

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,
Complainant

v.

ROBERT FRANKLYN MALIN
(CRD No. 1178312),

Respondent.

Disciplinary Proceeding
No. 2005001121401

Hearing Officer – LBB

DEFAULT DECISION

Dated: August 19, 2010

Respondent Robert Franklyn Malin violated NASD Conduct Rule 2110 by allowing the FINRA member firm of which he was president to conduct a securities business while it failed to maintain the required minimum net capital. Respondent is barred from associating with any member firm in any capacity.

Appearances

Frank M. Weber, Esq., New York, New York, Senior Regional Counsel, Department of Enforcement, for Complainant.

No appearance by or for Respondent.

DECISION

The Department of Enforcement filed the Complaint in this disciplinary matter on April 30, 2009.¹ The Complaint asserted several causes of action against A.B. Watley Direct, Inc. (“ABW Direct”), Linus Nkem Nwaigwe, and Robert Franklyn Malin (“Respondent”). The Fourth Cause of Action asserts the only cause of action against Malin, for violating NASD

¹ As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008, including certain conduct rules and procedural rules. See Regulatory Notice 08-57 (Oct. 2008). This decision refers to and relies on NASD Conduct Rule 2110, which was in effect at the time of the violation charged in the Complaint. The applicable rules are available at www.finra.org/rules.

Conduct Rule 2110, based on Malin's role in causing the firm to miscalculate its net capital and to continue to conduct a securities business while failing to maintain its required minimum net capital. ABW Direct and Nwaigwe settled the matter, leaving Malin as the sole respondent.

Despite being properly served with the Complaint, Notice of Complaint, and Second Notice of Complaint, Respondent has not filed an answer to the Complaint. On June 22, 2010, Enforcement filed a Motion for Entry of Default Decision, to which Respondent did not respond. Accordingly, pursuant to Procedural Rules 9215(f) and 9269, the allegations in the Complaint will be deemed admitted and Enforcement's motion will be granted.²

I. Respondent's Default

On April 29, 2009, the Department of Enforcement served the First Notice of Complaint and Complaint on Respondent by first-class and certified mail at three different addresses – two addresses that were listed in the Central Registration Depository, and a third address that Respondent had identified in an on-the-record interview ("OTR") as his current residential address. Declaration ¶ 24; CX-1, CX-31. The return receipt cards for the certified mailings to the first CRD address and the current residential address were returned to the Department of Enforcement, signed by "A. Turino." The card for the mailing to the second CRD address, which Respondent had indicated at his OTR was out of date, was returned to Enforcement marked by the Postal Service, "Return to Sender – Unclaimed." The first-class mailing to the second CRD address was returned to Enforcement as undeliverable, but the other first-class mailings were not returned. Declaration ¶ 25; CX-3, CX-4, CX-5. In addition, Enforcement sent the Complaint and Notice of Complaint to an attorney who had represented Respondent during

² The factual determinations in this decision are based on the allegations of the attached Complaint and the materials Enforcement filed with its default motion, which included the Declaration in Support of Motion for Entry of Default, submitted by counsel for Enforcement, and supporting documentation that was attached to counsel's declaration. Counsel's declaration is cited herein as "Declaration, ¶ ____." The supporting documentation is cited as "CX-____."

the investigation that led to the filing of the Complaint. Declaration ¶ 26; CX-2. Respondent did not answer or otherwise respond to the Complaint. See Declaration ¶ 27.

On May 28, 2009, Enforcement served the Second Notice of Complaint and Complaint on Respondent at all three addresses by first-class and certified mail. Declaration ¶ 28. The cards for the first CRD address and the alternative current address were returned to Enforcement, signed by "I. Ramos." The card for the mailing to the second CRD address was returned, marked as undeliverable. The first-class mailing to the second address was returned to Enforcement by the postal service, while the other first-class mailings were not returned. Declaration ¶ 29; CX-8 – CX-11. Enforcement also sent the Second Notice of Complaint to the attorney who had represented Respondent during the investigation. Declaration ¶ 30.

Respondent has not answered or otherwise responded to the Complaint. By failing to respond to the Complaint, he defaulted.

II. Jurisdiction

Respondent first became registered with FINRA in 1983, and was registered until April 17, 2008, except during a brief period when he was not registered with a member firm. From July 22, 2002, through April 17, 2008, Respondent was registered through member firm ABW Direct. Respondent has not been registered with a member firm since April 17, 2008. Declaration ¶¶ 7 – 9; CX-1.

Pursuant to Article V, Section 4 of FINRA's By-Laws, Respondent was subject to FINRA's jurisdiction at the time the Complaint was filed, and remains subject to FINRA's jurisdiction, because the Complaint was filed within two years after the termination of his registration with a member firm, and the Complaint charges him with violations that occurred while he was registered with a member firm.

