

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

STEPHEN NIETSCH
(CRD No. 3111082),

Disciplinary Proceeding
No. 2009020385001

Hearing Officer—Sara Nelson Bloom

DEFAULT DECISION

June 18, 2012

Respondent is barred from associating with any FINRA registered firm in any capacity for borrowing money from his customer, in violation of NASD Conduct Rules 2370 and 2110. Respondent is ordered to pay restitution in the amount of \$20,000.

Appearances

For the Department of Enforcement, William Brice La Hue, Esq., Atlanta, GA.

No appearance by or on behalf of Stephen Nietsch.

DECISION

I. Introduction

The FINRA Department of Enforcement (“Enforcement”) filed the attached Complaint with the Office of Hearing Officers on October 25, 2011. The Complaint charges Respondent Stephen Nietsch (“Nietsch”) with borrowing money from a customer, in violation of NASD Conduct Rules 2370 and 2110.¹

¹ Following 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 consolidated rules became effective on December 15, 2008. See FINRA Regulatory Notice 08-57, 2008 FINRA LEXIS 74 (Dec. 8, 2008). Because the Complaint in this case was filed after December 15, 2008, the procedural rules that apply are the FINRA rules of procedure. The conduct rules that apply are those that existed at the time of the conduct at issue.

Respondent did not answer the Complaint. Accordingly, on April 25, 2012, Enforcement filed a Motion for Entry of Default Decision (“Default Motion”), which is supported by the sworn declaration of William Brice La Hue, Esq. (“Decl.”), and four attached exhibits.² Pursuant to FINRA Procedural Rules 9215(f) and 9269, the allegations in the Complaint are deemed admitted, and Enforcement’s Default Motion is granted.

II. Procedural History

On October 25, 2011, Enforcement served the Complaint and the First Notice of Complaint on Respondent, but the service was not in accordance with the requirements of FINRA Rule 9134, which requires service of the complaint at the residential address for the respondent listed in the Central Registration Depository (“CRD”).³ Therefore, on January 17, 2012, Enforcement served the Complaint and an Amended Notice of Complaint on Respondent by mailing them to his most recent address recorded in the Central Registration Depository (“CRD”) by first-class and certified mail, return receipt requested.⁴ Enforcement also mailed copies of the Complaint and Amended Notice of Complaint to an alternate address (“Alternate Address”). The certified mailing sent to his CRD address was returned indicating that it was unclaimed. The certified mailing sent to the Alternate Address was returned signed by someone other than Respondent. The first class mailings were not returned.⁵ Respondent did not answer the Amended Complaint.⁶

On February 15, 2012, Enforcement served Respondent with the Complaint and Amended Second Notice of Complaint by first-class and certified mail, return receipt requested,

² Enforcement’s exhibits are labeled CX-1 through CX-4.

³ Decl. ¶ 7.

⁴ *Id.* ¶ 8.

⁵ *Id.*; CX-3.

⁶ Decl. ¶ 9.

addressed to his CRD address.⁷ Enforcement also mailed a copy to the Alternate Address. The mailing sent to Respondent's CRD address was returned to Enforcement as undeliverable. Enforcement received the receipt for mailing sent to the Alternate Address, which indicated that it was delivered. The first-class mailings were not returned.⁸

Respondent did not answer the Amended Complaint by the deadline set in the Amended Second Notice of Complaint, and Enforcement filed the Default Motion on April 25, 2012. Respondent did not file a response to the motion.

The Hearing Officer finds that Enforcement properly served Respondent by first-class certified mail pursuant to Rule 9134 and that Respondent therefore received constructive notice of this proceeding. Accordingly, the Hearing Officer finds Respondent in default and grants Enforcement's Default Motion.

