

**NASD OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

DANA D. TONEY  
(CRD No. 2617246),

Respondent.

Disciplinary Proceeding  
No. 2006006995801

Hearing Officer—Andrew H. Perkins

**DEFAULT DECISION**

January 10, 2008

**Respondent is barred from associating with any member firm in any capacity for failing to respond to requests for information issued by FINRA staff, in violation of Procedural Rule 8210 and Conduct Rule 2110. Respondent also violated Conduct Rules 3030 and 2110 by engaging in outside business activities without providing his firm written notice of his activities. However, in light of the bar, no additional sanctions are imposed for this violation.**

**Appearances**

Joel T. Kornfeld, Regional Counsel, Los Angeles, CA, for the Department of Enforcement.

No appearance by or on behalf of Dana D. Toney.

**DECISION**

**I. Introduction**

On September 4, 2007, the Department of Enforcement ("Enforcement") filed the attached Complaint against Dana D. Toney ("Toney" or the "Respondent"). The Complaint charges Toney with: (1) engaging in outside business activities without first providing his firm with written notice of his activities, in violation of NASD Conduct Rules 3030 and 2110; and (2)

failing to respond to FINRA staff's requests for information concerning the foregoing charges, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

The Respondent did not answer or otherwise respond to the Complaint. Consequently, on November 15, 2007, Enforcement filed a Motion for Entry of Default Decision, supported by the Declaration of Joel T. Kornfeld ("Kornfeld Decl.") and six exhibits. Toney did not reply to the motion. Accordingly, for the reasons set forth below, the Hearing Officer grants Enforcement's motion.

## **II. Findings of Fact and Conclusions of Law**

### **A. Respondent's Default**

The Hearing Officer finds that Enforcement properly served the Respondent with the Complaint by mailing the Complaint and the First and Second Notices of Complaint to his most current residential address shown in the Central Registration Depository (the "CRD address") by first-class certified mail. Enforcement mailed the First Notice of Complaint on September 4, 2007. The receipt returned by the US Postal Service shows that the mailing was delivered to Toney's CRD address on September 6, 2007.<sup>1</sup> Nonetheless, Toney did not answer the Complaint. Enforcement then mailed the Second Notice of Complaint to Toney on October 4, 2007. The receipt returned by the US Postal Service shows that the mailing containing the Second Notice of Complaint was delivered to Toney's CRD address on October 19, 2007.<sup>2</sup>

To date, Toney has not filed an Answer with the Office of Hearing Officers or otherwise responded to the Complaint.<sup>3</sup> Accordingly, the Hearing Officer finds Toney in default and,

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<sup>1</sup> Ex. 4.

<sup>2</sup> Ex. 6.

<sup>3</sup> Kornfeld Decl. ¶ 7.

pursuant to Procedural Rules 9215(f) and 9269(a)(2), deems the allegations in the attached Complaint admitted.<sup>4</sup>

## **B. Jurisdiction**

Toney entered the securities industry in July 2002 when he joined PFS Investments, Inc., a FINRA member firm. On September 16, 2002, Toney became registered as an Investment Company and Variable Contracts Products Representative (Series 6) with PFS Investments.<sup>5</sup> On November 17, 2006, PFS Investments filed a Form U5 (Uniform Termination Notice For Securities Industry Registration) that indicated that the firm had permitted Toney to resign after he failed to respond to the firm's affiliate regarding possible unreported outside business activities.<sup>6</sup> Toney's registration with FINRA terminated effective November 17, 2006.<sup>7</sup> Toney has not since been associated with a FINRA member firm or registered with FINRA. Nonetheless, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's Bylaws, because (1) the Complaint was filed within two years following the termination of his registration with FINRA and (2) the Complaint charges him with misconduct committed while he was associated with a FINRA member firm and with failing to respond to FINRA's requests for information made during the two-year period following his registration termination.

