FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. KENNETH J. MATHIESON (CRD No. 1730324), Respondent.	Disciplinary Proceeding No. 2014040876001 Hearing Officer–DW **EXTENDED HEARING PANEL DECISION** December 16, 2016

Respondent Kenneth J. Mathieson is suspended for one year from associating with any member firm in any capacity and fined $50,000 for participating in private securities transactions and engaging in outside business activities without prior written notice to, and permission from, his employer member firm.

Appearances

For the Complainant: Jonathan Golomb, Esq. and Lane A. Thurgood, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Kevin P. Conway, Esq. and Fawn Lee, Esq., Conway & Conway.

DECISION

I. Introduction

NASD Rule 3040 and FINRA Rule 3270 together require associated persons to provide prior written notice to their member firm before entering into any private securities transaction away from the firm, or engaging in any outside business activity. These advance requirements are necessary "so that the member's objections, if any, to such activities could be raised at a

meaningful time and so that appropriate supervision could be exercised as necessary under applicable law."[1]

On March 3, 2016, the Department of Enforcement (the "Department") filed a four-cause Complaint against Respondent Kenneth Mathieson, alleging that he violated both rules by participating in private securities transactions and engaging in outside business activities while associated with FINRA member firm Morgan Stanley Smith Barney, LLC ("Morgan Stanley") without prior written notice to, or prior written permission from, the firm. The Complaint also alleges that Mathieson ignored the firm's express direction not to participate in the outside activity and affirmatively concealed his outside involvement in compliance certifications.

On March 29, 2016, Mathieson filed an Answer denying the allegations and requesting a hearing. According to Mathieson, he adequately disclosed his securities transactions and did not engage in any disclosable outside business activities. The hearing was held in New York, New York, beginning on September 19, 2016.

II. Findings of Fact

A. Mathieson's Background

Mathieson entered the securities industry in 1987 as a registered representative with Prudential Securities.[2] He left Prudential for Smith Barney in 1999.[3] When Smith Barney sold part of its business to Morgan Stanley in June 2009, Mathieson became associated with Morgan Stanley.[4] At Morgan Stanley, Mathieson's business centered around fee-based management of retail customer accounts that held a portfolio of securities including passive exchange-traded funds and mutual funds.[5] Mathieson worked in partnership with his brother in Morgan Stanley's New York, New York office.[6]

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[1] *Dep't of Enforcement v. Weinstock*, No. 2010022601501, 2016 FINRA Discip. LEXIS 34, at *27 (NAC July 21, 2016) (FINRA Rule 3270); *see Dep't of Enforcement v. Fox*, No. 2012030724101, 2015 FINRA Discip. LEXIS 8, at *29 (NAC Mar. 9, 2015) ("The purpose of NASD Conduct Rule 3040 is to protect investors from unsupervised sales and securities firms from exposure to loss and litigation from transactions by associated persons outside the scope of their employment") (quotation omitted).

[2] Answer ("Ans.") ¶ 4.

[3] Hearing Transcript ("Tr.") 762.

[4] Tr. 934-35.

[5] Tr. 899-902, 915-18 (Eric Mathieson).

[6] Tr. 935-36.

B. Mathieson's Involvement with Aspen University

1. Mathieson's Personal Investment in Aspen University

In early 2010, a neighbor introduced Mathieson to an online college called Aspen University.[7] The private, for-profit university offered online degrees at the undergraduate and graduate levels.[8] Mathieson's neighbor, JS, a member of Aspen's board of directors, touted Aspen's prospects for the future and encouraged Mathieson to invest.[9] Shortly thereafter, Mathieson met with PS, the founder and chairman of the company. Mathieson and PS discussed the business prospects of the school.[10] After the meeting, Mathieson was excited about the prospects of the university and very interested in investing.[11]

On March 23, 2010, Mathieson submitted an outside investment approval request to Morgan Stanley for a $100,000 personal investment in Aspen.[12] Mathieson's request included his agreement to notify Morgan Stanley in writing of any change in his investment or any commitment of additional capital.[13] Morgan Stanley approved the request and Mathieson invested the $100,000.[14]

Mathieson later made additional investments in Aspen. Between September 2010 and May 2011, he made four additional stock purchases for an additional $66,000.[15] He also directed investments in the names of his three children totaling more than $30,000 per child between February 2011 and April 2012.[16] Mathieson did not give Morgan Stanley prior written notice of these additional investments, despite agreeing to do so at the time of his initial investment.[17] Following Aspen's public offering in the spring of 2012, Mathieson's Aspen stock was held in Morgan Stanley accounts.[18]

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[7] Tr. 1029-30.

