

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MALCOLM A. TURNER  
(CRD No. 2604387),

Respondent.

Disciplinary Proceeding  
No. 2007008061701

Hearing Officer – SW

**DEFAULT DECISION**

Date: September 3, 2008

**Respondent was barred for violating Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to requests for information issued by the FINRA staff. No separate sanctions were imposed for Respondent's violations of Conduct Rule 2110 when he (i) borrowed \$75,000 from a customer, in violation of his employer's internal procedures, and (ii) lied to his employer about the existence of the loan.**

**Appearances**

Pamela L. Shu, Esq., Senior Regional Counsel, Chicago, IL, for the Department of Enforcement.

No appearance by or for Respondent Malcolm A. Turner.

**DECISION**

**I. Procedural History**

On May 2, 2008, the Department of Enforcement ("Enforcement") filed the attached three-count Complaint, alleging: (1) in count one of the Complaint that Respondent Malcolm A. Turner ("Respondent") violated Conduct Rule 2110 when he borrowed \$75,000 from customer SK in violation of his employer's internal policy prohibiting representatives from borrowing funds from customers; (2) in count two of the Complaint that Respondent violated Conduct Rule 2110 when he lied to his employer about the existence of the loan during a surprise audit of his office; and (3) in count three of the Complaint that Respondent violated Conduct Rule 2110 and

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Procedural Rule 8210 when he failed to respond to requests for information issued by the FINRA staff pursuant to Procedural Rule 8210.

On July 23, 2008, Enforcement filed a Motion for Entry of Default Decision ("Motion"), supported by the Declaration of Pamela L. Shu, Esq., Senior Regional Counsel in FINRA's Chicago, IL office, and by 25 exhibits. For the reasons set forth below, Enforcement's Motion is granted.

## **II. Respondent's Default**

On April 30, 2008, Enforcement served Respondent with a copy of the Complaint and Notice of Complaint, via certified and first class mail, at his current residential address as reflected in FINRA's Central Registration Depository ("CRD address") and at an alternate address that Enforcement had obtained. Respondent failed to file an Answer or otherwise respond to the Complaint. On May 30, 2008, Enforcement served copies of the Complaint and Second Notice of Complaint, via certified and first class mail, on Respondent at his CRD address and the alternate address. Again, Respondent failed to file an Answer or otherwise respond to the Complaint.

The Hearing Officer finds that Enforcement complied with Procedural Rule 9134(b)(1) by sending the mailings to Respondent's CRD address and the alternate address. Accordingly, the Hearing Officer finds that Respondent received effective constructive notice of this proceeding and further finds that Respondent defaulted by failing to answer the Complaint.<sup>1</sup>

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<sup>1</sup> The factual determinations in this Decision are based on the Motion for Entry of Default Decision, the Declaration in Support of the Motion, the exhibits attached thereto, and the allegations in the Complaint, deemed admitted pursuant to Rules 9215(f) and 9269, and *Notice to Members* 99-77 (Sept. 1999).

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

#### **A. Jurisdiction**

Respondent was registered with Royal Alliance Associates, Inc. ("Royal Alliance") from November 1, 2001 through August 30, 2005. As a result of a customer complaint related to the prohibited loan and other allegations of misconduct, Royal Alliance filed Form U5 amendments on behalf of Respondent on February 15, 2007 and April 29, 2008.<sup>2</sup> Respondent is not currently associated with a FINRA member firm.

Nevertheless, Respondent remains subject to FINRA jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of the FINRA By-Laws, because the Complaint charges Respondent with misconduct while he was registered with a member firm and failures to provide information requested pursuant to Rule 8210 during the period of retained jurisdiction, and the Complaint was filed during the two-year period following the last amendment to his notice of termination of registration.<sup>3</sup>

#### **B. Respondent's Unethical Conduct Violated Conduct Rule 2110**

##### ***1. Respondent Borrowed Funds from Customer SK in Violation of his Employer's Policies***

Count one of the Complaint alleges that Respondent, while associated with Royal Alliance, violated Conduct Rule 2110 by borrowing \$75,000 from customer SK on November 5, 2003, when Royal Alliance's written supervisory procedures prohibited borrowing money from customers. At all times relevant to this Complaint, Royal Alliance's Sales Practice Manual

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<sup>2</sup> The Form U5 amendments disclosed that Respondent was the subject of a customer arbitration complaint that alleged various securities violations by Respondent.

