FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MODESTO BINEY (CRD No. 6239490), Respondent.	Disciplinary Proceeding No. 20140425550-02 Hearing Officer—DW **HEARING PANEL DECISION** August 31, 2016

Respondent Modesto Biney, a bank assistant manager, authorized payment of two checks cashed by a bank business customer. The latter cashed check resulted in an overdrawn account and a loss to the bank. The preponderance of the evidence did not establish that Respondent's actions were inconsistent with just and equitable principles of trade. Accordingly, the first cause of action is dismissed.

Respondent failed to timely produce documents requested during the investigation without providing adequate justification, as alleged in the second cause of action. For this violation Respondent is suspended for six months and fined $2,500. He is also assessed costs.

Appearances

For the Complainant: Russell Johnston, Esq., Danielle I. Schanz, Esq., and Richard Margolies, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: M. Juldeh Jalloh, Esq.

DECISION

I. Introduction

FINRA Rule 2010 requires industry members to observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business. The Rule "is not limited to rules of legal conduct but rather . . . states a broad ethical principle" that may be

breached even "where no legally cognizable wrong occurred."[1] Ethical standards encompassed by the Rule "go beyond legal requirements and depend on general rules of fair dealing, the reasonable expectations of the parties, marketplace practices, and the relationship between the firm and the customer."[2]

Here, we decide whether Respondent Modesto Biney breached Rule 2010's mandate in his capacity as branch assistant manager of a non-member bank by twice allowing a bank customer to cash a check against a business account without adequate funds in the account. Each time the customer represented to Biney that the business needed to make payroll and promised to make a deposit into the account in short order to cover the check cashed on the account. After the second cashed check, the customer failed to make the promised deposit. The bank suffered a loss, and then fired Biney.

The Department of Enforcement brought this action alleging that Biney "facilitated the conversion" of bank funds by the customer when he authorized the cashed checks, in violation of bank policy and Rule 2010. Enforcement also claims that Biney failed to timely produce requested documents during its investigation, in violation of FINRA Rule 8210. Biney filed an Answer denying the charges. This Hearing Panel held a hearing on the allegations in Minneapolis, Minnesota, beginning on April 27, 2016.

II. Findings of Fact

A. Background

Biney began work for Wells Fargo Bank, NA ("Wells Fargo") in 2010, while attending college at Metropolitan State University in St. Paul, Minnesota.[3] By all accounts, Biney was an exemplary employee for the bank. Through a series of promotions, he quickly rose from bank teller to assistant branch manager.[4] His branch manager regarded Biney as a "good employee," and a "very respected person" who "partnered with her" to run the branch.[5] His potential led the bank to invite Biney to become a registered representative with FINRA member Wells Fargo Advisors, LLC ("Wells Advisors"), which is affiliated with Wells Fargo.[6] Although Biney applied to take the requisite examination to become a registered representative, he did not successfully complete the examination. He continued to focus on his work at the bank.[7]

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[1] *Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *11 (NAC June 2, 2000) (citation omitted).

[2] *Id*. at *12.

[3] Hearing Transcript ("Tr.") at 38, 42 (Biney testimony).

[4] Tr. (Biney) 38-39.

[5] Tr. (Anike) 196, 219, 242.

[6] Tr. (Biney) 128-29.

[7] *Id*.

B. Biney Approves Two Cashed Checks

In May 2014, a bank business customer approached Biney with a problem—the customer expected to make a deposit with the bank the next day, but needed to cash a check immediately to meet payroll.[8] As an accommodation to the customer's business needs, Biney authorized payment of the check by applying a "credit memo" to the business account.[9] The credit memo created a temporary credit to the account that permitted the customer to cash a $6,400 check.[10] On the credit memo entry in the bank's computer system, Biney made the notation: "pending deposit on account."[11] After cashing the check, the customer returned the next day and deposited $6,400 as promised.[12]

