

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

CARLOS D. RIVERA
(CRD No. 5079860),

Respondent.

Disciplinary Proceeding
No. 2007010600101

Hearing Officer—Andrew H. Perkins

DEFAULT DECISION

October 9, 2009

The Respondent is barred from associating with any FINRA member firm in any capacity for failing to disclose an outside securities account to his member firm, in violation of NASD Conduct Rules 3050(c) and 2110; and for fabricating a letter on his firm's letterhead that he sent in an effort to have all restrictions on his new account removed, in violation of Conduct Rule 2110.

Appearances

Jill G. Fieldstein, Senior Counsel, New York, New York, for the Department of Enforcement.

No appearance by or for Carlos D. Rivera.

DECISION

I. Introduction

The Department of Enforcement ("Enforcement") for the Financial Industry Regulatory Authority ("FINRA") filed the attached Complaint with the Office of Hearing Officers on June 5, 2009. The Complaint contains two causes of action. The first cause of action alleges that Respondent Carlos D. Rivera ("Rivera") violated NASD Conduct Rules 3050(c) and 2110 by failing to disclose to his firm, Oppenheimer & Co., Inc.

("Oppenheimer"), that he had opened a securities account at Scottrade, Inc. The second cause of action alleges that Rivera violated NASD Conduct Rule 2110 by drafting and sending an unauthorized letter on Oppenheimer stationery, requesting Scottrade to remove any trading restrictions on his account.¹

Rivera did not answer or otherwise respond to the Complaint. Consequently, on September 23, 2009, Enforcement filed a Motion for Entry of Default Decision ("Default Motion"). The Default Motion is supported by the Declaration of Jill G. Fieldstein, Esq. ("Fieldstein Decl.") and six exhibits. Rivera did not oppose the Motion.²

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

Rivera was associated with Oppenheimer from December 7, 2006, through August 14, 2007; and he was registered with FINRA through Oppenheimer as a General Securities Representative from February 8 to September 12, 2007.³ The Uniform Termination Notice for Securities Industry Registration (Form U5) Oppenheimer filed with FINRA on September 12, 2007, reports that Oppenheimer terminated his employment because he had established an unauthorized securities account at another broker-dealer and had sent a false and

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). Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008. See Regulatory Notice 08-57 (Oct. 2008). This decision relies on the NASD Conduct Rules that were in effect at the time of the alleged violations and the procedural rules that were in effect before December 15, 2008. The rules are available at www.finra.org/rules.

² The factual determinations in this Decision are based on the allegations of the attached Complaint, which are deemed admitted, as well as the Fieldstein Declaration and attached exhibits.

³ Complainant's Exhibit ("CX")-1.

unauthorized letter on Oppenheimer stationery to the other firm in an effort to keep his unauthorized outside securities account.⁴

Rivera has not been associated with a FINRA member firm nor registered with FINRA since September 12, 2007. Nonetheless, FINRA has jurisdiction over Rivera 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.⁵

B. Respondent's Default

Rivera defaulted by failing to answer or otherwise respond to the Complaint. Enforcement served Rivera with copies of the Complaint and Notice of Complaint on July 7, 2009, first-class and certified mail, return receipt requested, at his residential address shown in FINRA's Central Registration Depository ("CRD"), as well as to a second address Enforcement believed was more current.⁶ The certified mailings were returned undelivered by the United States Postal Service, and Rivera did not respond to the Notice of Complaint.⁷

On August 5, 2009, Enforcement mailed copies of the Complaint and Second Notice of Complaint to Rivera at both his CRD address and the alternate address by first-class and certified mail, return receipt requested.⁸ The United States Postal Service returned both

⁴ CX-2, at 1-2.

⁵ Article V, Sec. 4(a), FINRA By-Laws, *available at* www.finra.org/rules (then follow "FINRA Manual" hyperlink to "Corporate Organization: Bylaws").

⁶ Fieldstein Decl. ¶ 15 & n.1. When Enforcement filed the Complaint with the Office of Hearing Officers in June 2009, it mailed copies of the Complaint and Notice of Complaint to the alternate address alone, but not to his CRD Address. Thus, in order to perfect good service when Rivera did not respond to the Notice of Complaint, Enforcement reserved the Complaint on July 7, 2009 at both the alternate address and his CRD Address, in accordance with Rule 9134(b)(1).