[8] Complainant's Exhibit ("CX-") 2.

[9] Tr. 1032.

[10] Tr. 1035-37.

[11] Tr. 1040.

[12] CX-12.

[13] CX-12.

[14] CX-14.

[15] CX-11; Tr. 79-80.

[16] CX-11; Tr. 80-81.

[17] Tr. 79-81.

[18] Tr. 82.

2. Mathieson's Outside Business Activities and Private Securities Transactions

Mathieson's involvement with Aspen was not limited to his investments.[19] Beginning in the latter part of 2010, he acted as a "strategic adviser" to the company.[20] He advised Aspen on the process of taking the then-privately held company public through a reverse merger transaction with a publicly traded shell corporation.[21] Beginning in October 2010, Mathieson served as the "eyes and ears" of Aspen's CEO as the company navigated the transaction.[22] His efforts included suggesting how to structure and price a merger, reviewing the employment agreement of the new CEO, and helping draft a letter of intent to effectuate the proposed transaction.[23] Mathieson intended to join Aspen's board of directors, and also expected to receive a number of shares of Aspen stock options in exchange for his service to the company.[24] He conferred with other members of Aspen's board on hiring marketing personnel, Aspen buying back securities from investors as part of the reverse merger, and raising money for the company.[25]

After engaging in Aspen-related activities for several months, Mathieson went to Morgan Stanley in December 2010 to request the firm's permission to serve on the company's board.[26] The firm's outside business activity approval request form explained that "[e]mployees are not permitted to accept any outside directorships or similar positions, employment or other business affiliations with an organization" without prior written approval.[27]

Mathieson's written request represented that he would serve on Aspen's board beginning on January 1, 2011, when he would "Advise [the] Board on Strategic Developments for Distance Education" as a "Strategic Advisor" to the company.[28] In late December, Morgan Stanley rejected his request because the firm's policy did not permit employees "to participate in directorships with for-profit entities because of actual or potential conflicts of interest."[29] Morgan Stanley's compliance department "voiced

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[19] Tr. 93.

[20] Ans. ¶ 7.

[21] Tr. 84-88, 98; CX-21.

[22] Tr. 84.

[23] Tr. 91-93, 97-98, 105-14, 190-92; CX-23–CX-26; CX-47.

[24] Tr. 88-92, 115-16; CX-22; CX-23; CX-27.

[25] Tr. 182-90; CX-45; CX-46.

[26] CX-15.

[27] CX-15.

[28] CX-15.

[29] CX-16.

concern about [Mathieson] being on the board and having any advisory role" with Aspen.[30] Mathieson was directed to "refrain from, or discontinue your role in, the outside activity."[31]

Consistent with this directive, Mathieson disclosed on a subsequent compliance report that he had no outside business activities.[32] But the disclosure was false, as Mathieson did not refrain from his Aspen-related work.[33] In February 2011, he continued working with members of the company's board to plan and coordinate stock offerings.[34] He reviewed offering materials, coordinated contacts with investors, reviewed corporate marketing plans, and discussed legal strategy with the board and outside counsel.[35] Mathieson personally paid legal fees on Aspen's behalf.[36] Also, through the spring of 2011, Mathieson recommended the company to his father, a former college roommate, and other friends and family—including a Morgan Stanley client—who participated in private placements of Aspen stock.[37] Mathieson participated in an investor meeting that led to private placement investments, and he facilitated investor payments to Aspen.[38]

Mathieson continued his intricate involvement with planning the details and timing of the reverse merger transaction with members of the board and outside counsel through the spring 2011.[39] He had numerous strategic discussions with the owner of the public shell, MM, who replaced PS as Aspen's CEO after the merger, and he worked on the company's behalf preparing to complete the transaction.[40]

Mathieson also participated regularly at meetings of the company's board of directors.[41] Though he was never actually appointed to the company's board, and never voted on any board resolution, Mathieson's actions were otherwise indistinguishable from those of an actual director of the company. Mathieson was identified on internal corporate communications as an Aspen director through the spring of 2011.[42] Aspen

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[30] Tr. 115-16; CX-16.