III. Findings of Fact and Conclusions of Law

A. Background

Respondent entered the securities industry in 1998. He was associated with FINRA member firm Banc of America Investment Services, Inc. (the "Firm") from May 2004 until October 2008, during which period he was registered with FINRA as a General Securities Representative.⁹ On November 6, 2009, within the two-year period of jurisdiction after Respondent's employment with the Firm ended, FINRA received an Amended Uniform Termination Notice for Securities Industry Registration ("Amended Form U5") filed by the Firm on behalf of Respondent. The Amended Form U5 alleged that Respondent may have engaged in

⁷ *Id.*

⁸ *Id.* ¶ 10.

⁹ CX-1.

conduct actionable under FINRA's Rules, including, among other things, selling away, misrepresentation, and unsuitable recommendations.

B. Jurisdiction

Although Respondent has not been registered with a member firm since October 2008, he remains subject to FINRA's jurisdiction, pursuant to Article V, Section 4 of FINRA's By-Laws, because the Complaint was filed within two years after the filing of an amendment to Respondent's Form U5, the amendment discloses that respondent "may have engaged in conduct actionable under any applicable statute, rule, or regulation" while he was associated with the Firm, and the Complaint charges Respondent with failure to respond to Rule 8210 requests that were issued within two years after the filing of the amended Form U5.

C. Borrowing from Customers

NASD Conduct Rule 2370(a) provides, in pertinent part, that "[n]o 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"

Here, despite the Firm's written policy prohibiting its registered representatives from borrowing money from customers, Respondent borrowed \$20,000 from customer JC.¹⁰ By doing so, Respondent violated NASD Conduct Rule 2370.

Specifically, during the relevant period, customer JC was in his late 70's and had suffered several strokes. In January 2008, Respondent told customer JC that he was in need of cash. On January 7, 2008, customer JC drew a personal check in the amount of \$20,000 made payable to Respondent and wrote the word "loan" in the memo section of the check. Customer JC gave the

¹⁰ Compl. ¶ 11.

check to Respondent, who negotiated it. Respondent admitted that he accepted the loan from customer JC. Respondent also admitted that he was aware that the Firm's procedures prohibited him from borrowing from customers when he accepted the check. Respondent has not repaid customer JC.¹¹

The Hearing Officer finds that Respondent violated NASD Conduct Rules 2370 and 2110, as alleged in the Complaint.

IV. Sanctions

The FINRA Sanction Guidelines ("Sanction Guidelines") do not provide specific guidance for borrowing money from a customer in violation 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."¹²

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 accepted responsibility for and acknowledged the misconduct, whether he acted intentionally, and whether the misconduct resulted in customer harm.¹³

¹¹ *Id.* ¶¶ 6-13.

¹² NASD Notice to Members 03-62, October 2003.

¹³ FINRA Sanction Guidelines 6 (2011) (Principal Considerations in Determining Sanctions Nos. 2, 10, 11, 13, 17), available at www.finra.org/sanctionguidelines.

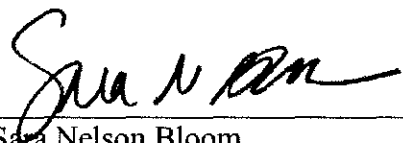
The Hearing Officer finds that Respondent's misconduct was egregious. Respondent borrowed \$20,000 from an elderly customer in poor health. Respondent solicited the loan. Respondent knew that his Firm prohibited borrowing funds from customers. Respondent failed to repay the loan. Enforcement requests a one-year suspension. However, the Hearing Officer finds that a bar is necessary to protect the investing public. Accordingly, the Hearing Officer will bar Respondent for this violation.

In addition, the Hearing Officer will order Respondent to pay restitution to customer JC in the principal sum of \$20,000, plus interest on the outstanding balance until it is paid in full.

V. Order

Respondent is barred from associating with any member firm in any capacity for borrowing money from his customer, in violation of NASD Conduct Rules 2370 and 2110. The bar shall become effective immediately if this Default Decision becomes the final disciplinary action of FINRA.

