

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Andrew P. Schneider
West Palm Beach, FL,

Respondent.

DECISION

Complaint No. C10030088

Dated: December 7, 2005

Respondent engaged in outside business activities without providing his member firm with written notice. Held, Hearing Panel's findings and sanctions affirmed.

APPEARANCES

For the Complainant: Leo F. Orenstein, Esq., Department of Enforcement, NASD

For the Respondent: Michael Scher, Esq.

DECISION

Andrew P. Schneider ("Schneider") appeals this matter pursuant to NASD Procedural Rule 9311. The Hearing Panel found that Schneider engaged in outside business activities without providing his member firm with written notice in violation of NASD Conduct Rules 3030 and 2110. The Hearing Panel fined Schneider \$5,000 and suspended him in all capacities for 60 days. After a complete review of the record, we affirm the Hearing Panel's findings of violations and the sanctions imposed.

I. Background

A. Schneider's Employment History

Schneider entered the securities industry in 1997 as a general securities representative. On October 26, 2001, Schneider associated with Millennium Brokerage, LLC ("Millennium") as a general securities representative and an equity trader. He remained associated with Millennium until March 21, 2002, when the firm terminated him for failing to disclose outside business activities and for referring business to another broker-dealer. Upon his termination from Millennium, on March 21, 2002, Schneider associated with Broadband Capital Management, LLC ("Broadband"). Schneider is also the president and CEO of Hedgeco, Inc. ("Hedgeco"), a consulting services business. Schneider presently is not registered with an NASD member firm.

B. Procedural History

The Department of Enforcement ("Enforcement") filed a complaint against Schneider on October 23, 2003, alleging that Schneider violated NASD Conduct Rules 3030 and 2110 when he failed to provide Millennium with notice of outside business activities related to Hedgeco. On June 29, 2004, a Hearing Panel found Schneider liable for the misconduct alleged in the complaint. Schneider's appeal followed. He did not request a hearing before the National Adjudicatory Council subcommittee empanelled to consider this appeal. The case was therefore considered on the basis of the written record.

II. Facts

The facts of this case are largely undisputed. Two days before Schneider associated with Millennium, on October 24, 2001, he incorporated Hedgeco with the State of New York. Schneider formed Hedgeco to operate an educational website focusing on hedge funds and to organize seminars where hedge fund managers would make presentations to potential investors. Schneider intended to use Hedgeco as a vehicle for soliciting and obtaining hedge fund execution business that he would then direct to his employing broker-dealer. Under Schneider's business plan, he would not be compensated directly for his efforts. Instead, Schneider would earn a commission on the execution business that the hedge funds conducted with his broker-dealer. Schneider did not receive compensation from his Hedgeco activities while Millennium employed him.

Millennium hired Schneider to develop the firm's institutional business and to trade proprietary accounts. Millennium's president, Christopher Horihan ("Horihan"), testified before the Hearing Panel that soon after Schneider associated with Millennium, Schneider lost interest in trading accounts and focused exclusively on developing Millennium's institutional business. Schneider proposed to Millennium the identical business plan that he had created for Hedgeco. At no point, however, did Schneider reveal to Millennium the existence of his business plan for Hedgeco or that he was Hedgeco's president.

Horihan explained that, under Schneider's plan, Millennium would sponsor seminars where invited hedge fund managers would present investment strategies and investment styles to qualified investors. In exchange for Millennium's sponsorship, the hedge funds were obligated to direct a designated amount of execution business to Millennium. Schneider recruited another Millennium representative, Peter Polombo ("Polombo"), to assist him with the Millennium seminar program.¹ Schneider told Polombo about Hedgeco soon after he met him. Polombo testified that Schneider told him not to discuss Hedgeco with the Millennium principals "until it was a finished product." The evidence is undisputed that Schneider never discussed with Millennium his activities regarding Hedgeco.

Schneider organized six or seven seminars that Millennium sponsored during his association with the firm. Overall, Millennium was satisfied with the growth of its institutional business under Schneider. Horihan testified that Schneider was successful in generating approximately \$15,000 to \$25,000 per month in hedge fund execution business for Millennium through the seminars. Despite Millennium's approval of Schneider's performance, Schneider was discontented with the firm. Schneider testified that Millennium was not paying him the agreed upon compensation, and the firm's small infrastructure, in his view, impeded his ability to develop business. Consequently, Schneider began pursuing other employment in or about January 2002.

