

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RICHARD C. CLARKE, II
(CRD No. 2306773),

Respondent.

Disciplinary Proceeding
No. 2005000336401

Hearing Officer – DMF

DEFAULT DECISION

November 28, 2006

Summary

Respondent is barred from associating with any NASD member in any capacity for borrowing funds from customers, in violation of Rules 2370 and 2110, and failing to respond to requests for information, in violation of Rules 8210 and 2110. In addition to the bars, Respondent is directed to reimburse his customers with interest.

Appearances

UnBo Chung, Esq., Chicago, IL (Rory C. Flynn, Esq., Washington, DC, and Mark Dauer, Esq., New Orleans, LA, Of Counsel), for Complainant.

No appearance by or for Respondent.

DECISION

I. Introduction

The Department of Enforcement filed the attached Complaint on April 10, 2006, alleging that Respondent Richard C. Clarke, II borrowed customer funds, in violation of Rules 2370 and 2110, and failed to respond to requests for information, in violation of Rules 8210 and 2110. Respondent did not file an Answer to the Complaint. On July 6,

2006, Enforcement filed a motion for a default decision, supported by the declaration of UnBo Chung and seven exhibits. Respondent did not reply to the motion.¹

II. Respondent's Default

On April 7, 2006, Enforcement sent the Complaint and Notice of Complaint to Respondent by regular and certified first class mail addressed to Respondent's most current residential address listed in the Central Registration Depository (the CRD address). On May 10, 2006, Enforcement sent the Complaint and Second Notice of Complaint to Respondent by regular and certified first class mail addressed to the CRD address. Respondent did not file an Answer or otherwise respond to the Complaint.

Enforcement served the Complaint and the Notices of Complaint on Respondent in accordance with Rule 9134, giving him constructive notice of this proceeding. By failing to respond to the Complaint, he defaulted. Pursuant to Rule 9269, the Hearing Officer will deem the allegations in the Complaint admitted.

III. Jurisdiction

Respondent was registered as a General Securities Representative through American Express Financial Advisors, Inc., now known as Ameriprise Financial Services, Inc., from April 1993 to January 2005 and as a General Securities Principal from September 2000 to January 2005. He was subsequently briefly registered through another NASD member in January and February 2005, but has not been registered since then. Nevertheless, he remains subject to NASD jurisdiction for purposes of this proceeding, pursuant to Art. V, § 4 of NASD's By-Laws, because the Complaint was

¹ The factual determinations in this decision are based on the allegations of the attached Complaint, which are deemed admitted, and the additional materials filed by Enforcement with its motion.

filed within two years after the termination of his last registration, and it charges him with misconduct while he was registered and with failing to provide information requested during that two-year period.

IV. Violations

The first cause of the Complaint alleges that while registered with American Express, between July 16, 2004 and September 2, 2004, Respondent borrowed \$2,000 from customer RF, \$6,000 from customer PL and \$30,000 from married customers MS and NS to invest in a boating supply company. The written supervisory procedures of American Express specifically prohibited registered representatives from borrowing money from customers except immediate family members. None of the customers is related in any way to Respondent.

These allegations, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent violated Rule 2370, which prohibits registered representatives from borrowing from customers unless the firm's written procedures allow the borrowing and the borrowing meets certain specified conditions. A violation of Rule 2370 is also a violation of Rule 2110.

The second cause of the Complaint alleges that on or about February 17 and March 28, 2005, NASD staff sent Respondent letters, pursuant to Rule 8210, requesting that he provide certain information. NASD staff sent the letters by first class and certified class mail to Respondent's CRD address, and pursuant to Rule 8210(d), he is deemed to have received them. Respondent did not respond in any manner to these requests.

These allegations, which are deemed admitted, are sufficient to establish, for purposes of this default decision, that Respondent failed to respond to requests for information, in violation of Rules 8210 and 2110.

V. Sanctions

The NASD Sanction Guidelines do not list a specific sanction for violating Conduct Rule 2370. Enforcement recommended that Respondent be barred and directed to repay the loans, plus interest, to all affected customers. This case involves three separate violations over a period of three months; Respondent has not repaid any of the money he borrowed; and, according to the declaration filed by Enforcement in support of its motion, the investigative record includes sign-in sheets establishing that Respondent attended compliance meetings at which the firm's policy against borrowing from customers was discussed. In addition, the Hearing Officer notes that Respondent was registered as a principal, and therefore should have been particularly aware of the prohibition against borrowing from customers. There is no evidence of any mitigating facts in this case. Therefore, the Hearing Officer concludes that this is an egregious case, for which the appropriate sanctions are a bar and a requirement that Respondent repay his customers the amounts he borrowed from them, together with interest from the date of the loans until they are repaid.

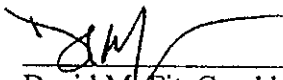
For failing to respond to requests for information, the Guidelines recommend a bar. NASD Sanction Guidelines at 35. Again, there is no evidence of any mitigating facts that would justify a lesser sanction in this case.

VI. Conclusion

Respondent Richard C. Clarke, II is barred from associating with any NASD member in any capacity for borrowing customer funds, in violation of Rules 2370 and 2110, and for failing to respond to requests for information, in violation of Rules 8210 and 2110. In addition, Respondent is ordered to pay (i) \$2,000 to customer RF, together with interest from July 16, 2004, until the date of payment; (ii) \$6,000 to customer PL, together with interest from August 17, 2004, until the date of payment; and (iii) \$30,000 to customers MS and NS, together with interest from September 2, 2004, until the date of payment. Interest shall be calculated pursuant to 26 U.S.C. § 6621(b)(2).²

These sanctions will be effective on a date set by NASD, except that the bars will be effective immediately if this decision becomes NASD's final disciplinary action.

