

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Christopher R. Van Dyk,
Bainbridge Island, WA,

Respondent.

DECISION

Complaint No. C3B020013

Dated: August 9, 2004

The National Adjudicatory Council increased sanction for private securities transaction violation to a bar because the violation was egregious. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: David Utevsky, Esq., NASD Department of Enforcement.

For the Respondent: Christopher R. Van Dyk, Bainbridge Island, WA, pro se.

DECISION

I. Background

We called this matter for review to examine the sanctions imposed by the Hearing Panel. Under review is a June 23, 2003 decision in which the Hearing Panel found that Christopher R. Van Dyk ("Van Dyk") violated: (1) NASD Rules 3040 and 2110 by participating in the sale of securities without receiving approval from his employer; and (2) NASD Rules 8210 and 2110 by failing to respond timely to requests for information from NASD staff.

Van Dyk entered the securities industry in 1986. From August 1996 until January 1999, Van Dyk was registered with RT Securities, Inc. ("RT Securities"), an NASD member firm owned by Raymond James Financial, Inc. ("RJ Financial" or "the Firm"). In January 1999, as a result of a merger, Van Dyk's registration with RT Securities was transferred to RJ Financial.

From January 1999 to August 2000, Van Dyk was registered with RJ Financial as a general securities representative, a registered options principal and a general securities principal.¹

II. Procedural History

On July 23, 2002, NASD's Department of Enforcement ("Enforcement") filed a three-cause complaint against Van Dyk.² On August 21, 2002, Van Dyk answered the complaint, requesting a hearing before a Hearing Panel. On November 29, 2002, Enforcement filed a motion to amend the complaint, which was approved by a hearing officer on December 3, 2002.³ The two-cause amended complaint alleged in cause one that Van Dyk violated Rules 3040 and 2110 by offering and selling securities, in the form of (1) promissory notes convertible into common stock and (2) common stock, issued by genieBooks.com Corporation ("genieBooks"), without providing prior written notice to, and receiving prior written approval from, RJ Financial. Cause two of the amended complaint alleged that Van Dyk failed to respond timely to NASD's requests for information.

A Hearing Panel conducted a two-day hearing in Seattle, Washington, on December 17 and 18, 2002. On June 23, 2003, the Hearing Panel issued a decision finding that Van Dyk had engaged in the misconduct alleged in the amended complaint. The Hearing Panel barred Van Dyk in his capacity as a general securities principal, and suspended him for one year in his capacity as a general securities representative for the first cause of action. In addition, the Hearing Panel imposed a concurrent one-year suspension against Van Dyk in his capacity as a general securities representative for the second cause of action. On August 1, 2003, we called this matter for review to examine whether the sanctions imposed by the Hearing Panel were appropriate.

¹ Van Dyk resigned from RJ Financial on August 15, 2000, and he is not currently registered with any NASD member firm.

² The three-cause complaint included two causes of action for violations of Rule 8210. In the second cause, the complaint alleged that Van Dyk had produced certain information requested by NASD, but that he had failed to respond to the staff's requests in a timely manner. In the third cause, the complaint alleged that Van Dyk had failed to produce certain documents requested by the staff.

³ After the original complaint was filed, Van Dyk produced certain additional documents and represented to the staff that the remaining documents either did not exist or could not be found. Enforcement accepted Van Dyk's representations and filed the amended complaint to incorporate the late submissions of documents into the second cause of action and withdraw the third cause of action.

III. Facts

Many of the relevant facts in this case are undisputed. Van Dyk joined RT Securities (prior to its merger with RJ Financial) specifically to become dually registered as a representative of a member firm and as an independent sales associate of a registered investment adviser.⁴ Van Dyk believed that his dual registrations allowed him to advise clients on the investment of securities in their portfolio, including securities not provided by RT Securities.⁵

A. Van Dyk's Outside Activities Involving RoxyBooks

In the summer of 1999, Van Dyk's brother contacted him to discuss RoxyBooks.com Corporation ("RoxyBooks"), a start-up company that intended to sell electronic copies of books over the Internet. Van Dyk reviewed RoxyBooks' business plan and decided to become involved with the company. Van Dyk became involved initially by drafting a proposed offering circular to obtain financing for RoxyBooks. By August 1999, Van Dyk was an officer, shareholder, and director of RoxyBooks. At this time, however, Van Dyk, did not advise RJ Financial of his involvement with RoxyBooks.

