

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ALAN R. TATGENHORST
(CRD No. 1613125),

Respondent.

Disciplinary Proceeding
No. 2008014828301

Hearing Officer—Andrew H. Perkins

DEFAULT DECISION

July 20, 2010

Respondent is barred from associating with any member firm in any capacity for failing to provide information and documents to FINRA staff, in violation of Procedural Rule 8210 and FINRA Conduct Rule 2010. In light of the bar, no separate sanction is imposed for Respondent's borrowing money from customers without his firm's approval, in violation of NASD Conduct Rules 2370 and 2110.

Appearances

Helen G. Barnhill, Senior Regional Counsel, Denver, Colorado, for the Department of Enforcement.

No appearance by or on behalf of Alan R. Tatgenhorst.

DECISION

I. Introduction

The FINRA Department of Enforcement ("Enforcement") filed the attached Complaint with the Office of Hearing Officers on March 11, 2010. The Complaint charges Respondent Alan R. Tatgenhorst ("Tatgenhorst"), a former registered broker with PlanMember Securities Corporation ("PlanMember"), with borrowing money from two of PlanMember's customers, in violation of NASD Conduct Rules 2370 and 2110; and with failing to respond completely to

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requests for information sent by FINRA staff, in violation of Procedural Rule 8210 and FINRA Conduct Rule 2010.¹

Tatgenhorst did not file an answer with the Office of Hearing Officers. Thus, on May 4, 2010, the Hearing Officer issued an order setting a deadline for Enforcement to file a motion for entry of a default decision. On June 2, 2010, Enforcement filed a Motion for Entry of Default Decision with the Office of Hearing Officers, together with the Declaration of Helen G. Barnhill and four exhibits. On June 8, 2010, the Office of Hearing Officers received an e-mail from Tatgenhorst in response to the order setting a deadline for Enforcement to file a motion for entry of a default decision. In the e-mail Tatgenhorst states that he would like to default because he does not have the means to retain counsel, he is in poor health, and he does not desire to pursue a career in the securities industry.

The Hearing Officer finds that Tatgenhorst defaulted by not filing an Answer with the Office of Hearing Officers. Accordingly, the Hearing Officer granted Enforcement's motion for entry of a default decision.

Based on the facts alleged in the Complaint, which are deemed admitted pursuant to Rules 9215(f) and 9269(a), as well as the additional evidence Enforcement filed in support of the motion for entry of default decision, the Hearing Officer barred Tatgenhorst from associating with any member firm in any capacity.

¹ On July 26, 2007 the Securities and Exchange Commission approved a proposed rule change filed by NASD to amend its Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc. (FINRA) in connection with the consolidation of NASD and certain member regulation and enforcement functions of NYSE Regulation. See Securities Exchange Rel. No. 56146. For simplicity, 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. See Regulatory Notice 08-57 (Oct. 2008). In that process, NASD Conduct Rule 2110 was renumbered as FINRA Conduct Rule 2010. Because the conduct at issue in the first cause of action occurred before December 2008, NASD Conduct Rules 2370 and 2110 apply to that cause of action. For the second cause of action, the applicable conduct rule is FINRA Conduct Rule 2010. The applicable rules are available at www.finra.org/rules.

II. Background

Tatgenhorst was employed by PlanMember and registered with FINRA as an Investment Company and Variable Contracts Products Representative from October 2000 until September 2008. PlanMember terminated his employment because it determined that he had borrowed money from a customer without the firm's approval.² Tatgenhorst's FINRA registration ended on September 5, 2008.³ He has not been registered with FINRA since that date.

Following receipt of the Uniform Termination Notice for Security Industry Registration (Form U5) PlanMember filed on Tatgenhorst's behalf, FINRA staff commenced an investigation into the facts and circumstances surrounding Tatgenhorst's discharge. That investigation led to the filing of the Complaint in this proceeding.

III. Jurisdiction

FINRA has jurisdiction over this disciplinary proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) the Complaint was filed within two years after the date FINRA terminated Tatgenhorst's registration, and (2) the Complaint charges him with misconduct that occurred while he was associated with a FINRA member firm, and with failing to respond to Enforcement's request that he provide information in connection with the investigation made during the two-year period following the termination of his last FINRA registration.⁴

² Barnhill Decl. ¶ 5; Ex. 1, at 3.

³ Ex. 1, at 3.

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

IV. Tatgenhorst's Default

On March 8, 2010, Enforcement served Tatgenhorst with the Notice of Complaint by first-class certified mail (return receipt requested) and first-class mail sent to his residential address recorded in the Central Registration Depository ("CRD") [REDACTED] [REDACTED] and to a corrected version of his CRD address [REDACTED] [REDACTED].⁵ Enforcement received signed receipts for both certified mailings. Both receipts were signed by "Peters."⁶ Tatgenhorst did not file an Answer or otherwise respond to the Complaint.