⁷ Fieldstein Decl. ¶¶ 15-16.

⁸ *Id.* ¶ 18.

certified mailings to Enforcement marked, "unclaimed."⁹ To date, Rivera has not filed an answer with the Office of Hearing Officers or otherwise responded to the Complaint.

Enforcement served Rivera with the Complaint, Notice of Complaint, and Second Notice of Complaint in accordance with FINRA Procedural Rule 9134(b)(1), thereby giving him constructive notice of this disciplinary proceeding. Therefore, Rivera defaulted by failing to answer the Complaint.¹⁰

Pursuant to Procedural Rules 9215(f) and 9269(a)(2), the Hearing Officer deems the allegations in the Complaint admitted and grants Enforcement's Default Motion.

C. Failure to Give Notice of an Outside Securities Account

The first cause of action in the Complaint alleges that Rivera violated NASD Conduct Rules 3050(c) and 2110. NASD Conduct Rule 3050(c) requires that an associated person, "prior to opening an account or placing an initial order for the purchase or sale of securities with another member, shall notify both the employer member and the executing member, in writing, of his or her association with another member."

The Complaint alleges that on December 18, 2006, Rivera completed an Employee Securities Account Acknowledgement Form ("Securities Account Form"), which at the time was required by Oppenheimer's written policies and procedures. Rivera disclosed on the form that he had an outside securities account at Scottrade, as well as accounts at three other broker-dealers.

In early January 8, 2007, Oppenheimer's compliance department determined that Rivera actually had two Scottrade accounts. On or about January 10, 2007, Oppenheimer's

⁹ Fieldstein Decl. ¶ 19.

¹⁰ *Dep't of Enforcement v. 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 (9th Cir. Aug. 12, 1998)).

compliance department sent Rivera a memorandum outlining the steps he was required to take to comply with the firm's policies regarding outside securities accounts. Among other things, the memorandum stated that Oppenheimer employees were prohibited from maintaining a securities account or placing orders with another financial institution without both the prior written approval of a branch manager or supervisor, and final clearance by the compliance department. The memorandum further stated that Oppenheimer would consider requests to maintain outside securities accounts, but if approval was denied, the outside account had to be closed and the securities transferred to Oppenheimer.

After receiving the memorandum, Rivera sought permission to keep the Scottrade accounts. Oppenheimer's compliance department denied Rivera's request on April 13, 2007, and instructed him to transfer the securities in those accounts to Oppenheimer.

On May 22, 2007, Oppenheimer sent a letter to Scottrade regarding Rivera's accounts. The letter informed Scottrade that Rivera had been notified that he no longer was allowed to hold the outside brokerage accounts and that the Scottrade accounts must be transferred to Oppenheimer. In addition, Oppenheimer requested Scottrade to restrict Rivera's accounts to "liquidating transactions only."

In apparent compliance with Oppenheimer's direction, Rivera provided Oppenheimer with copies of his Scottrade monthly statements, which showed that he had closed, or was in the process of closing, the accounts. However, Rivera did not cease his account activity at Scottrade. Instead, without disclosure to Oppenheimer, in July 2007, Rivera opened a new account at a different Scottrade office.

Based on the foregoing allegations, the Hearing Officer finds that Rivera violated Conduct Rules 3050(c) and 2110.¹¹

D. Creation of False Correspondence

When Rivera opened the new account at Scottrade in July 2007, he told the Scottrade branch manager that Oppenheimer had approved the account. Rivera's representation was false; Oppenheimer was not aware of the new account and had instructed Rivera to transfer all securities he held at Scottrade to Oppenheimer.

In reliance on Rivera's representation, Scottrade approved Rivera's new account, but restricted the account pending written confirmation from Oppenheimer that Rivera had its permission to maintain the account at Scottrade.

Knowing that Oppenheimer would not approve the account, on August 13, 2007, Rivera, without authorization, sent Scottrade a letter on Oppenheimer stationery, advising Scottrade that it could remove all restrictions on Rivera's account. The letter purportedly was signed by an employee named "Don Fulcom," but Oppenheimer did not have an employee by that name.

