

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

NIELS F. ROJAS
(CRD No. 5558557),

Respondent.

Disciplinary Proceeding
No. 20090166146

Hearing Officer—Andrew H. Perkins

DEFAULT DECISION

October 28, 2010

Respondent is barred from associating with any FINRA registered firm in any capacity for failing to respond to requests for information, in violation of Procedural Rule 8210 and Conduct Rule 2010. In light of the bar, no further sanctions were imposed for Respondent's failure to update his Form U4 to disclose that he had been charged with two felonies, in violation of NASD Conduct Rule 2110.

Appearances

David M. Jaffe, Esq., for the Department of Enforcement.

No appearance by or on behalf of Niels F. Rojas.

DECISION

I. Introduction

The FINRA Department of Enforcement ("Enforcement") filed the attached Complaint with the Office of Hearing Officers on April 26, 2010. The Complaint charges Respondent Niels F. Rojas ("Rojas") with: (1) failing to update his Uniform Application for Securities Industry Registration or Transfer ("Form U4") to disclose that he had been charged with two felonies, in violation of NASD Conduct Rule 2110, NASD Membership and Registration Rule Interpretive Material ("IM") 1000-1, and FINRA Conduct Rule 2010; and (2) failing to respond to two

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requests for information FINRA staff issued in connection with FINRA's investigation of the facts and circumstances surrounding his failure to disclose the felony charges, in violation of FINRA Procedural Rule 8210 and FINRA Conduct Rule 2010.¹

Rojas did not answer the Complaint. Accordingly, on August 17, 2010, Enforcement filed a Motion for Entry of Default Decision and Imposition of Sanctions ("Default Motion"), together with the declaration of Hugh C. Patton ("Patton Decl.") and 45 exhibits.² For the reasons set forth below, the Hearing Officer found Rojas in default and granted Enforcement's Default Motion.

II. Procedural History

On April 26, 2010, Enforcement served the Complaint and the First Notice of Complaint on Rojas by mailing them to his most recent address recorded in the Central Registration Depository ("CRD"), as well as five alternate addresses. Enforcement sent each mailing by first-class mail and certified mail, return receipt requested.³ The mailings sent to *his* CRD address were returned to Enforcement with notations indicating that the address was out of date. The United States Postal Service provided Enforcement with a forwarding address in New Mexico. Enforcement received confirmation of delivery for the certified mailing sent to [REDACTED]

[REDACTED] The return receipt card indicates that the mailing was delivered on April 30, 2010 and that the person who signed the receipt did so as "agent" for the addressee.⁴ However,

¹ Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA rules. The first phase of the new consolidated rules became effective on December 15, 2008. See FINRA Regulatory Notice 08-57 (Oct. 2008). Because the Complaint in this case was filed after December 15, 2008, the procedural rules that apply are those that existed on December 15, 2008. The conduct rules that apply are those that existed at the time of the conduct at issue.

² Enforcement's exhibits are labeled CX-1 through CX-45.

³ Patton Decl. ¶¶ 7-16.

⁴ *Id.* ¶ 11(a); CX-7.

the signature on the return receipt card is illegible.⁵ The remaining mailings were returned to Enforcement as undeliverable. Rojas did not answer or otherwise respond to the Complaint.

On May 27, 2010, Enforcement served a Second Notice of Complaint on Rojas by mailing it to seven addresses: his CRD address; the five original alternate addresses; and a sixth alternate address.⁶ In addition, on July 14, 2010, Enforcement served the Second Notice of Complaint on Rojas at the forwarding address in New Mexico supplied by the United States Postal Service. Enforcement sent each mailing by first-class mail and certified mail, return receipt requested. The mailings sent to his CRD address were returned to Enforcement with notations that the CRD address was out of date.⁷ The mailings sent to the six alternate addresses were returned to Enforcement with notations indicating that the addresses were not valid.⁸

To date, Rojas has not answered or otherwise responded to the Complaint.⁹

On July 15, 2010, the Office of Hearing Officers issued an order setting a deadline for Enforcement to file a motion for entry of a default decision, which Enforcement filed on August 17, 2010. Rojas did not file a response to the Default Motion.

Based on Rojas's default, the Hearing Officer deemed the allegations in the attached Complaint admitted pursuant to Rules 9215(f) and 9269(a).

⁵ *Id.*

⁶ Patton Decl. ¶¶ 18-19. Enforcement had overlooked the sixth alternate address when it served the First Notice of Complaint. Patton Decl. ¶ 16. Nonetheless, the Hearing Officer finds that Enforcement properly served Rojas with the First Notice of Complaint because this address was not his last known residential address. *See* FINRA Rule 9134(b)(1). Enforcement had sent a Wells notice to Rojas at this address before it filed the Complaint. The United States Postal Service returned the mailing as undeliverable. In addition, there is a note on the returned mailing that states Rojas had "moved 5 years ago." CX-31.