[31] Tr. 115-16; CX-16

[32] CX-20.

[33] Tr. 199.

[34] Tr. 119-33, 414-16; CX-27–CX-29; CX-31; CX-141; CX-147.

[35] Tr. 119-33, 414-16; CX-27–CX-29; CX-31; CX-141; CX-147.

[36] CX-58.

[37] Tr. 147-51, 246-55; CX-92–CX-94.

[38] Tr. 259-62; CX-108; CX-57; CX-67; CX-77; CX-97; CX-100.

[39] Tr. 135-41; CX-32; CX-54.

[40] Tr. 131-32; CX-31; CX-109; CX-124.

[41] Ans. ¶ 58; CX-127–CX-132.

[42] Tr. 438-55, 457-59; CX-132; CX-136–CX-139; CX-149.

merged with MM's company in May 2011, and through a subsequent reverse merger transaction in March 2012, Aspen became a publicly traded company.[43] Mathieson continued his ongoing Aspen business activities well into 2012.[44]

At the hearing, MM testified that Aspen never contemplated employing Mathieson as a member of its board, and that Mathieson never participated in board meetings or provided any advice on issues of corporate concern.[45] We are not persuaded by this testimony. The evidence set forth above demonstrates that Mathieson advised and worked extensively on Aspen's behalf with the desire and expectation of becoming a member of its board.[46]

Mathieson testified that despite his extensive work on behalf of Aspen, he never had any expectation of receiving direct compensation for his efforts.[47] We do not credit this testimony. The evidence persuades us that although Mathieson never received compensation from Aspen, he certainly contemplated and expected to receive compensation in the form of Aspen stock options in return for his "hard work" on Aspen's behalf.[48]

C. Morgan Stanley Discovers Mathieson's Aspen-Related Activities

According to Mathieson, the objective of his Aspen-related work was generating business for Morgan Stanley.[49] Mathieson's plan was to leverage his relationship with Aspen to open brokerage accounts at his firm for company executives and employees. He regularly discussed his Aspen-related activities with his supervisor at Morgan Stanley, AD.[50] Mathieson disclosed to AD that he was cultivating his relationship with Aspen in order to generate business for the firm.[51]

After Aspen completed its reverse merger and went public, Mathieson in fact secured a number of Aspen-related accounts for Morgan Stanley.[52] Mathieson had

[43] Ans. ¶ 8.

[44] Tr. 115.

[45] Tr. 825-27.

[46] Contemporaneous documents confirm Aspen's intent to employ Mathieson as a director. Tr. 843-44; CX-136. Mathieson himself could not say that MM "remember[ed] correctly" certain of Mathieson's Aspen-related conduct. Tr. 1074.

[47] Tr. 102, 289-90.

[48] Tr. 457-61; CX-148; CX-149.

[49] Tr. 289-90.

[50] Tr. 1069-70.

[51] Tr. 1071-73, 1085-86.

[52] Tr. 1086-87.

difficulty getting the new accounts opened at the firm because of Morgan Stanley's reluctance to accept deposited securities because Aspen was a "penny stock."[53] In order to persuade the firm's compliance department to accept the securities, Mathieson assembled a book of information on Aspen documenting the company's legitimate business and prospects.[54] The book, created in about November 2011, included financials, investor presentations, and other materials.[55] The cover letter to the materials indicated that Mathieson had served as a consultant to PS, Aspen's former CEO, in connection with the reverse merger transaction.[56] After several weeks of meetings with compliance personnel, Morgan Stanley allowed the Aspen share deposits and opened accounts.[57] Between March and June of 2012, Mathieson opened at least 50 Aspen-related accounts with Morgan Stanley.[58]