The following day, a Scottrade representative called Oppenheimer's compliance department because he had questions about the authenticity of the letter. The Oppenheimer compliance department advised Scottrade that no one named "Don Fulcom" worked at Oppenheimer.

A compliance officer from Oppenheimer then spoke to the Scottrade branch manager for the branch where Rivera opened the new account. The Scottrade branch manager told the Oppenheimer compliance officer that Rivera had represented that Oppenheimer had

¹¹ See, *Dep't. of Enforcement v. Guang Lu*, No. C9A020052, 2004 NASD Discip. LEXIS 8 (N.A.C. May 13, 2004).

approved the account. Following this conversation, the Oppenheimer compliance officer interviewed Rivera, who admitted that he had drafted and sent the fictitious Fulcom letter to circumvent Oppenheimer's prohibition against his maintaining an outside securities account.¹² Oppenheimer immediately terminated Rivera for cause.

The foregoing allegations and admissions are sufficient to establish that Rivera violated Conduct Rule 2110. Sending the false letter to Scottrade in an effort to circumvent Oppenheimer's policies and procedures is a clear violation of the requirement that persons associated with a member firm "observe high standards of commercial honor and equitable principles of trade."

III. Sanctions

The FINRA Sanction Guidelines ("Guidelines") for failure to disclose an outside securities account in violation of Conduct Rule 3050(c) recommend a fine of \$1,000 to \$25,000. In cases involving egregious conduct, the Guidelines recommend consideration of a suspension of up to two years, or a bar.¹³ The Guidelines for forgery and falsification of records in violation of Conduct Rule 2110 recommend a fine of \$5,000 to \$100,000 and a suspension of up to two years. In egregious cases, the Guidelines recommend that adjudicators consider a bar.¹⁴ In addition, the Guidelines for forgery and falsification of records contain two principal considerations for determining the appropriate sanction in an individual case: (1) the nature of the document forged; and (2) whether the respondent had a good-faith belief that he acted with express or implied authority.

¹² Rivera reiterated his admission in a letter to FINRA staff dated October 9, 2007.

¹³ FINRA Sanction Guidelines 17 (2007), *available at* www.finra.org/sanctionguidelines.

¹⁴ Guidelines 39.

Applying the foregoing Guidelines, the Hearing Officer determined that a bar is the appropriate sanction for each violation. In reaching this determination, the Hearing Officer considered the following aggravating factors. Foremost, Rivera intentionally violated Conduct Rule 3050(c). Oppenheimer had directed Rivera to close his outside accounts and transfer the securities in those accounts to Oppenheimer. In direct contravention of those instructions, Rivera secretly opened another account at Scottrade. In addition, Rivera acted deceitfully. He misled Scottrade's branch manager when he opened the new account. He told the Scottrade branch manager that Oppenheimer had approved his activity because Rivera knew that Scottrade would not let him maintain the account without Oppenheimer's permission. Moreover, Rivera fabricated the Fulcom letter on Oppenheimer's letterhead to avoid compliance with Conduct Rule 3050 and Oppenheimer's written policies and procedures. These actions demonstrate Rivera's willingness to violate important regulatory requirements for his personal convenience, as well as the grave risk he would pose to investors and his member firm if he were permitted to remain a licensed securities professional. On the other hand, the record contains no mitigating factors.

Accordingly, the Hearing Officer will bar Rivera from associating with any FINRA member firm in any capacity for failing to disclose his outside securities account and for fabricating the letter he sent to Scottrade in his effort to circumvent the requirements of Conduct Rule 3050(c) and Oppenheimer's policies and procedures that prohibited him from opening the Scottrade account.

IV. Order

Carlos D. Rivera is barred from association with any FINRA member firm in any capacity for failing to disclose an outside securities account, in violation of NASD Conduct Rules 3050(c) and 2110; and for fabricating a letter on Oppenheimer's letterhead that he sent

to Scottrade in an effort to have all restrictions on his new account removed, in violation of Conduct Rule 2110. The bars will become effective immediately if this Default Decision becomes FINRA's final disciplinary action in this proceeding.



Andrew H. Perkins
Hearing Officer

Copies to:

Carlos D. Rivera (by FedEx, next-day delivery, and first-class mail)
Jill G. Fieldstein, Esq. (by first-class and electronic mail)
David Sonnenberg, Esq. (by electronic mail)
Mark P. Dauer, Esq. (by electronic mail)

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

JUN - 5 2009

Department of Enforcement,

Complainant,

vs.