On April 13, 2010, Enforcement served Tatgenhorst with the Second Notice of Complaint by first-class certified mail (return receipt requested) and first-class mail sent to the same two versions of his CRD address.⁷ Enforcement received signed receipts for both certified mailings. Each was signed by "Carol Bender."⁸ Tatgenhorst did not respond to the Second Notice of Complaint.

The Hearing Officer finds that Tatgenhorst received constructive notice of this proceeding.⁹ Accordingly, the Hearing Officer finds that Tatgenhorst defaulted by failing to answer or otherwise respond to the Complaint.

⁵ Barnhill Decl. ¶ 10. Enforcement concluded that CRD incorrectly reflected that he resided in California rather than Arizona because Tucson is located in Arizona and the zip code attached to the address was a zip code for Tucson, Arizona. *Id.* Further, his CRD record reflects that he lived in Tucson, Arizona, from 1985 to 2005. *See* Ex. 2.

⁶ Ex. 3.

⁷ Barnhill Decl. ¶ 12.

⁸ Ex. 4.

⁹ *Department of Enforcement v. Reynolds Verdiner*, No. CAF020004, 2003 NASD Discip. LEXIS 42, at *5 (N.A.C. Dec. 9, 2003) (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)).

V. Findings of Fact and Conclusions of Law

A. Borrowing from Customers

NASD Conduct Rule 2370 provides, in pertinent part: (a) No person associated with a member in any registered capacity may borrow money from or lend money to any customer of such person unless: (1) the member has written procedures allowing borrowing and lending of money between such registered persons and customers of the member; and (2) the lending or borrowing arrangement meets one of the following conditions: (A) the customer is a member of such person's immediate family; (B) the customer is a financial institution regularly engaged in the business of providing credit, financing, or loans or other entity or person that regularly arranges or extends credit in the ordinary course of business..."¹⁰

The First Cause of Action alleges that Tatgenhorst twice borrowed money from the Ds, two of his customers at PlanMember. Tatgenhorst borrowed \$30,528 on December 15, 2004, and \$2,500 on December 9, 2005. Tagenhorst signed a promissory note payable to the Ds evidencing the loans. At the times Tagenhorst borrowed money from the Ds, PlanMember did not have written procedures allowing its registered representatives to borrow money from the firm's customers.¹¹ Further, Tatgenhorst did not request or obtain permission from PlanMember to enter into these loan transactions.¹² Tagenhorst admitted the foregoing facts in an e-mail he sent to FINRA staff dated October 16, 2008, in response to a request for information issued by the staff under NASD Procedural Rule 8210.¹³ In addition, in August 2008, Tagenhorst submitted a

¹⁰ Rule 2370 contains other conditions under which borrowing from customers is permissible; however, they are not relevant here because PlanMember did not permit borrowing under any circumstances.

¹¹ Barnhill Decl. ¶ 18.

¹² *Id.*

¹³ *Id.* ¶ 20(iv).

written statement to PlanMember in which he admitted that he had borrowed money from the Ds over the course of a few years.¹⁴

The Ds filed a civil action against Tatgenhorst to recover the balance due under the promissory note. Tatgenhorst defaulted, and the court entered judgment in the Ds favor against Tatgenhorst in the amount of \$33,028, plus 12% interest thereon from December 15, 2004, and attorneys' fees of \$1,500.¹⁵ Tatgenhorst did not pay the judgment. In March 2009, PlanMember paid the Ds \$7,000 in settlement of any claims they had against the firm.¹⁶

Based on the foregoing, the Hearing Officer finds that Tatgenhorst violated NASD Conduct Rules 2370 and 2110.¹⁷

B. Failure to Respond to Requests for Information

The Second Cause of Action alleges that FINRA staff sent Tatgenhorst several requests for information in connection with the investigation into the reason PlanMember terminated his employment. Tatgenhorst received and responded to the first request for information, which was dated September 16, 2008. Tatgenhorst responded by e-mail. In his response, he advised the staff that he preferred that communications be sent by e-mail.

On March 20, 2009, FINRA staff sent Tatgenhorst another request for information, seeking additional information and documents regarding the loan transactions with the Ds. The staff sent this request to Tatgenhorst's CRD address (and the corrected CRD address in Arizona) by certified and first-class mail. The staff also sent a copy of the request to Tatgenhorst's e-mail address. The staff received the receipt for the certified mailing signed by Carol Bender, who also

¹⁴ *Id.* ¶ 20(iii).

¹⁵ *Id.* ¶ 22.

