

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 51467 / April 1, 2005

Admin. Proc. File No. 3-11621

In the Matter of the Application of

MICHAEL A. ROOMS
7377 South Flower Street
Littleton, Colorado 80128

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDING

Violations of Conduct Rules

Causing Violations of Penny Stock Rules

Attempt to Obstruct NASD Examination

Associated person of member firm of registered securities association caused firm to violate penny stock rules under the Securities Exchange Act, and attempted to mislead association in connection with its related examination. Held, association's findings of violation are sustained in part, and the bar it imposed is sustained.

APPEARANCES:

Eric B. Liebman and Patrick G. Compton, of Lindquist & Vennum, PLLP, for Michael A. Rooms.

James S. Wrona, for NASD

Appeal filed: August 31, 2004
 Last brief received: December 1, 2004

I.

Michael A. Rooms, who was a general securities principal and representative with Patterson Travis, Inc. ("the Firm"), formerly an NASD member, 1/ appeals from NASD disciplinary action. NASD found that Rooms violated penny stock rules under the Securities Exchange Act of 1934 2/ and NASD Conduct Rule 2110 3/ by failing to provide customers with required information and disclosures in connection with his sales of a penny stock, Turner Group, Inc. ("TG"). 4/ NASD also found that Rooms violated NASD Procedural Rule 8210 5/ and Conduct Rule 2110 by attempting to obstruct an NASD examination with respect to the Firm's sales of TG. NASD imposed a bar on Rooms for the obstruction violation and stated that, in light of the bar, it need not determine the suspension it would otherwise have imposed for the penny stock violations. 6/ We base our findings on an independent review of the record.

II.

The penny stock rules "are part of a comprehensive effort by the Congress and the Commission to reduce fraud and manipulation in the penny stock market and to provide investors with important information concerning that market." 7/ As pertinent here, Rule 15g-2 under the Exchange Act requires that, prior to the sale of a penny stock, the customer must be furnished with a risk disclosure document describing the risks of investing in penny stocks. Rule 15g-5

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- 1/ The Firm, a respondent in this proceeding, did not appeal its expulsion from membership by the NASD Hearing Panel.
- 2/ Rules 15g-2, 15g-3, and 15g-5 under the Exchange Act, 17 C.F.R. § 240.15g-2, 15g-3, and 15g-5.
- 3/ Conduct Rule 2110 requires adherence to high standards of commercial honor and just and equitable principles of trade.
- 4/ TG was engaged, among other things, in environmental consulting and engineering and the production of oil and gas.
- 5/ Procedural Rule 8210 gives NASD staff the right to require persons associated with member firms to supply information with respect to any matter involved in an NASD examination.
- 6/ NASD also assessed costs.
- 7/ Penny Stock Disclosure Rules, Securities Exchange Act Rel. No. 30608 (April 20, 1992), 51 SEC Docket 557, 559.

under the Act requires that the salesperson's compensation in connection with a penny stock transaction be disclosed to the customer.

In November and December 1997, when the Firm was making a market in TG, Rooms sold 2,425 shares of the stock to customers. Rule 15g-1(e) under the Exchange Act exempts "transactions that are not recommended" from penny stock disclosure requirements. However, as noted below, Rooms recommended (and sold) TG stock to at least three customers. He does not challenge NASD's finding that he violated penny stock rules in connection with those sales.

Rooms told customer Daryl Heasley that TG had "potentially a lot of upside" and "was going to perform." According to Heasley, Rooms was "very convincing" that TG "probably would be or should be" a winner, and Heasley relied on his recommendation. Rooms also recommended TG to customer Albert Contursi, stating that TG "was an up and coming oil company whose profit potential looked very good, and that [the Firm] was turning some of their better customers onto [it]." Customer Henry Debski could not recall what Rooms told him about TG, but stated that Rooms recommended that he purchase the stock. 8/

These customers were not furnished with a risk disclosure document. Nor were they told the amount of Rooms' compensation. We accordingly conclude that, in connection with these sales, Rooms caused the Firm to violate Rules 15g-2 and 15g-5 under the Exchange Act, and thereby violated Conduct Rule 2110, which requires adherence to just and equitable principles of trade. 9/

8/ Contursi and Debski did not testify at the hearing. Instead, their written declarations were introduced into evidence. Rooms objects to this hearsay evidence. However, the declarations are sworn; there is no evidence that the customers in question were biased against Rooms; and their statements are mutually corroborative and consistent with the testimony of Heasley who testified at the hearing. We agree with NASD that the declarations are reliable and probative. See John Montelbano, Exchange Act Rel. No. 47227 (January 22, 2003), 79 SEC Docket 1474, 1484-1485, and the authorities there cited.