In addition, Respondent is ordered to pay restitution to JC in the principal amount of \$20,000, plus interest thereon at the rate established under Section 6621(a)(2) of the Internal Revenue Code from July 13, 2007, until paid.¹⁴


Sara Nelson Bloom
Hearing Officer

Copies to:

Stephen Nietsch (*via overnight courier, electronic and first-class mail*)
William Brice La Hue, Esq. (*via electronic and first-class mail*)
Mark P. Dauer, Esq. (*via electronic mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

¹⁴ 26 U.S.C. § 6621(a)(2). The interest rate, which is used by the Internal Revenue Service to determine interest due on underpaid taxes, is adjusted each quarter and reflects market conditions. Customer JC is identified in the addendum to this decision, which is served only on the parties.

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

STEPHEN NIETSCH,
(CRD No. 3111082)

Respondent.

Disciplinary Proceeding
No. 2009020385001

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. In January 2008, while registered with a FINRA member firm, Stephen Nietsch borrowed \$20,000 from an elderly customer, in violation of NASD Conduct Rules 2370 and 2110.

RESPONDENT AND JURISDICTION

2. Stephen Nietsch (Nietsch) entered the securities industry in June 1998, when he was employed by a FINRA member firm. Nietsch was registered as general securities representative in September 1998. Nietsch was employed by a second FINRA member firm from July 2000 until May 2004. In May 2004, Nietsch was employed by FINRA member firm Banc of America Investment Services, Inc. (BAIS) as a general securities representative. Nietsch remained with BAIS until October 2008. Nietsch is not currently registered by a FINRA member firm.
3. On November 6, 2009, BAIS filed an Amended Uniform Termination Notice for Securities Industry Registration (Amended Form U5) on behalf of Nietsch. The Amended Form U5 disclosed that a Statement of Claim had been filed by customer J.C.

regarding Nietsch, alleging, among other things, selling away, misrepresentation, and unsuitable recommendations.

4. Although Nietsch has not been associated with a FINRA member firm since October 2008, he remains subject to FINRA's jurisdiction pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) the Complaint was filed within two years after the date of the Amended Form U5 filed by BAIS during the two-year period following Nietsch's termination, and (2) the Complaint charges Nietsch with misconduct committed while he was associated with a FINRA member firm.

CAUSE OF ACTION

NASD Conduct Rules 2370 and 2110

(Borrowing from Customers)

5. The Department realleges and incorporates by reference paragraphs 1 through 4 above.
6. During the relevant period, Nietsch was associated with BAIS, and J.C., an individual in his late 70s, was a customer of Nietsch and BAIS.
7. In January 2008, Nietsch informed J.C. that he was in need of cash.
8. On January 7, 2008, customer J.C. drew a check in the amount of \$20,000 made payable to Nietsch and wrote the word "loan" in the memo section of the check.
9. J.C. gave the check to Nietsch, who negotiated it.
10. Nietsch admitted to FINRA that he accepted the \$20,000 loan from customer J.C.
11. BAIS had written procedures prohibiting its registered representatives from borrowing funds from customers.
12. Nietsch was aware of BAIS's procedures prohibiting its registered representatives from borrowing from customers when he accepted the \$20,000 loan from customer J.C.
13. Nietsch has not repaid customer J.C. the \$20,000 which he borrowed on January 7, 2008.

14. Such acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rules 2370 and 2110 by Respondent Nietsch.

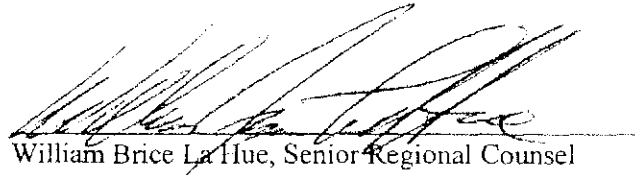
RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. Order that one or more of the sanctions provided under FINRA Rule 8310(a) be imposed, including that the Respondent be required to disgorge fully any and all ill-gotten gains and/or make full and complete restitution, together with interest.
- B. Order that the Respondent bear such costs of the proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330.

FINRA DEPARTMENT OF ENFORCEMENT

Date: 10/25/11



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