

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C9A980041
v.	:	
	:	
	:	Hearing Panel Decision
	:	
	:	
	:	Hearing Officer - GAC
	:	
	:	
	:	
	:	August 13, 1999
Respondents.	:	

Digest

The Department of Enforcement (“Enforcement”) filed a Complaint alleging that Respondents _____ (“_____”) and _____ (“_____”) (together as “Respondents”) violated NASD Rules 2110 and 1120(b) by failing to comply with the firm element portion of the continuing education requirements.

Based on the Hearing record, the Hearing Panel found that the Respondents violated NASD Rules 2110 and 1120(b) as alleged in the Complaint. The Hearing Panel fined the Respondents \$2,500 jointly and severally and assessed costs to the Respondents.

Appearances

Thomas K. Kilkenny, Regional Counsel, Philadelphia, PA, (Rory C. Flynn, Washington, DC, Of Counsel), on behalf of the Department of Enforcement.

_____, *pro se* and on behalf of _____.

DECISION

I. PROCEDURAL BACKGROUND

A. Complaint

Enforcement filed a single cause Complaint on November 18, 1998. The Complaint alleges that in 1996 and 1997, _____, acting through _____, did not comply with NASD Rule 1120(b) by failing to: (a) annually evaluate and prioritize its training needs; (b) develop a written training plan; and (c) maintain records documenting the content of its programs and the completion of the programs by covered registered persons. According to the Complaint, such conduct constitutes violations of NASD Rules 2110 and 1120(b) by _____ and _____.

B. Answer

The Respondents filed an Answer on January 12, 1999. The Respondents admit that _____ has been a member of the National Association of Securities Dealers, Inc. (“NASD”) since 1983.¹ Respondents further admit that _____ is the President of _____ and has been registered with the NASD as a principal since 1983.² _____ has six registered representatives and its services principally relate to mutual funds and insurance products.³

¹ Respondents’ Answer, p. 1.

² Id.

³ Id.

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The Respondents denied that _____ failed to comply with the firm element of the continuing education requirements under Rule 1120(b) during 1996 and 1997. To the contrary, Respondents claim that all registered representatives complete 12 or more hours of continuing education annually to comply with state insurance department requirements.⁴ In addition, the firm’s registered representatives are trained by “wholesalers and other outside vendors [who] train ... in the proper use of their various products.”⁵ The Answer further described the nature of continuing education courses taken by firm employees, including courses offered by the Pennsylvania Bar Association and the Certified Financial Planner Board of Standards. As for the written training plans, the Respondents stated that “[b]ecause of our small size, if and when a training situation arises with a new product, we take care of that immediately ... without undue formalities.”⁶

C. The Hearing

The Hearing was held in Philadelphia, Pennsylvania on May 17, 1999, before a Hearing Panel composed of the Hearing Officer and two current members of the District 9 Committee. Enforcement presented Vlad Uchenik (“Uchenik”), an Associate Examiner in the NASD’s District 9 Office as its only witness. _____ testified on behalf of _____ and himself.

The Hearing Officer admitted into evidence 11 exhibits Enforcement offered. (CX 1 - 11).⁷ The Hearing Officer also admitted three exhibits Respondents offered. (RX 1 - 3).⁸

⁴ Respondents’ Answer, p. 2.

⁵ Id.

⁶ Id.

⁷ References to Enforcement’s Exhibits admitted at the Hearing are designated “CX.”

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In February 1995, the Securities and Exchange Commission approved new continuing education requirements for registered persons subsequent to their initial qualification and registration with the NASD.⁹ The firm element of the NASD's continuing education requirements states that, "[at] a minimum, each member shall at least annually evaluate and prioritize its training needs and develop a written training program. The plan must take into consideration the member's size, organizational structure, and scope of business activities¹⁰ A member must maintain records documenting the content of the programs and completion of the programs by covered registered persons."¹¹

The NASD issued several *Notice to Members* and other publications to inform

⁸ References to Respondents' Exhibits admitted at the Hearing are designated "RX."

