

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant v. Respondent.	Disciplinary Proceeding No. C06050004 Hearing Officer – RSH HEARING PANEL DECISION January 4, 2006
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Respondent violated Conduct Rules 2110 and 3011 by failing to timely prepare and implement anti-money laundering procedures. For these violations, Respondent is fined \$2,500.

Appearances

George C. McGuigan, Jr., Esq., Mark P. Dauer, Esq. (Rory C. Flynn, NASD Chief Litigation Counsel, Washington, DC and Andrew A. Favret, NASD Regional Chief Counsel, New Orleans, LA, Of Counsel)

John E. Dees, Jr., Esq., Dallas, TX, for Respondent

DECISION

I. Procedural History

On March 14, 2005, the Department of Enforcement (“Enforcement”) filed a Complaint against Respondent alleging that it had violated NASD Conduct Rules 3011 and 2110 by failing to develop and implement a written anti-money laundering (“AML”) program by the deadline set by NASD.

On April 4, 2005, Respondent filed an Answer requesting a hearing and admitting that it had violated Rule 3011, but denying that it had violated Rule 2110. On April 29, 2005, Respondent filed a Motion to Dismiss the Rule 2110 charge, stating that its

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“inadvertent failure to have a written policy in place, when it believed such policies had no application to its business, should not be deemed to be a violation of [Rule 2110].”

The Hearing Officer denied Respondent’s Motion to Dismiss, holding that “violations of other NASD Conduct Rules also violate NASD Conduct Rule 2110.”

On July 11, 2005, Enforcement filed a Motion for Summary Disposition, arguing that the undisputed facts in the case supported its claim that Respondent violated Rules 3011 and 2110 by failing to have a written AML program in place by the NASD deadline. On July 22, Respondent filed a response in which it stipulated to the Statement of Undisputed Facts attached to Enforcement’s Motion for Summary Disposition. On August 23, 2005, the Hearing Officer, on behalf of the Hearing Panel, issued an order granting Enforcement’s Motion for Summary Disposition as to liability, ruling that Respondent violated Conduct Rules 3011 and 2110.

A hearing for the purpose of deciding sanctions was held on October 6, 2005 at NASD offices in Dallas, Texas before a Hearing Panel composed of the Hearing Officer and two current members of NASD’s District 6 Committee.¹

II. Findings of Fact and Conclusions of Law

A. Respondent

_____, the president and sole owner of the Respondent firm, founded the firm in 1989. Before founding the firm, he obtained an MBA, worked for an investment management company for eight or nine years, ran Bear Stearns’ institutional

¹ The hearing transcript is referred to as “Tr.” Enforcement called one witness: the NASD examiner in this case. The Respondent called one witness: the Respondent firm’s president. Enforcement introduced 6 exhibits into evidence (Exhibits CX1 through CX6). The Respondent introduced 7 exhibits into evidence (Exhibits 1 through 7).

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desk for six or seven years, and ran a risk arbitrage firm for another six or seven years.² Respondent has never had more than five employees and currently employs three people, including _____.³ Respondent is a “\$5,000 broker”—its net capital requirement is \$5,000 and it does not maintain customer accounts, accept customer funds or have a clearing agreement.⁴ Respondent’s Membership Agreement with the NASD states that it may conduct the following business: a) underwriting or selling group participant; b) private placements of securities; and c) financial consulting services.⁵ John Michael Malone (“Malone”), an NASD examiner, testified that during the period at issue in this case, Respondent did not conduct any securities transactions.⁶

B. Respondent Violated Conduct Rules 3011 and 2110 by Failing to Implement a Written AML Program by the NASD Deadline

NASD Conduct Rule 3011 mandates that, “On or before April 24, 2002, each member shall develop and implement a written anti-money laundering program reasonably designed to achieve and monitor the member’s compliance with the requirements of the Bank Secrecy Act...and the implementing regulations promulgated thereunder by the Department of the Treasury...” Rule 3011 also requires firms to designate a person to supervise the AML program.⁷ In its Answer, Respondent stated it “admits to a violation of Rule 3011, but only to the extent of failing to have a written Anti-Money Laundering Program in place on or before April 24, 2002.”⁸ In addition, Respondent stipulated, inter alia, to the following facts:

² Tr. at 46.

³ *Id.* at 47-48.

⁴ Tr. at 35.

⁵ CX 2 at 2.

⁶ Tr. at 33.

⁷ Rule 3011(d).

⁸ Answer at 1.