Christopher Fong ("Fong"), the then-vice president of marketing at the investment advisory firm of Balestra Capital ("Balestra"), referred Schneider to Broadband. Fong testified that he first met Schneider in late 2001 when Schneider "cold called" him at Balestra. According to Fong, Schneider introduced himself as someone working in the industry on a capital construction program with hedge funds and high net worth individuals. In his investigative testimony, Fong stated that Schneider identified himself as "with a company called Hedgeco" and that Hedgeco was "in the investor conference business." Sometime thereafter, Schneider and Fong agreed that Balestra would participate in a seminar that Schneider was organizing to be held in upstate New York. Fong testified that Balestra elected to attend the seminar and to pay for its attendance through referred execution business. Fong stated in his investigative testimony that he believed that Hedgeco sponsored the event because he only learned of Schneider's association with Millennium after the event. Balestra later opened an account with Millennium.

In February 2002, Fong arranged for Schneider and Polombo to meet with representatives of Broadband. Polombo testified that the purpose of the meeting was to determine whether Broadband was interested in working with and investing in Hedgeco. Schneider presented to Broadband his vision for Hedgeco and discussed his plans for Hedgeco's website.

¹ Both Schneider and Polombo worked at Millennium's Park Avenue office in New York City. Millennium had employed Polombo for 13 months when Schneider joined the firm. Also located at the Park Avenue office were one or two traders and an intern. At some point, Schneider assigned the intern to assist him with the seminar program. Millennium employed no branch manager or compliance officer at the Park Avenue office. Horihan, who oversaw the general operations of the firm, was employed at Millennium's office in New Jersey.

By mid-February, Schneider began working with Broadband to use Hedgeco to organize seminars that were intended to generate execution business for Broadband.² Schneider regularly communicated by e-mail with Broadband about referring business to Broadband. Schneider conducted his Hedgeco business using the e-mail address of “aschneider@hedgeco.net.”³ Schneider frequently sent e-mail from this address with an automatic signature that included his status as president and CEO of Hedgeco. The signature also included Schneider’s telephone number at Millennium as a contact number. The signature, however, included no reference to Millennium or Schneider’s association with the firm. Schneider testified that he hired his brother to design Hedgeco’s website and e-mail system. Schneider claimed that his brother implemented the automatic signature on Schneider’s e-mail, which identified him as president and CEO of Hedgeco. Schneider maintained that his brother just assumed that Schneider was the president and CEO of Hedgeco and mistakenly included this and the reference to Hedgeco in his signature. Despite these purported inaccuracies, Schneider did nothing to correct them and continued to send e-mail using this automatic signature.

The record includes a series of e-mail communications that evidence Hedgeco and Schneider’s involvement with Broadband while Schneider was associated with Millennium. On February 14, 2002, Schneider sent an e-mail to Broadband’s vice chairman, Philip Wagenheim (“Wagenheim”). Schneider wrote, “I need to start opening accounts very shortly please call me to explain how you want to do this.” On March 5, 2002, Schneider again wrote to Wagenheim requesting that he contact four investment advisory firms and provide them with a mutual fund list. Schneider admitted before the Hearing Panel that he had referred these four entities to Broadband and that “possibly” Millennium was unaware of his actions. As part of that same March 5 e-mail correspondence, Wagenheim informed Schneider that he had opened accounts for the Latin Value Fund and ING Barings F/A/O Barbary Coast and was in the process of opening an account for Main Street Fund. On March 18, 2002, Schneider forwarded to Wagenheim a summary detailing how one customer “envision[ed] moving ahead with Hedgeco.” The e-mail stated that the customer would open and trade a personal account once Schneider was “firmly established at Broadband.” The e-mail further stated that the customer would agree to sponsor seminars and would “launch a new fund using [a] zero coupon bond strategy that [would] be marketed through Hedgeco. . . . [A]ssets raised thru Hedgeco [would] be kept at Broadband.”

