which impaired her mobility. The Hearing Officer denied both motions by order dated December 8, 2004. The order advised Applicants that, if Xu had a physician's opinion stating that Xu was "physically incapable of participating in a telephone conference call without causing harm to himself," he could appoint someone, such as Huang, to appear for him. The order warned, in bold type, that failure to appear could be deemed a default. The next day, Applicants again moved for an adjournment. The Hearing Officer promptly denied this third request but advised Xu that, if he provided medical confirmation of his condition by December 10, he would not be held in default. The order also notified Huang that she was expected to appear on the conference call, either in person or through counsel.

On December 10, 2004, the Hearing Officer received a faxed letter signed by "SP Xu", stating that he was a friend of Xu's and that Xu was in the hospital with "dizziness, vomiting and coma." The letter advised that "[a]ny mental irritation and annoying [sic] is strictly prohibited for [Xu's] advanced glaucoma." The letter attached a November 18, 2004 note on the letterhead of a physician, stating that Xu was "visually disabled secondary to his glaucoma," and that Xu would "require[] an eye exam every 4-6 months for the rest of his life."

On December 10, 2004, the prehearing conference nonetheless began with Xu's participation. Xu stated that he represented Huang, who never entered an appearance. During the conference, Xu moved to stop the conference and postpone it indefinitely because his health

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<sup>14/</sup> The motion complained again about the alleged net capital deficiency, asserted that staff had fabricated evidence, and alleged that the New Jersey District Director had initiated this proceeding, not Enforcement.

conditions made his continued participation "unsuitable." <sup>15/</sup> The Hearing Officer denied the motion, advising the parties that the physician's note she had received earlier that day failed to establish that Xu could not participate in a telephone call. Then Xu moved to disqualify the Hearing Officer on the grounds that she was "immoral," among other allegations, and asserted that the disqualification motion was grounds for discontinuing the conference. The Hearing Officer denied Xu's motion to discontinue and advised Xu that he could file a formal motion to disqualify her. Xu announced that he would no longer participate in the hearing and disconnected from the conference call. The Hearing Officer and Enforcement staff continued the conference, discussing Applicants' discovery motion and scheduling. The Hearing Officer deferred Enforcement's oral motion to hold Huang in default.

On December 14, 2004, the Hearing Officer issued an order directing the parties to provide OHO with dates on which the parties would be available for a January 2005 prehearing conference. The order also advised Xu that if he failed to participate in the January conference without adequate medical documentation that he was too ill to participate in a conference call, he would be held in default. <sup>16/</sup> On December 17, 2004, Applicants notified the Hearing Officer by a faxed "Note -- Participation in January 2005 Pre-Hearing Conference" that Huang had suffered a stroke "on the way" to the December 10, 2005, conference call and had been hospitalized for two days as a result. The "Note" was not accompanied by medical documentation. However, Applicants agreed to the January 27 or 28, 2005 dates. On December 21, 2004, the Hearing Officer issued an order scheduling the next conference for January 27, 2005 and warning that failure to appear or remain at the conference without the prior filing of an explicit medical opinion could result in a default. <sup>17/</sup>

At 7:19 p.m. on January 26, 2005, Xu faxed an emergency request to reschedule the January 27, 2005 conference stating that Huang had gone to the hospital at 7:00 p.m. because she was "suddenly spitting blood." The Hearing Officer went forward with the conference on January 27 without Applicants. The Hearing Officer noted that the January 26, 2005 emergency motion was not supported with medical documentation of Applicants' medical claims. By

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<sup>15/</sup> Xu complained that the "eye doctor" told him that he, Xu, was "almost blind"; that the stress of participating in the hearing was dangerous to his health; that he was "really, really weak"; that he was "about to throw up"; that he had difficulty breathing; and that he was in a "very, very, bad mood . . . [and his] head was exploding."

<sup>16/</sup> In response to Enforcement's November 22, 2004 request, the order also required Applicants to use the proper caption of the proceeding on all their filings. Because Applicants contended that the proceeding had been commenced by the District Director and members of NASD staff in their personal capacities and was, therefore, invalid, they had been captioning their filings as though the District Director and members of the staff, rather than Enforcement, had instituted the proceeding.

<sup>17/</sup> On January 24, 2005, Applicants again moved to disqualify the Hearing Officer. On January 26, 2005, the Chief Hearing Officer denied Applicants' motion; the order was sent by fax at approximately 5:30 p.m. and by first-class mail.

written order dated January 28, 2005, and faxed to the parties at approximately 4:00 p.m., the Hearing Officer found Applicants in default, directed Enforcement to move for issuance of a default decision, and reminded the parties that they had been warned of the consequences of failing to appear at the conference.

