

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

MICHAEL A. NICOLOSI
(CRD No. 5430609),

Respondent.

Disciplinary Proceeding
No. 2008012516401

Hearing Officer – RSH

DEFAULT DECISION

July 30, 2009

The Respondent violated Conduct Rule 2110 and IM-1000-1 by failing to disclose on his Form U4 that he had been charged with a felony. For this violation, the Respondent was barred from associating with any member firm in any capacity.

Appearances

Jeff Kern, Senior Regional Counsel, and David Jaffe, Regional Chief Counsel, New York, NY, for the Department of Enforcement.

No appearance by or for Michael A. Nicolosi.

DECISION

I. Introduction

The Department of Enforcement (“Enforcement”) for the Financial Industry Regulatory Authority (“FINRA”) filed a Complaint (attached to this Decision as Exhibit A) charging that the Respondent, Michael A. Nicolosi (“Nicolosi”), violated Conduct Rule 2110 and Membership and Registration Rule Interpretive Material (“IM”) 1000-1 by willfully failing to disclose on his Uniform Application for Securities Industry Registration or Transfer (“Form U4”) that he had been charged with felony assault.¹

¹ The FINRA Rules, which include NASD Procedural and Conduct Rules, are at www.finra.org/Rules.

Enforcement filed the Complaint with the Office of Hearing Officers on January 8, 2009. Nicolosi did not answer or otherwise respond to the Complaint. Consequently, on June 4, 2009, Enforcement filed a Motion for Entry of Default Decision, supported by the Declaration of Jeff Kern ("Kern Decl.") and 14 exhibits. Nicolosi did not reply to the motion.

II. Findings of Fact and Conclusions of Law

A. Jurisdiction

From August 26, 2007, through April 23, 2008, Nicolosi was registered with FINRA as a General Securities Representative ("GSR") through an association with member firm Olympia Asset Management, Ltd. ("Olympia"). From April 21, 2008, through June 13, 2008, Nicolosi was registered as a GSR with another FINRA member firm. Nicolosi has not been associated with any FINRA member firm since June 13, 2008.²

Although Nicolosi is not currently registered with FINRA, FINRA has jurisdiction of this disciplinary 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 that occurred while he was associated with a FINRA member firm.³

B. Origin of the Complaint

The staff of FINRA's Department of Enforcement initiated an examination of a notification made by FINRA's Central Registration Depository ("CRD") concerning Nicolosi's failure to report certain criminal disclosures on his Form U4.⁴

² Complainant's Exhibit (CX)-1; Kern Decl., ¶¶ 4, 5.

³ See Article V, Sec. 4(a), FINRA By-Laws, *available at* www.finra.org/Rules (then follow "FINRA Manual" hyperlink to "Corporate Organization: Bylaws").

⁴ Kern Decl., ¶ 7.

Nicolosi defaulted by failing to answer the Complaint.⁸ Accordingly, pursuant to Procedural Rules 9215(f) and 9269(a)(2), the Hearing Officer deems the allegations in the Complaint admitted and grants Enforcement's motion for entry of a default decision.

D. Willful Failure to Disclose a Felony Charge on Form U4

The sole Cause of Action in the Complaint alleges that Nicolosi violated Conduct Rule 2110, IM-1000-1, and Article V, Section 2 of FINRA's By-Laws by willfully failing to disclose material information on his Form U4.

According to the Complaint, in November 2004, Nicolosi was arrested and charged with felony assault. On August 20, 2007, in connection with his employment at Olympia, Nicolosi completed and signed a Form U4, which was sent to FINRA's CRD. On the Form U4, Nicolosi answered "no" to Question 14A(1)(b), which asked, "Have you ever...been charged with any felony?" The Complaint also alleges that the felony charge was material. Finally, the Complaint alleges that Nicolosi's failure to disclose the felony charge was willful because, in his on-the-record testimony to FINRA staff, Nicolosi stated: "I thought that the felony charge, even though it was reduced, would bar me from the industry. I've always wanted to do this, and I was concerned that it would bar me from getting my license."