¹⁶ *Id.*

¹⁷ *Stephen J. Gluckman*, Exchange Act Rel. No. 41628, 1999 SEC LEXIS 1395, *22 (July 20, 1999) (citations omitted) (conduct that violates an NASD Conduct Rule is a violation of Conduct Rule 2110).

had signed the receipt for the certified mailing containing the first request for information dated September 16, 2008. Tatgenhorst did not respond to the second request for information and documents.

On April 9, 2009, FINRA staff sent Tatgenhorst another letter, requesting the same information and documents the staff had requested in the request letter dated March 20, 2009. The staff sent the final request by certified and first-class mail to Tatgenhorst's CRD address (and the corrected CRD address in Arizona). In addition, the staff sent a copy of the request to his e-mail address. Carol Bender again signed the receipt for the certified mailing. However, Tatgenhorst did not respond to the request.

The facts alleged in the Second Cause of Action establish that Tatgenhorst violated Procedural Rule 8210 and Conduct Rule 2010 by failing to respond to the requests for information and documents dated March 20 and April 9, 2009.

VI. Sanctions

A. Borrowing from Customers

The FINRA Sanction Guidelines ("Guidelines") do not provide specific guidance for violations of Conduct Rule 2370. However, an NASD Notice to Members provides guidance on Rule 2370's importance: "Loans between registered persons and their customers are of legitimate interest to NASD and member firms because of the potential for misconduct. NASD has brought disciplinary action against registered persons who have violated just and equitable principles of trade by taking unfair advantage of their customers by inducing them to lend money in disregard of the customers' best interests, or by borrowing funds from, but not repaying, customers."¹⁸

¹⁸ NASD Notice to Members 03-62, October 2003.

According to the General Principles Applicable to All Sanction Determinations (“General Principles”), adjudicators should impose sanctions that are designed to deter future misconduct and improve overall business standards. In addition, adjudicators are directed to consider whether the respondent attempted to conceal his misconduct, whether he accepted responsibility for and acknowledged the misconduct to his employer or a regulator prior to detection and intervention by the employer or regulator, and whether he engaged in the misconduct over an extended period of time.¹⁹

The Hearing Officer finds that Tatgenhorst’s misconduct was serious and warrants a significant sanction. Tatgenhorst borrowed more than \$33,000 from the Ds, which he failed to repay. In addition, there is no evidence that Tatgenhorst believed PlanMember had approved the loans. Tatgenhorst benefited financially, while the Ds lost more than \$26,000.

Enforcement recommended that Tatgenhorst be suspended in all capacities for two years for this violation. The Hearing Officer agrees with Enforcement’s assessment of the seriousness of Tatgenhorst’s misconduct and finds that a two-year suspension is warranted under the facts and circumstances of this case. Nonetheless, the Hearing Officer will not impose the suspension for this violation because the Hearing Officer will bar Tatgenhorst for his failure to respond to the staff’s requests for information. The Hearing Officer also will not order Tatgenhorst to pay restitution to the Ds because such an order is unnecessary. The Ds have obtained a civil judgment against Tatgenhorst for the full amount of their loss.²⁰

¹⁹ FINRA Sanction Guidelines 6 (2007) (Principal Considerations in Determining Sanctions Nos. 2, 9, and 10), available at www.finra.org/sanctionguidelines.

²⁰ See *Department of Enforcement v. Kaweske*, No. C07040042, 2007 NASD Discip. LEXIS 5, at *52 (N.A.C. Feb. 12, 2007) (“Like all sanctions ... an order of restitution is discretionary.”).

B. Failure to Respond to Requests for Information

The Sanction Guidelines recommend a bar when a respondent fails to respond in any manner to a request for information and there are no mitigating factors.²¹ Here, Tatgenhorst failed to respond to two requests for information and documents. The fact that he responded to an earlier and distinct request for information is not sufficiently mitigating to warrant allowing Tatgenhorst to continue in the securities industry. Accordingly, the Hearing Officer will bar Tatgenhorst for this violation.

VII. Order

Alan R. Tatgenhorst is barred from associating with any member firm in any capacity for failing to respond in any manner to two requests for information and documents, in violation of FINRA Procedural Rule 8210 and FINRA Conduct Rule 2010, as alleged in the Second Cause of Action. The bar shall become effective immediately if this Default Decision becomes the final disciplinary action of FINRA.



Andrew H. Perkins
Hearing Officer

Copies to:

Alan R. Tatgenhorst (by electronic and first-class mail)
Helen G. Barnhill, Esq. (by electronic and first-class mail)
Mark P. Dauer, Esq. (by electronic mail)
David R. Sonnenberg, Esq. (by electronic mail)

²¹ *Sanction Guidelines* 35.

**FINRA
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

COMPLAINANT,

v.

**ALAN R. TATGENHORST
(CRD No. 1613125),**

RESPONDENT.