<sup>3</sup> Article V, Section 4(a) of the FINRA By-Laws creates a two-year period of retained jurisdiction over former registered persons, covering misconduct that began before the registration terminated and failure to provide information, requested pursuant to Rule 8210, during the period of retained jurisdiction. Article V, Section 4(a) also provides that the running of the two year period of retained jurisdiction recommences from the date of the filing of an amended Form U5, if the amended Form U5 (i) is filed within two years of the original Form U5 filing, and (ii) discloses that such person may have engaged in conduct actionable under any applicable statute, rule, or regulation.

prohibited representatives from borrowing funds from customers. Respondent certified on December 22, 2004 that he reviewed and agreed to abide by Royal Alliance's Policies.

In its Motion, Enforcement submitted the additional information that: (1) the promissory note executed by Respondent's wife indicated that the \$75,000 loan would be repaid by March 31, 2005;<sup>4</sup> (2) on December 18, 2003, Respondent and his wife executed a mortgage on their residential real estate to secure the \$75,000 promissory note; (3) Respondent repaid only a portion of the loan leaving \$68,000 of the \$75,000 loan unpaid; (4) Respondent asked customer SK to lie to Royal Alliance about the existence of the loan; (5) on January 30, 2007, customer SK filed an arbitration claim regarding the loan and other matters; and (6) the customer arbitration was settled for a payment of \$60,000 on April 15, 2008.

In addition, when responding to Royal Alliance's annual compliance questionnaire on September 30, 2004, Respondent wrote "no" to the question "since your affiliation with the Firm, have you loaned money to a client, borrowed money from a client, co-invested with a client, or issued a personal promissory note, that you did not disclose to the Firm on a previous occasion," despite having borrowed \$75,000 from customer SK on November 5, 2003.

Accordingly, Respondent was aware that his conduct violated his employer's policies and he attempted to conceal his misconduct.

## **2. *Respondent Lied to his Employer Regarding the Loan***

The second cause of the Complaint alleges that, on August 22, 2005, Royal Alliance personnel conducted a surprise audit of Respondent's office after receiving a telephone complaint from customer SK's son about the \$75,000 loan. Royal Alliance personnel asked

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<sup>4</sup> Despite the signature of Respondent's spouse on the promissory note, the loan was made to Respondent. The arbitration claim filed by customer SK stated that Respondent had a business idea to hold investment seminars and provide investment advice to retirees or people on the verge of retirement, and requested the loan to bring this business idea to fruition. The promissory note stated that upon the death of the borrower, the principals of Strategic Wealth Management, LLC located at Respondent's Royal Alliance office would continue to meet the borrower's obligations relative to the promissory note.

Respondent whether he had borrowed funds from SK, and Respondent falsely answered that he had not.

### 3. *Respondent's Actions Constituted Unethical Conduct*

Conduct Rule 2110 states, "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."<sup>5</sup> Because Conduct Rule 2110 "is not limited to rules of legal conduct but rather . . . it states a broad ethical principle,"<sup>6</sup> it may be violated by unethical conduct, independent of a violation of any other law, regulation, or rule.

In *Department of Enforcement v. Davenport*, No. C05010017, 2003 NASD Discip. LEXIS 4, at \*8-10 (NAC May 7, 2003), the National Adjudicatory Council held that a respondent who violated his employer's policies regarding borrowing from customers and lied to his employer about his actions violated Rule 2110, explaining:

The SEC has construed Conduct Rule 2110 broadly to apply to all business-related misconduct, regardless of whether the misconduct involved securities. . . . The principal consideration is whether the misconduct reflects on an associated person's ability to comply with regulatory requirements necessary to the proper functioning of the securities industry and protection of the public. . . .

... Applying the foregoing principles to this case, we find that [the respondent's] misconduct – misrepresenting to his firm that he had not borrowed from customers in violation of the firm's policy – occurred in the context of his business-relationship with his employer. We also find that [the respondent's] dishonesty to his firm reflects directly on his ability to abide by his firm's policies, many of which are designed to protect the public and the firm, and to deal responsibly with the public. We therefore affirm the Hearing Panel's finding that [the respondent's] misrepresentations to his firm that he had not violated his firm's policy violated Conduct Rule 2110.

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<sup>5</sup> Although Rule 2110 refers only to members, Rule 0115 provides: "Persons associated with a member shall have the same duties and obligations as a member under these Rules."

<sup>6</sup> *Timothy L. Burkes*, 51 S.E.C. 356 (1993), *aff'd mem.*, *Burkes v. SEC*, 29 F.3d 630 (9th Cir. July 24, 1994).

Prior to November 10, 2003, there was no FINRA rule governing a representative's borrowing of funds from a customer. However, Royal Alliance, as a FINRA member, had an obligation to establish supervisory policies and procedures to govern the activities of its registered persons, in order "to protect the public and the firm, and to deal responsibly with the public."<sup>7</sup> In doing so, Royal Alliance was entitled to define and limit the types of transactions between its registered representatives and its customers, and Respondent was required to respect and abide by Royal Alliance's policies in that regard.