⁷ Patton Decl. ¶ 21.

⁸ *Id.* ¶¶ 22-28.

⁹ *Id.* ¶ 30.

III. Findings of Fact and Conclusions of Law

A. Background

Rojas entered the securities industry in June 2008 when he was employed by Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), a FINRA registered firm. On September 17, 2008, he registered with FINRA as a General Securities Representative.¹⁰

On or about December 18, 2008, Merrill Lynch received an anonymous telephone call on its ethics hotline. The caller stated that Rojas had been arrested and gave Merrill Lynch the criminal case number.¹¹ On December 29, 2008, Rojas resigned from Merrill Lynch.

On January 2, 2009, Merrill Lynch submitted an Amended Uniform Termination Notice for Securities Industry Registration ("Form U5") with FINRA on Rojas's behalf. The amended Form U-5 disclosed the criminal action. Upon receipt of the amended Form U-5, FINRA terminated his registration effective January 2, 2009.¹²

B. 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 January 2, 2009, the date FINRA terminated Rojas'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 requests for information made during the two-year period following the termination of his FINRA registration.¹³

¹⁰ CX-1, at 3-4.

¹¹ Compl. ¶ 11.

¹² CX-1, at 4.

¹³ 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").

C. Failure to Amend Form U4

The First Cause of Action alleges that Rojas failed to amend his Form U4 to disclose that he had been arrested on October 24, 2008, and charged with two felonies: assault and battery upon a police officer; and assault and battery upon an emergency medical technician.¹⁴ On December 23, 2008, Rojas waived his right to a jury trial, and on January 26, 2009, he entered a plea of *nolo contendere* to both felony charges.¹⁵ On March 23, 2009, the District Court of Tulsa County, Oklahoma, accepted Rojas's plea without entering a judgment of guilt and placed him on a deferred sentence for three years.¹⁶

Pursuant to Article V, Section 2(c) of FINRA's By-Laws, Rojas was required to amend his Form U4 "not later than 30 days after learning of facts or circumstances giving rise to the amendment." At the time in question, Form U4 Question 14A.(1) asked applicants whether they have ever been charged with any felony. Rojas had answered "No" to this question when he applied for registration through Merrill Lynch on July 16, 2008. Rojas never amended his Form U4 to disclose the felony charges filed against him in October 2008.

NASD 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.¹⁷ FINRA uses the Form U4 to screen and monitor applicants seeking to participate in the securities industry.¹⁸ "[T]he candor and forthrightness of applicants is critical to the effectiveness of the screening process" because

¹⁴ CX-36.

¹⁵ Patton Decl. ¶ 42; CX-35, at 7.

¹⁶ Patton Decl. ¶ 43.

¹⁷ "Because of the importance that the industry places on full and accurate disclosure of information required by the Form U4, we presume that essentially all the information that is reportable on the Form U4 is material." *Department of Enforcement v. Knight*, No. C10020060, 2004 NASD Discip. LEXIS 5, at *13-14 (NAC Apr. 27, 2004).

¹⁸ *Department of Enforcement v. Zayed*, No. 2006003834901, 2010 FINRA Discip. LEXIS 13, at *10 n.8 (NAC Aug. 19, 2010).

the Form U4 is used by FINRA and other self-regulatory organizations, state regulators, and broker-dealers to determine and monitor the fitness of securities professionals.¹⁹ A Form U4 that is inaccurate or incomplete so as to be misleading may be deemed to be conduct inconsistent with just and equitable principles of trade in violation of Conduct Rule 2110.²⁰

Based on the allegations in the Complaint, the Hearing Officer finds that Rojas violated NASD Conduct Rule 2110, FINRA Conduct Rule 2010, and IM-1000-1 by not updating his Form U4 to disclose that he had been charged with two felonies.²¹

D. Failure to Provide Information and Documents

The Second Cause of Action alleges that Rojas failed to respond to two requests for information and documents FINRA staff sent to him pursuant to FINRA Rule 8210 in connection with FINRA's investigation of his arrest and felony charges disclosed in the Form U5 amendment Merrill Lynch filed on his behalf on January 14, 2009.

FINRA staff sent the first request to Rojas on February 5, 2009, by first-class and certified mail at his CRD address.²² Rojas did not respond.

FINRA staff sent the second request to Rojas on September 23, 2009, by first-class and certified mail at his CRD address.²³ Rojas did not respond.

The facts alleged in the Second Cause of Action establish that Rojas violated FINRA Rules 8210 and 2010 by failing to respond to the staff's requests for information.

¹⁹ *Guang Lu*, Exchange Act Rel. No. 51047, 2005 SEC LEXIS 117, at *19-20 (Jan. 14, 2005), *aff'd*, 179 Fed. Appx. 702 (D.C. Cir. 2006).