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<sup>4</sup> *Department of Enforcement v. Reynolds Verdiner*, No. CAF020004, 2003 NASD Discip. LEXIS 42, at \*5 (N.A.C. Dec. 9, 2003) (NASD Procedural Rule 9134(b)(1) allows for constructive notice by mailing a complaint to the respondent's most recent CRD address) (quoting *Lubeck v. SEC*, 1998 U.S. App. LEXIS 18849, at \*20 (9<sup>th</sup> Cir. Aug. 12, 1998)).

<sup>5</sup> Ex. 1, at 5 (CRD record).

<sup>6</sup> Ex. 2.

<sup>7</sup> Ex. 1, at 5.

### C. Unreported Outside Business Activities

The First Cause of the Complaint alleges that Toney owned and managed Choice Services Management, Inc. ("Choice Services"), a Nevada corporation, which operated an Internet site to assist individuals with locating and recovering unclaimed government refunds. Online advertisements described the services the company offered and showed its office address as Toney's residential address. The company's Articles of Incorporation list Toney as its managing member.<sup>8</sup>

Enforcement commenced an investigation into Toney's outside business activities after it received the Form U5 filed by PFS Investments.<sup>9</sup> In the course of that investigation, on January 17, 2006, Toney admitted during a telephone interview with FINRA staff that he owned Choice Services and that he had not disclosed his involvement with the company to PFS Investments.<sup>10</sup>

NASD Conduct Rule 3030 provides that no person registered with a member "shall be employed by, or accept compensation from, another person as a result of any business activity ... outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member ... in the form required by the member." The purpose of Conduct Rule 3030 is to provide member firms with an opportunity to raise any objections to such activities at a meaningful time and to exercise appropriate supervision as necessary under applicable law.<sup>11</sup> Conduct Rule 3030 requires disclosure of all outside business activity, not just

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<sup>8</sup> Kornfeld Decl. ¶ 8.

<sup>9</sup> *Id.* ¶ 5.

<sup>10</sup> *Id.* ¶ 11.

<sup>11</sup> *Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons*, Exchange Act Release No. 26,063, 1988 SEC LEXIS 1841 (Sept. 6, 1988), adopted at Exchange Act Release No. 26,178, 1988 SEC LEXIS 2032 (Oct. 13, 1988).

securities-related activity.<sup>12</sup> Based on the foregoing, the Hearing Officer finds that Toney violated NASD Conduct Rules 3030 and 2110.

In this case, the allegations in the Complaint are sufficient to establish that Toney violated Conduct Rule 3030. Toney was obligated under Conduct Rule 3030 to disclose his intended outside business activities when he first took steps to commence any business activity unrelated to his relationship with PFS Investments.<sup>13</sup> Accordingly, the Hearing Officer finds that Toney violated NASD Conduct Rules 3030 and 2110 by engaging in outside business activities without first providing PFS Investments with written notice of his intended activities.

#### **D. Failure to Respond to Requests for Information**

The Second Cause of the Complaint alleges that Toney failed to respond to two requests for information that NASD staff sent in connection with their investigation of Toney's outside business activities.

The Complaint alleges that the staff sent the first request by certified and first-class mail on December 4, 2006, to Toney at his CRD address. The staff received a signed receipt from the US Postal Service indicating that the request was delivered to Toney's CRD address on December 6, 2006.

The staff then sent Toney the second request on December 21, 2006, by certified and first-class mail. The staff received a signed receipt from the US Postal Service indicating that the request was delivered to Toney's CRD address on December 23, 2006.

Toney did not respond to either of the staff's information requests. Accordingly, the Hearing Officer finds that Toney violated Procedural Rule 8210 and Conduct Rule 2110.

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<sup>12</sup> *District Bus. Conduct Comm. v. Cruz*, No. C8A930048, 1997 NASD Discip. LEXIS 62, at \*96 (N.B.C.C. Oct. 31, 1997).

<sup>13</sup> *Department of Enforcement v. Schneider*, No. C10030088, 2005 NASD Discip. LEXIS 6, at \*13-14 (N.A.C. Dec. 7, 2005).