**DISCIPLINARY PROCEEDING
No. 2008014828301**

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Respondent Alan R. Tatgenhorst borrowed approximately \$33,000 from a customer of his employing brokerage firm in violation of NASD Conduct Rules 2370 and 2110. In addition, he violated FINRA Rules 8210 and 2010 when he failed to respond to a request for information and documents which FINRA sent to him.

RESPONDENT

2. Respondent Tatgenhorst first entered the securities industry when he became registered as an Investment Company & Variable Contracts Products Representative with PlanMember Securities Corporation ("PlanMember"), a FINRA member, on October 18, 2000. PlanMember terminated Tatgenhorst's registration on September 3, 2008, after discovering that Tatgenhorst had borrowed funds from a firm customer without obtaining prior written approval

from PlanMember. Although Tatgenhorst is not presently associated with a member, FINRA has jurisdiction to issue this Complaint pursuant to Article V, Section 4 of its By-laws.

FIRST CAUSE OF ACTION

Borrowing From A Customer (Conduct Rules 2370 and 2110)

3. The Department realleges and incorporates by reference paragraphs 1 and 2 above.

4. On or about December 15, 2004, while associated with PlanMember in a registered capacity, Respondent Tatgenhorst borrowed \$30,528.00 from the Ds, customers of PlanMember for whom Respondent Tatgenhorst was the assigned registered representative. On December 9, 2005 Tatgenhorst borrowed an additional \$2,500.00 from the Ds. Tatgenhorst issued a promissory note to the Ds documenting the existence of the loans.

5. At the time Tatgenhorst borrowed the money, PlanMember did not have written procedures allowing the borrowing and lending of money between registered persons and customers of the firm. Respondent Tatgenhorst did not request or obtain permission from PlanMember to borrow money from the Ds.

6. Conduct Rule 2370 only allows registered representatives to borrow money from a customer if, among other things, the member has written procedures allowing the borrowing of money between a registered person and a customer of the member. Because PlanMember's procedures did not address and therefore did not permit borrowing, Tatgenhorst could not borrow money from the Ds in compliance with Conduct Rule 2370. Further, the loans were not in conformance with conditions set forth in Rule 2370 (a)(2)(A)-(E) for permissible loans.

7. By virtue of the conduct set forth above in paragraphs 4 through 6, Tatgenhorst violated NASD Conduct Rule 2370. His conduct also violated NASD Conduct Rule 2110, as such conduct is inconsistent with high standards of commercial honor and just and equitable principles of trade.

SECOND CAUSE OF ACTION

Failure to Respond to a Request for Information and Documents FINRA Rule 8210 and FINRA Conduct Rule 2010

8. The allegations of paragraphs 1, 2, and 4 through 7 above, are realleged and incorporated herein by reference.

9. On or about September 16, 2008, FINRA staff sent a letter via certified mail and first class mail to Tatgenhorst's residential address, according to the Central Registration Depository (CRD). The request concerned PlanMember's termination of his registration for borrowing funds from a customer without the firm's written approval. The Domestic Return Receipt was returned to FINRA and signed for by "CB". Tatgenhorst responded to the request by email. In his response, he indicated that his email address was his preferred method of communication.

10. On March 20, 2009 FINRA staff sent a second and different request for information and documents to Tatgenhorst's most current residential address according to CRD, via certified and first class mail, pursuant to FINRA Rule 8210. The CRD address for Tatgenhorst is [REDACTED]. Because Tucson is known to exist in Arizona and "85749" is an Arizona zip code, FINRA staff sent the letter to this address in both California and Arizona. Staff also sent the request to the e-mail address provided by Tatgenhorst in his response to the September 16, 2008, request. The March 20, 2009, request pertained to the allegations of borrowing to which Cause One of this Complaint pertains. The requested information and documents were to be provided on or before April 3, 2008. The Domestic

Return Receipts for both certified mailings, which were returned to FINRA, were signed by CB to evidence acceptance of delivery. The first-class mailings were not returned. Tatgenhorst did not provide the information and documents requested in the letter dated March 20, 2009.

11. On April 9, 2009, FINRA staff sent another request letter by first class and certified mail to Tatgenhorst's CRD address in California and Arizona and to his e-mail address. The request was made pursuant to FINRA Rule 8210. The letter requested the same information contained in the Rule 8210 request letter dated March 20, 2009. The requested information was to be provided on or before April 24, 2009. The Domestic Return Receipts for both certified mailings, which were returned to FINRA, were signed by CB. The first class letters were not returned. Tatgenhorst did not provide the information requested in the letter dated April 9, 2009.

12. By virtue of the foregoing, Tatgenhorst violated FINRA Rules 8210 and 2010.

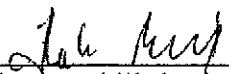
PRAYER

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 Respondent bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330.

FINRA DEPARTMENT OF ENFORCEMENT

Date: March 8, 2010



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