²⁰ See IM-1000-1; *Thomas R. Alton*, 52 S.E.C. 380, 382 (1995), *petition for rev. denied*, 105 F.3d 664 (9th Cir. 1996).

²¹ Enforcement did not allege that Rojas willfully failed to disclose the two felony charges on his Form U4. Therefore, the Hearing Officer did not find that he was subject to statutory disqualification, pursuant to Section 3(a)(39)(F) of the Securities Exchange Act of 1934.

²² CX-41.

²³ CX-43.

IV. Sanctions

A. Failure to Respond to Requests for Information

For failing to respond to FINRA Rule 8210 requests for information, the FINRA Sanction Guidelines provide that a bar should be “standard” when there is a complete failure to respond.²⁴ The Guidelines for failing to respond to requests for information list principal considerations for adjudicators to assess in determining appropriate sanctions. Adjudicators are instructed to consider “[w]hether the required information has been provided and, if so, [to] consider the number of requests made, the time [Rojas] took to respond, and the degree of regulatory pressure required to obtain a response.” Adjudicators also consider the nature of the information requested in assessing appropriate sanctions.²⁵

The Hearing Officer finds that a bar from associating with any FINRA member firm in all capacities is an appropriately remedial sanction given the facts and circumstances, including a lack of mitigating factors that would warrant a lesser sanction. The information the staff sought was important. Accordingly, the Hearing Officer will bar Rojas from associating with any FINRA member firm in all capacities.

B. Failure to Amend Form U4

For filing a false, misleading or inaccurate Form U4 or failing to file necessary amendments to a Form U4, the Guidelines recommend that an individual be fined from \$2,500 to \$50,000 and suspended in all capacities for five to 30 business days. In egregious cases, the Guidelines call for consideration of a suspension in any or all capacities of up to two years, or a bar.²⁶ The Guidelines also provide that in determining the appropriate sanction, adjudicators consider:

²⁴ FINRA Sanction Guidelines 35, *available at* www.finra.org/sanctionguidelines.

²⁵ *Id.*

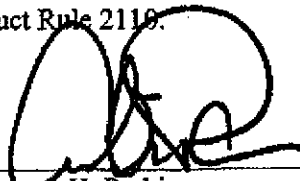
²⁶ *Id.* at 73-74.

(1) whether the information at issue was significant; (2) the nature of that information; and (3) whether the respondent's failure to disclose information resulted in a statutorily disqualified individual associating with a firm.²⁷

Here, the information that Rojas did not disclose on his Form U4 was significant. On the other hand, Rojas was not statutorily disqualified and there is no evidence of harm. Under these circumstances, the Hearing Officer finds that it would be appropriate to fine Rojas \$5,000 and suspend him from associating with any member firm in any capacity for three months. However, in light of the bar imposed upon Rojas for his failure to provide information to FINRA, the Hearing Officer does not impose a sanction for this violation.

V. Order

Rojas is barred from associating with any member firm in any capacity for failing to respond to requests for information, in violation of Procedural Rule 8210 and 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. In light of the bar, no further sanctions were imposed for his failure to update his Form U4 to disclose that he had been charged with two felonies, in violation of NASD Conduct Rule 2110.



Andrew H. Perkins
Hearing Officer

Copies to:

Niels F. Rojas (*via overnight courier and first-class mail*)
David M. Jaffe, Esq. (*via electronic and first-class mail*)
Mark P. Dauer, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

²⁷ *Id.* at 73.

**FINANCIAL INDUSTRY REGULATORY AUTHORITY (FINRA)
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

COMPLAINANT,

v.

**NIELS F. ROJAS,
(CRD No. 5558557),**

RESPONDENT.

**DISCIPLINARY PROCEEDING
No. 2009 016 6146**

Hearing Officer _____

COMPLAINT

The Department of Enforcement alleges:

Summary

1. Rojas acted in contravention of Article V, Section 2 of FINRA's By-Laws and violated NASD Membership and Registration IM-1000-1, NASD Conduct Rule 2110, and FINRA Conduct Rule 2010, in that he failed to amend his Uniform Application for Securities Industry Registration or Transfer ("Form U4") to disclose that he had been charged on October 30, 2008 with two felony counts of assault and battery.
2. The firm through which he was registered at the time, Merrill Lynch, Pierce, Fenner & Smith, Inc. (BD No. 7691) ("Merrill Lynch"), only became aware of the matter on or about December 18, 2008 as a result of an anonymous telephone call to its Ethics Hotline. Rojas resigned from Merrill Lynch on or about December 30, 2008, and the firm filed a Uniform Termination Notice for Security Industry

Registration ("Form U5") on his behalf on or about January 2, 2009. On January 14, 2009, Merrill Lynch filed an amendment to Rojas' Form U5 disclosing the felony charges.