Van Dyk testified that he had a general familiarity with the Firm's policies and procedures regarding outside activities, but he did not closely review them.⁶ Van Dyk was aware, however, that he could not maintain outside business activities that had not been disclosed or were not within the scope of his investment adviser activities. Van Dyk also testified that he did not generally obtain NASD Notices to Members, and that he had not reviewed Notice to Members 94-44, which discusses the application of Rule 3040 (Private Securities Transactions of an Associated Person) to individuals dually registered as a representative and an investment adviser.⁷

⁴ On August 8, 1996, Van Dyk executed an independent sales associate agreement with RT Securities. In a November 12, 1996 letter, RT Securities approved Van Dyk's dual registration with RT Securities and his own company, Securities Advisers Group, Inc. ("SA Group"). SA Group was an investment adviser registered with the State of Washington and it was not affiliated with either RT Securities or RJ Financial following the merger.

⁵ According to Van Dyk's investment adviser application, his investment adviser activities included "provid[ing] consulting or advice on private placements, and other business related activities."

⁶ In 1999, RJ Financial's policy on outside activities provided that all activities for which compensation is received must be disclosed and approved in writing via a "Request to Engage in Outside Activity" form.

⁷ Notice to Members 94-44 confirmed that Article III, Section 40 of NASD's Rules of Fair Practice (currently NASD Rule 3040) applied to the investment adviser activities of registered representatives. Thus, Notice to Members 94-44 established that a dually registered representative who participates in a private securities transaction must, prior to participating in

[Footnote continued on next page]

In an October 11, 1999 letter to RJ Financial, Van Dyk advised the Firm that he was accepting the appointment as president and chief administrative officer, chief financial officer, and director of marketing with RoxyBooks. Enclosed with the October 11, 1999 letter was a complete set of the RoxyBooks solicitation documents, including a private placement memorandum, form of offeree questionnaire, and form of subscription agreement. The October 11, 1999 letter specifically indicated that RoxyBooks anticipated raising \$3,375,000 in a first round of financing, and requested RJ Financial's permission to present RoxyBooks' private placement memorandum to certain of Van Dyk's long-time investment advisory clients who were also clients at RJ Financial. Van Dyk indicated in the October 11, 1999 letter that he would not be compensated for the placement of RoxyBooks securities beyond his normal compensation as an officer of RoxyBooks. In a memorandum dated November 10, 1999, the president of RJ Financial advised Van Dyk that RJ Financial did not approve of Van Dyk's outside activities surrounding the RoxyBooks venture.

In early November 1999, a dispute arose between Van Dyk and certain RoxyBooks directors. Consequently, on November 11, 1999, RoxyBooks terminated Van Dyk. On November 15, 1999, Van Dyk submitted his resignation as a director of RoxyBooks and continued to work as a registered representative for RJ Financial and as a registered investment adviser for SA Group.

B. Van Dyk's Outside Activities Involving genieBooks

By mid-December 1999, Van Dyk believed that RoxyBooks would fail and that its assets would become available for sale. In January 2000, Van Dyk developed the idea to start genieBooks. Van Dyk intended for genieBooks to acquire RoxyBooks' assets and continue selling electronic copies of books over the Internet. Van Dyk executed Articles of Incorporation for genieBooks on January 11, 2000.⁸

On January 27, 2000, genieBooks issued a tender offer to the stockholders of RoxyBooks.⁹ At the time of the tender offer, Van Dyk called RJ Financial's compliance department to inform the department of his involvement with genieBooks. In the telephone conversation, the compliance department reiterated that the Firm did not approve of Van Dyk's

[cont'd]

the transaction, provide written notice to, and receive approval from his firm, even if the transaction is executed in the course of the representative's investment adviser business.