Carlos D. Rivera (CRD No. 5079860),

Respondent.

DISCIPLINARY PROCEEDING

No. : 2007010600101

HEARING OFFICER:

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Rivera failed to disclose to his employer, Oppenheimer & Co., Inc. ("Oppenheimer" or the "Firm"), an outside brokerage account that he held at Scottrade, Inc. ("Scottrade"). Rivera opened the undisclosed Scottrade account after Oppenheimer expressly told him that he could not maintain two other Scottrade accounts that had been opened prior to Rivera's employment with Oppenheimer. Scottrade restricted trading in Rivera's newly opened and undisclosed account until it received notice from Oppenheimer that Rivera was free to hold the outside investment account. Rivera sent Scottrade a letter on Oppenheimer letterhead, signing the name of a non-existent employee, requesting that the trading restrictions on the account be lifted. Upon receipt of the letter, Scottrade contacted Oppenheimer and it was revealed that Rivera's letter was a forgery. Rivera's failure to disclose an outside brokerage account constitutes a violation of NASD Rules 3050(c) and 2110. By knowingly providing the false letter to Scottrade, Rivera failed to

observe high standards of commercial honor and just and equitable principles of trade in violation of NASD Rule 2110.

JURISDICTION

2. Rivera first became associated with a FINRA regulated broker-dealer in November 2005. He became associated with Oppenheimer in December 2006 and was registered with the Firm as a General Securities Representative from February 8, 2007 until his termination on August 14, 2007.

3. Rivera has not been associated with a FINRA regulated broker-dealer since his termination from Oppenheimer on August 14, 2007. FINRA retains jurisdiction over Rivera pursuant to Article V, Section 4(a) of the By-Laws because the conduct that serves as the basis for this action commenced prior to his termination of registration from a FINRA regulated broker-dealer and this proposed AWC has been filed within two years after the effective date of Rivera's termination of registration from a FINRA regulated broker-dealer.

FACTS COMMON TO THE FIRST AND SECOND CAUSES OF ACTION

Rivera's Failure to Disclose an Outside Account

4. On December 18, 2006, Rivera completed the Firm's required Employee Securities Account Acknowledgement Form ("Securities Account Form") on which he disclosed that he had one outside brokerage account at Scottrade, as well as accounts at three other brokerage firms.

5. On or before January 8, 2007, Oppenheimer's compliance department received Rivera's Securities Account Form along with the relevant account statements. The compliance department determined that based on Rivera's account statements, he

actually had two accounts with Scottrade, which was noted on his Securities Account Form.

6. On or about January 10, 2007, an Oppenheimer Senior Compliance Officer sent Rivera a memorandum outlining the steps Rivera was required to take to be in compliance with the Firm's policies regarding outside brokerage accounts. Among other things, the memorandum stated that Oppenheimer employees "are **PROHIBITED** from maintaining a securities account or placing orders with another financial institution without the prior written approval by the Branch Manager/Supervisor AND the final clearance by the Compliance Dept." (Emphasis in original).

7. The January 10, 2007 memorandum also indicated that the Firm would entertain requests to maintain outside brokerage accounts, but if approval was denied, the employee "must close the Outside Account and have it transferred to" Oppenheimer.

8. After receiving the January 10, 2007 memorandum, Rivera sought permission from the Firm to maintain his two outside brokerage accounts at Scottrade. On April 13, 2007, the Senior Compliance Officer sent Rivera an email denying his request to trade outside of Oppenheimer and instructing Rivera to transfer his positions in his Scottrade accounts to Oppenheimer.

9. On May 22, 2007, the Senior Compliance Officer sent a letter to Scottrade regarding Rivera's two accounts. The letter informed Scottrade that Rivera had been notified that he no longer was allowed to hold the outside brokerage accounts and that the Scottrade accounts must be transferred to Oppenheimer. The Senior Compliance Officer requested that Scottrade restrict Rivera's accounts to "liquidating transactions only," and

that Scottrade provide the Firm with duplicate monthly statements and confirms for Rivera's two accounts.