Two weeks later, the customer returned to Biney with the same problem—the customer needed immediate cash for payroll but this time expected a wire transfer of funds into the account in short order.[13] Biney again applied a credit memo to the account, and the customer cashed a $7,500 check.[14] On the credit memo Biney made the notation: "incoming wire."[15] But the promised wire did not arrive.[16]

After repeated efforts by Biney and others over the next several days to contact the customer and collect the promised wire, the customer deposited a check for $7,600 into the account.[17] But that check was returned unpaid by its issuing bank as fraudulent.[18] About the same time, the federal government indicted the customer on an unrelated charge.[19] The bank never recovered the money it paid out for the cashed check, and Wells Fargo sustained a $7,500 loss.[20] Shortly thereafter, Wells Fargo fired Biney for approving the credit memos.[21]

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[8] *Id*. at 81-83.

[9] *Id*.

[10] *Id*. at 89.

[11] *Id*. at 86-87.

[12] *Id*. at 93.

[13] *Id*. at 94-98, 104.

[14] *Id*. at 100-01, 108-09; Complainant's Exhibit ("CX-") 9.

[15] Tr. (Biney) 104; CX-8.

[16] Tr. (Biney) 101.

[17] *Id*. at 104-05.

[18] Tr. (Millard) 292-93.

[19] Tr. (Biney) 185. The indictment alleges that the customer and others trafficked in stolen cell phones through a number of mobile device stores that they owned and operated in the area. *See* Respondent's Exhibit 3.

[20] Tr. (Millard) 299.

[21] Tr. (Anike) 217.

C. Biney's Approval Authority

The parties dispute whether bank policy authorized Biney to issue credit memos under the circumstances. Wells Fargo's written policy documents vest Biney authority as an Assistant Branch Manager to approve a "credit memo" crediting a customer account in amounts up to $10,000.[22] The written policy separately provided Biney authority to approve account overdrafts in amounts up to $25,000.[23]

Enforcement contends that notwithstanding these dollar thresholds, bank policy only permitted the application of a credit memo when an actual deposit was "in hand."[24] Biney's branch manager explained that a credit memo is proper when "you have an offsetting item that you're depositing into a customer's account, and the funds will not be immediately available, so we have that offsetting item, and we're able to make those funds immediately available for the customer."[25]An internal procedure document explained that a credit memo "[s]hould only be performed after completing a deposit transaction when immediate credit is needed."[26] The procedure document contemplates the presence of an actual deposit before a credit memo is applied, not the promise of a future deposit that Biney relied on.

Yet the evidence does not persuade us that the document was part of any training or guidance provided to Biney, or that he otherwise had reason to be aware that the bank's credit memo policy required the presence of a deposit.[27] According to Biney, his prior manager, T.R., instructed him that "there are situations where a customer would come, they didn't even have the funds, but they're expecting maybe their paycheck coming into the account, and based on the relationship with the bank, we are allowed to do memo credits."[28] Biney's directive from the bank was "to retain business customers, a lot of customers, so we should do whatever I please in our position to help the customer build a relationship with us."[29] Biney observed T.R. process credit memos without cash in hand, and he himself processed similar transactions on past

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[22] CX-3.

[23] CX-3.

[24] Tr. (Millard) 285. Given Biney's authority to approve overdrafts up to $25,000, it is not clear that a credit memo—which creates a temporary account credit for only 24 hours—was necessary to cash the checks. According to Biney, he applied the credit to try to save the customer overdraft fees. Tr. (Biney) 82-83.

[25] Tr. (Anike) 196.

[26] CX-2.

[27] His manager testified that Biney was trained on credit memos, but she explained that her testimony assumed Biney received such training prior to her work at the branch. *See* Tr. (Anike) 200-01. The manager who actually trained Biney did not testify. There was evidence that employees were required to complete periodic compliance training, e.g., Tr. (Anike) 245-48, but there was no evidence of what guidance pertinent to credit memos was included in this training. *See* Tr. (Biney) 49-51.

[28] Tr. (Biney) 55-56.