⁸ Van Dyk has been the president, chairman of the board of directors, and a minority shareholder of genieBooks since its inception. Van Dyk owned 4.5 million shares of genieBooks, approximately 46.15% of the outstanding stock, in January 2000.

⁹ The tender offer documents indicated that after the purchase of shares of RoxyBooks, genieBooks would merge with RoxyBooks and operate as the surviving corporation.

proposed outside activities and that Van Dyk would have to resign from RJ Financial if he wanted to pursue the genieBooks venture.

In a February 9, 2000 letter to the compliance director for RJ Financial's securities division, Van Dyk explicitly stated that he had decided to go forward with the development of genieBooks, and, accordingly, was tendering his resignation. Van Dyk, however, did not resign, and he continued to work for RJ Financial until he was discharged on August 15, 2000. In the February 9, 2000 letter, Van Dyk specifically stated that genieBooks intended to raise \$3 million in a series of small private placement offerings over the next few months, and that he was interested in working out a way to pursue the genieBooks venture while still working as a registered representative for RJ Financial.¹⁰ Van Dyk also indicated that if the Firm did not approve of his involvement with genieBooks, he was requesting that the Firm agree to a transition period in which he could continue to work for both genieBooks and RJ Financial until he could "wind down" his registered representative responsibilities. RJ Financial never responded to Van Dyk's February 9, 2000 letter.

In a private offering memorandum, dated February 25, 2000 ("February 25 Offering"), genieBooks offered for sale to the public 200 convertible notes at \$1,000 face value per note, and 30 convertible notes at \$1,000 face value per note. The February 25 Offering contained the following disclaimer ("Offering Disclaimer"):

This Offering is not an offering by or of Raymond James Financial Services, Inc., for which Mr. Van Dyk has served as a Registered Representative or Securities Advisors Group, Inc., a Registered Investment Advisory firm, nor has either Corporation or their representatives passed upon the merits of these securities or the accuracy or completeness of this Memorandum. Mr. Van Dyk acts in connection with the Offering solely as an Officer of the Company and has a substantial financial interest in the Company.

In an April 16, 2000 private placement memorandum ("April 16 Offering"), genieBooks offered for sale 800,000 shares of common stock at \$.50 per share. The April 16 Offering also included a disclaimer identical to the Offering Disclaimer.¹¹ In the end, genieBooks raised approximately \$683,000 from these offerings.¹²

¹⁰ Van Dyk did not include any additional information regarding these offerings in the February 9, 2000 letter.

¹¹ Van Dyk also testified that he orally notified potential investors that RJ Financial had no connection with the offerings.

¹² Van Dyk testified that clients of RJ Financial invested approximately \$187,500 in genieBooks securities.

Van Dyk testified that as an officer of genieBooks, he solicited money for genieBooks. Van Dyk was involved in creating the offering documents and in contacting prospective investors. From January 2000 through August 15, 2000, Van Dyk received payments of \$42,690 from genieBooks in his capacity as its officer, director, and chairman, including \$37,690 in consulting fees and \$5,000 as a reimbursement of expenses. Van Dyk admitted that genieBooks had no general corporate funds and that the source of these payments was the funds raised through the offerings.

C. Van Dyk's Audit and Subsequent Resignation from RJ Financial

In July 2000, one of RJ Financial's compliance auditors conducted a surprise audit of Van Dyk's branch office. By July 2000, Van Dyk had moved from his 1999 location and his new office was now located inside a suite of offices for genieBooks. Van Dyk testified that during the compliance auditor's visit, he disclosed his involvement with genieBooks and showed the compliance auditor the genieBooks offering documents, as well as the Offering Disclaimer.

