FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant v. SCOTT R. TISCHLER (CRD No. 3248953), Respondent.	Disciplinary Proceeding No. 2007008370701 Hearing Officer – RSH **HEARING PANEL DECISION** May 8, 2009

Respondent violated Conduct Rules 2370 and 2110 by improperly borrowing $67,000 from a customer. For this violation, the Respondent was fined $5,000 and suspended from associating in any capacity with any member firm for one year.

Appearances

For Complainant: David F. Newman and John M. D'Amico, Philadelphia, PA, and Frank E. Kulbaski, III, Washington, D.C., FINRA Department of Enforcement.

For Respondent: Scott G. Crowley of Crowley & Crowley, Richmond, VA.

DECISION

I. PROCEDURAL HISTORY[1]

On September 22, 2008, the Department of Enforcement ("Enforcement") filed a Complaint with the Office of Hearing Officers alleging that Respondent Scott R. Tischler ("Tischler") violated Conduct Rules 2370 and 2110 by borrowing money from a

[1] As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA"). References in this decision to FINRA include, where appropriate, NASD. Initially, FINRA adopted NASD's rules and certain NYSE rules, but it is in the process of establishing a consolidated FINRA rulebook. To that end, on December 15, 2008, certain consolidated FINRA rules became effective, replacing parallel NASD and/or NYSE rules, and in some cases the prior rules were re-numbered and/or revised. *See* Regulatory Notice No. 08-57, FINRA Notices to Members, 2008 FINRA LEXIS 50 (Oct. 2008). This Decision refers to and relies on the NASD rules that were in effect at the time of the Respondent's alleged misconduct and cited in the Complaint as the basis for the charges against him.

customer, MT, in violation of his firm's prohibition. Enforcement further alleged that Tischler aggravated the violation by denying, on firm compliance questionnaires, that he had borrowed money from any customers.[2]

On October 16, 2008, Tischler filed an Answer in which he admitted that he borrowed the funds from MT, but claimed that MT was not his customer.[3] Tischler requested a hearing.

The hearing was held on February 3, 2009 in Richmond, Virginia before a Hearing Panel composed of the Hearing Officer and two former members of FINRA's District 9 Committee. Enforcement called three witnesses: Joanne Deaton ("Deaton"), who is registered with FINRA through Royal Alliance Associates, Inc. ("Royal Alliance"), and was Tischler's manager; Devin J. Garofalo ("Garofalo"), who is registered with FINRA through LPL Financial; and customer MT. Tischler testified but did not call any other witnesses. Enforcement introduced 18 exhibits and Tischler introduced 9 exhibits. All of the exhibits were admitted into evidence. The parties also stipulated to the facts contained in their Joint Stipulations, dated January 28, 2009.[4]

II. FINDINGS OF FACT

A. The Respondent

Tischler was continuously registered as a General Securities Representative ("GSR" or "Series 7") between July 1999 and October 2007. He is charged with conduct

[2] This second allegation would support a separate cause of action for, *e.g.*, dishonesty or falsification of firm records, however, the Complaint charges only one count. Throughout the course of these proceedings, Enforcement and Tischler treated the loan and the denial of it as a single course of conduct, and Enforcement sought only one sanction for the conduct. Thus, it would be unfair at this point to split the cause of action, when the Respondent was only given notice that he would be defending one charge.

[3] Although Rule 2370 refers to "customers," the parties in this case used "customers" and "clients" interchangeably. The Rules do not define "customer" except to say that the term "shall not include a broker or dealer." Rule 0120(g). The two terms are used synonymously in this decision.

[4] In this decision, "Tr." refers to the transcript of the hearing; "CX" to Enforcement's exhibits; "RX" to Respondent's exhibits; and "Stip." to the parties' joint stipulations.

that occurred while he was registered as a GSR through FINRA member Royal Alliance Associates, Inc. ("Royal Alliance") from December 2, 2005, to December 19, 2006. Before joining Royal Alliance, Tischler worked for several life insurance and securities firms. From June 1999 until June 2002, he was registered through American Express Financial Advisors, Inc. and sold insurance products through IDS Life Insurance Company (jointly termed "American Express"). He became an area vice president for American Express. From June 2002 until December 2004, Tischler was registered through MetLife Securities, Inc. and sold insurance products through Metropolitan Life Insurance Company (jointly termed "MetLife"). At MetLife, he ran offices with over 75 advisors and supervised a territory from Virginia to Florida with over 400 representatives. He was registered as a GSR with UBS Securities, Inc. for less than a year before joining Royal Alliance.[5]