[29] *Id*. at 57.

occasions, all without question by anyone at the bank.[30] Other witnesses testified consistently that in their own experiences working at the bank the decision of whether to issue a credit memo depended on the bank's relationship with a particular customer and did not necessarily require a deposit in hand.[31] Significantly, the written limits under the bank's policy documents gave Biney authority to approve amounts up to $10,000 in the specific circumstance of a "[m]issing deposit." Both sides agree that this provision governed Biney's authority to approve the credit memos. We conclude that bank policy, as reflected in the language of this provision, authorized Biney's actions. Biney applied a credit memo in anticipation of a "missing deposit." And a deposit that is "missing" cannot be "in hand."[32]

D. Enforcement Investigates the Conduct

After Wells Fargo fired Biney, its affiliate Wells Advisors filed a Form U5[33] with FINRA disclosing his termination.[34] Biney previously submitted an application to FINRA for purposes of associating with Wells Advisors at the time of his application to sit for an industry examination.[35] Thus, Wells Advisors terminated Biney's association despite the fact that Biney

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[30] *Id*. at 58, 69. On cross-examination of his testimony regarding the common use of credit memos, Enforcement confronted Biney with his prior on-the-record ("OTR") testimony. Biney was asked at his OTR: "Were there situations in the past that you created credit memos for clients before a deposit was made into the account?" In response, he testified: "No, I don't know that I can remember, no." *Id*. at 71-72. Biney explained that he understood the question to apply to the particular business customer whose transactions were at issue (and the subject of a series of prior questions), and not to other bank customers. *Id*. at 72-73. Biney testified that he explained at other points during his OTR that he had done similar transactions for other customers. While Enforcement did not return to the subject at the hearing, Biney's OTR is consistent with his testimony. At his OTR he testified that the bank employed credit memos to allow "a customer to have access to funds . . . [t]hat they don't otherwise have in their account," and that he personally "employed a credit memo to allow a customer access to . . . [bank] funds" on multiple occasions. CX-23, at 21-22. We find Biney's hearing testimony on this point—and on all other material points—truthful and credible.

[31] Tr. (McComb) 452; (Aban) 485-86. There was also evidence that the bank's compliance department provided real-world guidance to bank personnel that at times was inconsistent with the bank's written policies. Tr. (Aban) 490-91.

[32] Biney's most recent manager explained a scenario where a deposit might be "missing" in the sense that the deposit was incorrectly credited to the wrong account, and a credit memo to the proper account could provide access to funds still within the control of the bank. Tr. (Anike) 198. But she never explained how a deposit whose location is both known and within the bank's control—even if erroneously deposited to the wrong account—is "missing." The authorization document provides for both a "[m]issing deposit" *and* for "[m]isposted errors." CX-3. By providing for both situations, the authorization's language necessarily contemplates each circumstance. We further note that the substance of the transaction, Biney's approval of payment of a customer cashed check that causes an overdraft in an underfunded account, appears to fall within Biney's $25,000 approval limit to "[a]pprove . . . [o]verdraft decisions." CX-3.

[33] When an associated person leaves a FINRA member firm for any reason, the firm must file a Form U5—a Uniform Termination Notice for Securities Industry Registration—within 30 days.

[34] Tr. (Brown) 330-31.

[35] Tr. (Biney) 128-32.

never actually completed the examination or worked for the firm.[36] This disclosure prompted Enforcement's investigation.[37]

As part of its investigation, Enforcement examined the possibility of coordination or some other connection between Biney and the customer who cashed the check.[38] To that end, on September 22, 2014, Enforcement requested pursuant to FINRA Rule 8210 that Biney produce a number of items, including his personal banking records for a nine-month period.[39] Biney produced all requested items within the two-week timeframe requested by Enforcement.[40]

Enforcement then requested additional materials from Biney, including additional information regarding bank credit memos, Biney's relationship to the customer, information related to whether Biney had any connection or association with other co-conspirators named in the customer's criminal indictment, as well as bank statements going back an additional twelve months.[41] The request required production of all materials within one week.[42] Biney once again promptly responded by producing all materials requested, including a "quite voluminous" amount of bank records.[43]

Shortly thereafter, Enforcement sent Biney a request for his OTR testimony.[44] At that point, Biney retained counsel who interacted with investigators.[45] After two continuances granted at counsel's request, Biney testified on January 14, 2015.[46]

On March 4, 2015, Enforcement requested Biney produce his telephone records for a nine-month period to determine the nature and extent of any communications between Biney and the customer or others named as co-conspirators in the customer's criminal indictment.[47] Enforcement provided two weeks for a response. On the day of the request, Biney's counsel

[36] Tr. (Biney) 178-79.