III. Origin of Investigation Leading to the Complaint

The charges that led to the filing of the Complaint arose from the findings of three separate examinations of ABW Direct. The charge against Respondent was filed as a result of findings in a special financial examination that focused on ABW Direct's calculation of its net capital. Declaration ¶ 32.

IV. Violation of Rule 2110

The principal purposes of the net capital rule are to "protect customers and other market participants from broker-dealer failures and to enable those firms that fall below the minimum net capital requirements to liquidate in an orderly fashion without the need for a formal proceeding or financial assistance from the Securities Investor Protection Corporation." *Fox & Co. Investments, Inc.*, Exchange Act Rel. No. 52,697, 2005 SEC LEXIS 2822, at *18 (Oct. 28, 2005) (citations omitted). Engaging in securities transactions while a firm is in violation of the net capital rule constitutes a violation of Conduct Rule 2110. *Id.* at *27, n.29; *Paul Joseph Benz*, Exchange Act Rel. No. 51,046, 2005 SEC LEXIS 116, at *10 (Jan. 14, 2005).

According to the Complaint, the allegations of which are deemed admitted, on seven dates in 2005, ABW Direct conducted a securities business while failing to maintain its minimum required net capital under SEC Rule 15c3-1. Complaint ¶ 56.

- On June 30, 2005, ABW Direct conducted a securities business while failing to maintain adequate net capital. According to the firm's calculations, it had excess net capital of \$4,969. In fact, it had a net capital deficiency of \$208,730.70. The difference was the result of the firm's failure to record, and improper recording of, a number of items. For example, the firm failed to record the liability that resulted from a settlement agreement with a law firm, failed to record certain payables, and under-recorded certain payables. Complaint ¶ 58(a).

- On August 31, 2005, ABW Direct conducted a securities business while failing to maintain adequate net capital. According to the firm's calculations, it had excess net capital of \$1,327, but it actually had a net capital deficiency of \$172,839.87. The key items leading to the deficiency were those that created the deficiency on June 30, 2005. Complaint ¶ 58(b).
- On September 28, 2005, ABW Direct conducted a securities business while failing to maintain adequate net capital. According to the firm's calculations, it had excess net capital of \$7,071, but it actually had a net capital deficiency of \$65,505.42. The key items that led to this net capital deficiency included some of the same errors that caused the deficiency on June 30, 2005, including the liability resulting from the settlement with the law firm and the erroneous recording of certain payables. Complaint ¶ 58(c).
- On September 30, 2005, ABW Direct conducted a securities business while failing to maintain adequate net capital. According to the firm's calculations, it had excess net capital of \$41,853, but it actually had a net capital deficiency of \$31,560.43. The key items that caused this net capital deficiency included some of the same items that caused the deficiency on June 30, 2005, including the liability resulting from the settlement with the law firm and the erroneous recording of certain payables. Complaint ¶ 58(d).
- On October 27, 2005, ABW Direct conducted a securities business while failing to maintain adequate net capital. According to the firm's calculations, the firm had excess net capital of \$14,139, when it actually had a net capital deficiency of \$65,137.01. The primary reasons for the firm's miscalculation was the firm's

failure to recognize that its net capital requirement had increased to \$100,000 because the firm had engaged in proprietary trading, and that stock that had been contributed to the firm in an effort to boost its net capital had declined in value. Complaint ¶ 58(e).

- On October 31, 2005, ABW Direct conducted a securities business while failing to maintain adequate net capital. According to the firm's calculations, the firm had a net capital deficiency of \$ \$42,663, when it actually had a net capital deficiency of \$97,554.51. As on October 27, 2005, the firm had failed to take into account that its net capital requirement had increased to \$100,000. Complaint ¶ 58(f).
- On November 10, 2005, ABW Direct conducted a securities business while failing to maintain adequate net capital. According to the firm's calculations, the firm had excess net capital of \$11,509, when it actually had a net capital deficiency of \$66,553.50. The firm had again failed to take into account that its net capital requirement was \$100,000. Complaint ¶ 58(g); CX-12

Respondent was the president of ABW Direct. The president of a broker-dealer may be held responsible for the firm's net capital violations if the president had actual knowledge of the firm's net capital insufficiency. *Benz*, at *10. "[O]fficers of securities firms bear a heavy responsibility in ensuring that the firm complies with all applicable rules and regulations . . . [including] the net capital requirements." *Hutchison Financial Corp.*, 51 S.E.C. 398, 403-04 (1993). The Complaint alleges that Malin had both substantial responsibility and involvement with the net capital violations.