More than a year later, in late 2013, Mathieson was confronted by managers and compliance personnel at Morgan Stanley about his role with Aspen.[59] Shortly thereafter, Mathieson was suspended, and then terminated, from the firm.[60] Morgan Stanley filed a Form U5 that disclosed that Mathieson was fired for his "unapproved involvement in an outside company, including communications with the company's management and board of directors, providing support related to company transactions, and purchases of company stock."[61] This Form U5 filing led to the investigation that resulted in this proceeding.[62]

III. Conclusions of Law

A. Outside Business Activities

FINRA Rule 3270 prohibits registered persons from being an employee, independent contractor, sole proprietor, officer, director, or partner of another person, or from being compensated or having the reasonable expectation of compensation from any other person as a result of any business activity outside the scope of the relationship with their member firm, unless they have provided prior written notice to the member, in the form specified by the member. The purpose of the Rule "is to ensure that firms 'receive prompt notification of all

[53] Tr. 1088-96.

[54] Tr. 1096-1102.

[55] Respondent's Exhibit ("RX-") 50.

[56] RX-50.

[57] Tr. 1123.

[58] Tr. 1125.

[59] Tr. 1125-26.

[60] Tr. 1130-41.

[61] CX-5.

[62] Tr. 41-42.

outside business activities of their associated persons so that the member's objections, if any, to such activities could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law.'"[63] A registered representative must "disclose outside business activities at the time when steps are taken to commence a business activity unrelated to his relationship with his firm."[64] The sweep of the Rule is intentionally broad, requiring registered persons "to report *any* kind of business activity engaged in away from their firms,"[65] not only business activities related to securities.[66] A violation of FINRA Rule 3270 constitutes conduct inconsistent with just and equitable principles of trade and therefore violates FINRA Rule 2010.[67]

We find that Mathieson violated FINRA Rule 3270.[68] He failed to provide the requisite written notice of his Aspen-related activities to Morgan Stanley prior to commencing his activities; he sought approval only after working with Aspen for several months. And after his request for permission to join the company's board was denied, Mathieson disregarded Morgan Stanley's directive to discontinue all related outside activities and continued working with Aspen for more than a year thereafter.

The intent of the rule is to provide Mathieson's employer the opportunity (and responsibility)[69] to appropriately oversee his outside activities. But Mathieson affirmatively circumvented such oversight by serving as a shadow, "de facto" Aspen director after being

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[63] *Dep't of Enforcement v. Houston*, No. 2006005318801, 2013 FINRA Discip. LEXIS 3, at *32 (NAC Feb. 22, 2013), *aff'd*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614 (Feb. 20, 2014) (quoting Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons, Exchange Act Release No. 26063, 1988 SEC LEXIS 1841, at *2-3 (Sept. 6, 1988)); *see also* NASD Notice to Members 88-86, *available at* http://finra.complinet.com, 1988 NASD LEXIS 207 (Nov. 1988) (introducing the predecessor to FINRA Rule 3270 and explaining that it is "intended to improve the supervision of registered personnel by providing information to member firms concerning outside business activities of their representatives").

[64] *Dep't of Enforcement v. Schneider*, No. C10030088, 2005 NASD Discip. LEXIS 6, at *13-14 (NAC Dec. 7, 2005) (citing *Dep't of Enforcement v. Abbondante*, No. C10020090, 2005 NASD Discip. LEXIS 43, at *30-31 (NAC Apr. 5, 2005)) (rejecting argument that representative was not required to disclose outside business activity that was formed to conduct future business).

[65] NASD Notice to Members 01-79 (Dec. 2001), http://www.finra.org/industry/notices/01-79 (emphasis in original).

[66] *Dist. Bus. Conduct Comm. v. Cruz*, No. C8A930048, 1997 NASD LEXIS 123, at *101 (NBCC Oct. 31, 1997).

[67] *See Dep't of Enforcement v. Moore*, No. 2008015105601, 2012 FINRA Discip. LEXIS 45, at *24-25 & n.19 (NAC July 26, 2012).

[68] Mathieson does not dispute that FINRA possesses jurisdiction over him. Mathieson remains associated with a FINRA member and is therefore subject to FINRA's rules. *See* FINRA Rule 0140 (stating that FINRA's rules apply to all members and persons associated with a member and that associated persons have the same duties and obligations as a member under FINRA's rules).