On a "Branch Manager Annual Compliance Interview" form, dated July 13, 2000 and signed by the compliance auditor, Van Dyk indicated that he had disclosed all outside business activities to RJ Financial.¹³ RJ Financial's procedures, however, required that representatives wishing to participate in outside employment complete, sign, and submit a "Request to Engage in Outside Activity" form, and Van Dyk never submitted this form to RJ Financial.

On August 14, 2000, the President of RJ Financial called Van Dyk for an explanation of Van Dyk's outside securities transactions involving genieBooks. In a memorandum faxed to RJ Financial on August 15, 2000, Van Dyk tendered his resignation effective immediately. On August 16, 2000, RJ Financial filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") on behalf of Van Dyk. The Form U5 stated that Van Dyk had been discharged on August 15, 2000, due to his failure to disclose outside business activities and possible involvement in private securities transactions.

D. Van Dyk's Rule 8210 Requests

Upon receipt of the Form U5 filed by RJ Financial, NASD staff initiated an investigation and sent Van Dyk, on May 16, 2001, a request for information, pursuant to Rule 8210.¹⁴ The May 16, 2001 request asked Van Dyk to identify all persons whom he had solicited to invest in genieBooks and to provide copies of all the documents provided to these persons.

On May 30, 2001, Van Dyk responded to NASD staff's inquiries and indicated that documents would be provided in a timely manner. On July 2, 2001, NASD staff asked Van Dyk

¹³ The form allowed Van Dyk to check off "Yes" or "No" boxes indicating whether he had disclosed all outside business activities to RJ Financial.

¹⁴ NASD had sent an earlier request on April 23, 2001, to an outdated address.

to identify his investment adviser clients who were solicited to invest in genieBooks and to produce the April 16 Offering and additional documentation. In a July 24, 2001 letter, Van Dyk explained that he would attempt to provide the documents and responses to NASD's questions in a timely manner, but he explained that he would not be able to respond immediately because he was in the process of consolidating two offices and he was currently involved in other litigation.

On July 26, 2001, NASD sent a letter indicating that Van Dyk's July 24, 2001 response was not adequate and requesting that he appear at an on-the-record interview. On August 3, 2001, Van Dyk provided some of the requested information to NASD staff, including: (1) the February 25 Offering, (2) the April 16 Offering, and (3) a list of genieBooks investors whom he identified as clients of RJ Financial. Van Dyk, however, did not provide a complete list of all genieBooks investors. On August 22, 2001, Van Dyk participated in an NASD on-the-record interview.

Following the on-the-record interview, NASD sent Van Dyk, on September 10, 2001, an additional request for a complete schedule of all genieBooks investors for both offerings, and a list of all individuals who provided loans to genieBooks. On September 24, 2001, Van Dyk responded that he had provided a complete list of individuals and institutions that were clients of both RJ Financial and his investment adviser business, and that NASD would have to obtain information regarding non-RJ Financial clients from genieBooks.

On January 3, 2002, NASD sent an additional request letter to Van Dyk, asking for a list of all genieBooks investors, including those who were not clients of RJ Financial. This letter also warned Van Dyk that his refusal to provide the requested information could lead to disciplinary action under Rule 8210. In a January 17, 2002 letter to NASD, Van Dyk stated that he would not provide any information that he received in his capacity as chairman and president of genieBooks, and indicated that genieBooks would provide such information only upon receipt of "comprehensive hold harmless and indemnification from [NASD]."¹⁵ NASD refused to provide such an indemnification.