At 6:40 p.m., Applicants faxed a response to the order restating their medical problems. This transmission included handwritten notes from a physician stating that Huang had bronchitis and a chest infection and would be unable to work until early February. 18/ The same physician further stated that Xu suffered from acute pharyngitis and would be able to return to work in early February as well.

On February 1, 2005, the Hearing Officer issued an order scheduling a conference for February 8, 2005 to determine whether the January 28, 2005 default order should be vacated. On February 3, 2005, Applicants faxed a letter to the Chief Hearing Officer and the Hearing Officer objecting to the February 8, 2005 date because of a conflict with the Chinese New Year holiday, reiterated that medical problems prevented their appearance at the January 27, 2005 conference, and included a "Consultation Request Form" dated some time in December 2004 that has illegible handwritten notations. On February 4, 2005, the Hearing Officer issued an order rescheduling the conference for February 14, 2005 at 10:00 a.m. She stated that the document included with the February 3 transmission did not excuse the January 27 failure to appear. 19/

On February 10, 2005, Applicants faxed a letter to the Chief Hearing Officer and Hearing Officer Witherspoon stating that they could not appear at the February 14, 2005 conference because it conflicted with previously scheduled medical appointments on that day at 10:30 a.m. OHO treated this letter as a motion to reschedule the conference, and on February 11, 2005, the Deputy Chief Hearing Officer denied the motion on the grounds that its claims with respect to medical appointments were unsupported by any evidence and showed no good cause for postponement.

On February 14, 2005, at 9:05 a.m., Applicants faxed a letter to the Chief Hearing Officer, Deputy Chief Hearing Officer Fitzgerald, and Hearing Officer Witherspoon stating that Applicants would not appear at that day's conference because of their medical appointments, requesting that the entire proceeding be dismissed, and asserting that the whole case had been "framed up" and based on unspecified NASD "frauds." Hearing Officer Witherspoon conducted the conference as scheduled, noting that applicants had failed to appear or to provide any medical documentation to excuse their absence.

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18/ The copy of the handwritten notes in the record is only partially legible.

19/ The order further stated that, if Applicants found that having the proceeding decided on the papers without a hearing was more convenient for them, they could notify the Hearing Officer.



In a February 15, 2005 letter faxed to the Chief Hearing Officer and Hearing Officers Fitzgerald and Witherspoon, Applicants accused Hearing Officer Witherspoon of discrimination and bias with respect to the scheduling of the February 14 conference. The letter included a note from a physician stating that he examined Xu and Huang on February 14. The physician's note did not identify the time of the appointments, explain the need for the medical examinations, or state whether rescheduling of the appointments would have been possible.

On February 21, 2005, Applicants filed another motion with the Chief Hearing Officer to disqualify Hearing Officer Witherspoon because of bias and urging the Chief Hearing Officer to investigate Hearing Officer Witherspoon's "frauds in the proceeding" and report back to them. The Chief Hearing Officer denied this motion on February 28, 2005, noting that Hearing Officer Witherspoon had exhibited "utmost patience" in dealing with Applicants and that "[Applicants] have demonstrated over and over again their clear refusal to abide by the procedures set forth in the NASD Rules and in [Hearing Officer Witherspoon's] orders." 20/

On July 1, 2005, Hearing Officer Witherspoon issued a default decision based on Applicants' failure to appear at either the January 27 or February 14, 2005 conferences. Applicants appealed the Hearing Officer's decision to the National Adjudication Committee ("NAC"). The NAC found that Hearing Officer Witherspoon had properly entered a default finding against Applicants. The NAC further found that Perpetual had operated while suspended and that Xu and Huang were responsible for Perpetual's operations while suspended. The NAC also found that Huang's responses to the February 19 request were incomplete and her responses to the March 18 and April 7, 2004 requests were incomplete and untimely. 21/

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20/ On March 8, 2005, Applicants filed with the Chief Hearing Officer yet another motion to disqualify Hearing Officer Witherspoon. The Chief Hearing Officer denied Applicants' motion on April 4, 2005 and on April 5, 2005, Applicants filed another motion to disqualify Hearing Officer Witherspoon.

21/ Applicants object that NASD's Secretary, who signed the NAC decision, "can not replace NAC to make decision and she had no standing to issue the NAC August 16, 2006 Decision." However, NASD's Secretary signs the NAC decision "on behalf of the [NAC]," not in her personal capacity. Her role is purely administrative. The decision was issued by the NAC.