Schneider, with his brother and Polombo, was also developing Hedgeco’s interactive website while he was associated with Millennium. Schneider contended that the site was

² Schneider asserts that he only referred business to Broadband that Millennium could not do. He contends that Broadband, unlike Millennium, was able to open off-shore accounts and offer hedge fund clients venture capital deals and investment banking.

³ Schneider gave both Polombo and the intern working at the Park Avenue office a “hedgeco.net” e-mail address. Schneider assigned the intern to “cold call” country clubs in an effort to secure potential Hedgeco seminar sites.

nonoperational. Enforcement, however, presented evidence below that demonstrated that parts of the website were functional by February 2002. Enforcement submitted an e-mail dated February 27, 2002, from Tina Wood of Beacon Rock Capital. The message stated in part that a principal of Beacon Rock Capital was “interested in speaking with a Hedgeco representative regarding capacity opportunities.” The e-mail originated from “Tina Wood <inquiries@hedgeco.net>” and was sent to “Andrew Schneider <inquiries@hedgeco.net>.” Tina Wood listed her contact e-mail address as “tina@beaconrock.com.” When confronted at the hearing below with this e-mail, Schneider could not explain how her inquiry could reflect that she sent it from a Hedgeco address unless she had clicked on a link on the Hedgeco website. He characterized it as “impossible.” Enforcement also submitted a page from Hedgeco’s website that reflected the website’s appearance on March 14, 2002. This page listed upcoming Hedgeco sponsored seminars. One of these listed seminars was scheduled for April 3, 2002, at The City Club in San Francisco.⁴ Schneider stated that this was originally a Millennium event that became a Broadband event after he joined Broadband. Polombo testified that Millennium was unaware that Hedgeco was sponsoring the event and that it was being advertised on Hedgeco’s website. Polombo also testified that the advertising materials for The City Club seminar listed Polombo’s hedgeco.net e-mail address as the RSVP address.

Millennium first learned of Hedgeco in March 2002 while Horihan was visiting Millennium’s Park Avenue office. During that visit, Horihan discovered e-mail correspondence sent to and from Polombo’s “hedgeco.net” address. Horihan testified that he discovered “dozens, . . . , if not hundreds of emails to and from Peter Polombo from Hedgeco, to various contacts, hedge funds, [and] Millennium customers.” Horihan believed that Hedgeco was “a business operation” being operated out of Millennium. Horihan testified that he believed the Hedgeco activities constituted a business operation because the activities included organizing meetings and initiating and following up with business contacts. Horihan also found archived e-mail communications related to Hedgeco on other computers in the Park Avenue office. From these communications and a subsequent investigation of the Hedgeco website, Horihan learned that Schneider was the president and CEO of Hedgeco. Horihan testified that it appeared to him that Schneider was establishing a business relationship involving Hedgeco and Broadband. Horihan stated that it appeared that Schneider was employing the same business model used by Millennium, but to refer execution business to Broadband instead. Millennium subsequently terminated both Schneider and Polombo. Schneider and Polombo immediately associated with Broadband.

⁴ Schneider contended that several of these seminars were fictitious and that he merely used them to demonstrate how the website would appear once it was functional. He admitted, however, that The City Club seminar was a real event.

III. Discussion

The Hearing Panel found that Schneider violated Conduct Rules 3030 and 2110. We affirm those findings.

Conduct Rule 3030 prohibits any person associated with a member firm from being “employed by, or accept[ing] compensation from, any other person as a result of any business activity, other than a passive investment, outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member.” The rule was “intended to improve the supervision of registered personnel by providing information to member firms concerning outside business activities of their representatives.” *NASD Notice to Members 88-86* (introducing the substance of what is now Conduct Rule 3030 in Article III, Section 43 of the NASD Rules of Fair Practice). Member firms are to receive “prompt notification of *all outside business activities* of their associated persons so that the member’s objections, if any, to such activities [can] be raised at a meaningful time and so that appropriate supervision [can] be exercised.” *Id.* (emphasis added); *see also NASD Notice to Members 01-79* (emphasizing that under Conduct Rule 3030 associated persons are required “to report *any* kind of business activity engaged in away from their firm”); *Dist. Bus. Conduct Comm. v. Cruz*, Complaint No. C8A930048, 1997 NASD Discip. LEXIS 62, at *96 (NBCC Oct. 31, 1997) (explaining that Rule 3030’s reach extends to all outside business activity, not just securities-related activity).