[69] "While FINRA recognizes that a member does not have the same supervisory responsibilities over a registered person's outside *non-securities* activities as it does for his or her outside *securities* activities, a member nevertheless has an important regulatory responsibility to evaluate the potential impact of the outside business activities of its registered persons … ." FINRA Response to Comments, File No. SR-FINRA-2009-042, at p.7 (July 30, 2010), *available at* http://www.finra.org/industry/rule-filings/sr-finra-2009-042.

denied permission to serve in a formal role. Mathieson disputes this characterization, contending that a "de facto" board member "has never been clearly defined by FINRA," and his "interactions with Aspen do not come close to the responsibilities [of] a board member" because he never actually voted on any board resolution.[70] But the SEC has made clear that "associated persons are required 'to report any kind of business activity engaged in away from their firm'"[71] and Mathieson plainly engaged in unreported ongoing business activities on Aspen's behalf. Regardless of whether Mathieson's self-described role as a "strategic advisor" rendered him a de facto director of Aspen,[72] his conduct triggered the disclosure obligations of the rule.[73]

Whether Mathieson worked as a consultant, an advisor, or a de facto director, he carried on an array of business for Aspen's benefit—he participated in personnel decisions, marketing strategies, corporate financing, and stock offering activity. We reject Mathieson's contention that his Aspen business was not truly "outside" activity but instead part of his Morgan Stanley duties. Although Mathieson sought—with some success—to bring new business to the firm through his work with Aspen, this motive does not alter the external character of his conduct. Mathieson did not, for instance, review marketing plans for online education initiatives for any Morgan Stanley purpose.[74] FINRA's National Adjudicatory Council ("NAC") has explained that "[s]ecurities sales [for the member firm] can often result from activities that are widely understood to constitute outside business activities."[75] That Morgan Stanley stood to derive some benefit from Mathieson's outside work does not alter the character of the work itself, or lessen the need for appropriate supervision of Mathieson's conduct.[76]

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[70] Mathieson's Pre-Hearing Brief, at 23-24.

[71] *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *16 (July 1, 2008) (citing NASD Notice to Members 01-79).

[72] *Compare Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 425, n.4 (1972) (In construing short-swing profits statute, "courts have allowed proof that the [individual] performed the functions of an officer or director even though not formally denominated as such" in determining whether an individual was an "officer" or "director" of a corporation) *with The Osler Inst., Inc. v. Lois Forde*, 333 F.3d 832, 838-39 (7th Cir. 2003) (rejecting claims of breach of fiduciary duty against claimed "de facto" director who attended board meetings but never held herself out as a director). Mathieson acknowledges that Morgan Stanley's Code of Conduct defines reportable outside activities to include any "non-Morgan Stanley business, whether or not you receive compensation, including … acting as a consultant for[] another person or entity." Mathieson's Pre-Hearing Brief, at 14.

[73] *See Dep't of Enforcement v. Weinstock*, No. 2010022601501, 2016 FINRA Discip. LEXIS 34, at *13-14 (NAC July 21, 2016) (respondent's "business relationship" with outside party, "including the introductions of his business contacts" for purposes unrelated to firm, constituted "business activity outside the scope of his employment").

[74] *See* CX-141. *Weinstock*, 2016 FINRA Discip. LEXIS 34, at *14 (respondent "crossed the line" when he collaborated with outside party on strategy to stimulate interest in product unrelated to his firm).

[75] *Dep't of Enforcement v. KCD Financial, Inc.*, No. 2011025851501, 2016 SEC LEXIS 38, at *34 (NAC Aug. 3, 2016).

[76] In addition, as explained above we conclude that as a result of his business efforts on behalf of the company, Mathieson had a reasonable expectation of compensation from Aspen, bringing his conduct squarely within Rule 3270's definition of outside activities requiring disclosure.