On June 3 and June 5, 2002, Van Dyk provided NASD with a list of all investors, including those who were not clients of RJ Financial, and the requested copies of offeree questionnaires and subscription agreements executed by some of these investors. On July 23, 2002, Enforcement filed a complaint against Van Dyk, alleging that he had failed to respond promptly to its requests and that Van Dyk had not produced requested documentation relating to 18 investors. More than two months after the complaint was filed, Van Dyk provided Enforcement with copies of subscription agreements and offeree questionnaires for two

¹⁵ Around this time, genieBooks had been sued and had recently settled a civil dispute with a former RoxyBooks director. Van Dyk indicated that he was hesitant to provide the requested information to NASD because of concerns that it could expose genieBooks to liability. Van Dyk, however, offered no theory as to the basis of this potential liability except for his belief that "anything [genieBooks] did could just result in . . . more litigation against [the company]."

additional investors and indicated that the requested documentation relating to the remaining investors either did not exist or could not be located.¹⁶

IV. Discussion

The essential facts in this case are largely undisputed. Van Dyk (1) participated in the sale of the genieBooks securities between January 2000 and August 2000; (2) participated in the sale of genieBooks securities outside the regular scope of his employment with RJ Financial; and (3) did not receive written approval from RJ Financial prior to his participation in the sale of genieBooks securities. Moreover, the evidence shows that Van Dyk failed to provide information requested by NASD in a timely manner. After reviewing the record in this matter, we affirm the Hearing Panel's findings as to each of the violations, which we discuss in turn.

A. Rule 3040 Violation

Rule 3040 requires that an associated person who intends to participate in a private securities transaction, prior to the transaction, must "provide written notice to the member with which he is associated describing in detail the proposed transaction and the person's proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction" Further, if the transaction is for compensation, the member firm must approve or disapprove of the proposed transaction in writing.¹⁷

Van Dyk argued that he did not violate the underlying purpose of Rule 3040 because: (1) he believed that the money he received for soliciting genieBooks investors was not "selling compensation" under Rule 3040; (2) he had advised RJ Financial of his intention to seek funding for genieBooks in his capacity as an officer of genieBooks; (3) as a registered investment adviser, he had an agreement with his employer that he could recommend and participate in private placements for his investment adviser clients as long as he did not receive compensation based on the specific security transaction; and (4) in his solicitation activities, he specifically advised his customers orally and in writing that his genieBooks activities were completely separate from RJ Financial. Van Dyk's argument is not persuasive.

First, Rule 3040 defines "selling compensation" broadly to include any compensation paid directly or indirectly from whatever source in connection with, or as a result of, the purchase or sale of a security. Van Dyk admitted that genieBooks had no general corporate funds and that the money he received as an officer of genieBooks came from the genieBooks investors who purchased the convertible notes and common stock through the February 25 and

¹⁶ Van Dyk provided this information to Enforcement on October 9, 2002.

¹⁷ Pursuant to Rule 3040, if the member approves an associated person's participation in the proposed transaction, the transaction must be recorded on the books and records of the member and the member must supervise the person's participation in the transaction.

April 16 Offerings. Consequently, any funds that Van Dyk received from genieBooks were a direct result of these offerings and are considered selling compensation under Rule 3040.¹⁸

Second, although Van Dyk notified RJ Financial that he intended to participate in securities transactions to provide financing for genieBooks in the February 9, 2000 letter, Rule 3040 requires that the notice specify in detail the proposed transactions.¹⁹ Van Dyk's February 9, 2000 letter did not detail the terms of the genieBooks note offering or the common stock offering, and therefore did not comply with Rule 3040.

Van Dyk believed that because of his dual registration, he did not need to obtain RJ Financial's approval to solicit investors for genieBooks. Van Dyk was mistaken. As stated in Notice to Members 94-44, Rule 3040's notice and approval requirements applied to him even though he was dually registered.²⁰ In any event, Van Dyk was aware that RJ Financial had advised him in January 2000 that he could not be involved in genieBooks and remain registered with the Firm. Thus, it was unreasonable for Van Dyk to assume that he had RJ Financial's permission to be involved with genieBooks during an undefined "transition period" because RJ Financial did not respond to his February 9, 2000 letter. Van Dyk's conduct is even more unreasonable in light of the fact that RJ Financial had previously objected to his participation in the RoxyBooks venture, an outside business activity that was essentially identical to the genieBooks venture.