FINRA staff then made several attempts to contact Toney by telephone. On January 5, 9, and 17, 2007, FINRA staff left voice mail messages for Toney. Toney returned the staff's call on January 17 at which time he acknowledged that he received both of the written requests for information. Toney then requested a one-week extension of time to provide a written response. Although the staff agreed to his request, Toney never supplied the promised written response.<sup>14</sup>

Thereafter, FINRA staff made two more attempts to contact Toney by telephone on January 25 and February 2, 2007. However, Toney did not respond to the voice mail messages the staff left for him.<sup>15</sup>

Toney never provided any of the information FINRA staff requested in the two Rule 8210 requests for information.

### **III. Sanctions**

#### **A. Failure to Respond to Requests for Information**

The FINRA Sanction Guidelines ("Guidelines") recommend a bar where a respondent fails to respond in any manner to a request for information issued pursuant to Procedural Rule 8210.<sup>16</sup> Where mitigation exists, the Guidelines recommend consideration of a suspension in all capacities of up to two years.

FINRA staff sent Toney two written requests for documents in connection with its investigation of his outside business activities, which the Respondent acknowledged he received. Nonetheless, he did not provide any of the requested documents although he stated that he would after he received a requested extension of time to respond. Accordingly, the Hearing Officer will

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<sup>14</sup> Kornfeld Decl. ¶ 21.

<sup>15</sup> Kornfeld Decl. ¶¶ 21-23.

<sup>16</sup> Sanction Guidelines 35 (2007), available at <http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf>.

bar Toney from associating with any FINRA member in any capacity for violating Procedural Rule 8210 and Conduct Rule 2110.

**B. Outside Business Activities**

The Sanction Guidelines governing outside business activities recommend a fine of \$2,500 to \$50,000 and a suspension of up to 30 business days where there are no aggravating circumstances.<sup>17</sup> In this case, the record does not disclose any aggravating factors. The outside business activities did not involve any of PFS Investments' customers, and the nature of the business would not have created the impression that PFS Investments approved the services Choice Services offered the public. There also is no evidence that Toney's business activities caused anyone any injury. Accordingly, the Hearing Officer finds that the appropriate remedial sanctions are a \$5,000 fine and a suspension of 10 business days. However, in light of the bar imposed for Toney's failure to respond to the staff's requests for information, the Hearing Officer will not impose these additional sanctions.

**IV. Order**

Dana D. Toney is barred from associating with any member firm in any capacity for failing to respond in any manner to requests for information, in violation of Procedural Rule 8210 and Conduct Rule 2110. The bar shall become effective immediately if this Default Decision becomes the final disciplinary action of FINRA.



Andrew H. Perkins  
Hearing Officer

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<sup>17</sup> *Id.* at 14.

Copies to:

Dana D. Toney (by FedEx, next day delivery, and first-class mail)

Joel T. Kornfeld, Esq. (by electronic and first-class mail)

Mark P. Dauer, Esq., Of Counsel to Enforcement (by electronic and first-class mail)

David R. Sonnenberg, Esq., Of Counsel to Enforcement (by electronic and first-class mail)

**FINANCIAL INDUSTRY REGULATORY AUTHORITY**

**OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

COMPLAINANT,

v.

DANA D. TONEY  
CRD No. 2617246

RESPONDENT.

DISCIPLINARY PROCEEDING  
No. 2006006995801

**COMPLAINT**

The Department of Enforcement alleges:

SUMMARY

1. While associated with PFS Investments, Inc. ("PFSI"), Respondent Dana D. Toney owned a business entitled Choice Services Property Management LLC ("Choice Services"). Toney failed to provide prompt written to his firm of this outside business activity. The Staff sent Toney two Rule 8210 requests inquiring about his involvement with Choice Services and the notice, if any, that he provided to his firm. Toney never responded to either request. Toney violated Procedural Rule 8210 and Conduct Rule 2110.

RESPONDENT AND JURISDICTION

2. From March 20, 1995 through August 30, 1997, Toney was associated with PFSI as an Investment Company/Variable Contracts Products Representative. Toney reassociated with PFSI from July 22, 2002 through November 14, 2006 in the same capacity. PFSI is a

member of FINRA (f/k/a National Association of Securities Dealers or NASD (hereinafter "FINRA")). Toney is not presently associated with a FINRA member firm. Pursuant to Article V, Section 4 of FINRA's By-Laws, Toney is subject to FINRA's jurisdiction for purposes of this Complaint.