It is undisputed that Schneider failed to notify Millennium, in any capacity, of his activities with Hedgeco and Broadband. Schneider, however, argues that he was not “employed by” Hedgeco during the relevant period because it was not a viable entity and lacked the traditional hallmarks of an employer such as revenue, sales, an office, stationery, and business cards. Schneider argues that Conduct Rule 3030 is therefore inapplicable. We disagree. Schneider’s reading of the rule ignores the rule’s language and its purpose.

The SEC and the NAC have held that an associated person is required to disclose outside business activities at the time when steps are taken to commence a business activity unrelated to his relationship with his firm. *See Micah C. Douglas*, 52 S.E.C. 1055, 1059 (1996); *Dep’t of Enforcement v. Abbondante*, Complaint No. C10020090, slip op. at 12 (NAC Apr. 5, 2005) (rejecting argument that representative was not required to disclose outside business activity when outside business was formed to conduct future business). The preponderance of the evidence shows that Schneider had taken more than just steps toward engaging in business with Hedgeco. As demonstrated by the e-mail communications contained in the record, Schneider was holding himself out as the president and CEO of Hedgeco, marketing Hedgeco to potential customers, and actively soliciting business to send to Broadband. In addition, Polombo testified that Schneider promoted Hedgeco when he met with hedge fund managers and identified himself as the president of Hedgeco. Moreover, Schneider launched Hedgeco’s quasi-functional website that allowed visitors to send live inquiries to Hedgeco during his association with Millennium. The record makes readily apparent that Schneider was conducting business on behalf of Hedgeco, and Schneider admits that he gave no notice to Millennium of his activities involving Hedgeco. We thus find that Hedgeco employed Schneider for purposes of Conduct Rule 3030’s

notice requirements. *See* NASD Rule 113 (“The Rules shall be interpreted in such a manner as will aid in effectuating the purposes and business of the Association.”).

Schneider also argues that Conduct Rule 3030 requires that he earn compensation from his outside activities; therefore, because he earned no compensation, his conduct falls outside Conduct Rule 3030’s scope.⁵ We disagree and find that the text of the rule settles this dispute. Schneider’s interpretation does not square with a complete reading of Conduct Rule 3030’s text. The rule’s language expressly states, in the disjunctive, that an associated person is prohibited from being “employed by, *or* accepting compensation from, any other person” outside the scope of his employment with his member firm unless he provides prompt written notice to his firm of his activities. Conduct Rule 3030 (emphasis added.) Thus, Conduct Rule 3030 attaches potential liability to a respondent regardless of whether he received compensation for an outside business activity. *See generally* *Maximo Justo Guevara*, 54 S.E.C. 655, 667 n.27 (2000) (“[A] violation of Rule 3030 requires only that a registered person engage in outside employment.”); *cf. Mark H. Love*, Exchange Act Rel. No. 49248, 2004 SEC LEXIS 318, at *5-6 (Feb. 13, 2004) (analyzing the text of Conduct Rule 3040, the companion to Conduct Rule 3030, to support a finding that notification is required not only when compensation is received). The fact that Schneider received no compensation from Hedgeco while he was associated with Millennium did not relieve Schneider of his obligation to inform his firm promptly and in writing of his outside business activities.⁶ His failure to do so violated NASD’s rules.

The record demonstrates by a preponderance of the evidence that Schneider violated Conduct Rules 3030 and 2110.⁷ We therefore affirm the Hearing Panel’s findings of violation.

⁵ During the proceedings below, Enforcement conceded that it could not show that Schneider received compensation for his outside business activities.

⁶ Schneider cites a series of cases in an attempt to support his point that a Rule 3030 violation requires compensation. Most of the cited cases contain the factual element that compensation was earned. These cases do not, however, stand for the legal proposition that in order for Rule 3030 liability to attach, compensation is required. The express language of the rule precludes such a holding. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (“When the statute’s language is plain, the sole function . . . is to enforce it according to its terms.” (internal quotation omitted)).