[37] Tr. (Brown) 332-33.

[38] *Id.* 333-34.

[39] *Id.*

[40] *Id.* at 347-48; CX-15.

[41] Tr. (Brown) 350-51; CX-17.

[42] *Id.* at 351; CX-17.

[43] Tr. (Brown) 352-53; CX-18.

[44] Tr. (Brown) 353; CX-19.

[45] Tr. (Brown) 354.

[46] *Id.* at 354-56.

[47] *Id.* at 359-60.

responded, "there is no way we can meet your artificial deadline of March 13, 2015."[48] Biney made no substantive response by the deadline.[49]

The record reflects no documented explanation or request for extension from Biney or his counsel. Enforcement's investigator testified that "there was a lot of communication between Enforcement and [counsel], both by phone and email"—including an extension of the deadline—but the correspondence was not included in the exhibits presented at the hearing.[50] According to the investigator, Biney's counsel communicated to Enforcement that he needed to meet with Biney and then determine when Biney could provide documents.[51]

On March 20, 2015, Enforcement set a new deadline for production of the records—one week later on March 27. But on March 23, Enforcement sent another letter to Biney's counsel requiring Biney to appear for additional testimony on March 25—just two days after the date of the letter and two days before production was due—to explain his failure to produce the phone records.[52] Neither Biney nor his counsel appeared for the testimony.[53] On March 26, 2015, Biney's counsel transmitted a response to Enforcement's request for production.[54] The response stated objections, and then asserted that Biney possessed no responsive records as he transacted through his phone carrier online and did not retain records, bills or copies of statements.[55] The response gave no indication of what efforts Biney had made, if any, to obtain the records from his carrier.[56]

Biney's counsel and Enforcement staff communicated orally and in writing multiple times in late March. But none of these communications included Biney's counsel expressing that he was making efforts to obtain the records or having difficulty obtaining the records from the

[48] CX-25.

[49] Tr. (Brown) 362-63.

[50] *Id.* at 364-66.

[51] *Id.* at 366

[52] *Id.* at 368-69.

[53] *Id.* at 369-71. The investigator testified that setting testimony two days after the date of the request was an "unusual" investigative practice. *Id*. Enforcement does not allege this failure to appear as a violation of FINRA rules.

[54] Tr. (Brown) 373.

[55] CX-29.

[56] CX-29.

cell phone provider.[57] The investigator did not explain what the communications between Biney's attorney and Enforcement were about, if not Biney's outstanding production.[58]

On March 30, 2015, Enforcement sent Biney's counsel a notice that it would initiate a proceeding to suspend Biney from associating with a FINRA member pursuant to FINRA Rule 9552 for Biney's failure to comply with the request for phone records.[59] Earlier that day, Biney's counsel advised Enforcement that he would be out of the office between April 2 and April 23, 2015.[60] On April 2, 2015, Enforcement sent a notice suspending Biney pursuant to Rule 9552.[61] The notice provided that the suspension would convert into a permanent bar on July 7, 2015.[62] There is no evidence that Biney made efforts through counsel to obtain or produce the records following his initial production.[63]

On July 7, 2015, Biney's counsel submitted a request to terminate the suspension and attached phone records responsive to Enforcement's request.[64] After Enforcement advised that the records were incomplete, Biney's counsel explained that he was still awaiting additional records from the carrier.[65] By July 28, 2015, Biney through his counsel produced all records requested by Enforcement.[66] Enforcement terminated Biney's suspension on August 3, 2015.[67]

After receiving the records, Enforcement analyzed the materials to identify contacts or connections between Biney and the customer or his indicted co-conspirators.[68] The records

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[57] Tr. (Brown) 405-07, 412-13.