Respondent's failure to abide by Royal Alliance's policies and his efforts to hide the transaction both by having his wife sign the promissory note and by falsely stating on his 2004 annual compliance questionnaire that the borrowing did not occur, "reflects on [his] ability to comply with regulatory requirements necessary to the proper functioning of the securities industry and protection of the public."<sup>8</sup>

Furthermore, a registered representative is obligated to respond truthfully to his employer's questions regarding his business activities; any failure of a registered person to do so impedes a member firm's ability to fulfill its supervisory responsibilities. Respondent failed to fulfill this obligation when he lied about the loan in response to a direct question during a surprise audit by Royal Alliance.

Based on the allegations deemed admitted, the Hearing Officer finds that both (i) Respondent's failure to abide by his firm's policies prohibiting the borrowing of funds from customers, and (ii) Respondent's misrepresentations to his employer in that regard constituted

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<sup>7</sup> The loan occurred before Conduct Rule 2370 governing borrowing by customers became effective on November 10, 2003. Loans between registered persons and their customers are of legitimate interest to FINRA and member firms because of the potential for misconduct. See *NASD Notice to Members 03-62* (Oct. 2003).

<sup>8</sup> *Davenport* at \*9.

unethical conduct, and thereby violated Conduct Rule 2110, as alleged in counts one and two of the Complaint.

**C. Respondent Failed to Respond to FINRA Requests for Information**

Count three of the Complaint alleges that Respondent failed to respond to three requests for information that were sent by the FINRA staff to Respondent at his CRD address. The FINRA staff sent the requests for information to Respondent on April 4, April 25, and August 7, 2007, via first class and certified mail.<sup>9</sup> Each request was made pursuant to Procedural Rule 8210. Respondent failed to respond in any manner to the requests for information.

The Hearing Officer finds that Respondent is deemed to have received the requests for information sent to his CRD address pursuant to Rule 8210(d). Failure to comply with Rule 8210 requests for information is a serious violation because it subverts FINRA's ability to perform its regulatory responsibilities.<sup>10</sup>

Based on the allegations deemed admitted, the Hearing Officer finds that Respondent violated Conduct Rule 2110 and Procedural Rule 8210 as alleged in the third cause of the Complaint.

**IV. Sanctions**

**A. Respondent Failed to Respond to Rule 8210 Requests for Information**

For failing to respond to three requests for information issued by the FINRA staff pursuant to Procedural Rule 8210, Enforcement recommended that Respondent be barred. The *FINRA Sanction Guidelines* provide that a bar should be standard when an individual respondent

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<sup>9</sup> A copy of the August 7, 2007 request was also sent to Respondent at the alternate address.

<sup>10</sup> See, e.g., *Richard J. Rouse*, Exch. Act Rel. No. 32,685, 1993 SEC LEXIS 1831, at \*7 (1993); *Joseph G. Chiulli*, Exch. Act Rel. No. 42,359, 2000 SEC LEXIS 112, at \*16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for FINRA to conduct its investigations effectively, and emphasizing that FINRA members and associated persons must fully cooperate with requests for information).

does not respond in any manner to a request issued pursuant to Rule 8210.<sup>11</sup> The record does not indicate the existence of any mitigating factors that would warrant a lesser sanction.

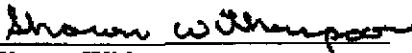
Accordingly, the Hearing Officer accepts Enforcement's recommendation and bars Respondent for failing to respond to the three requests for information.

**B. No Separate Sanction Imposed for Respondent's Borrowing of Funds from a Single Customer or Lying About the Transaction**

There are no *Guidelines* directly applicable to Respondent's two Rule 2110 violations. Because the Hearing Officer barred Respondent for his Rule 8210 violation, the Hearing Officer will impose no separate sanction for Respondent's violations of Conduct Rule 2110 when he: (i) borrowed funds from a customer in violation of his firm policies; or (ii) lied about the existence of the loan to his employer.

**V. Order**

Respondent Malcolm A. Turner is barred from associating with any FINRA member firm in any capacity for violating Conduct Rule 2110 and Procedural Rule 8210 by failing to respond to three requests for information issued by the FINRA staff pursuant to Rule 8210. The bar will become effective immediately upon this Default Decision becoming the final disciplinary action of FINRA.

  
Sharon Witherspoon  
Hearing Officer

Dated: Washington, DC  
September 3, 2008

<sup>11</sup> *FINRA Sanction Guidelines*, p. 35 (2007), available at <http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf>.

**Copies to:**

**Malcolm A. Turner (via FedEx and first class mail)**

**Pamela L. Shu, Esq. (via electronic and first class mail)**

**Mark P. Dauer, Esq. (via electronic and first class mail)**

**David R. Sonnenberg, Esq. (via electronic and first class mail)**

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

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REGISTRATION & DISCLOSURE

Department of Enforcement,

Complainant,

V.