9/ The penny stock rules, by their terms, apply to broker-dealers, not individuals. See Franklin N. Wolf, 52 S.E.C. 517, 524 n.33 (1995). NASD also found that, in violation of Rule 15g-3 under the Exchange Act, Rooms' customers were not informed of TG's inside bid and ask quotations. The record does not support this finding, and we therefore set it aside.

III.

Following an NASD examination of the Firm in April 1998, NASD sent David Travis, the Firm's owner and president, 10/ several requests for information pursuant to Procedural Rule 8210. The initial request, dated May 26, 1998, asked, among other things, whether the Firm's TG transactions during the period November 1997 to February 1998 had been recommended to customers and, if not, that documentation be provided substantiating that claim. Travis replied on June 30, stating that all of the Firm's TG transactions were exempt from the penny stock rules because, among other things, the transactions had not been solicited. He supplied some customer letters to that effect, and stated that a few such letters were missing, and that he was trying to locate them.

On August 11, 1998, in response to a second NASD request, Travis supplied additional non-solicitation letters. On May 28, 1999, NASD sent Travis a third request for information. NASD's letter noted that Travis had provided non-solicitation letters for only some of the accounts in question, and requested documentation in support of the exemption claimed for each of the accounts on NASD's attached schedule. The letter warned that a failure to respond completely could result in the imposition of sanctions. In June 1999, after receiving this letter, Travis asked Rooms to get signed non-solicitation forms from every customer who did not have one in his file. Rooms then contacted the three customers noted above.

Rooms called Heasley and told him that TG (whose stock had done poorly) had misled the Firm, and that, if Heasley would sign a document that Rooms was sending him and send it back within two days, Heasley would be compensated with stock worth the same amount as the amount he had invested in TG. The document that Rooms sent to Heasley, entitled "Affirmation of Non-Solicitation," noted Heasley's purchase of TG and the date of that purchase, November 21, 1997. Below that notation was a printed statement reciting that Heasley's purchase of TG had not been "solicited in any way, nor made on the basis of any recommendation or information from [the Firm], its research department, or any of its employees." Next to the signature line on this form, Rooms had entered the same date that appeared above, the date of Heasley's purchase of TG.

Heasley wanted the stock that Rooms offered but was very uncomfortable signing a backdated form. Before sending the signed form back to Rooms, he added the date he actually signed it (June 25, 1999) both underneath his signature and next to the date that Rooms had entered on the signature line. However, when Rooms received the signed form from Heasley, he admittedly removed the 1999 dates before turning the form over to Travis.

Rooms had similar conversations with Contursi and Debski. He told Contursi that he knew that the price of TG had dropped, that TG had given the Firm inaccurate information, and

10/ Travis, a respondent in this proceeding, did not appeal the Hearing Panel's order barring him from association with any NASD member firm and assessing a \$50,000 fine.

that customers who had purchased TG were being compensated with additional stock. However, in order to get the additional stock, Contursi would have to sign the non-solicitation form that Rooms was sending him. After Contursi received the form, he noticed that it was backdated to the date of his TG purchase. He decided not to sign the document because his purchase of TG had been solicited, and he would not sign anything that was untrue.

Rooms told Debski that, prior to Rooms' sale of TG, somebody connected with that company had given a presentation to the Firm that painted a rosier picture of TG's prospects than turned out to be the case. Rooms stated that Debski would be given enough additional shares of stock roughly to equal the price he had paid for TG, but that, in return for that stock, he would have to sign a document stating that his purchase of TG had not been solicited. Debski told Rooms not to send him the document because it was untrue, and Rooms did not send it.