Nicolosi's felony charge was material. The National Adjudicatory Council ("NAC") has determined that information on the Form U4 is material if a reasonable employer reading the Form would "view the disclosure of the omitted information as

⁸ *Dep't. 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 (9th Cir. Aug. 12, 1998)).

significantly altering the total mix of information available.”⁹ Furthermore, the NAC has made clear that “[b]ecause of the importance that the industry places on full and accurate disclosure of information required by the Form U4, [it is] presumed that essentially all the information that is reportable on the Form U4 is material.”¹⁰ In this case, Nicolosi had been charged with felony assault. The NAC has consistently held that criminal history is material.¹¹

Nicolosi’s failure to disclose the felony charge was also willful. “Willfulness” is established by a showing that a person “knew or reasonably should have known under the particular facts and circumstances that his conduct was improper.”¹² Nicolosi’s investigative testimony shows that he knew he should have disclosed the felony but chose not to.

Conduct Rule 2110 and IM-1000-1 require associated persons to disclose accurately and fully information required in the Form U4 and to observe high standards of commercial honor and just and equitable principles of trade.¹³ The accuracy of an applicant’s Form U4 “is critical to the effectiveness” of a self-regulatory organization’s ability “to monitor and determine the fitness of securities professionals.”¹⁴

⁹ *Dep’t. of Enforcement v. Knight*, 2004 NASD Discip. LEXIS 5, at *14 (N.A.C. Apr. 27, 2004), (quoting *SEC v. Mayhew*, 121 F.3d 44, 52 (2d Cir. 1997)).

¹⁰ *Id.*, at *13.

¹¹ *Dep’t. of Enforcement v. Jason A. Craig*, 2007 FINRA Discip. LEXIS 16 (N.A.C. Dec. 27, 2007); *Dep’t. of Enforcement v. Andrew C. Knight*, 2004 NASD Discip. LEXIS 5 (N.A.C. Apr. 27, 2004).

¹² *Christopher LaPorte*, Exchange Act Release No. 39171, 1997 SEC LEXIS 2058, at n. 2 (Sep. 30, 1997).

¹³ IM-1000-1 provides that the filing of registration information that “is incomplete or inaccurate so as to be misleading ... or the failure to correct such filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade” in violation of Rule 2110. *See also Thomas R. Alton*, 52 S.E.C. 380, 382 (1995).

¹⁴ *Rosario R. Ruggiero*, 52 S.E.C. 725, 728 (1996) (citing *Alton*, 52 S.E.C. at 382); *see also Guang Lu*, Exchange Act Rel. No. 51047, 2005 SEC LEXIS 117, at *19-20 (Jan. 14, 2005) (recognizing that “the candor and forthrightness of applicants is critical to the effectiveness of the screening process”).

The allegations in the Complaint are sufficient to establish, for purposes of this Default Decision, that Nicolosi willfully failed to disclose material information on his Form U4, as required by FINRA By-Laws. Accordingly, the Hearing Officer finds that by failing to disclose his felony charge, Nicolosi violated FINRA's By-Laws, NASD Conduct Rule 2110, and IM-1000-1.

III. Sanctions

FINRA Sanction Guidelines ("Guidelines") governing sanctions for false and misleading Forms U4 direct adjudicators to consider two relevant "principal considerations" when determining sanctions: (1) the nature and significance of the information at issue; and (2) whether [the] failure resulted in a statutorily disqualified individual becoming or remaining associated with a firm.¹⁵ Nicolosi's felony assault charge would have been highly significant to regulators, broker-dealers and public customers relying on the information in his Form U4. In this case, Nicolosi's arrest involved violence and alcohol abuse. This conduct can affect workplace safety and performance, as well as Nicolosi's ability to abide by laws, rules and regulations. Olympia would have found the information directly relevant to its assessment of Nicolosi's fitness to work at the firm. Further, the Hearing Officer finds that Nicolosi's failure to update his Form U4 was willful. Therefore, Nicolosi is subject to statutory disqualification.¹⁶

This is an egregious case for which Nicolosi should be barred. Nicolosi's investigative testimony reflects a calculated decision to hide his felony arrest. The record

¹⁵ FINRA Sanction Guidelines 73 (2007).

¹⁶ FINRA By-Laws, Article III, Sec. 4.

contains no evidence of mitigating factors. Accordingly, the Hearing Officer will bar Nicolosi from associating with any member firm in any capacity for his failure to disclose his felony charge on his Form U4.