Malcolm Alphonse Turner  
General Securities Representative  
CRD No. 2604387,

Respondent.

DISCIPLINARY PROCEEDING  
No. 2007008061701

**COMPLAINT**

The Department of Enforcement alleges:

**SUMMARY**

1. Malcolm Alphonse Turner (Turner or Respondent) borrowed approximately \$75,000 from a customer that he failed to repay, in violation of NASD Conduct Rule 2110. During a surprise audit and internal investigation by his sponsoring firm, Turner made false statements about his activities. Turner subsequently failed to respond to FINRA's requests for information and documentation regarding his activities, in violation of NASD Conduct Rule 8210.

**RESPONDENT**

2. Turner became registered as a General Securities Representative (Series 7) on May 1, 1995. Turner became registered with Royal Alliance Associates (Royal Alliance) on November 1, 2001, and worked there until he was terminated on August 26, 2005. He is not currently registered with a FINRA Member. On February 15, 2007, within two years of Turner's

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termination of employment, Royal Alliance filed an amendment to Turner's Form U5 upon receipt of the Statement of Claim by customer SK regarding Turner. Since this Complaint was filed within two years of the date of the Amendment to Turner's Form U5, he is subject to FINRA's jurisdiction, pursuant to Article V, Section 4 of FINRA'S By-Laws.

#### **FIRST CAUSE OF ACTION**

##### **Borrowing Customer Funds (NASD Rule 2110)**

3. NASD Conduct Rule 2110 requires a Member, in the conduct of his business, to observe high standards of commercial honor and just and equitable principles of trade.
4. On or about November 5, 2003, Turner borrowed funds from customer SK and signed a promissory note in the amount of \$75,000, in which he agreed to repay customer SK by April 1, 2005.
5. At all times relevant to this Complaint, Royal Alliance's Sales Practice Manual prohibited representatives from borrowing funds from customers.
6. Turner failed to repay the money he borrowed from SK by April 1, 2005.
7. The acts, practices and conduct described above constitute a violation of NASD Conduct Rule 2110 by Turner.

#### **SECOND CAUSE OF ACTION**

##### **Lying to the Member (NASD RULE 2110)**

8. The Department realleges and incorporates by reference paragraphs 3 through 7 above.
9. On or about August 22, 2005, after receiving a telephone call from SK's son about Turner borrowing funds from SK, Royal Alliance management conducted a surprise audit of Turner's office to investigate the reported activity.

10. Upon finding no documentation of loans from SK in Turner's office, Royal Alliance management asked Turner in person whether he had borrowed funds from SK, to which Turner responded that he had not.

11. Turner's denial to Royal Alliance during its surprise audit and internal investigation that he had borrowed funds from SK was false and misleading, and constitutes a separate and distinct violation of NASD Conduct Rule 2110.

**THIRD CAUSE OF ACTION**  
**Failure to Respond (NASD Rule 8210)**

12. The Department realleges and incorporates by reference paragraphs 3 through 11 above.

13. Pursuant to NASD Procedural Rule 8210, FINRA sent to Turner at his CRD address written requests for information and documentation about several matters, including the Arbitration claim filed by SK against Turner, his dealings with SK, the alleged loan to Turner from customer SK, and Turner's alleged failure to repay the loan.

14. On April 4, 2007, FINRA sent the written requests to Turner at his CRD address via Certified Delivery and by First Class delivery, for which the signed receipt of delivery was returned to FINRA on April 17, 2007, and the First Class mail was not returned. Turner failed to respond by the required due date of April 19, 2007.

15. On April 25, 2007, FINRA again sent written requests to Turner at his CRD address via Certified Delivery and by First Class delivery, for which the signed receipt of delivery was returned to FINRA on May 2, 2007 and the First Class mail was not returned. Turner failed to respond by the required due date of May 9, 2007.

16. On August 7, 2007, FINRA again sent a written request to Turner at his CRD address via First Class Mail which was returned to FINRA stamped "Forward Time Expired, Return to

Sender”.

17. On August 7, 2007, FINRA again sent written requests to Turner at a newly discovered address via Certified Delivery and by First Class delivery, which were returned to FINRA stamped “Undeliverable as addressed, no forwarding order on file.”

18. The time by which Turner should have responded to FINRA’s written requests for information and documentation has expired without Turner’s response in any manner.

19. Based on the foregoing acts, Turner violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210.

#### **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), be imposed, including a bar from registration in any capacity with any FINRA Member; 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; and
- C. order any other fitting sanction.

#### **FINRA DEPARTMENT OF ENFORCEMENT**

Date: April 30, 2008

  
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