⁷ Conduct Rule 2110 provides that members shall “observe high standards of commercial honor and just and equitable principles of trade.” A violation of Conduct Rule 3030 is also a violation of Conduct Rule 2110. *See Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999) (stating that violation of an NASD rule also violates Conduct Rule 2110).

IV. Sanctions

The Hearing Panel fined Schneider \$5,000 and suspended him for 60 days in all capacities. We affirm the Hearing Panel's sanctions in total. We also affirm the assessed costs.

The NASD Sanction Guidelines ("Guidelines") for outside business activities recommend a fine of \$2,500 to \$50,000.⁸ In addition, the Guidelines recommend a suspension of up to one year if the activities involve aggravating misconduct and a longer suspension or a bar in egregious cases.⁹ We have applied the specific considerations for determining sanctions for outside business activities to the facts of this case and find several aggravating circumstances relevant to Schneider's misconduct.¹⁰ We find disquieting that Schneider's business for Hedgeco involved potential Millennium customers. Schneider intentionally directed business away from Millennium and to Broadband despite his association with Millennium. In addition, Schneider used Millennium's office, computer system, telephone number, and employees in developing his business for Hedgeco and to refer business to Broadband. Schneider's conduct therefore created the appearance that Millennium approved of his outside business activities. Millennium, however, was unaware of Schneider's outside activities because he affirmatively attempted to conceal them.¹¹ We note that Polombo testified at the hearing below that Schneider instructed him not to discuss Hedgeco with Millennium.

We also consider aggravating that Schneider mischaracterized his conduct with Hedgeco and Broadband at the hearing below.¹² Schneider testified that his activities with Hedgeco were done for the benefit of Millennium in order to provide services to customers that Millennium did not offer. The evidence, however, demonstrates quite the contrary. Horihan testified that, in certain cases, Millennium allowed representatives to refer business to another broker-dealer when Millennium did not provide a requested business line. Millennium allowed a representative to make such referrals provided that Millennium employed the representative, the representative had a contractual relationship with the other broker-dealer, and Millennium could oversee the venture. Horihan further testified that if Millennium did not offer a service that a hedge fund requested, the firm would look into expanding its services to accommodate the

⁸ *NASD Notice to Members 03-65.*

⁹ *Id.*

¹⁰ *See id.*

¹¹ *See NASD Notice to Members 03-65; Guidelines (2001 ed.) at 9 (Principal Considerations In Determining Sanctions) (attempting to conceal misconduct is an aggravating factor under the Guidelines).*

¹² *Guidelines at 10 (providing misleading or inaccurate testimony in NASD proceedings is an aggravating factor under the Guidelines).*

request. In this case, Millennium was given no opportunity to serve these potential customers because Schneider directed them only to Broadband.

The outside business activities that Schneider engaged in without notice to Millennium constitute a serious violation. In the context of earlier disciplinary cases, NASD has noted that prior notice of an associated person's outside business activities may have "prevented harm to the investing public or the firm's entanglement in legal difficulties."¹³ *NASD Notice to Members* 88-86. Thus, Conduct Rule 3030 was intended not only to protect investors, but also to protect securities firms from potential litigation as a result of the unrevealed, extramural activities of their associated persons.

For these reasons, we fine Schneider \$5,000 and suspend him in all capacities for 60 days.

V. Conclusion

We affirm the Hearing Panel's finding that Schneider engaged in outside business activities without providing Millennium with prompt written notice in violation of NASD Conduct Rules 3030 and 2110. Accordingly, we affirm the Hearing Panel's imposition of sanctions. Schneider is fined \$5,000 and suspended for 60 days. Schneider is also ordered to pay hearing costs of \$4,239.36, consisting of an administrative fee of \$750 and hearing transcript costs of \$3,489.36.¹⁴

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

¹³ Although there is no evidence of investor harm, Schneider's misconduct harmed Millennium.

¹⁴ We also have considered and reject without discussion all other arguments of the parties.

Pursuant to NASD Procedural Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for nonpayment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for nonpayment.