

This Decision has been published by the NASDR Office of Hearing Officers and should be cited as OHO Redacted Decision C07010010.

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

DEPARTMENT OF ENFORCEMENT,	:	Disciplinary Proceeding
	:	No. C07010010
Complainant,	:	
	:	
v.	:	HEARING PANEL DECISION
	:	
	:	Hearing Officer - SW
	:	
	:	
	:	Date: November 15, 2001
Respondent.	:	

Respondent, a former registered representative, was fined \$500 for violating Rule 3050 by opening, and trading in, a securities account with another NASD member, without notifying his employer and without notifying the other NASD member that he was an associated person.

Appearances

Gary M. Lisker, Esq., Regional Counsel, Atlanta, GA for the Department of Enforcement.

_____, pro se.

DECISION

I. Procedural Background

A. Complaint and Answer

The Department of Enforcement filed a Complaint against Respondent on February 15, 2001, consisting of one cause of action. The Complaint alleged that, while associated with FAS Wealth

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Management Services, Inc. (“FAS Management”)¹, Respondent opened a securities account with E*Trade Securities, Inc. (“E*Trade”) on July 1, 1998, and effected several transactions in that account without notifying FAS Management of the account and without notifying E*Trade that he was an associated person, in violation of Conduct Rules 3050 and 2110.

Respondent admitted that he executed a registered representative agreement with FAS Management on June 9, 1998. Respondent admitted that he opened an account with E*Trade on July 1, 1998 and executed several trades in July and August 1998. Respondent admitted that he did not disclose the E*Trade account to his employer until 1999.

Nevertheless, Respondent argued that he had not violated Rule 3050 because he was not employed by FAS Management until mid-August 1998 and he did not trade in the E*Trade account after he became employed by FAS Management in mid-August 1998.

B. The Hearing

The Hearing in this proceeding was conducted on August 28, 2001, in Boca Raton, Florida.² The Hearing was held before a Hearing Panel consisting of two current members of the District 7 committee and a Hearing Officer. Enforcement presented no witnesses and four exhibits. Respondent presented the testimony of Ms. _____, the compliance officer of FAS Management, and himself. Respondent presented one separate exhibit.³

¹ When Respondent applied for employment at FAS Management, the firm was known as Executive Wealth Management Services, Inc.

² References to the testimony set forth in the transcript of August 28, 2001 Hearing will be designated as “Tr. p.” with the appropriate page number(s).

³ References to exhibits presented by Enforcement will be designated as “CX-.” Respondent’s one exhibit will be referenced as “RX-1.”

II. Findings of Facts and Conclusions of Law

A. Jurisdiction

Respondent was registered with FAS Management from June 23, 1998 until October 27, 1999. (CX-1, p. 3). Under Article V, Section 4 of the NASD's By-Laws, the NASD retains jurisdiction over Respondent for two years following the termination of his registration with a member firm, and the NASD may file a complaint against Respondent based upon conduct that occurred prior to the termination of his registration. Enforcement filed its Complaint on February 15, 2001, within two years of the termination of Respondent's association, and the Complaint alleged that Respondent's misconduct occurred before his association was terminated. Thus, the NASD has jurisdiction over this proceeding.

B. Findings of Fact

There is very little dispute concerning the facts. (Tr. pp. 12-13). On June 8, 1998, Respondent submitted his Form U-4 application for securities industry registration or transfer to FAS Management.⁴ (CX-2, p. 5). On June 9, 1998, Respondent signed a registered representative agreement with FAS Management. (Tr. pp. 11-13). On June 9, 1998, FAS Management countersigned the Form U-4 application for securities industry registration or transfer. (CX-2, p. 5). On June 23, 1998, the NASD approved Respondent's registration with FAS Management, and it became effective on that date. (CX-1, p. 3).

⁴ Respondent completed and executed a number of other documents at the same time, including, (i) an acknowledgement of policy regarding advertisements; (ii) a correspondence memorandum; (iii) declarations to the supervisory office; (iv) an agreement to abide by the written policy on insider trading; (v) a confidentiality and nondisclosure agreement; and (vi) an annual regulatory checklist. (CX-3, pp. 43-54).

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A week later, on July 1, 1998, Respondent opened an account with E*Trade with a \$2,000 check. (CX-4, pp. 3, 7). Respondent traded in the E*Trade account from July through August 14, 1998.⁵

Respondent testified that when he completed the employment application with FAS Management, _____, the hiring supervisor, told him “it would take six to eight weeks for my documents to be approved by them, at least.”⁶ (Tr. p. 14; CX-3, p. 63). Respondent then went on vacation. (Tr. p. 14). Upon his return, Respondent stated, “there was a phone message . . . from a _____ saying that due to the pending merger . . . there would be a hire (sic) freeze and therefore I would not be employed by them at that time.” (Id.).

After the ____ phone message, Respondent applied to another broker dealer, Baron Chase, for employment on June 17, 1998 and opened the E*Trade account on July 1, 1998. (Tr. pp. 14-15; CX-1, p. 2; CX-4, p. 7). On or about August 14, 1998, FAS Management called and told Respondent for the first time that he was approved and registered. (Tr. p. 15). Respondent testified, “[T]hat surprised me, but I went to work with them starting August 14th. At that time, on that date, I closed my positions with E-Trade.” (Id.). Respondent closed his trading positions in the E*Trade Account; however, the account remained opened through 1999.⁷ (CX-4, pp. 1, 16).