## III.

A. Applicants' Default

NASD Rule 9269(a) authorizes a Hearing Officer to "issue a default decision against a Respondent that . . . fails to appear at a pre-hearing conference . . . of which the party has due notice." 22/ There is no dispute that Applicants had "due notice" or that they failed to appear for the January 27, 2005 and February 14, 2005 conferences.

The burden was on Applicants to demonstrate that they had "good cause" for not appearing at the conferences because of their health problems. 23/ We agree with NASD that Applicants failed to present adequate documentation of their asserted medical conditions to excuse their failure to appear on January 27, 2005. Instead of a medical certificate stating that Applicants were unable to participate in the conference call without damaging their health, Applicants presented medical documentation which focused on Applicants' ability to return to work, noting that Xu had acute pharyngitis (i.e., a sore throat) and that Huang suffered from respiratory infections. Nothing in the documentation demonstrated that they were precluded from participating in a telephone conference call. Moreover, the doctor's diagnosis of Huang did not support Applicants' descriptions of her condition (e.g., "stroke" or "spitting blood"). These medical certificates do not, therefore, support Applicants' claim of good cause for their failures to appear.

Applicants claimed, beginning on February 10, 2005, that they were unable to appear at the February 14, 2005 hearing to set aside the default because the hearing conflicted with previously scheduled medical appointments. Applicants did not suggest an alternate time on February 14, 2005, for the conference. Moreover, the medical documentation Applicants submitted on February 15, 2005 does not provide a diagnosis or statement that supports the conclusion that Applicants were unable to participate in the hearing, nor does the documentation state how long the appointments lasted, or whether it was possible to reschedule them. Applicants have failed to show that they had good cause for their failures to appear at the February 14, 2005 conference. 24/

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22/ NASD Procedural Rule 9269(a).

23/ NASD Procedural Rule 9344(a). In evaluating claims of good cause, NASD takes into account the purported reasons for the failure to appear. See NASD Notice to Members 99-77 (Sept. 1999).

24/ Applicants cite instances of problems with respect to OHO's mailing and faxing of documents to Applicants. The record indicates that when these errors were brought to OHO's attention, OHO apologized to the Applicants and re-sent the materials. None of these errors appears to be intentional, nor do any of them appear to have had any impact  
(continued...)

Applicants claim that Hearing Officer Witherspoon's denial of their motions for adjournment were acts of discrimination against two elderly and disabled individuals. 25/ The Hearing Officer properly required Applicants to provide medical corroboration to substantiate that the claimed disabilities existed and were of such severity as to preclude their participation in the conferences. Applicants failed to demonstrate their medical conditions to NASD or to us. Because Applicants have failed to establish that they had good cause for failing to appear on the telephonic conferences, of which they were duly notified, on January 27 and February 14, 2005, we find that NASD appropriately found Applicants in default. 26/

B. Doing Business While Suspended

NASD suspended the Firm by its order dated November 25, 2002. Applicants note that in November 2002, the Firm had laid off its employees and vacated its New York offices. However, the record reflects that the Firm's customers transacted business using the Firm's on-line trading platform between December 1, 2002 and January 14, 2003 and that Perpetual's customers accessed the clearing firm's trading platform during that time through the Firm. Applicants received revenue from this activity. However, even if, as Applicants contend, the Firm realized no monetary gain from the unauthorized operations, those operations nonetheless violate NASD Rule 2110 because Applicants' disregard for NASD's Suspension Order is itself a failure to observe just and equitable principles of trade. 27/

Applicants argue that they were not notified of the Suspension Order until January 14, 2003, when NASD staff arrived for the on-site audit. 28/ Applicants also assert that, because NASD undertook to send copies of the Suspension Order to the Firm and to Huang, service was not completed and effective until they received it. 29/ However, NASD Procedural Rule 9514(g)

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24/ (...continued)  
on the proceedings.

25/ CRD records reflect that Xu was born in 1945 and that Huang was born in 1946.

26/ Cf. James M. Russen, Jr., 51 S.E.C. 675, 677 (1993) (holding that applicants must demonstrate good cause to set aside default).

27/ David C. Ho, Securities Exchange Act Rel. No. 54481 (Sep. 22, 2006), 88 SEC Docket 3194, aff'd, No. 06-3788 (7th Cir. Apr. 25, 2007) (nonprecedential disposition).

28/ There is nothing in the record to support Applicants' assertions that this proceeding was initiated to "cover up OHO misconduct for failure to serve this Suspension or Decision." The record shows that Applicants did securities business while the Firm was suspended.