Rooms contends that he did not attempt to obstruct NASD's examination. He asserts that, as far as he was aware, he was simply assisting Travis in correcting the Firm's records; that he was unaware of any NASD examination; and that, at the time he contacted customers seeking their signatures on non-solicitation forms, he did not know that the forms would be turned over to NASD.

Rooms' contentions ignore the plethora of admissions that he made in the proceedings below. In his answer to NASD's complaint, Rooms admitted that, when Travis instructed him to obtain non-solicitation letters from his customers, Travis told Rooms that NASD staff had requested this information. Rooms further admitted in his answer that he gave the signed customer forms to Travis for submission to NASD staff.

Rooms argues that the admissions in his answer should be given "minimal weight" since he could not afford counsel at the time and the answer was drafted by Travis' attorney. Even if we were to accept Rooms' contention that little weight should be given to the admissions in his answer (which we do not), those admissions were repeated and amplified in Rooms' testimony below. Rooms testified that Travis told him that NASD was seeking the non-solicitation letters, and that was why Rooms was attempting to obtain them from his customers. Rooms also stated, "I'm sure I was aware there was an NASD examination going on in the Firm, and that's what (the non-solicitation letters) were being requested for." Rooms' claim that his testimony was based on what he learned subsequent to the period in question is contradicted by his own words at the hearing.

Rooms further contends that he did not violate NASD Procedural Rule 8210 since NASD never invoked the rule with respect to him. As noted above, Rule 8210 gives NASD staff the right to require persons associated with member firms to supply information in connection with an NASD examination. The rule states that "[n]o member or person shall fail to provide information . . . pursuant to this Rule," and that a notice under the rule shall be deemed received by the person to whom it is directed when it is transmitted to that person's last known residential address as reflected in the Central Registration Depository.

It is undisputed that, during the relevant period, Rooms never received any such notice. No request for information pursuant to Rule 8210 was ever directed to Rooms during that time. ^{11/} NASD's requests were directed to Travis, not Rooms. On its face, the language of Rule 8210 appears to limit its scope to obtaining information from, and ensuring compliance by, those persons and firms to whom such requests are directed. ^{12/} Liability under the rule may possibly extend to associated persons of a firm who are aware of an 8210 request directed to the firm and seek to falsify or impede the firm's response. Here, however, the record does not establish that, during the relevant period, Rooms was aware of the 8210 requests directed to Travis. Under the circumstances, we are unable to conclude that Rooms violated Rule 8210.

As noted above, NASD found that Rooms' attempted obstruction of NASD's examination also violated Conduct Rule 2110 which mandates adherence to "high standards of commercial honor and just and equitable principles of trade." Rooms contends that to find him in violation of Rule 2110 would constitute a denial of due process since that rule did not give him fair notice that the conduct in which he engaged was prohibited. He describes his conduct as nothing more than the procurement of documents for his employer, and states that he was merely an unwitting pawn in Travis' scheme to deceive NASD.

We reject Rooms' characterization of his conduct. The evidence shows that, with knowledge of NASD's pending examination, and aware that the form letters he was seeking to obtain from customers would be turned over to NASD, Rooms deliberately sought to deceive NASD with respect to his prior sales of TG. He offered bribes to his customers in an effort to get them to sign false non-solicitation forms, and backdated the forms to make it appear that they had been signed at the time of his sales. When one customer entered the actual date of signing on his form, Rooms deleted it.

Due process requires that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." ^{13/} Rooms could hardly have been unaware that the deliberate deception he sought to practice on NASD did not comport with high standards of commercial honor and just and equitable principles of trade. Indeed, we have consistently held

^{11/} Such a request was sent to Rooms in December 1999, several months after the period in question.