For every paragraph relating to net capital, the Complaint alleges that ABW Direct acted through Malin, and specifically alleges that he was aware of the violations. In addition, on September 29, 2005, the Staff sent a letter to Respondent, as president of ABW Direct, advising the firm to cease conducting a securities business, but the firm asserted that the notice was insufficient, the firm was capital compliant, and refused to cease conduct of its securities business. As a result, the firm operated on September 30, 2005, with insufficient net capital. Complaint ¶¶ 61, 66.

As noted above, a key reason for some of the net capital violations was the increase in the net capital requirement due to proprietary trading. Respondent was substantially involved both in the trading and the net capital issue that arose from the trading. The firm received an infusion of capital on October 4, 2005, in the form of the contribution of shares of a penny stock. From October 27, 2005, through November 10, 2005, the firm engaged in 42 transactions in its proprietary account involving the penny stock and another stock, thereby raising its net capital requirement to \$100,000. Complaint ¶¶ 63 – 64. See SEC Rule 15c3-1(a)(2)(iii). As a result of the increased net capital requirement, as set forth above, the firm operated with insufficient net capital on three dates in 2005. Respondent stated that he approved the transactions and gave the instructions to enter into the transactions because “the value of the securities in the account was drastically declining.” Declaration ¶ 48; CX-28 p. 3.

Respondent admitted in an OTR that he caused the firm’s penny stock transactions to be cancelled and re-billed, aggregating multiple transactions into single transactions. Respondent said that he caused the transactions to be cancelled and re-billed because “there was some silly rule that if you were a \$5,000 broker-dealer, you couldn’t do more than ten trades in a year. So

we put in one ticket because in our mind it was one transaction for each date.” Declaration ¶¶ 50 – 51.

Although Respondent was not ABW Direct’s FINOP, it would have been inappropriate for Respondent to rely on the Firm’s FINOP with respect to the errors in the net capital calculations. The Firm’s FINOP was a part-time contractor who never visited the firm, but instead relied on the firm to send him financial statements and documentation. Thus, the FINOP had no control with respect to whether invoices were included in the firm’s net capital calculations. Declaration ¶ 54. See *William H. Gerhauser*, Exchange Act Rel. No. 40639, 1998 SEC LEXIS 2402, at *17 – *18 (Nov. 4, 1998) (president of broker-dealer liable where he had “intervened” in determining firm’s net capital).

Respondent violated NASD Conduct Rule 2110 by allowing ABW Direct to conduct a securities business when it did not have adequate net capital.

V. Sanctions

For net capital violations by an individual, FINRA’s Sanction Guidelines (“Guidelines”) recommend a fine of \$1,000 to \$50,000 and a suspension of up to 30 business days. In egregious cases, the Guidelines recommend consideration of a lengthier suspension (of up to two years) or a bar. Guidelines at 29 (2007 ed.). Enforcement recommends a bar, arguing that Respondent’s disciplinary history justifies the highest sanction recommended by the Guidelines.

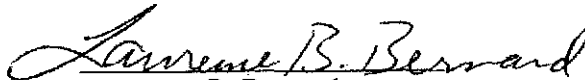
In 2009, Respondent agreed to be permanently barred from associating with any broker or dealer by the SEC, following his criminal conviction for conspiracy to commit securities fraud. In 2007, Respondent was suspended for six months in a principal capacity and fined \$50,000, and agreed to findings that he failed to implement, maintain, and enforce an effective supervisory system, in a case arising from allegations of improper market timing and late trading in mutual funds. In 2006, Respondent agreed to findings that he either knew or should have

known that representations made to FINRA in documents related to a subordinated loan by ABW Direct's former sister firm, A.B. Watley, Inc., were false, incomplete, and misleading. He was suspended for 30 days in a principal capacity and fined \$15,000. Declaration ¶¶ 15 – 19.

A bar is the appropriate sanction. In addition to Respondent's serious disciplinary history, the record shows that there were multiple violations, that Respondent knew or should have known of all of the violations, engaged in conduct designed to evade the increase in his firm's net capital requirement, and permitted the firm to continue to operate when he disputed FINRA Staff's notice that the firm's net capital was deficient.

VI. Conclusion

Respondent Robert Franklyn Malin violated NASD Rule 2110 by allowing the FINRA member firm of which he was president to conduct a securities business while failing to maintain its required minimum net capital requirement. Respondent is barred from associating with any member firm in any capacity. The bar will become effective immediately if this decision becomes FINRA's final disciplinary action in this proceeding.


Lawrence B. Bernard
Hearing Officer

Copies: Robert Franklyn Malin (*via overnight courier and first-class mail*)
Frank Weber, Esq. (*via electronic and first-class mail*)
William St. Louis, Esq. (*via electronic and first-class mail*)
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