29/ Rule 9134(b)(3). Applicants also suggest that transmission to the Firm and Huang was  
(continued...)

provides that non-summary suspension decisions are to be served on the parties pursuant to NASD Procedural Rules 9132 and 9134. 30/ Those rules mandate that when a person is represented by counsel, orders (other than a complaint or document initiating a proceeding) shall be served on such counsel. 31/ Applicants were represented by an attorney, Kevin Tung, in the Suspension Proceeding. Accordingly, Rules 9132(c) and 9134(b) required NASD to serve the Suspension Order on Tung. In compliance with its rules, NASD served Tung by first class mail with a Notice of Decision dated November 25, 2002. The Suspension Order was effective on that date. There is no dispute that Tung received the Suspension Order, because on November 29, 2002, Tung filed an application for review of the suspension decision and a motion to stay its effectiveness with the Commission. 32/

Applicants argue that service of the Suspension Order on Tung was ineffective. They assert that Tung represented the Firm solely for purposes of its appeal and was not the Firm's "general attorney." 33/ NASD rules do not recognize a "limited" appearance for counsel, and

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29/ (...continued)  
ineffective because there is no showing that the Federal Express delivery was signed for. NASD rules permit service to be effective on delivery by methods other than first-class mail, and there is evidence in the record that the courtesy copies of the Suspension Order were delivered by Federal Express. The rule does not require a signature for service to be effective. Id.

30/ NASD Procedural Rule 9514(g) provides that

[t]he Hearing Panel shall provide its proposed written decision to the NASD Board . . . . If the NASD Board does not call the proceeding for review, the proposed written decision of the Hearing Panel shall become final, and the Hearing Panel shall serve its written decision on the Parties pursuant to Rules 9132 and 9134.

Rule 9132(b) provides that "[a]n order . . . shall be served pursuant to Rule 9134."

31/ NASD Procedural Rules 9132(c) and 9134(b)(2).

32/ Applicants also argue that the Suspension Order was required to be served on an officer of the Firm pursuant to NASD Rule 9131 because the Suspension Order "initiated an order." However, Rule 9131 provides the method for serving complaints or documents initiating proceedings only. Rule 9132 governs service of orders, such as the Suspension Order. Rules 9132 and 9134 ("Methods and Procedures for Service") mandate service on counsel.

33/ Although Applicants allege that the NAC in its decision "willfully falsified" NASD Rules 9132 and 9134, there is no evidence to support such a characterization. The language of  
(continued...)

Tung's filing of an application for review evidences that he accepted service on Perpetual's behalf.

Applicants make several claims with respect to the validity and correctness of the arbitration award underlying the Suspension Order. The arbitration award is final and is not subject to collateral challenge here. <sup>34/</sup> Any issues raised with respect to the Suspension Proceedings were decided in our opinion in Perpetual Securities, Inc., <sup>35/</sup> and also are not subject to challenge here.

Applicants also attempt to shift the responsibility for their noncompliance to Tung and NASD. They claim that Tung failed to notify Applicants of the service of the Suspension Order and that NASD knew that Tung had not informed the Firm of the Suspension Order. Applicants cannot blame NASD or their counsel for their failure to comply with the Suspension Order. <sup>36/</sup> Here, the Applicants were aware of the Suspension Proceeding, and had begun to close their New York office in anticipation of a possible sanction. They were responsible for being aware of their NASD membership status while they continued to do business. We find that the Firm violated NASD Rule 2110 by conducting a securities business during the period that its registration was suspended.

#### C. Responsibility of Huang and Xu for the Firm's Violation

Huang was the Firm's Executive Vice President, Chief Financial Officer, FINOP, and — along with Xu — a registered principal. In partial responses to NASD's information requests, she stated that she was the executive in charge of the Firm's shutdown of its operations between November 2002 and January 2003 and that she was responsible for "[a]rranging clients' orders through internet clearing firm's platform." Moreover, as FINOP, Huang was responsible, pursuant to NASD Rule 1022(b)(2)(G), for, among other things, any matters "involving the financial and operational management of the member." <sup>37/</sup>

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<sup>33/</sup> (...continued)  
the NAC decision quoted by Applicants is an accurate paraphrase of the rule.

<sup>34/</sup> Tony R. Smith, 54 S.E.C. 1097, 1103 n.14 (2000) ("[T]o permit a party dissatisfied with an arbitral award to attack it collaterally for legal flaws in a subsequent disciplinary proceeding would subvert the salutary objective that the NASD's [arbitration] resolution seeks to promote").

<sup>35/</sup> 56 S.E.C. at 1008.

<sup>36/</sup> B.R. Stickle & Co., 51 S.E.C. 1022, 1025 (1994) (rejecting blame-shifting arguments).

<sup>37/</sup> NASD Membership and Registration Rule 1022(b)(2)(G).