Contrary to Mathieson's contentions, his supervisor's awareness of certain of his Aspen-related conduct does not excuse his violation. Although Mathieson's supervisor, AD, was generally aware that Mathieson was working to recruit a number of Aspen-associated individuals as Morgan Stanley clients, the evidence does not persuade us that he was aware of the details of Mathieson's role in planning and executing the strategic direction of the company.[77]

More importantly, AD's supervisory authority at Morgan Stanley did not include the power to grant final approval for outside business activities.[78] And Mathieson's presentation of a binder of Aspen materials (in the context of opening new accounts) that suggest some degree of Mathieson's involvement with Aspen does not constitute an acceptable alternative to required disclosure. The law is clear that a supervisor's knowledge of an outside business activity does not relieve the registered person of his responsibility to provide written notice to his employer in the format the firm required.[79] His supervisor's general awareness that Mathieson was seeking Aspen-related business for the firm did not relieve Mathieson of his independent obligation to disclose in writing the particulars of his activities. Although he provided written notice of his intent to serve as Aspen director in the future, Mathieson never provided Morgan Stanley appropriate written notice that his Aspen-related activities were already underway and in fact persisted after he was directed to stop. In fact, on a subsequent compliance report, he falsely stated that he had no outside business activities.[80] By his false disclosure, and his continuation of Aspen activities in the face of Morgan Stanley's directive to cease his outside conduct, Mathieson violated the ethical mandate of FINRA Rule 2010.[81]

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[77] We credit AD's testimony that Mathieson did not disclose to him significant aspects of his Aspen-related activities. Tr. 495-510.

[78] Tr. 487-90.

[79] *E.g.*, *Dist. Bus. Conduct Comm. v. Merz*, No. C8A960094, 1998 NASD Discip. LEXIS 40, at *33, n.13 (NAC Nov. 11, 1998) (written notice must be made to member, not simply to any registered securities principal of the member); *Dep't of Enforcement v. Dahmer*, No. C8A030086, 2005 NASD Discip. LEXIS 16, at *13-14 (OHO Feb. 17, 2005) (division and branch managers' knowledge of outside business activities did not satisfy requirement that the firm receive prompt written notice in the form required by the member); *Dep't of Enforcement v. Barrick*, No. C8A030034, 2004 NASD Discip. LEXIS 22, at *7 (OHO Apr. 26, 2004) (Rule "requires prompt written, not oral, notification" of outside business activity and "[t]here is no exception for verbal statements to supervisors.").

[80] CX-20.

[81] *Dep't of Enforcement v. Skiba*, No. E8A2004072203, 2010 FINRA Discip. LEXIS 6, at *13-14 (NAC Apr. 23, 2010) (respondent's "failure to structure the transactions as variable annuity replacements and to submit proper documentation to the Firm and customers as required by the Firm constitute unethical misconduct"); *Dep't of Enforcement v. Prout*, No. C01990014, 2000 NASD Discip. LEXIS 18, at *6 (NAC Dec. 18, 2000) (submitting false firm documentation violated just and equitable principles of trade).

In sum, we find that Mathieson violated FINRA Rule 3270. As a consequence of his violation, and for his failure to disclose his outside activities on compliance reports or cease his unauthorized activities when directed to stop, he also violated FINRA Rule 2010.[82]

B. Private Securities Transactions

NASD Conduct 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 … ."

Rule 3040 ensures that member firms adequately supervise the suitability and due diligence responsibilities of their associated persons and protects investors from being misled as to employing firms' sponsorship of transactions that are conducted away from the firms.[83] It also serves to protect employers against investor claims arising from associated persons' private securities transactions.[84] To achieve these purposes, its reach is construed broadly, encompassing the activities of associated persons who participate in any manner in a transaction.[85] Scienter need not be proven to establish a violation.[86]

We find that Mathieson violated the Rule as alleged in the first cause of action. Mathieson admits that after he disclosed his initial Aspen investment he made multiple subsequent purchases of Aspen stock without new disclosure.[87] Mathieson argues that because his original disclosure adequately identified Aspen as the security subject to investment and his connection to the company, no further disclosure was called for as the Rule "does not require the associated person to state the amount of shares purchased."[88] But the Rule requires that each transaction be disclosed "*in detail*."[89] Such detail

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[82] The Complaint's second cause alleges the violation of FINRA Rules 3270 and 2010; the third cause alleges alternatively that Mathieson violated FINRA Rule 2010 by his ongoing participation in Aspen-related activities after being directed to stop by Morgan Stanley. The fourth cause alleges that Mathieson's false compliance certification violated FINRA Rule 2010. As explained above, we find each violation established by the evidence.

