

Comment submitted by Bill Singer, Esq., publisher of the:

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[FINRA Bogarts The Weed In Medical Marijuana Settlement \[brokeandbroker.com\]](#)

April 20, 2018

Another day and another idiotic *Outside Business Activities Rule* regulatory settlement between the Financial Industry Regulatory Authority and a registered representative. Today's featured BrokeAndBroker.com Blog case is a perfect example of everything that's wrong with FINRA's OBA Rule. As such, I'm going to post this entire article on FINRA's website as another comment about ***Regulatory Notice 18-08: FINRA Requests Comment on Proposed New Rule Governing Outside Business Activities and Private Securities Transactions*** at <http://www.finra.org/industry/notices/18-08>

Case In Point

For the purpose of proposing a settlement of rule violations alleged by the Financial Industry Regulatory Authority ("FINRA"), without admitting or denying the findings, prior to a regulatory hearing, and without an adjudication of any issue, Mina A. Mishrikey submitted a Letter of Acceptance, Waiver and Consent Arbitration 2017055313401, April 12, 2018(AWC"), which FINRA accepted. In the Matter of Mina A. Mishrikey, Respondent(AWC 2017055313401, April 12, 2018).

The AWC asserts that Mishrikey was first registered in 2000, and from July 2006 through August 2017, he was registered with FINRA member firm Deutsche Bank Securities, Inc. The AWC asserts that "Mishrikey does not have any relevant formal disciplinary history with the Securities and Exchange Commission, any self-regulatory organization or any state securities regulator."

Up In Smoke

The AWC asserts on September 7, 2016, Mishrikey sought approval from Deutsche Bank to participate in an outside business activity ("OBA") involving a company that intended to submit a license to the State of Pennsylvania to produce and sell medical marijuana pursuant to the Pennsylvania Medical Marijuana Act. The AWC asserts that on September 9, 2016, the Deutsche Bank denied Mishrikey's request to engage in the medical marijuana OBA.

The Rulebook

FINRA Rule 3270. Outside Business Activities of Registered Persons

No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member. Passive investments and activities subject to the requirements of Rule 3280 shall be exempted from this requirement.

Supplementary Material:

.01 Obligations of Member Receiving Notice. Upon receipt of a written notice under Rule 3270, a member shall consider whether the proposed activity will: (1) interfere with or otherwise compromise the registered person's responsibilities to the member and/or the member's customers or (2) be viewed by customers or the public as part of the member's business based upon, among other factors, the nature of the proposed activity and the manner in which it will be offered. Based on the member's review of such factors, the member must evaluate the advisability of imposing specific conditions or limitations on a registered person's outside business activity, including where circumstances warrant, prohibiting the activity. A member also must evaluate the proposed activity to determine whether the activity properly is characterized as an outside business activity or whether it should be treated as an outside securities activity subject to the requirements of Rule 3280. A member must keep a record of its compliance with these obligations with respect to each written notice received and must preserve this record for the period of time and accessibility specified in SEA Rule 17a-4(e)(1).

Takin' Another Hit

The AWC alleges that despite being denied his firm's permission to engage in the OBA, between September 2016 and July 2017, Mishrikey nonetheless continued to work as a Director of the marijuana company. In outlining the nature of what FINRA deemed as Mishrikey's continuing to "work as a Director," the AWC states that he:

provided financial advice to the Company and assisted the Company in preparing and submitting its application to sell medical marijuana.

A Matter of Expectations

In addition to citing Mishrikey's role as the company's Director, the AWC further alleges that:

During this period, Mishrikey also acquired an equity interest in the Company, and thus had a reasonable expectation of future compensation from the Company's anticipated business activities. The Company never received such a license and thus was never an operating entity. Mishrikey failed to notify Deutsche Bank that he continued to participate in the prohibited outside business activity. In fact, when confronted by the Firm, Mishrikey initially denied that he still was involved with the Company. By virtue of the foregoing, Respondent violated FINRA Rules 3270 and 2010.

Discharge

On August 17, 2017, Deutsche Bank filed a Form U5 stating that Mishrikey was discharged for a "violation of firm policies including engaging, and misrepresenting involvement, in an unauthorized outside business activity after being denied permission to engage in such activity."

Sanctions

FINRA deemed Mishrikey's conduct to constitute an outside business activity in contravention of Deutsche Bank's express denial and in violation of FINRA Rules 3270 and 2010. In accordance with the terms of the AWC, FINRA imposed upon Mishrikey a \$5,000 fine and a three-month-suspension from associating in any and all capacities with any FINRA member firm.

Bill Singer's Comment

To avoid any taint that I am spinning FINRA's words or paraphrasing its allegations, let me reprint in pertinent part (with highlighting added) of the AWC titled "FACTS AND VIOLATIVE CONDUCT":

FINRA Rule 3270 states that "[n]o registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member."

On September 7, 2016, Mishrikey sought approval from Deutsche Bank to participate in an outside business activity involving a company that intended to submit a license to the State of Pennsylvania to produce and sell medical marijuana pursuant to the Pennsylvania Medical Marijuana Act (the "Company"). On September 9, 2016, the Firm denied his request.

Between September 2016 and July 2017, Mishrikey nonetheless continued to work as a Director of the Company. Among other things, Mishrikey provided financial advice to the Company and assisted the Company in preparing and submitting its application to sell medical marijuana. During this period, Mishrikey also acquired an equity interest in the Company, and thus had a reasonable expectation of future compensation from the Company's anticipated business activities. The Company never received such a license and thus was never an operating entity.

Mishrikey failed to notify Deutsche Bank that he continued to participate in the prohibited outside business activity. In fact, when confronted by the Firm, Mishrikey initially denied that he still was involved with the Company.