As the Firm's President, Xu was responsible for the Firm's compliance with the securities laws unless that duty was responsibly delegated to another. 38/ Although Xu suggests he was away from the Firm because of his mother's illness, he nonetheless had an obligation to ensure that someone was in charge of the Firm in his absence. 39/ Xu does not state that he delegated this responsibility to Huang or the Firm's other employee. However, to the extent he ceded this responsibility to Huang, he had an obligation to monitor her performance. 40/ Consequently, we find Xu to be responsible for Perpetual's operation during the time it was suspended.

Under these circumstances, Huang, as FINOP, and Xu, as president, shared authority regarding the operations of the Firm, and we find that they are both responsible for the Firm's violation of NASD Rule 2110. 41/

D. Huang's Violation of Rules 8210 and 2110

NASD Rule 8210 obligates associated persons to provide information to NASD in the course of an investigation. 42/ NASD Rule 8210 is an essential tool for NASD's enforcement responsibilities under the Securities Exchange Act of 1934. As we have stated, "[i]t is well settled that, because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate." 43/

NASD directed three requests for information to Huang with respect to the Firm's operations while suspended. Each request was sent to the CRD addresses for the Firm and

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38/ Pac. On-Line Trading & Sec., 56 S.E.C. 1111, 1117 n.11 (2003); Gary E. Bright, 51 S.E.C. 463, 470-71 (1993).

39/ See PAZ Sec., 86 SEC Docket at 1885.

40/ Bright, 51 S.E.C. at 470-71 (finding firm president "responsible for compliance with all of the requirements imposed on his firm unless and until he reasonably delegates particular functions to another person in that firm, and neither knows nor has reason to know that such person's performance is deficient").

41/ Cf. Steven P. Sanders, 53 S.E.C. 889, 904 & n.30 (1998) (in personnel supervision context when supervisory authority is shared, more than one supervisor can be held responsible for failures to supervise.) (citing Houston A. Goddard, 51 S.E.C. 668 (1993)).

42/ NASD Procedural Rule 8210(a).

43/ Rooney A. Sahai, Exchange Act Rel. No. 51549 (Apr. 15, 2005), 85 SEC Docket at 873 n.24. See also Joseph G. Chiulli, 54 S.E.C. 515, 524 (2000)("[Respondent] substantially undermined the NASD's ability to carry out its regulatory responsibilities by failing to provide the documents when the NASD requested them").

Huang. The request for information issued on February 19, 2004 received a partial response from Huang on March 8, 2004. Neither of the requests, issued on March 18 and April 7, 2004 and addressed to the Holmdel post office box received a response of any kind from Huang until August 6, 2004, more than a month after NASD commenced this proceeding.

Huang argues that she did not receive the second and third requests until late July because they were addressed to her CRD address in New Jersey and the mail service took a long time to forward mail to her residence in Canada. She claims she responded "promptly" to the requests for information once she received them. However, NASD Rule 8210 provides that "[a] notice under this Rule shall be deemed received by the member or person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the [CRD]." 44/

Moreover, in her response to the March 8, 2004 request for information, Huang gave the Holmdel, New Jersey post office box as her return address and did not suggest that Xu or Huang or the Firm had moved, or were about to change their CRD addresses. The Wells submission signed by Huang and received by NASD on April 5, 2004 also listed as its return address the Holmdel post office box address. Huang was required to keep her CRD address current, and she must bear the consequences of her failure to do so. 45/

Huang's August responses to the second and third requests, coming as they did after NASD had already filed the complaint, were untimely. We have said repeatedly that NASD should not have to initiate a disciplinary action to provoke a response to its information requests pursuant to Rule 8210. 46/

Huang's responses to the February 19, 2004 request were incomplete. She answered some of the questions but failed to provide any of the requested documents and failed to provide evidence of her efforts to obtain documents that Huang claimed were unavailable to her. Instead of including copies of the Firm's written supervisory procedures, Huang provided a narrative of her activity incident to shutting down the Firm's operations in 2002. Huang cannot fulfill her obligation to provide information by "second guessing" NASD's request and providing information NASD did not request in lieu of the documents it did request. 47/

Huang's belated responses to the second and third requests were also incomplete. They included neither the account information nor the telephone records requested by NASD. Huang stated that the Firm did not have the type of records NASD requested and the Firm's telephone

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44/ NASD Procedural Rule 8210(d) (emphasis added).

45/ Nazmi C. Hassanieh, 52 S.E.C. 87, 90 (1994).

46/ See, e.g., Charles R. Stedman, 51 S.E.C. 1228, 1232 (1991) and cases cited therein.