[83] *Dep't of Enforcement v. Carcaterra*, No. C10000165, 2001 NASD Discip. LEXIS 39, at *8-9 (NAC Dec. 13, 2001).

[84] *Id*.

[85] *See Stephen J. Gluckman*, 54 S.E.C. 175, 183 (1999).

[86] *Alvin W. Gebhart, Jr.*, Exchange Act Release No. 53136, 2006 SEC LEXIS 93, at *54-55 (Jan. 18, 2006).

[87] Ans. ¶ 13. Mathieson's personal purchases fall within the broad scope of NASD Rule 3040. *Harry Friedman*, Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at *13-14 (May 13, 2011) (both purchases and sales constitute "participation in any manner in 'private securities transactions' under Rule 3040").

[88] Mathieson's Pre-Hearing Brief, at 9.

[89] NASD Rule 3040(b) (emphasis added).

includes, at a minimum, the amount of the transaction.[90] Mathieson's failure to correctly disclose the amounts of his subsequent transactions establishes his violation.

Mathieson also violated the Rule by participating in private placements of Aspen securities, as well as the Aspen reverse merger transaction. While Mathieson insists that he never "solicited" any investor to invest with Aspen, "Rule 3040's reach is very broad and encompass[es] the activities of an associated person who not only makes a sale but who participates in any manner in the transaction."[91] In this context, "participation" in a securities transaction includes "introducing customers to the issuer, arranging and/or participating in meetings between customers and the issuer, or receiving a referral or finder's fee from the issuer."[92]

Mathieson's conduct falls within the broad scope of this proscription. He does not dispute that he referred potential investors to executives at the company for the purpose of making investments in Aspen's private placements.[93] He touted the prospects of Aspen to potential investors, directed them to participate in these offerings, and facilitated the investment process.[94] This was participation.[95] And Mathieson's work with Aspen officers and directors in planning the reverse merger transaction that took the company public likewise amounted to participation in a securities transaction.[96]

In sum, we find that Mathieson violated NASD Rule 3040. As a consequence of his violation, he also violated FINRA Rule 2010.[97]

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[90] *William Louis Morgan*, 51 S.E.C. 622, 627, n.19 (1993) ("[A]t the very minimum, such detail must include the identity of the investor and the amount involved.").

[91] *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *32-33 & n.22 (Sept. 24, 2015) (internal quotations omitted), *appeal dismissed*, No. 15-15199-EE (11th Cir. May 19, 2016), quoting *Gluckman*, 54 S.E.C. 175, 183 & n.24. *See also Joseph Abbondante*, Exchange Act Release No. 53066, 2006 SEC LEXIS 23, at *28 (Jan. 6, 2006) ("Conduct Rule 3040 is broad in scope and is not limited merely to solicitation of an investment."), *aff'd*, 209 F. App'x 6, 8 (2d Cir. 2006).

[92] Notice to Members 01-79.

[93] Tr. 147-51, 246-55; CX-36; CX-92; CX-93; CX-94.

[94] Tr. 147-51, 246-55; CX-36; CX-92; CX-93; CX-94.

[95] *Mark H. Love*, Exchange Act Release No. 49248, 2004 SEC LEXIS 318, at *1-4, *8-10 (Feb. 13, 2004) (broker's introduction of customers to friend who placed customers in IPO transactions and "facilitated to some degree the transaction process" violated Rule 3040 despite the fact that broker received no fee or compensation); *Abbondante v. SEC*, 209 F. App'x 6, 7-8 (2d Cir. 2006) (broker violated Rule 3040 where he was "the sole source of information for some of the investors, [and] he admitted that he 'brought in a couple of people' to invest").

[96] *Charles A. Roth*, 50 S.E.C. 1147, 1147-51 (1992) (broker's participation in business sale transactions triggered private securities transaction disclosure obligations); *see* FINRA Rule 3280(e) (defining "private securities transaction" to include, among other things, outside "new offerings of securities which are not registered with the Commission").