Tischler joined Royal Alliance in December 2005 as the leader of a three-person team. The other two advisors--Garofalo and Charles Scales ("Scales")--had much less experience in the securities industry than Tischler. Garofalo did not have a Series 7 license while at Royal Alliance; instead, he held only Series 6 and 63 licenses. The team adopted a commission structure whereby Tischler would receive an override on any commissions Garofalo and Scales earned. To facilitate the commission arrangement, the team had joint representative codes. Tischler, Garofalo, and Scales focused on sales of mutual funds and variable annuities, and did very little equities business.[6] Garofalo's initial responsibilities included taking care of the paperwork—after making sure customers completed and signed documents, he submitted the paperwork to insurance

[5] Stip. 1; CX-1; Tr. at p. 161.
[6] Tr. at pp. 16-20; 47-49.

carriers and Royal Alliance. When he proved unable to properly manage the paperwork, the task was given to Scales.[7] Garofalo believed that he was the junior member of the team and would learn by watching Tischler during meetings with customers.[8]

B. Royal Alliance's Written Procedures Prohibited Tischler from Borrowing Money from Clients

Tischler admitted that Royal Alliance's written procedures prohibited registered representatives from borrowing money from clients unless they were relatives or lending institutions. He admitted the following facts in his stipulations:

In 2006, Royal Alliance's written supervisory procedures contained the following provision: "RRs are not permitted to borrow from or lend to any clients. This restriction does NOT apply when RR enters into a loan arrangement with:

- A family member (defined as parents; grandparents; in-laws; siblings; children; grandchildren; cousins; aunts or uncles; nieces or nephews; and any person who the RR supports, directly or indirectly, to a material extent);
- A financial institution in the business of providing credit, financing or loans AND where the terms of the lending arrangement are those that would be available to the general public doing business with those institutions."[9]

C. Tischler Borrowed Money from MT

Tischler admitted that he took three loans totaling $67,000 from MT. Tischler admitted the following facts in the parties' Joint Stipulations: (1) From June 2006 to August 2006, Respondent borrowed a total of $20,000 from [MT]. He received these funds in cash and gave them to Richard Scales—another representative of Royal Alliance who was experiencing financial difficulties; (2) In August 2006, Respondent borrowed $47,000 from [MT]. He received these funds through a cashier's check and used them to

[7] Tr. at pp. 21; 48-53.
[8] Tr. at pp. 49-50.
[9] Stip. 7.

make a down payment on the purchase of a home. [MT] was a real estate agent for this purchase and received a commission; and (3) In December 2006, Respondent repaid the loans to [MT].[10]

Tischler borrowed the first $20,000 from MT in two $10,000 payments. MT and Tischler disagreed about whether Tischler solicited the money or MT offered it. However, both agreed that the money was for the benefit of Scales, who was having financial difficulty.[11] Tischler and MT agreed that MT offered the third loan of $47,000 to Tischler when Tischler did not have the down payment to purchase a home. MT was the real estate agent on the transaction and stood to lose a $14,000 commission if the sale did not occur. MT and Tischler agreed that MT offered the money because of the trust and friendship that had developed between the two men.[12]

D. Tischler Failed to Disclose the Loans to Royal Alliance

Tischler admitted that he failed to disclose the loans from MT to Royal Alliance. He stipulated to the following facts:

Tischler completed and submitted three separate "2006 Annual Compliance Questionnaires" for Royal Alliance, dated September 26, 2006, September 27, 2006, and September 28, 2006, respectively. Each of the Questionnaires contained the following question (Section V, No. 7): "Since your affiliation with the Firm, have you loaned money to a client, or borrowed money from a client…that you did not disclose to the Firm on a previous occasion (For example, in a previous Annual Compliance Questionnaire)?" Tischler answered "No" to this question on all three Questionnaires.[13]

[10] Stips. 3, 4, 5.
[11] Tr. at pp. 101-103; 143-148.
[12] Tr. at pp. 103-104; 149-152.
[13] Stip. 8.