⁹ Originally adopted as a new Part XII to Schedule C of the NASD By-Laws, the requirement was renumbered as NASD Rule 1120.

¹⁰ NASD Rule 1120(b)(2)(A).

¹¹ NASD Rule 1120(b)(2)(C).

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members of their obligations pursuant to the new continuing education requirements.¹² In addition, in June 1995, the NASD provided software to all members, free of charge, to help members prepare a needs analysis and develop a written training plan for the firm element requirements.¹³ Another NASD publication, in August 1996, announced that a new, improved version of the software was available to members.¹⁴ _____ acknowledged that he always reviewed the *Notice to Members* received by _____, and that the firm received the software provided by the NASD in 1995.¹⁵

In June 1998, NASD examiners conducted an examination of _____. During that examination, NASD examiners requested that the firm produce written documentation of the firm's compliance with the continuing education requirements under NASD Rule 1120(b) for the 1996-97 period.¹⁶ In response, _____ informed the NASD examiners that the firm did not maintain written documentation in connection with an annual analysis and prioritizing of training, or written training plans for those years.¹⁷ The NASD examiners also asked for documents that reflected any training that had taken place. _____ responded that firm

¹² CX 6 (*Notice to Members* 95-13, dated March 8, 1995); CX 7 (For Your Information, dated August 1995); CX 8 (*Notice to Members* 96-55, dated August 1996); CX 9 (*Notice to Members* 96-60, dated October 1996); CX 10 (*Notice to Members* 97-9, dated March 1997); and CX 11 (*Special Notice to Members* 97-66, dated September 1997).

¹³ CX 7.

¹⁴ CX 8.

¹⁵ Hearing Transcript ("Hearing Tr.") pp. 48-49.

¹⁶ Hearing Tr. p. 27.

¹⁷ Id.

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employees had attended insurance courses, but that the firm did not maintain records to reflect that training.¹⁸

A June 4, 1998 letter from _____ to the NASD provides further evidence of _____ lack of a written annual analysis, and its failure to institute a formal continuing education program. In that letter, _____ stated that “as of [June 4, 1998], _____ ... has not implemented a written continuing education program for either the firm or regulatory element. However, the undersigned has been regularly conducting meetings to review needs analysis, training requirements, and to cover new developments.”¹⁹ _____ written supervisory procedures at the time of the examination also revealed that _____ lacked any procedures to address its continuing education obligations.²⁰

_____ testified that in compliance with the continuing education requirements, he and _____, the firm’s Corporate Counsel, met each year before the annual compliance meetings. According to _____, he and _____:

... completed an internal needs analysis for continuing education purposes. We accomplished this by reviewing personnel files which included designations, degree information, product mix and the continuing education we were receiving from our insurance and mutual fund meetings with the wholesalers and regional meetings. We came to the conclusion that no further formalized training was needed. We believe we fulfilled the requirement and received sufficient training from various other means, including the Firm Element. For this reason, we determined no additional need is required, and thus no need for a written plan stating that.²¹

¹⁸ Hearing Tr. p. 28.

¹⁹ CX 1.

²⁰ Hearing Tr. pp. 29-30; CX 2.

²¹ Hearing Tr. pp. 20-21.

_____ later reiterated his position that “[i]f there is no need [for the analysis], there is no requirement.”²² In support of his position, _____ cited NASD *Notice to Members* 99-69, entitled “Industry/Regulatory Council on Continuing Education Issues Update on the Status of the Securities Industry Continuing Education Program.” (“NTM 96-69”).²³ Specifically, _____ cited to question and answer numbers 54 and 55 in a document prepared by the Securities Industry Continuing Education Program, and reproduced in NTM 96-69.²⁴ They read as follows:

Question 54: May insurance industry continuing education or training taken in conjunction with professional designation programs such as Certified Financial Planner satisfy Firm Element Requirements?