10. Sometime after May 22, 2007, Rivera forwarded to Oppenheimer's compliance department copies of his online Scottrade monthly statements demonstrating that his Scottrade accounts had been closed or that he was in the process of transferring out the positions from the account to Oppenheimer.

11. On or around July 24, 2007, however, Oppenheimer's Senior Compliance Officer received some confirms from Scottrade indicating that Rivera had recently purchased securities in one of these accounts.

Rivera's Creation of a False Document

12. Unbeknownst to Oppenheimer, in or around July 2007, Rivera opened a third Scottrade account at a different branch office than the one that held his two other Scottrade accounts. Rivera told the branch manager at the new branch that Oppenheimer was allowing him to maintain the outside account. Scottrade, however, restricted Rivera's account until the firm received written confirmation from Oppenheimer that Rivera had permission to maintain his outside brokerage account at Scottrade.

13. On or around August 13, 2007, Rivera, without Oppenheimer's knowledge or permission, wrote a letter on Oppenheimer stationery purporting to be from a Firm employee named "Don Fulcom," and faxed it to Scottrade. The letter requested that Scottrade remove the trading restrictions in place on Rivera's newly opened account.

14. On August 14, 2007, a Scottrade representative called the Oppenheimer Senior Compliance Officer because he had questions about the authenticity of the fax he

had received from "Don Fulcom." The Scottrade representative was told that Oppenheimer had not authorized the letter, and that no one named "Don Fulcom" worked at Oppenheimer.

15. Oppenheimer's Senior Compliance Officer then called a Scottrade branch manager familiar with Rivera's newly opened account. The Scottrade branch manager reported that Rivera had informed him that Oppenheimer had given Rivera permission to maintain the outside account at Scottrade.

Rivera's Admissions

16. On August 14, 2007, after speaking with Scottrade representatives, Oppenheimer's Senior Compliance Officer apprised Rivera's supervisor of the situation. When the supervisor interviewed Rivera on August 14, 2007, Rivera admitted that he maintained a brokerage account at Scottrade. Rivera also admitted that he drafted and sent the letter from "Don Fulcom" to Scottrade in an effort to circumvent Oppenheimer's prohibition against maintaining outside brokerage accounts without prior written approval.

17. Oppenheimer immediately terminated Rivera for cause.

18. On September 24, 2007, FINRA sent a letter to Rivera, requesting a detailed written explanation regarding the basis of his termination from Oppenheimer. Rivera responded to FINRA's request on October 9, 2007, and stated: "I understand that I failed to comply with Oppenheimer and the Industry's Policy. I did send a letter to Scottrade asking to circumvent any account transfers without the firm's approval."

FIRST CAUSE OF ACTION

**Failure to Disclose Outside Brokerage Account
Violation of NASD Rules 3050 and 2110**

19. The Department realleges and incorporates Paragraphs 1 through 18 by reference.

20. As he admitted on August 14, 2007, and again on October 9, 2007, Rivera failed to disclose to Oppenheimer that he opened a new Scottrade in or around July 2007, after Oppenheimer denied his request to maintain his two existing Scottrade accounts.

21. By reason of the foregoing, Rivera violated NASD Rules 3050(c) and 2110.

SECOND CAUSE OF ACTION

**Creation of a False Document
Violation of NASD Conduct Rule 2110**

22. The Department realleges and incorporates Paragraphs 1 through 21 by reference.

23. Rivera drafted and sent to Scottrade a letter that purported to be from an Oppenheimer employer named "Don Fulcom." The "Don Fulcom" letter instructed Scottrade to remove any trading restrictions on the brokerage account that Rivera had failed to disclose to Oppenheimer.

24. Rivera admits that he sent the fictitious letter in an effort to circumvent Oppenheimer's prohibition against his maintenance of an outside brokerage account.

25. By reason of the foregoing, Rivera failed to observe high standards of commercial honor and just and equitable principles of trade in violation of NASD Rule 2110.

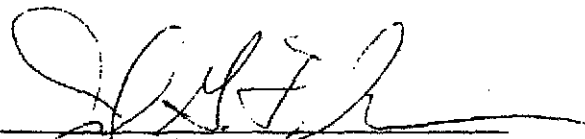
RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

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

FINRA DEPARTMENT OF ENFORCEMENT

Dated: June 5, 2009



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