In addition, in August 2006, Tischler certified that he had reviewed Royal Alliance's Code of Ethics, which prohibited registered representatives from "[b]orrowing money or securities from a client unless the client is a financial institution engaged in the business of loaning funds."[14] Yet, in September 2006, Tischler completed three Annual Compliance Questionnaires in which he denied borrowing money from any clients.[15] Tischler claimed that since he did not consider MT to be his client, he did not disclose the loans he had just taken from MT the month before.[16]

E. MT was Tischler's Customer

While Tischler admits that he borrowed money from MT and failed to disclose the loans to Royal Alliance, he argues that he did not violate the firm's policies or NASD rules because MT was not Tischler's customer. The evidence does not support Tischler's argument.

MT testified at the hearing that he viewed Garofalo and Tischler as a team and considered himself to be Tischler's client. MT, a real estate broker, first met Tischler in March 2006 at a meeting arranged by Garofalo at Garofalo's home. At the meeting, which lasted at least an hour and a half, Tischler introduced himself and explained his work and background as a financial planner. MT testified, "…Scott gave me his impressive resume. And basically, just, you know, right then and there, I felt he was the guy that I wanted to involve my money with….I felt he was a good guy and really wanted

[14] CX-4.
[15] Stip. 8; CX-9, 10, 11.
[16] Tr. at 175-177. Although at the hearing Tischler testified that he was not sure of the date of the $47,000 loan, Tischler stipulated that he received the loan in August of 2006 and also admitted in his Answer that he had received the loan in August of 2006.

to work with him." Based on the meeting, MT purchased a $10,000 Pacific Life variable annuity in April 2006.[17]

The paperwork for the annuity purchase supports MT's view. Both Garofalo's and Tischler's names and signatures appear on the annuity application under "Soliciting Agent's Signature," and on the annuity contract delivery receipt. Garofalo and Tischler both admitted that Garofalo had signed Tischler's name to the documents; however, Garofalo testified that Tischler had given him permission to sign in order to expedite the process. Tischler denied that he gave Garofalo permission to sign his name. The Hearing Panel found Garofalo's testimony to be more credible, particularly in light of the other evidence which indicated that the two brokers were sharing business. In his on-the-record testimony, Tischler stated that he had given Garofalo "blanket authority" to sign Tischler's name on some "things of non-significance."[18]

Other documents also indicate that MT was Tischler's client. The confirmation from Pacific Life lists Tischler as MT's registered representative. The cover letter from Pacific Life delivering the annuity contract is addressed to Tischler and directs him to "deliver the enclosed contract to your client as soon as possible."[19] Pacific Life also sent quarterly statements that listed Tischler as MT's representative.[20] Finally, Royal Alliance's commission run for Tischler showed that he received a commission on 50% of MT's investment.[21]

[17] CX-5 at p.2; Tr. at pp. 95-96; 107-108.
[18] CX-18 at pp. 28-29. See also, Stip. 6.
[19] CX-5.
[20] CX-6.
[21] CX-7; Tr. at pp. 24-29; 44-45.

Garofalo's description of the meeting that took place at his home is essentially the same as MT's version.[22] Garofalo also testified that he and Tischler signed an agreement to "do all of [their] business 50-50," though he expected to do the "lion's share of the work, basically doing paperwork, processing, helping gather leads, and going to appointments."[23] He confirmed that he and Tischler split the commission on the variable annuity sale to MT.[24]

Deaton, a Royal Alliance affiliate who supervised the brokers in the office where Tischler, Garofalo and Scales worked, also testified that the three brokers worked together and confirmed that Tischler and Garofalo shared their business and split the commission on MT's annuity purchase.[25]

Tischler maintains that MT was Garofalo's client, not his, because Garofalo arranged the meeting with MT. Tischler further argues that MT was Tischler's friend, rather than his client, because the two of them had other joint business ventures, socialized frequently and attended the same church.[26] Tischler, Garofalo, and MT all testified that the three men met often—sometimes weekly—to discuss other possible business ventures and how they could refer business to each other. Eventually, the three formed a partnership to invest in real estate with a fourth person. MT also became Tischler's real estate agent in the purchase of Tischler's home.[27]

Tischler's business partnership and friendship with MT does not change MT's status as Tischler's customer. Furthermore, Tischler's friendship and business dealings

