

NEW YORK STOCK EXCHANGE, INC.

EXCHANGE HEARING PANEL DECISION 04-139

August 26, 2004

LEE I. FISHMAN

FORMER REGISTERED REPRESENTATIVE

* * *

Violated Exchange Rule 346(b) in that he engaged in an outside business and was compensated without the required consent, made recommendations to customers to invest in an unapproved outside business and they did, made misstatements on his firm's compliance forms, caused a violation of Exchange Rule 342.16 in that he sent one or more faxes to customers without review and approval – Consent to censure and eight-month bar.

Appearances:

For the Division of Enforcement
Simon Swidler, Esq.
Ellen R. McCarthy, Esq.
Michael B. Ettlinger, Esq.

For the Respondent
S.M. Chris Franzblau, Esq.

* * *

An Exchange Hearing Panel met to consider a Stipulation of Facts and Consent to Penalty entered into between the Exchange's Division of Enforcement and Lee I. Fishman, a former registered representative with Merrill Lynch, Pierce, Fenner & Smith Incorporated (the "Firm"). Without admitting or denying guilt, Mr. Fishman consented to a finding by the Hearing Panel that he:

- I. Violated Exchange Rule 346(b) in that he engaged in an outside business and was compensated by another person, without making a written request and receiving the prior written consent of his member organization employer.
- II. Engaged in conduct inconsistent with just and equitable principles of trade in that he:
 - A. Made recommendations to customers to invest in an unapproved outside business, and one or more customers invested based upon such information.
 - B. Made misstatements on one or more compliance forms utilized by his member organization employer.
- III. Caused a violation of Exchange Rule 342.16 in that, on one or more occasions, he sent facsimile correspondence to one or more customers from the office of his member organization employer without prior supervisory review and approval.

For the sole purpose of settling this disciplinary proceeding, the Division of Enforcement and Mr. Fishman stipulate to certain facts, the substance of which follows:

Background and Jurisdiction

1. Lee I. Fishman (“Fishman”) was born on January 19, 1941. He entered the securities industry in or about 1964, as a registered representative with Firm A, a non-member organization. In 1968, Fishman left Firm A, and thereafter became employed by a succession of organizations, as follows:

Firm B (1968-1969) (non-member)
 Firm C (1969-1972) (non-member)
 Firm D (1972-1973) (non-member)
 Firm E (1973) (non-member)
 Firm F (1974) (member)
 Firm G (successor to Firm C) (1974-1990) (non-member)

Fishman remained at Firm G until his voluntary departure in approximately September 1990, when he joined the Firm. On or about October 1, 1990, Fishman was approved as a registered representative of the Firm by the New York Stock Exchange, Inc. (the “Exchange”). Fishman remained at the Firm until his retirement on or about July 2, 2001. He is no longer employed in the securities industry.

2. On August 10, 2001, the Exchange received a Uniform Termination Notice for Securities Industry Registration (“Form U-5”) dated August 7, 2001 from the Firm reporting that Fishman, formerly a registered representative in the Firm’s Short Hills, NJ branch office, was the subject of complaints by one or more Firm customers that he solicited them to participate in a private placement without knowledge or consent by the Firm.
3. By letters dated August 24, 2001 and July 11, 2002, which he received, the Exchange's Division of Enforcement (“Enforcement”) notified Fishman that it was investigating the matter reported in the Form U-5.

Summary of Violative Conduct

4. At various times in 1999 and 2000, Fishman engaged in an undisclosed outside business for which he received compensation by, without the knowledge or consent of the Firm, causing one or more Firm customers to invest in an outside private placement in which Fishman had a financial interest. In addition, Fishman failed to submit certain facsimile correspondence pertaining to the outside private placement to the Firm for supervisory review, and made one or more misstatements on Firm compliance forms regarding his outside business activity.

Undisclosed Outside Business; Unapproved Facsimile Correspondence

5. Exchange Rule 346(b) states in relevant part: “Without making a written request and receiving the prior written consent of his...member organization employer, no...employee of a ...member organization shall at any time be engaged in any other business, or be employed or compensated by any other person; or ...have, directly or

indirectly, any financial interest in another organization engaged in any securities, financial or kindred business.”

6. In or about mid-1999, Fishman invested approximately \$100,000 of his own personal funds in a private placement called XYZ Technologies, LLC (“XYZ”), an Internet service provider. Fishman made such investment as a result of conversations he had with his friend, P (“P”), the Chief Financial Officer (“CFO”) of XYZ.
7. At P’s request, Fishman gave Spies names, as well as addresses and/or telephone numbers, of other potential investors. Such potential investors identified by Fishman included two of Fishman’s Firm customers, the ABC Partnership and KG.
8. P informed Fishman that if any of the potential investors he identified actually invested in XYZ, Fishman would be given additional XYZ stock for himself. Fishman in fact received additional XYZ stock pursuant to this arrangement.
9. On or about November 8, 1999, P faxed Fishman a one-page information sheet regarding XYZ and directed Fishman to “please share this information as you see fit.” Thereafter, on or about November 10, 1999, Fishman used a Firm fax cover sheet to fax the information he received from P to his Firm customer the ABC Partnership. On the bottom of the Firm cover sheet, Fishman hand wrote, “You can still [invest]. This is going to be very good.” Fishman sent this fax without submitting it for prior supervisory review and approval, in circumvention of Firm procedure regarding outgoing fax transmissions.
10. On or about May 17, 2000, pursuant to Fishman’s recommendation, the ABC Partnership invested \$250,000 in XYZ, via a wire transfer from its Firm account. KG also invested in XYZ, as a result of Fishman’s having provided his name to P.
11. XYZ filed for Chapter 11 bankruptcy in or about June 2000.

Misstatements to Firm; Books and Records

12. Relevant Merrill procedure required Fishman to complete an annual “Compliance Disclosure Form,” which asked, “Do you have any outside employment, business interests, investments or trusteeships?”
13. On the 1999 and 2000 “Compliance Disclosure Form,” Fishman answered such question with a “No” answer, which was not true.

DECISION

The Hearing Panel, in accepting the Stipulation of Facts and Consent to Penalty, found Mr. Fishman guilty as set forth above by unanimous vote.

PENALTY

In view of the above findings, the Hearing Panel, by unanimous vote, imposed the penalty consented to by Mr. Fishman of a censure and an eight-month bar from membership, allied membership, approved person status, and from employment or association in any capacity with any Exchange member or member organization.

For the Hearing Panel

Vincent F. Murphy
Hearing Officer