47/ Joseph Patrick Hannan, 53 S.E.C. 854, 859 (1998).

company could not provide her with the requested records. However, NASD members have an obligation beyond a mere statement that the records are not available: "[i]f [an associated person] could not readily provide the information that NASD requested, [he or she] ha[s] an obligation to explain, as completely as possible, [his or her] efforts and . . . inability to do so." 48/ Huang failed to provide any evidence of her efforts to obtain the requested documents or of the telephone company's refusal to provide the information.

Huang argues that no harm has been done by her incomplete responses, because NASD was able to get the information it needed from other sources. We have repeatedly held that a recipient of an information request is not permitted to "substitute [his or her] judgment about whether [he or she] was a relevant person to [provide information] for that of the NASD [staff]" conducting an investigation. 49/

By failing to respond completely to the February 19, 2004 request and failing to respond completely and in a timely manner to the March 18, 2004 and April 7, 2004 requests for information, Huang violated NASD Rules 8210 and 2110. 50/

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48/ Rooney A. Sahai, Exchange Act Rel. No. 51549 (Apr. 1, 2005), 85 SEC Docket 862, 872 ("We have long said that if a respondent is unable to provide the information requested, there remains a duty to explain that inability. In this case, we would have expected such an explanation from [the applicant] to detail his efforts to obtain the information requested.").

49/ Hannan, 53 S.E.C. at 860.

50/ A violation of NASD Rule 8210 is also a violation of NASD Rule 2110. Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999).



## IV.

Applicants have made several allegations regarding the fairness of these proceedings.

- Applicants allege that the NASD District Director "fabricated evidence." Applicants never identify what evidence was allegedly fabricated, and there is no record evidence that the District Director, or anyone at NASD, fabricated evidence.
- Applicants object that Hearing Officer Witherspoon improperly rejected several motions filed by Applicants on the grounds that Applicants did not use the proper caption. 51/ The Hearing Officer has the authority to administer the proceedings in conformity with NASD procedures, 52/ and Applicants' failure to identify the Department of Enforcement as the prosecuting authority was inconsistent with NASD Rule 9136, which requires all papers filed in connection with a proceeding to "include . . . the title of the proceeding, the names of the Parties, the subject of the particular paper . . . and the number assigned to the proceeding." 53/ Requiring Applicants to observe NASD's rules governing the form of pleadings was within Hearing Officer Witherspoon's authority.
- Applicants complain that NASD caused the New Jersey state securities agency to commence administrative proceedings against Applicants. There is no evidence that NASD ordered or urged New Jersey authorities to institute proceedings. NASD properly posts its disciplinary decisions on its website where they are available to regulators and the general public.

## V.

Exchange Act Section 19(e)(2) governs our consideration of Applicants' appeal from the sanctions imposed by NASD. 54/ Section 19(e)(2) provides that the Commission will sustain NASD's sanctions unless it finds, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or

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51/ See supra n.16.

52/ NASD Procedural Rule 9235.

53/ NASD Procedural Rule 9136(a)(3). Procedural Rule 9120(x) defines "Party" in a disciplinary proceeding to mean Enforcement, the Department of Market Regulation, or the Respondent (i.e., as defined in Procedural Rule 9120(z), the member or associated person named in the complaint).

54/ 15 U.S.C. § 78s(e)(2).

inappropriate burden on competition. <sup>55/</sup> NASD concluded that Applicants' operation of a securities business while the Firm's membership was suspended warranted a permanent bar and separately found that Huang's failure to respond to information requests independently warranted a bar. For the reasons set forth below, we conclude that Applicants' operation of a securities business while the Firm's membership was suspended, considered in light of the aggravating factors present in this record and the lack of mitigating factors, demonstrate that barring Applicants is necessary to protect investors. With regard to the separate sanction imposed on Huang for failing to respond in a timely and complete manner to NASD information requests, however, we conclude that a bar is excessive on the facts of this case. Accordingly, we modify that sanction as set forth below.

We begin our analysis with a consideration of whether the imposed sanctions are allowable under NASD's Sanction Guidelines. <sup>56/</sup> Because the Sanction Guidelines do not specifically provide a guideline for sanctions for the operation of a securities business while suspended, NASD looked to the guideline for permitting a disqualified person to associate with a member firm prior to NASD approval. The Sanction Guidelines provide that a firm that allows a disqualified person to associate without prior approval may be fined between \$5,000 and \$50,000 and, in egregious cases, may be suspended for up to two years. <sup>57/</sup> The Sanction Guidelines provide further that the supervisory principal responsible for allowing the violation may be suspended for up to two years and, in an egregious case, may be barred. <sup>58/</sup>

NASD found that there were several aggravating factors that supported expelling the Firm and barring Xu and Huang, the supervisory principals. As an initial matter, NASD determined that Applicants' conduct was more serious than allowing a disqualified person to

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<sup>55/</sup> Applicants do not claim, and the record does not show, that NASD's action imposed an unnecessary or inappropriate burden on competition.