⁵ In July 1998, Respondent executed three purchases and three sales in the account. (CX-4, p. 11). In August 1998, Respondent executed a purchase and a sale of Planet Hollywood stock. (CX-4, p. 15).

⁶ Ms. _____ estimation of the time to obtain approval was based on Respondent’s having answered “yes” to two questions on his Form U-4. (Tr. p. 15; CX-2, p. 4).

⁷ On September 1998, Respondent wrote a check on the E*Trade account in the amount of \$400. (Tr. p. 25; CX-4, p. 19). Subsequently, the balances in the account as of September 30, 1998 and December 31, 1998 were \$13.82. (CX-4, pp. 18, 20). On February 9, 1999, Respondent deposited \$8,250 into the E*Trade account. (CX-4, p. 25). Respondent wrote a check on the E*Trade account in February 1999 in the amount of \$976. (Tr. p. 26; CX-4, p. 25).

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Ms. ____ confirmed Respondent's recollection, stating, "[W]e were in the process of a merger, our firm, with another one at that time, and it is possible I did say that we were having a hiring freeze for the time period that you mentioned." (Tr. p. 44).

Respondent disclosed the E*Trade account to his employer in a memorandum dated October 7, 1999. (CX-3, p. 65).

C. Respondent Violated Rule 3050

As a matter of law, Respondent is presumed to know and understand the NASD Rules. Carter v. SEC, 726 F.2d, 472, 474 (9th Cir. 1983). Conduct Rule 3050(c) provides that "a person associated with a member, prior to opening an account or placing an initial order for the purchase or sale of securities with another member, shall notify both the employer member and the executing member, in writing, of his or her association with the other member; provided, however, that if the account was established prior to the association of the person with the employer member, the associated person shall notify both members in writing promptly after becoming so associated."

The NASD Bylaws define an associated person as a natural person who is registered under the Rules of the Association. Respondent admits that he became registered on June 23, 1998. (Tr. p. 37). Respondent opened the securities account with E*Trade on July 1, 1998 subsequent to his registration. In addition, in mid-August when Respondent actually began soliciting accounts at FAS Management, he failed to disclose the existence of the E*Trade account to FAS Management, and he failed to disclose to E*Trade that his current employer was a broker-dealer. Accordingly, Respondent violated Rule 3050.

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The NASD has held that a violation of Conduct Rule 3050 is also a violation of Conduct Rule 2110's requirement to observe just and equitable principles of trade.⁸ Consequently, the Hearing Panel determined that Respondent violated Conduct Rules 3050 and 2110.

III. Sanction

The NASD Sanction Guidelines for failure to comply with Rule 3050 provide for a fine ranging from \$1,000 to \$25,000. The Guidelines also suggest that, in egregious cases, the adjudicator suspend the individual in any or all capacities for up to two years or bar the individual.⁹ Enforcement recommended that Respondent be fined \$1,000.

The Hearing Panel agrees that the sanction should be minimal. The Hearing Panel finds that Respondent sincerely, but inaccurately, believed that he was not associated with FAS Management at the time that he opened the E*Trade account,¹⁰ and when he began working at FAS Management he believed he complied with Rule 3050 by no longer trading in the E*Trade account. Under the circumstances, the Hearing Panel has determined that Respondent should not be sanctioned for his good faith failure to notify FAS Management prior to opening the E*Trade account, but the Hearing Panel finds that Respondent should be sanctioned for failing to advise FAS Management, in mid-August 1998, of the existence of the E*Trade account and for failing to advise E*Trade that his current employer was a broker-dealer. His belief that he was only required to stop trading in the account reflected a serious

⁸ Dist. Bus. Conduct Comm. for District No. 3 v. Brian Prendergast, Complaint No. C3A960033, 1999 NASD Discip. LEXIS 19, at *60 (NAC, July 8, 1999) aff'd, Brian Prendergast, Exchange Act Release 44632, 2001 SEC LEXIS 1533 (Aug. 1, 2001). (Stating that failures to make required disclosure "constituted conduct inconsistent with high standards of commercial honor and just and equitable principles of trade, in violation of Conduct Rule 2110").

⁹ NASD Sanction Guidelines, p. 21 (2001).

¹⁰ Respondent's belief that he was not working at FAS Management and, therefore, not associated with FAS Management was not unreasonable based on FAS Management's representation that there was a hiring freeze.

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misunderstanding of his obligations under NASD Rule 3050, which had not been corrected by the time of the Hearing. The Hearing Panel concluded that at least a small fine is needed to emphasize to Respondent the importance of knowing his obligations as an associated person. Accordingly, the Hearing Panel fines Respondent \$500.

IV. Conclusion

The Hearing Panel fines Respondent \$500. In addition, Respondent is ordered to pay the \$1,572.50 hearing cost, which includes an administrative fee of \$750 and hearing transcript costs of \$822.50.

The fine and the hearing cost are due and payable upon Respondent's re-entry into the industry. This sanction shall become effective on a date set by the Association, but not earlier than 30 days after the date this decision becomes the final disciplinary decision of the Association.¹¹

HEARING PANEL

By: Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
November 15, 2001

¹¹ 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.