Finally, Van Dyk's belief that he had fulfilled the underlying purpose of Rule 3040 by providing each investor with a written and oral disclaimer regarding RJ Financial's lack of involvement with genieBooks did not justify his failure to comply with the explicit requirements of Rule 3040. Rule 3040 "serves not only to protect investors, but also to permit securities firms, which may be subject to liability in connection with transactions in which their representatives become involved, to supervise such transactions." Mark H. Love, Exchange Act Rel. No. 49248, 2004 SEC LEXIS 318, at *9 (Feb. 13, 2004) (citing Gilbert M. Hair, 51 S.E.C. 374, 378 (1993)). Van Dyk's disclosures to investors had no effect on RJ Financial's ability to supervise the genieBooks transactions, or the Firm's exposure to liability. Thus, Van Dyk's written and oral disclaimers accompanying the offering did not satisfy his obligation under Rule 3040.

¹⁸ See William Louis Morgan, 51 S.E.C. 622, 627 (1993) (holding that cash derived from private securities transactions used to finance branch office operations is "selling compensation" under Rule 3040).

¹⁹ Under Rule 3040, proper notice requires a description of: (1) the securities transaction, and (2) the associated person's role in the transaction, including whether he has received or may receive selling compensation in connection with the transaction.

²⁰ Even if Van Dyk initially believed that he was permitted to solicit his investment adviser clients for the genieBooks offerings without RJ Financial's approval, it was unreasonable for him to fail to review closely the relevant NASD rules before soliciting these clients.

In addition, Rule 3040 requires not only that the associated person provide prior written notice to the employer of the private securities transactions, but also requires that if the employer disapproves of the associated person's participation in the private securities transaction, the associated person shall not participate in the transaction in any manner, directly or indirectly. RJ Financial did not approve Van Dyk's participation in the genieBooks transactions, but Van Dyk took part in the transactions anyway. Van Dyk solicited the purchase of securities for compensation without obtaining the prior written approval of his employer. Accordingly, we find that Van Dyk violated NASD Rules 3040 and 2110.

B. Rule 8210 Violation

NASD Procedural Rule 8210(a)(1) requires persons associated with a member of NASD to report "orally, [or] in writing ... with respect to any matter" under investigation by NASD. Rule 8210's purpose is to provide a means for NASD to carry out its regulatory functions in the absence of subpoena power and it is a "key element in the NASD's effort to police its members."²¹ Consequently, an associated person's "[f]ailure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate."²²

In this case, NASD requested information about a possible private securities violation. Van Dyk was capable of providing NASD with the requested information, but he refused to do so in a timely manner.²³ Van Dyk's flawed understanding of NASD procedure is the primary reason for his failure to respond timely to NASD's requests for information. Van Dyk testified that he believed NASD's investigation into his outside securities transactions would operate like a civil court proceeding in that an independent third party, such as a judge, would ultimately determine whether he had to comply with NASD's requests for information. NASD rules, however, do not accord a respondent the same options as a party involved in a civil proceeding.

By registering with NASD, Van Dyk "agreed to abide by [NASD's rules,] which are unequivocal with respect to [an associated person's] obligation to cooperate with the NASD."²⁴ Because of his registration with NASD, Van Dyk is also charged with knowing and complying

²¹ Richard J. Rouse, 51 S.E.C. 581, 584 (1993).

²² Michael David Borth, 51 S.E.C. 178, 180 (1992) (stating that "[respondents], as registered representatives, each had a clear obligation to supply the information that the NASD requested.").

²³ Although Van Dyk ultimately provided NASD with a satisfactory response, he did so more than a year after NASD initially requested the information.