IV. Order

Michael A. Nicolosi is barred from association with any member firm in any capacity for his violation of FINRA By-Laws Art.V, Sec. 2, Conduct Rule 2110 and IM-1000-1. The bar will become effective immediately if this Default Decision becomes FINRA's final disciplinary action in this proceeding.

SO ORDERED.

A handwritten signature in black ink, appearing to read "Rochelle S. Hall", written over a horizontal line.

Rochelle S. Hall
Hearing Officer

Copies to: Michael A. Nicolosi (*via overnight carrier and first-class mail*)
Jeff Kern, Esq. (*via electronic and first-class mail*)
David Jaffe, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

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

DEPARTMENT OF ENFORCEMENT,

COMPLAINANT,

V.

MICHAEL NICOLOSI (CRD NO.
5430609),

RESPONDENT.

DISCIPLINARY PROCEEDING
No.

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. This matter involves the willful failure of Respondent Michael Nicolosi to disclose on a Uniform Application for Securities Industry Registration or Transfer Form (Form U4) the material fact that he had been charged with felony assault, in contravention of Article V, Section 2 of FINRA By-Laws and in violation of NASD Interpretive Material (IM)-1000-1, and NASD Conduct Rule 2110.

JURISDICTION

2. From August 26, 2007 through April 23, 2008, Nicolosi was registered with FINRA as a General Securities Representative through an association with member firm Olympia Asset Management, Ltd. (BD No. 126331). From April 21, 2008 through June 13, 2008, Nicolosi was registered as a GSR with another FINRA member firm.

3. Nicolosi is no longer employed in the securities industry. FINRA retains jurisdiction pursuant to Article V, Section 4 of the By-Laws.

BACKGROUND

4. Paragraphs 1 through 3 of this Complaint are realleged and incorporated herein by reference.
5. On November 20, 2004, Nicolosi was arrested and charged with Assault in the Second Degree under New York Penal Law § 120.05-02, a Class C felony, in Otsego County, New York.
6. Ultimately, Nicolosi resolved this charge by pleading guilty to Disorderly Conduct, New York Penal Law § 240.26-01, which is classified as a Violation. On December 20, 2004, Nicolosi was sentenced to a conditional discharge and paid a \$500 fine.

SOLE CAUSE OF COMPLAINT

(Willful Failure to Disclose Material Facts on Form U4)
Contravention of Article V, Section 2 of FINRA's By-Laws
and violation of IM-1000-1 and NASD Conduct Rule 2110

7. Paragraphs 1 through 6 of this Complaint are realleged and incorporated herein by reference.

8. On August 20, 2007, in connection with his employment at Olympia, Nicolosi completed and executed a Form U4 that was submitted to FINRA's Central Registration Depository on his behalf by Olympia on October 1, 2007.
9. Question 14A(1) on the Form U4 asks:

Have you ever:
(b) been charged with any felony?
10. Nicolosi answered this question by checking the "no" box despite his awareness that he had, in fact, been charged with a felony in connection with his November 2004 arrest and that disclosing it on his Form U4 could adversely affect his application.
11. In his on-the-record testimony, Nicolosi stated: "I thought that the felony charge, even though it was reduced, would bar me from the industry. I've always wanted to do this, and I was concerned that it would bar me from getting my license."
12. Nicolosi, therefore, willfully failed to disclose the fact that he had been charged with felony assault on the Form U4 he completed and signed on August 20, 2007.
13. This fact is material to FINRA's ability to evaluate the fitness of individuals seeking entry to the securities industry and, similarly, to Olympia's ability to screen prospective employees. In essence, the accurate disclosure of these facts would have affected Nicolosi's ability to become registered with FINRA and remain employed at Olympia.

By reason of the foregoing, Nicolosi acted in contravention of Article V, Section 2 of FINRA's By-Laws and violated NASD IM-1000-1 and NASD Conduct Rule 2110.

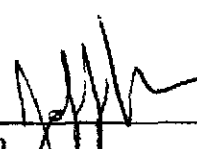
RELIEF REQUESTED

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.
- B. order that the Nicolosi bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330.
- C. make specific findings that Nicolosi's conduct, as alleged in the Sole Cause of Complaint, was willful; the omitted information was material; and, the omission to state material facts was on a Form U4 application.

FINRA DEPARTMENT OF ENFORCEMENT

Date: January 8, 2009



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