Answer: Participation in a program designed to meet the requirements of an educational or continuing education program of another related industry, such as that required for insurance-licensed personnel, or of a professional designation program in a field related to the securities industry may meet all or part of the Firm Element requirements....

For example, if a covered person’s sales-related activities were limited to insurance and insurance-related securities, training received through insurance industry continuing education might be sufficient....

If an external educational or continuing education program is used to meet an individual’s Firm Element training requirement, the firm must document the applicability of that program to the training plan.

Question 55: What should be the content of the Firm Element?

²² Hearing Tr. p. 34.

²³ Hearing Tr. pp. 37-39, CX 9.

²⁴ Id.

Answer: It will vary. Each firm is required to analyze and evaluate its training needs at least annually. The firm's size, organizational structure, and scope of business, products and services, as well as regulatory developments and the Regulatory Element performance of its registered persons, will all need to be considered in determining training needs. Once its needs are identified, the firm will devise a written training plan to address those needs with training programs appropriate to its business.

Each firm must then administer its continuing education program in accordance with its annual needs analysis and written plan, and must maintain records documenting the content of the programs and completion of the programs by covered persons.

Contrary to _____ argument, nothing in these questions or answers relieved _____ or _____ of the firm's obligation to prepare a written plan, document the content of the programs, and keep records concerning completion of the programs by _____ registered personnel. As noted in both answers, each firm must document how it is complying with the rule, even if the training is from an external training or continuing education program.

The Hearing Panel finds that, although _____ and _____ annually evaluated and prioritized its training needs, as required by NASD Rule 1120(b), _____ failed to properly document its written training plan. The Hearing Panel also finds that _____ and _____ fulfilled, in part, the requirement to maintain adequate records of the content of the programs and the completion of the programs by its registered representatives. Specifically, the Respondents introduced an exhibit that reflected the training received by _____ during the review periods.²⁵ The evidence, however, was incomplete in that it did not include records for the other registered representatives.

²⁵ RX 1.

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The Respondents also failed in part to maintain records documenting the content of the programs and completion of the programs by covered registered representatives, as required in NASD Rule 1120(b)(2)(C). Such failure to follow these rules constitutes a failure to observe high standards of commercial honor and just and equitable principles of trade. Therefore, the Respondents violated NASD Rules 2110 and 1120(b).

III. SANCTIONS

The Hearing Panel reviewed the principal considerations outlined in the NASD Sanction Guidelines (“Guidelines”) in determining the appropriate sanctions. The Hearing Panel identified several relevant mitigating factors. First the Hearing Panel found no evidence that the firm’s misconduct denied any registered person access to participation in firm-sponsored continuing education. In addition, the Hearing Panel determined that the failure to comply with the continuing education requirement did not result in any related regulatory problems. Finally, the record also shows that _____, through _____, has already taken corrective measures to address the violative activity by amending its written supervisory procedures to include continuing education.

The Guidelines recommend that for violating the continuing education - firm element requirements, a fine ranging from \$2,500 to \$20,000 be imposed on a firm and responsible principal. Enforcement requested that the Respondents be fined \$2,500 jointly and severally for the violations, consistent with the Hearing Panel’s finding of mitigation. The Hearing Panel believes that the mitigating circumstances described above warrants a minimal fine for these violations. The Hearing Panel therefore fines the Respondents, \$2,500, jointly and severally.

IV. CONCLUSION

The Hearing Panel found that Respondents _____, and _____ violated NASD Rules 2110 and 1120(b). The Hearing Panel fined the Respondents \$2,500 jointly and severally. The Hearing Panel also assessed costs against the Respondents, jointly and severally, in the amount of \$1,070, consisting of a \$750 administrative fee and \$320 for the cost of the Hearing transcript.²⁶

Hearing Panel

by: _____
Gary A. Carleton
Hearing Officer

²⁶ The Hearing Panel considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.