[22] Tr. at pp. 54-55.
[23] Tr. at p. 48.
[24] Tr. at p. 63.
[25] Tr. at pp. 20; 28-29.
[26] Tr. at pp. 140-143; 159-160.
[27] Tr. at pp. 54-55; 108-109; 141-142; 148-150.

with MT grew out of their first meeting, which was arranged for the purpose of gaining MT as a client. Prior to Tischler's testimony at the hearing, he recognized that MT was his client. In his June 2007 written response to Enforcement's request for information pursuant to Rule 8210, Tischler referred to MT as his "client" several times. For example, when discussing the money he borrowed from MT, Tischler wrote: "I also was studying for my series 24 and realized it is not a good thing to borrow money from clients. After reading that, I immediately paid back everything." Tischler also wrote: "[MT] was never a planning client, just a transactional client.[28]

In light of the evidence, the Hearing Panel rejects Tischler's claim that MT was not his client.

III. CONCLUSIONS OF LAW

A. FINRA Has Jurisdiction Over the Respondent

Although Tischler is not currently associated with any FINRA member, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Art. V, Sec. 4 of FINRA's By-Laws, because the Complaint was filed within two years after the termination of his last registration and it charges him with misconduct while he was registered with FINRA.

B. Tischler Violated Conduct Rules 2370 and 2110

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

[28] CX-14.

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…"[29]

The evidence submitted by Enforcement is sufficient to establish that Tischler borrowed $67,000 from customer MT between June and August 2006, in violation of Royal Alliance's written procedures. Accordingly, the Hearing Panel finds that Tischler violated Conduct Rule 2370. It is well established that any conduct that violates an NASD Conduct Rule is a violation of Conduct Rule 2110.[30]

IV. SANCTIONS

The FINRA Sanction Guidelines ("Guidelines") do not provide any specific sanctions for violations of Rule 2370. According to the General Principals Applicable to All Sanction Determinations ("General Principles"), adjudicators should impose sanctions that are designed to deter future misconduct and improve overall business standards.

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

[29] Rule 2370 contains other conditions under which borrowing from customers is permissible; however, they are not relevant here because Royal Alliance's written procedures allowed borrowing only if conditions (A) or (B) were met.

[30] *Stephen J. Gluckman*, Exchange Act Rel. No. 41628, 1999 SEC LEXIS 1395, *22 (July 20, 1999) (citations omitted).

money in disregard of the customers' best interests, or by borrowing funds from, but not repaying, customers."[31]

In addition, adjudicators are directed to consider whether the respondent attempted to conceal his misconduct, and 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.[32]

Tischler's violation of Rule 2370 was aggravated because he borrowed money from a customer even though he knew that Royal Alliance's written procedures prohibited such loans. Tischler further aggravated the violation by failing to disclose the loans on his Annual Compliance Questionnaires, thereby falsifying important firm documents, and preventing his employer from questioning and monitoring the loans. Furthermore, Tischler has not yet accepted responsibility for his misconduct, instead insisting that MT was not his customer. Tischler's repayment of the loans is a mitigating factor. Nevertheless, the Hearing Panel finds that Tischler's misconduct was serious and warrants a $5,000 fine and a suspension from associating with any member firm in any capacity for a period of one year.

V. ORDER

For violating Conduct Rules 2370 and 2110, Respondent Scott R. Tischler is fined $5,000 and suspended from associating with any member firm in any capacity for a period of one year. In addition, he is ordered to pay costs in the amount of $2817.26, which includes a $750 administrative fee and the cost of the hearing transcript. The fine and costs shall be payable on a date set by FINRA, but not less than 30 days after this

[31] NASD Notice to Members 03-62, October 2003.
[32] Sanction Guidelines, pp. 2, 6.

decision becomes FINRA's final disciplinary action in this matter. If this decision becomes FINRA's final disciplinary action, the suspension shall begin on July 6, 2009 and end on July 5, 2010.[33]

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Rochelle S. Hall
Hearing Officer
For the Hearing Panel

Copies to:
Scott R. Tischler (via overnight courier and first-class mail)
Scott G. Crowley, Esq. (via facsimile and electronic mail)
David F. Newman, Esq. (via first-class and electronic mail)
Frank E. Kulbaski, III, Esq. (via first-class mail and electronic mail)
John M. D'Amico, Esq. (via electronic mail)
Mark P. Dauer, Esq. (via electronic mail)
David R. Sonnenberg, Esq. (via electronic mail)

[33] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.