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- From on or about April 25, 2002, to on or about December 3, 2003, Respondent failed to develop and implement any written anti-money laundering program reasonably designed to achieve and monitor compliance with the requirements of the Bank Secrecy Act and the implementing regulations promulgated thereunder by the Department of Treasury.
- Respondent violated Conduct Rule 3011 because it did not have a written anti-money laundering compliance program by the due date of April 24, 2002.⁹

_____ also admitted at the hearing that Respondent had failed to implement an AML program by the NASD deadline.¹⁰ Respondent's written AML program was not in place until December 3, 2003, when _____ signed it.¹¹

Despite Respondent's argument to the contrary, it is a well-established rule that a violation of one NASD rule also constitutes a violation of Rule 2110, which provides that, "A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."¹² The Hearing Panel therefore finds that Respondent violated Rules 3011 and 2110.

⁹ Enforcement's Motion for Summary Disposition, Statement of Undisputed Facts at 2.

¹⁰ Tr. at 48.

¹¹ CX 6 at 16.

¹² See, e.g., *Magnus Oppenheim & Co., Inc.*, Exchange Act Release No. 51479, 2005 SEC LEXIS 764, at *7 (Apr. 6, 2005); *Jim Newcomb*, Exchange Act Release No. 44945, 2001 SEC LEXIS 2172, at n1; *Stephen J. Gluckman*, Securities Exchange Act Release No. 41628, 1999 SEC LEXIS 1395, at *22 (July 20, 1999).

III. Sanctions

Enforcement characterized this case as “serious” though not “egregious”.¹³ While recognizing that Respondent was careless rather than willful in failing to have an AML program in place, it argued that NASD member firms have an obligation to be aware of all NASD rules that apply to their business and may not pick and choose which rules to comply with. Enforcement requested that Respondent be censured and fined \$10,000.

_____ testified at the hearing that although he was aware of NASD’s new rule requiring brokerage firms to implement AML programs, he did not believe the rule applied to Respondent because it did not receive customer funds.¹⁴ For that reason, he did not read carefully enough the NASD emails notifying its members of the deadline for implementing AML programs. In arguing for a more lenient sanction than that requested by Enforcement, Respondent asked the Hearing Panel to consider the size of the firm in assessing fines; the \$10,000 fine requested by Enforcement is double Respondent’s net capital, making the fine punitive rather than remedial. Respondent also pointed to the fact that its lack of AML supervisory procedures did not result in a violation of anti-money laundering laws. Finally, Respondent reminded the Hearing Panel that it now has a compliant AML program, even though its procedures are largely inapplicable to Respondent, because it does not carry any customer accounts.

The Hearing Panel agrees that this is not an egregious case. Nevertheless, as the NASD has instructed its members, “establishing, maintaining, and enforcing written supervisory procedures is a cornerstone of self-regulation within the securities

¹³ Tr. at 10.

¹⁴ Tr. at 48.

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industry.”¹⁵ Respondent did not purposefully ignore NASD’s notifications to members concerning the AML deadline; however, it was clearly negligent in not paying sufficient attention to them. The NASD Sanction Guidelines (“Guidelines”) recommend a fine of \$1,000 to \$25,000 for deficient written supervisory procedures.¹⁶ Although Enforcement characterized a fine in the \$1,000 to \$2,000 range as a “slap on the wrist”,¹⁷ the Hearing Panel finds that a \$10,000 fine is large, relative to Respondent’s size and net capital requirement of \$5,000. More importantly, Respondent’s violation was not willful. In addition, Respondent has implemented a written AML program. Finally, because Respondent does not handle customer accounts, it is unlikely that it will be in a position to violate the law at which NASD Rule 3011 is directed.

Accordingly, for all of these reasons, the Hearing Panel fines Respondent \$2,500.

IV. Conclusion

Respondent violated NASD Conduct Rules 3011 and 2110 by failing to implement a written AML program by the date specified by NASD. For this violation, Respondent is fined \$2,500. In addition, Respondent is ordered to pay costs in the amount of \$1,325.75, which includes an administrative fee of \$750 and the cost of the hearing transcript. This sanction shall become effective on a date set by NASD, but not earlier than 30 days after this Decision becomes the final disciplinary action of NASD.

HEARING PANEL

By: Rochelle S. Hall
Hearing Officer

¹⁵ *NASD Notice to Members 98-96*, 1998 NASD LEXIS 121, at *1.

¹⁶ *NASD Sanction Guidelines*, 2005 ed. at 109.

¹⁷ Enforcement’s Pre-Hearing Brief at 7.