[97] A violation of NASD Rule 3040 also constitutes a violation of FINRA Rule 2010. *Abbondante*, 2006 SEC LEXIS 23, at *36.

IV. Sanctions

FINRA's Sanction Guidelines ("Guidelines") provide a number of considerations for adjudicators in determining the appropriate sanction for misconduct involving activities outside the firm. For private securities transactions the Guidelines recommend a fine of $5,000 to $73,000 and a suspension or a bar depending on the dollar amount of the sales.[98] The Guidelines also address outside business activities, recommending a fine of $2,500 to $73,000 and a suspension of up to one year depending on the existence of aggravating factors. In egregious cases, a bar may be appropriate.[99]

Because of the substantial overlap between Mathieson's violations, we assess the facts pertaining to his overall conduct together.[100] For selling away, the Guidelines state that "[t]he first step in determining sanctions is to assess the extent of the selling away, including the dollar amount of sales, the number of customers and the length of time over which the selling away occurred."[101] Here, the value of Mathieson's own private securities transactions was approximately $166,000.[102] His sales away from Morgan Stanley involved a public offering to securities that implicated a substantial volume of investors and occurred over the course of more than a year.[103]

Mathieson's conduct was aggravating in additional respects. There was no evidence that Mathieson disclosed his Aspen affiliation to investors.[104] He did not provide Morgan Stanley complete disclosure of the details of his outside sales activity.[105] And Mathieson sold away despite his employer's express direction to cease his outside activities.[106]

Principal considerations for outside business activities point to additional aggravating factors. Mathieson's conduct went on for years, an extended period of time.[107] Mathieson's participation in the sales of Aspen securities gave investors the misleading impression that the sales were endorsed by his employer, Morgan Stanley.[108] And we find aggravating the fact that Mathieson misled his employer about the existence

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[98] FINRA Sanction Guidelines at 14-15 (2016), http://www.finra.org/industry/sanction-guidelines.

[99] Guidelines at 13.

[100] Guidelines at 4 (Principal Consideration No. 4); *Blair C. Mielke*, 2015 SEC LEXIS 3927, at *59 (batching outside business activity and selling away violations for purposes of sanctions).

[101] Guidelines at 15.

[102] CX-11.

[103] Tr. 986-87, 1064-67.

[104] Guidelines at 14 (Principal Consideration No. 5).

[105] Guidelines at 15 (Principal Consideration No. 9).

[106] Guidelines at 15 (Principal Consideration No. 10).

[107] Guidelines at 13 (Principal Consideration No. 3).

[108] Guidelines at 13 (Principal Consideration No. 4).

of the outside activity in compliance forms and his outside activity request form, and that Mathieson's solicitations involved at least one Morgan Stanley customer.[109] On the other hand, there is no evidence that his conduct resulted in investor harm.[110]

Mathieson's conduct was serious. He engaged in substantial outside activities, including private and public offerings of securities, while circumventing the supervisory procedures put into place by his employer. He facilitated sales of penny stock securities that his employer deemed of such risk that he was ultimately required to obtain special dispensation to even deposit the stock at his firm. His violations merit a significant sanction.

Given the particular facts and circumstances of this case, we find that Mathieson's violations warrant a one-year suspension in all capacities and a $50,000 fine. The sanction we impose is appropriately remedial under the circumstances, reflects the substantial nature of the violation and that the misconduct frustrated rules designed to ensure proper supervision of securities and business transactions necessary for the protection of investors. Moreover, the sanction will discourage others from engaging in similar misconduct.

V. Order

Mathieson is suspended for one year from associating with any member firm in any capacity and fined $50,000. Mathieson also is ordered to pay costs in the amount of $8,619.22, including an administrative fee of $750 and hearing transcript costs.

If this decision becomes FINRA's final disciplinary action, Mathieson's suspension shall commence at the opening of business on February 6, 2017. The fine and costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.[111]

David Williams
Hearing Officer
For the Extended Hearing Panel

[109] Guidelines at 13 (Principal Considerations No. 1 and No. 5).

[110] Guidelines at 13 (Principal Consideration No. 2).

[111] The Extended Hearing Panel considered all of the parties' arguments. They are rejected or sustained to the extent that they are inconsistent with the views reflected in this decision.

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