²⁴ Brian L. Gibbons, 52 S.E.C. 791, 794 n.12 (1996) (quoting Michael Markowski, 51 S.E.C. 553, 557 (1993)).

with NASD procedures.²⁵ Here, even if Van Dyk was initially unaware of Rule 8210's requirements, NASD staff advised him in writing that he was required to respond to NASD's requests pursuant to NASD procedural rules. Thus, Van Dyk should have known that the rules of discovery in civil disputes among individuals did not govern NASD's investigation and that he had to respond timely to NASD's requests.

Van Dyk argued that he complied with Rule 8210 because he believed that only the documents relating to RJ Financial customers were needed for NASD to conduct its investigation.²⁶ Registered persons, however, may not ignore NASD inquiries, nor may they determine for themselves if the information requested is material to an investigation.²⁷ Thus, Van Dyk cannot be excused from his obligation to timely respond to NASD's requests simply because he believed that NASD did not need information relating to non-RJ Financial clients.

We also reject Van Dyk's argument that the information that he allegedly obtained in his capacity as an officer of genieBooks could not be obtained under a Rule 8210 request. Under NASD's procedures, a registered person refusing to comply with a Rule 8210 request for information carries the burden of articulating a legitimate rationale for such non-compliance.²⁸ We therefore find that Van Dyk violated Rule 8210 and Rule 2110 by failing to provide information to Enforcement in a timely manner.

²⁵ As a matter of law, Van Dyk is presumed to know and understand NASD's Rules. Carter v. SEC, 726 F.2d 472, 474 (9th Cir. 1983). See also Dist. Bus. Conduct Comm. v. Pan Oceanic Invs., Inc., Complaint No. SF-1256, 1990 NASD Discip. LEXIS 26, at *41 (Bd. of Governors Feb. 28, 1990) (stating that a broker-dealer is held to know the rules pursuant to which it operates).

²⁶ The genieBooks offerings were the subject of NASD's investigation into Van Dyk's possible private securities transaction violation. Van Dyk neither provided a rationale, nor do we find any reason as to why only information regarding clients of RJ Financial who participated in the genieBooks offerings would be relevant to NASD's investigation.

²⁷ See Dep't of Enforcement v. Dennis Sturm, Complaint No. CAF000033, 2002 NASD Discip. LEXIS 2, at *9 (NAC Mar. 21, 2002) (stating that a respondent receiving a Rule 8210 request is not entitled to second-guess NASD staff's need for the information requested).

²⁸ Van Dyk offered no reason for refusing to provide the requested information to NASD outside of a general fear that his compliance with the request could expose genieBooks to future litigation. Moreover, Van Dyk did not identify any statute, privilege or other legal restriction to establish how his status as a genieBooks officer precluded him from complying with NASD's Rule 8210 request.

V. Sanctions

A. Rule 3040 Violation

For Rule 3040 violations, NASD's Sanction Guidelines ("Guidelines") recommend a fine ranging from \$5,000 to \$50,000, and suggest that the adjudicator increase the fine amount by adding the amount of the respondent's financial benefit.²⁹ The Guidelines also suggest that the adjudicator may bar the individual depending on the circumstances of the case.³⁰ We find that Van Dyk's misconduct was egregious and warrants the imposition of a bar to protect the investing public.³¹ In determining the appropriate remedial sanction, we considered the Principle Considerations in Determining Sanctions that apply to Rule 3040 violations.³² We find that numerous, significant aggravating factors exist regarding Van Dyk's Rule 3040 violation.

We find Van Dyk's participation in the sale of genieBooks securities, even after RJ Financial informed him that he could not do so and still remain registered with the Firm, to be an aggravating factor. The fact that RJ Financial prohibited Van Dyk from participating in almost identical activities less than four months earlier makes Van Dyk's conduct even more alarming. In addition, we find it aggravating that Van Dyk: (1) sold the securities to RJ Financial's customers without the Firm's approval; (2) had a proprietary and managerial role³³ in genieBooks when he committed the Rule 3040 violation; (3) participated in two separate securities offerings, raising approximately \$683,000 for genieBooks; and (4) obtained a direct financial benefit from his misconduct.