<sup>56/</sup> The Sanction Guidelines have been promulgated by NASD in an effort to achieve greater consistency, uniformity, and fairness in the sanctions that are imposed for violations. NASD Sanction Guidelines 1 (2006 ed.)(available on line at [http://www.nasd.com/web/groups/enforcement/documents/enforcement/nasdw\\_011038.pdf](http://www.nasd.com/web/groups/enforcement/documents/enforcement/nasdw_011038.pdf)). Since 1993, NASD has published and distributed the Sanction Guidelines so that members, associated persons, and their counsel will have notice of the types of disciplinary sanctions that may be applicable to various violations. Id. The Sanction Guidelines are not NASD rules that are approved by the Commission, but NASD-created guidance for NASD Adjudicators -- which the Sanction Guidelines define as Hearing Panels and the National Adjudicatory Council. Id. Although the Commission is not bound by the Sanction Guidelines, it uses them as a benchmark in conducting its review under Exchange Act Section 19(e)(2).

<sup>57/</sup> NASD Sanction Guidelines at 56.

<sup>58/</sup> Id.

associate, and showed a more extreme disregard for NASD regulatory authority. In addition, the Firm operated for a month and a half in violation of the Suspension Order. NASD also found that the misconduct underlying the suspension, failing to pay an arbitration award for several years until discipline was brought, was particularly serious.

NASD also determined that the Firm had a disciplinary history of disregard of NASD rules. NASD found that on November 8, 1999, the Firm and Xu had entered into a Letter of Acceptance, Waiver, and Consent in which they consented to a censure and a \$6,000 joint-and-several fine on the basis of allegations that the Firm, acting through Xu, had violated NASD advertising review rules and had opened a branch office without prior NASD approval and without registering the branch office with NASD. NASD found that this conduct "indicates the Firm's demonstrated lack of regard for regulatory requirements."

On the facts of this case as a whole, we concur in NASD's determination that Applicants' misconduct in operating a securities business while the Firm's membership was suspended demonstrates a risk too great to the self-regulatory system – and the markets and investors it protects – to allow Applicants to remain in the securities industry. Applicants were responsible for the Firm's continued operation in violation of the Suspension Order. In addition to the aggravating factors cited by NASD, *i.e.*, the seriousness of the misconduct and Xu's and the Firm's disciplinary history, Applicants' disregard of the Suspension Order put the Firm in a position to earn money from commissions when it should not have been operating at all is an aggravating factor specifically noted in the Sanction Guidelines. <sup>59/</sup> Moreover, throughout this proceeding, Xu and Huang have failed to take responsibility for any of their conduct. Applicants' failure to observe the terms of the Firm's suspension until specifically ordered to do so during an on-site audit also indicates that imposition of another suspension would not be adequately remedial because it would be similarly ignored. By operating after receiving notice of the suspension of its membership, the Firm demonstrated that its disregard for NASD's regulatory authority is sufficiently great that only a bar will deter further misconduct and provide the requisite investor protection. Applicants have not identified any mitigating factors with respect to their operation of the Firm while suspended. <sup>60/</sup>

Under these circumstances, we conclude that expulsion of the Firm and a bar against Xu and Huang in all capacities for their operation of the Firm while the Firm was suspended redress the risk to the public interest created by Applicants' continued participation in the securities industry and are neither excessive or oppressive. The expulsion and bar are also appropriate

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<sup>59/</sup> Id. at 7, item 17 ("Principal Considerations").

<sup>60/</sup> Applicants have claimed that they have been treated unfairly because of their ages and alleged infirmities. However, they do not claim these factors should mitigate the sanctions. They only raised them in the context of whether the default judgment was properly issued. We have addressed those factors, supra, in our discussion of the merits.

because they will serve as deterrents to others who may be inclined to ignore NASD's imposition of disciplinary sanctions less than a bar. 61/

We agree with NASD's finding that Huang failed to respond to the information requests of February 19, 2004 in a complete manner and the information requests of March 18, 2004 and April 7, 2004 in a timely and complete manner. The Sanction Guidelines provide that, for violations of Rule 8210, "[i]f the individual did not respond in any manner, a bar should be standard." 62/ They further provide, however, that NASD consider up to a two-year suspension and a monetary penalty when a respondent fails to respond in a timely manner. 63/ The Sanction Guidelines provide "Principal Considerations in Determining Sanctions" to assist NASD in determining the appropriate sanction. 64/ Among the considerations mentioned in connection with the failure to provide timely and complete information, the nature of the information requested and whether the information was ever provided are specifically applicable to this violation. 65/