Notice Is Not Seeking Approval

For starters and in an effort to assure you that I'm not a total idiot or fully living in denial, let's agree on a few preliminary things. If Mishrikey was named as and he had accepted the title of "Director," then he would have been covered under Rule 3270's per that role. Merely serving as a Director, however, is not prohibited under the Rule, which only renders such service a violation "unless he or she has provided prior written notice to the member, in such form as specified by the member." Consequently, if a

registered representative provides said prior written notice then service as a Director is okay as far as the letter of the Rule goes. The AWC states that Mishrikey had notified his firm. As I often say, I didn't write the Rule and if it's vague, that should be interpreted against its author, which is FINRA. Just point to me where in the body of the Rule it says that a registered representative must obtain "approval" for an OBA. Sure, I'm a stickler for detail but that's also why I get the big bucks as a lawyer!

Mishrikey was required to give prior written notice of the OBA, which he did. There was not requirement for him to obtain approval. There is a separate "Supplementary Material" to the Rule, and that does impose obligations upon a member firm (in contradistinction to the body of the Rule's imposition of obligations upon a registered representative). The *Supplementary Material* requires the member firm to evaluate all notices concerning OBA. Among the outcomes of such an evaluation is that the firm can prohibit the OBA but that is not adopted and so stated within the body of the Rule applicable to the registered representative and would suggest that when an employee persists in unapproved OBA conduct that the remedy is for the employer to discharge the employee. Splitting hairs? Perhaps, but when FINRA fails to write a clean, clear, and precise rule, then the regulator is inviting barbers to bring their shears and have at the hairy mess before them.

Reasonable, Expectations, and Intentions

Then there's the Rule's reference to the obligation to provide prior written notice about an outside business activity if you have a "reasonable expectation of compensation." The AWC concedes that as of September 7th, the medical marijuana company merely "intended to submit a license," Consequently, it sure as hell doesn't sound like the company was *involved* in any *active* business as much as was stuck at the stage of a start-up venture hoping to get licensing approval to engage in a business. Carefully note that the AWC states that as late as July 2017, Mishrikey was still assisting the company "in preparing and submitting its application to sell medical marijuana." That means that nearly a year after he submitted his September 7, 2016, written notice to Deutsche Bank Securities, that the proposed venture had still not been licensed and was still merely preparing an application and taking steps to submit it.

Addressing the Ball

There is a difference between addressing a golf ball on the tee and actually hitting the ball off the tee. Similarly, there is a difference between preparing to engage in a business and engaging in one. In Mishrikey's situation, the facts clearly prove that when he provided his September 2016 OBA notice, there was no ongoing medical marijuana business and nearly a year later that condition was unchanged. All of which undercuts FINRA's characterization that Mishrikey was continuing to "work" as a Director or that he still had some illusory "reasonable expectation of compensation" in September 2016 and/or through July 2017.

Taking License with the Facts

FINRA asserts when Mishrikey acquired an equity interest in the marijuana start-up that this magically altered his consciousness and that, of course, Mishrikey "had a reasonable expectation of future compensation from the Company's anticipated business activities." Think about that . . . seriously, give it some thought. We have a proposed medical marijuana business that requires a license. You can't engage in that business without a license. You can't buy or sell jack. Not all that different from needing a liquor license to open a bar or liquor store. You can buy all the bongos, rolling papers, glassware, bar stools, tables, and shelving you want but without the requisite licenses, you can't open your doors to the public. You appreciate the difference in signs stating "Coming Soon" and "Grand Opening"?

Not Much Operating Room

As such, without a duly issued license, Mishrikey's medical marijuana business is merely a hope and a dream. As we read through the AWC, we see references to the fact that the license has not yet been secured. Worse, as the AWC's timeline progresses, we see that a year after Mishrikey first notifies Deutsche Bank Securities of the proposed business and his role as a Director that those involved in the venture are still preparing an application and have not yet submitted it. The AWC describes the state of affairs in July 2017 as "the Company's anticipated business activities." All of which makes FINRA's case against Mishrikey silly to the extent the regulator wants us to accept the fact that he had a "reasonable expectation of future compensation"

from an "anticipated business activity." Again, not my words but FINRA's prose in its own AWC. Finally, to drive that last nail into the coffin, please read and re-read this sentence in the AWC:

The Company never received such a license and thus was never an operating entity.

FINRA Speed Trap

To be fair to FINRA, Mishrikey didn't do himself any favors by continuing on with whatever the hell he was doing with the marijuana start-up after his employer allegedly told him to stop. Frankly, if Deutsche Bank Securities fired Mishrikey for doing what he was told not to do, I'm not going to argue against the employer's action. But getting shit-canned by your employer is not the same as having to pony up a \$5,000 fine and sit in the penalty box for a couple of months because some so-called self-regulatory-organization doesn't "like" what you've done.

Reduced to its self-basting silliness, FINRA fined and suspended Mishrikey for failing to get approval (notwithstanding that he was only required to provide written prior notice, which he did) to engage in a business that needed a license but "never received such," and for engaging in an OBA involving a business that was "never an operating entity." FINRA has far more important and far better work to do in terms of protecting the investing public and ensuring the standards of its members' conduct than this garbage that looks less like sincere regulation and more like a speed trap for the unwary. Yeah, I know, Mishrikey entered into the settlement and signed off on it. I ain't gonna second guess him. On the other hand, FINRA should always remember that there is a difference

between having the right to do something and doing the right thing.

READ:

["Bill Singer Esq Comments On FINRA Notice To Members 18-08: Outside Business Activities \[brokeandbroker.com\]"](#) (BrokeAndBroker.com Blog, March 7, 2018), which states, in part:

Activities that are *generic* to merely creating an entity or preparing to engage in a business, however, should not trigger the proposed FINRA Rule 3290 prior notice requirement.

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