SO ORDERED.



David M. FitzGerald
Hearing Officer

Copies to: Richard C. Clarke, II (*via overnight and first class mail*)
UnBo Chung, Esq. (*via electronic and first class mail*)
Mark P. Dauer, Esq. (*via electronic and first class mail*)
Rory C. Flynn, Esq. (*via electronic and first class mail*)

² The interest rate, which is used by the Internal Revenue Service to determine interest due on underpaid taxes, is adjusted each quarter and reflects market conditions. The customers are specifically identified in an Addendum to this decision which is served only on the parties.

**NASD
OFFICE OF HEARING OFFICERS**

Department of Enforcement,

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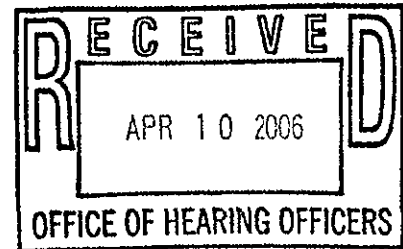
Richard C. Clarke II,
CRD No. 2306773

Respondent.

Disciplinary Proceeding
No. 2005000336401

Hearing Officer

COMPLAINT



Upon information and belief, Complainant alleges as follows:

1. Respondent Richard C. Clarke II ("Respondent") became registered with NASD on March 10, 1993 as a General Securities Representative. On September 21, 2000, Respondent became a General Securities Principal. Between the time period of May 1993 and December 2004, Respondent was registered in these capacities with American Express Financial Advisors, Inc. ("Member"), a member of NASD. Between the time period of December 2004 and February 2005, Respondent was registered in the above capacities with Country Capital Management Company. Respondent is not currently registered with any NASD members. NASD has jurisdiction over Respondent pursuant to Article V, Section 4 of the Association's By-Laws, which provides for a two-year period of retained jurisdiction over formerly associated persons.

FIRST CAUSE OF COMPLAINT
NASD Conduct Rules 2370 and 2110:
Borrowing from Customers

2. Paragraph number 1, above, is re-alleged and incorporated herein by reference.
3. On or about July 16, 2004, Respondent borrowed \$2,000 from a customer, RF, to invest in a boating supply company. The Member's written supervisory procedures specifically prohibited borrowing money from customers unless the customer was an immediate family member of the representative. RF is not related in any way to Respondent.
4. On or about August 17, 2004, Respondent borrowed \$6,000 from a customer, PL, to invest in a boating supply company. The Member's written supervisory procedures specifically prohibited borrowing money from customers unless the customer was an immediate family member of the representative. PL is not related in any way to Respondent.
5. On or about September 2, 2004, Respondent borrowed \$30,000 from married customers MS and NS to invest in a boating supply company. The Member's written supervisory procedures specifically prohibited borrowing money from customers unless the customer was an immediate family member of the representative. Neither MS nor NS is related in any way to Respondent.
6. The acts, practices and conduct above constitute separate and distinct violations of NASD Conduct Rules 2370 and 2110 by Respondent.

SECOND CAUSE FOR COMPLAINT
NASD Conduct Rule 2110 and NASD Procedural Rule 8210
Failure to Respond to Requests for Information

7. Paragraphs 1 through 6, above, are re-alleged and incorporated herein by reference.
8. On or about February 15, 2005, NASD Staff sent to Respondent a request that he provide certain information, pursuant to and in accordance with the provisions of NASD Procedural Rule 8210. That request for information was sent by first class and certified mail to Country Capital Management Company, where Respondent was registered at the time. This address was obtained through the Central Registration Depository system ("CRD"). Both the first class and certified mailings were returned to the NASD Staff marked "Insufficient Address."
9. On or about February 17, 2005, NASD Staff sent to Respondent a request that he provide certain information, pursuant to and in accordance with the provisions of NASD Procedural Rule 8210. That request for information was sent by first class and certified mail to Respondent's address of record as contained in the records of the CRD ("CRD address"). The first class mailing to the CRD address was not returned to the NASD Staff, and receipt for the certified mail was returned back to NASD signed by "Stephanie Zimmerman."
10. On or about March 28, 2005, NASD Staff sent to Respondent a second request that he provide the information initially requested on February 17, 2005, pursuant to and in accordance with the provisions of NASD Procedural Rule 8210. This request for information

was sent by first class and certified mail to Respondent's CRD address. The first class mailing to the CRD address was not returned to the NASD Staff, and receipt for the certified mail was returned back to NASD signed by "Stephanie Zimmerman."

11. The acts, practices and conduct described above constitute separate and distinct violations of NASD Conduct Rule 2110 and Procedural Rule 8210 by Respondent.

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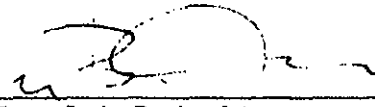
PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. An order imposing sanctions upon the Respondent in accordance with NASD Rule 8310.
- C. An order requiring Respondent to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest;
- D. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and
- E. An order imposing any other fitting sanction.

**NASD DEPARTMENT OF
ENFORCEMENT**

Date: April 7, 2006



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