The seriousness of the untimely responses is aggravated by the fact that some of the information was never provided at all. Ultimately, Huang's recalcitrance in producing the information requested by NASD frustrated NASD's investigation of the scope of Perpetual's activities in contravention of its suspension and, consequently, is considered to be extremely serious. To the extent that Huang's arguments that her responses were untimely due to the delay in forwarding her mail to Canada could be considered an argument for mitigation of the sanction imposed on her, we found above that these arguments were unpersuasive given Huang's persistence in using her New Jersey address in communications with NASD during the relevant period.

Huang's conduct threatened NASD's self-regulatory function and the investors it was created to protect and, in light of the absence of mitigating factors, warrants a substantial sanction to deter her from engaging in such misconduct in the future and to deter others from failing to respond in a complete and timely manner to NASD information requests. We conclude, however, that the bar imposed by NASD against Huang in all capacities as a sanction for her failure to respond is an excessive remedy on the facts of this case. As discussed, NASD's

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61/ In making this determination, we are mindful that although "general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry." PAZ Sec., 2007 U.S. App. LEXIS 17412, at \*18 (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir. 2005)).

62/ NASD Sanction Guidelines 35.

63/ Id. at 35.

64/ Id. at 6.

65/ Id. at 35.

own Sanction Guidelines provide that, in the absence of mitigating factors, a bar is the standard sanction for those who do not respond to a request for information "in any manner" but that where, as in this case, the individual made some response but "did not respond in a timely manner, [the Adjudicator should] consider suspending the individual in any or all capacities for up to two years." 66/ We agree with the remedial judgment reflected in the Guideline recommendation: a dilatory or incomplete response poses less risk to the self-regulatory system and investors than a complete failure to respond and, in the absence of aggravating circumstances indicating a fundamental unfitness to participate in the securities industry, can be remedied by a sanction less than a bar. 67/ Accordingly, we reduce the sanction imposed by NASD for Huang's failure to provide timely and complete responses to NASD's information requests from a bar to a suspension of Huang in all capacities for two years. 68/

An appropriate order will issue. 69/

By the Commission (Chairman COX and Commissioners ATKINS, NAZARETH and CASEY).

Nancy M. Morris  
Secretary

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66/ See NASD Sanction Guidelines 39; Sahai, 89 SEC Docket 2402.

67/ See PAZ Sec., 2007 U.S. App. LEXIS 17412, at \*15-16 (stating that Exchange Act Section 19(e)(2) authorizes "expulsion not as a penalty but as a means of protecting investors . . . . The purpose of the order is remedial, not penal.") (quoting Wright v. SEC, 112 F.2d 89, 94 (2d Cir. 1940)).

68/ We recognize, of course, that, if the bar in all capacities against Huang for the operation of the Firm while the Firm was suspended is sustained after the appeal process has been exhausted, that the two-year suspension for her failure to respond will be redundant. This potential for redundancy does not make it excessive or oppressive, however: NASD may consider and impose sanctions separately and independently of one another for separate violations alleged in the same proceeding. In this way, if one of the sanctions is vacated during the appeal process, the remaining sanction need not be relitigated.

69/ We have considered all of the arguments advanced by the parties. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 56613 / October 4, 2007

Admin. Proc. File No. 3-12416

In the Matter of the Application of  
  
PERPETUAL SECURITIES, INC.,  
YOUWEI P. XU,  
and  
CATHY Y. HUANG  
1603 - 7300 Yonge Street  
Thornhill, Ontario L4J7Y5  
Canada

For Review of Disciplinary Action Taken by  
  
NASD

ORDER SUSTAINING SANCTIONS IN PART AND MODIFYING THEM IN PART

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by NASD against Perpetual Securities, Inc. and Youwei P. Xu be, and it hereby is, sustained; and it is further

ORDERED that the findings of violation made by NASD against Cathy Y. Huang be, and they hereby are, sustained; and it is further

ORDERED that the bar imposed by NASD on Cathy Y. Huang for violation of NASD Conduct Rule 2110 be, and it hereby is, sustained; and it is further

ORDERED that the bar imposed by NASD on Cathy Y. Huang for violation of NASD Investigations Rule 8210 be, and it hereby is, set aside; and it is further

ORDERED that Cathy Y. Huang be suspended in all capacities for two years for violation of NASD Investigations Rule 8210, the suspension to commence on the date of this order.

By the Commission

Nancy M. Morris  
Secretary