FIRST CAUSE OF ACTION

Participation in an Undisclosed Outside Business Activity  
(NASD Conduct Rules 3030 and 2110)

3. On or about April 11, 2006, Choice Services Property Management LLC ("Choice Services") filed Articles of Organization with the Nevada Secretary of State. The Articles identify Dana D. Toney as Choice Services' Resident Agent as well as a Managing Member.

4. Choice Services is involved in processing unclaimed government refunds as well as property management. In an online storefront, Choice Services stated that its "claims processing division services includes: locating and contacting individuals with unclaimed State and Federal Government assets and processing the correct paperwork for their claim." Its management and leasing division "works with people who are having financial challenges [and] help[s] people reach a solution that doesn't negatively affect their credit." Toney's residence and Choice Services are both located at [REDACTED]

5. In a January 17, 2007 telephone conversation with the Staff, Toney confirmed that he owned Choice Services and that he had not disclosed his involvement with Choice Services to his former firm, PFSI.

6. Toney failed to give PFSI prompt written notice of his involvement with Choice Services.

7. Such acts, practices and conduct by Toney violated NASD Conduct Rules 3030 and 2110.

SECOND CAUSE OF ACTION  
Failure to Provide Information  
(NASD Procedural Rule 8210 and Conduct Rule 2110)

8. On November 14, 2006, Toney was terminated from PFSI because he failed to respond to his firm's inquiries about his involvement with Choice Services.

First FINRA Request

9. On December 4, 2006, FINRA requested, pursuant to Procedural Rule 8210, that Toney provide information concerning his outside business activities while he was registered with PFSI. The letter asked Toney to provide a signed statement responsive to the Staff's inquiry by December 18, 2006.

10. The request was sent by regular first class and certified mail to Toney's CRD address, [REDACTED]

11. The request sent by regular first class mail to the CRD Address was not returned.

12. The staff received a signed receipt for the certified mailing indicating that it was delivered and received on December 6, 2006. However, the recipient's signature was illegible.

13. Toney did not respond at all to this first request for information.

Second FINRA Request

14. On December 21, 2006, FINRA requested, pursuant to Procedural Rule 8210, that Toney provide the information about his outside business activities that had been previously requested in the December 4, 2006 letter. The second letter requested a signed statement responsive to the Staff's inquiry by January 4, 2007. The letter also warned that failure to comply with the request could result in a disciplinary action.

15. This second request, like the previous request, was sent by regular first class and certified mail to Toney's CRD address, [REDACTED]

16. The request sent by regular first class mail was not returned.

17. The staff received a signed receipt for the certified mailing indicating that it was delivered and received on December 23, 2006. However, the recipient's signature was illegible.

18. Toney did not respond to this Second Request for Information.

19. On January 5, 2007, January 9, 2007, and January 17, 2007, the Staff left telephonic messages for Toney.

20. On January 17, 2007, after the third telephone message, Toney telephoned FINRA Staff. He acknowledged that he had received the requests for information. He also stated that Choice Services was a company he had formed to manage properties that he owned. He admitted that he had not disclosed this information to PFSI. Toney requested a one week extension of time within which to provide a written response to the Staff's requests for information.

21. On January 25, 2007, the Staff left telephonic messages for Toney at his residential telephone number and the Choice Services telephone number stating that no response had been received and requesting that he telephone the Staff.

22. On February 2, 2007, the Staff again left telephonic messages for Toney at his residential telephone number and the Choice Services telephone number.

23. Toney never responded to the January 25, 2007 or February 2, 2007 telephonic messages and never produced a written response to the Staff's second request for information.

## RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. order that one or more of the sanctions provided under NASD Rule 8310(a), including monetary sanctions, be imposed; and
- B. order that the Respondent bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330.

## FINRA DEPARTMENT OF ENFORCEMENT

Date: September 4, 2007

  
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