Finally, we conclude that Van Dyk's violation of Rule 3040 was the result of reckless action. Van Dyk suggests that his misconduct was based on his misunderstanding of NASD's rules regarding dual registration. Van Dyk admitted, however, that he never took the time to closely review RJ Financial's policies or NASD's rules. The record shows that Van Dyk failed to review the relevant NASD rules even after RJ Financial: (1) informed him that he could not sell genieBooks securities and remain registered with the Firm; and (2) rejected his similar proposal

²⁹ See Guidelines, (2004 ed.) at 17 (Selling Away-Private Securities Transactions).

³⁰ Id.

³¹ We note that Van Dyk has filed for bankruptcy and that in an order dated March 19, 2003, the United States Bankruptcy Court for the Western District of Washington permitted NASD to pursue this disciplinary action, but it required that NASD impose no monetary sanctions against Van Dyk.

³² See Guidelines, (2004 ed.) at 17.

³³ Van Dyk served as genieBook's president and also owned over 46% of genieBooks stock during the period of his misconduct.

for participation in the RoxyBooks venture. We find Van Dyk's indifference toward NASD rules and his firm's procedures to be reckless and an aggravating factor in this case.

Based on the above factors, we find that Van Dyk's misconduct warrants a bar in all capacities.

B. Rule 8210 Violation

The applicable Guideline recommends that, where an individual does not respond in a timely manner to a request for information issued under Rule 8210, a suspension of up to two years and a fine ranging from \$2,500 to \$25,000 should be imposed.³⁴ Under this Guideline, the following factors are relevant to determining the appropriate remedial sanctions for a Rule 8210 violation: (1) the nature of the information requested; (2) the number of requests made; (3) the time respondent took to respond; and (4) the degree of regulatory pressure required to obtain a response.³⁵

We find it aggravating that Enforcement had to make five official requests of Van Dyk during its investigation and that Van Dyk took more than one year to respond completely to NASD's requests for information.³⁶ In addition, Van Dyk did not provide NASD with some of the requested information until after Enforcement filed a complaint against him. Thus, Enforcement was forced to exert a significant amount of regulatory pressure to obtain an adequate response from Van Dyk.

Van Dyk's failure to respond timely to NASD information requests is serious misconduct that warrants a significant sanction. We therefore suspend Van Dyk in all capacities for two years.³⁷

³⁴ See Guidelines, (2004 ed.) at 37 (Failure to Respond or Failure to Respond Truthfully, Completely or Timely to Requests Made Pursuant to NASD Procedural Rule 8210)

³⁵ Id.

³⁶ The Hearing Panel considered it a mitigating factor that Van Dyk promptly returned phone calls and was generally accessible during the period of Enforcement's investigation. Although Van Dyk may have been accessible throughout the investigation, he was only providing NASD with the information that he deemed was necessary. In light of Van Dyk's failure to respond fully to NASD's requests, we do not consider his accessibility during the investigation to be a mitigating factor.

³⁷ In light of our bar of Van Dyk for his Rule 3040 violation, we decline to impose this suspension. In addition, because the United States Bankruptcy Court for the Western District of Washington lifted an automatic stay in Van Dyk's bankruptcy proceeding to permit this disciplinary proceeding on the condition that NASD not impose monetary sanctions, we impose no monetary sanctions for Van Dyk's violations.

VI. Conclusion

We find that Van Dyk: (1) violated Rules 3040 and 2110 by engaging in private securities transactions without his Firm's consent; and (2) violated Rules 8210 and 2110 by failing to timely respond to NASD staff's requests for information. We reject Van Dyk's arguments that his Firm's silence constituted an approval of his outside activities and that his lack of understanding of NASD procedure excused his misconduct.³⁸ Accordingly, Van Dyk is barred from associating with any NASD member firm in any capacity. The bar will be effective as of the date of this decision.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary

³⁸ We have considered and reject without discussion all of the parties' other arguments.