3. Rojas also violated FINRA Procedural Rule 8210 and FINRA Conduct Rule 2010, in that he failed to respond to the Staff's requests for information sent on February 5, 2009 and September 23, 2009.

Respondent

4. Rojas first became registered with FINRA as a general securities representative through an association with Merrill Lynch. He was registered through Merrill Lynch from September 17, 2008 until January 2, 2009.
5. Rojas is not currently registered with a member firm, but remains subject to FINRA's jurisdiction pursuant to FINRA Bylaws, Article V, Section 4.

FIRST CAUSE OF ACTION (Failure to Amend Form U4)

**NASD Membership and Registration IM-1000-1,
NASD Conduct Rule 2110, and FINRA Conduct Rule 2010**

6. The Department realleges and incorporates by reference paragraphs 1 through 5 above.
7. On October 24, 2008, Rojas was arrested in Oklahoma by the Tulsa Police Department.
8. On October 30, 2008, Rojas was charged with two felony counts:
 - i. assault and battery upon a police officer in violation of 21 O.S. §649; and

ii. assault and battery on an emergency medical technician in violation of 21 O.S. §650.5.

9. Pursuant to Article V, Section 2(c) of the FINRA By-Laws, Rojas was required to amend his Form U4 by at least December 1, 2008 – thirty days after being charged with a felony.
10. Rojas did not amend his Form U4, as required, or otherwise disclose to Merrill Lynch that he had been charged with a felony.
11. On or about December 18, 2008, Merrill Lynch received an anonymous telephone call to its Ethics Hotline. The caller stated that Rojas had been arrested and gave the docket number for the criminal case: CF-2008-5392.
12. Merrill Lynch, which had been unaware of the arrest before the telephone call, confirmed the accuracy of the anonymous tip.
13. Rojas resigned from Merrill Lynch on or about December 30, 2008.
14. On or about January 2, 2009, Merrill Lynch filed a Form U5 on behalf of Rojas, indicating that his termination was voluntary.
15. On January 14, 2009, Merrill Lynch filed an amendment to Rojas' Form U5, changing the answer to the following question – Question 7(C)(2) – from “No” to “Yes”:

While employed by or associated with your firm, or in connection with events that occurred while the individual was employed by or associated with your firm, was the individual: . . . charged with any felony?

16. The January 14, 2009 amendment to Rojas' Form U5 includes a Criminal Disclosure Reporting Page stating that Rojas was arrested and charged in the District Court of Tulsa County, Case No. CF-2008-5392, to a felony count of assault and battery upon a police officer and a felony count of assault and battery on an emergency medical technician.

19. By reason of the foregoing, Rojas acted in contravention of Article V, Section 2 of FINRA's By-Laws and violated NASD Membership and Registration IM-1000-1, NASD Conduct Rule 2110, and FINRA Conduct Rule 2010.

SECOND CAUSE OF ACTION
(Failure to Respond to Requests for Information)
FINRA Procedural Rule 8210 and FINRA Conduct Rule 2010

20. The Department realleges and incorporates by reference paragraphs 1 through 19, above.
21. On or about February 5, 2009, FINRA Staff sent a letter to Rojas pursuant to FINRA Procedural Rule 8210 ("First Request"). The First Request sought information concerning the arrest and felony charges disclosed in the January 14, 2009 amendment to Form U5 filed by Merrill Lynch on Rojas' behalf.
22. The First Request was sent by first class and certified mail to Rojas' residential address as listed in FINRA's Central Registration Depository: 3037 S. Cincinnati Avenue, Tulsa, OK 74114.
23. The First Request sent by first class mail was not returned to FINRA.
24. The First Request sent by certified mail was returned to FINRA marked "unclaimed."
25. Rojas' response to the First Request was due by February 19, 2009. Rojas has not responded to date.
26. On or about September 23, 2009, the Staff sent a second request letter to Rojas pursuant to FINRA Procedural Rule 8210 ("Second Request"), requesting the same information as in the First Request. The Second Request was sent to the same address as the First Request, by regular and certified mail.
27. The Second Request sent by first class mail was not returned to FINRA.

28. The Second Request sent by certified mail was returned to FINRA marked "unclaimed."
29. Rojas' response to the Second Request was due by October 7, 2009. Rojas has not responded to date.
30. Based on the foregoing, Rojas violated FINRA Procedural Rule 8210 and FINRA Conduct Rule 2010.

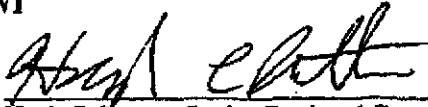
RELIEF REQUESTED

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 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: April 26, 2010


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