^{12/} Cf. Stratton Oakmont, Inc., 52 S.E.C. 1170 (1997), where we held that a member firm impeded an NASD investigation and thereby violated just and equitable principles of trade when it refused to release a customer from a settlement agreement that prevented the customer from discussing his complaint with NASD. We stated (at 1174 n.11): "We do not conclude that the firm's [action] also violated [the predecessor of Rule 8210] Here, NASD staff sought information from a customer . . . , not a member"

^{13/} Grayned v. City of Rockford, 408 U.S. 104, 108 (1972), quoted in Upton v. SEC, 75 F.3d 92, 98 (2d Cir. 1996).

that such efforts to impede NASD investigations violate those standards. ^{14/} Thus our application of Rule 2110 to Rooms' actions does not establish a new standard of conduct. The rule "has long obligated NASD members to cooperate with [NASD] in its effort to perform its regulatory functions." ^{15/} Rooms does not disagree. In his brief on appeal, he states, "If . . . [I had been] . . . made aware of [NASD's] investigation . . . and thereafter acted intentionally to falsify documents to obstruct that investigation, [I] would undoubtedly have [had] reasonable notice that [my] conduct was prohibited." In fact, Rooms was aware of NASD's examination and sought to obstruct it. We accordingly sustain NASD's finding that he violated Conduct Rule 2110.

IV.

Rooms contends that the bar imposed on him is excessive. He asserts, among other things, that, with 13 years in the securities business, he has no prior disciplinary record and has had no customer complaints. He argues that he acted without scienter, and states that, when he did receive an NASD request for information after the period at issue, he responded fully and truthfully. He further contends that his sanction is inconsistent with others imposed in more egregious circumstances, and that he is being held accountable for Travis' misconduct.

Rooms is not being disciplined for anyone's conduct but his own. We have rejected his claim that he was an "unwitting pawn" who did not understand the wrongfulness of his conduct. Rooms sought to conceal his penny stock violations by supplying NASD with false information.

NASD's ability to police compliance with the federal securities laws and NASD rules is a core component of its self-regulatory functions. To carry out its responsibilities, NASD must have the full cooperation of persons subject to its jurisdiction. Actions such as those committed by Rooms subvert NASD's regulatory processes. They are more damaging than a refusal to respond to a request for information since they mislead NASD and can conceal wrongdoing.

Rooms' truthful testimony subsequent to the relevant period does not aid him. As NASD stated, "[c]apitulation after NASD staff learned of the misconduct from customer statements is hardly mitigating considering [Rooms' attempt] to keep NASD staff from learning the truth in the first instance." ^{16/} As Rooms himself recognizes, sanctions depend on the particular facts and

^{14/} John J. Fiero, 53 S.E.C. 434, 438 n. 12 (1998), rev'd on other grounds, No. 98-4103 (2d Cir. 1999) (unpublished opinion); Stratton Oakmont, Inc., supra, 52 S.E.C. at 1173; Brian L. Gibbons, 52 S.E.C. 791, 795 (1996); William Edward Daniel, 50 S.E.C. 332, 336 (1990).

^{15/} Stratton Oakmont, Inc., supra, 52 S.E.C. at 1175.

^{16/} See Brian L. Gibbons, supra, 52 S.E.C. at 794 n. 10. ("Gibbons' offers to confess after his
(continued...)

circumstances of each case, and cannot be determined by the action taken in other proceedings. 17/ Here, the deliberate deception practiced by Rooms clearly warrants the sanction imposed on him. 18/ We accordingly conclude that his sanction is neither excessive nor oppressive. Nor does it impose an undue burden on competition.

An appropriate order will issue. 19/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, ATKINS, and CAMPOS).

Jonathan G. Katz
Secretary

16/ (...continued)
actions were discovered do not mitigate his offense.").

17/ See Butz v. Glover Livestock Commission Co., 411 U.S. 182, 187 (1973); John Montelbano, supra, 79 SEC Docket at 1497.

18/ The fact that we have not sustained NASD's finding that Rooms violated Procedural Rule 8210 does not lessen the seriousness of his misconduct or warrant any reduction in his sanction.

19/ We have considered all of the arguments advanced by the parties. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 51467 / April 1, 2005

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In the Matter of the Application of

MICHAEL A. ROOMS
7377 South Flower Street
Littleton, Colorado 80128

For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES
ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by NASD against Michael A. Rooms, and
NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Jonathan G. Katz
Secretary