[58] The investigator admitted she did not participate in a number of phone calls between counsel. Tr. (Brown) 405-07, 412-13. Biney's counsel's questions during his cross-examination of the investigator strongly implied that the delay stemmed from difficulty in obtaining records from the cellular provider. While Biney presented no evidence of such difficulty—or the substance of the parties' communications that might reflect discussions of such issues—production problems or conversations between counsel that may be within the particular knowledge of Biney's trial counsel would present obstacles to the presentation of evidence. *See* OHO Order 13-04 (2009019042402) (June 3, 2013) at 3, http://www.finra.org/sites/default/files/OHODecision/p296314_0_0_0.pdf ("An attorney who is likely to be a witness at a trial is generally prohibited from acting as an advocate at the trial.") (citing ABA Model Rule of Professional Conduct 3.7).

[59] CX-30.

[60] CX-30.

[61] CX-31.

[62] CX-31.

[63] Tr. (Brown) 379-80.

[64] CX-33.

[65] Tr. (Brown) 384-86.

[66] *Id*. at 386-88.

[67] CX-37.

[68] Tr. (Brown) 388-89.

revealed no connections whatsoever.[69] Enforcement ultimately identified no basis to conclude that Biney collaborated or conspired with the customer.[70] Wells Fargo's internal investigation reached the same conclusion.[71]

III. Conclusions of Law

A. Biney Was Subject to FINRA's Jurisdiction

Biney never worked in any capacity for any FINRA member firm. But when he applied for an industry examination in anticipation of future work with Wells Advisors, he prepared and signed a Uniform Application for Securities Industry Registration (Form U4). In that application, he agreed to submit himself to FINRA's jurisdiction and abide by its requirements.[72] Though he did not successfully complete the industry examination, he remained associated with Wells Advisors and bound by his obligations under FINRA rules.[73] His association did not end until his termination from Wells Advisors. Because Biney's actions giving rise to this matter occurred while he was associated and within two years after his association ended, FINRA properly exercised jurisdiction over his conduct.[74]

B. Biney Did Not Violate FINRA Rule 2010 by Approving the Credit Memos

FINRA Rule 2010—sometimes referred to as the "J&E rule"— requires that the business-related conduct of FINRA members and their associated persons comport with "high standards of commercial honor and just and equitable principles of trade."[75] It mandates that

[69] *Id*. at 389-90.

[70] *Id*. at 441.

[71] Tr. (Millard) 302-03.

[72] *See* NASD Notice to Members 99-95 (Nov. 1999), http://www.finra.org/industry/notices/99-95 ("[A]ny person who signs and submits a Form U-4 is an associated person.").

[73] *See Howard Brett Berger*, Exchange Act Release No. 55706, 2007 SEC LEXIS 895, at *17 (May 4, 2007), *remanded*, No. 07-2692 (2d Cir. Sept. 13, 2007) (remand order), *supplemental decision issued*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141 (Nov. 14, 2008), *petition for review denied*, 347 F. App'x 692 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2380 (2010); Article I(rr) of FINRA's By-Laws (stating that a natural person who has applied for registration meets the definition of "associated person" under the By-Laws).

[74] *See* Article V, Section 4(a)(iii) of FINRA's By-Laws (FINRA retains jurisdiction over a formerly registered person for "two years after the date upon which such person ceased to be associated with the member.").

[75] *Dep't of Enforcement v. Ortiz*, No. E0220030425-01, 2007 FINRA Discip. LEXIS 3, at *15 n.14 (NAC Oct. 10, 2007), *aff'd*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401 (Aug. 22, 2008).

securities industry participants not only conform to legal and regulatory requirements, but also conduct themselves in the course of their business with integrity, fairness, and honesty.[76]

Misconduct need not involve securities or even the securities industry to be actionable under the J&E rule.[77] The rule's intentionally broad scope is calculated to remediate "methods of doing business which, while technically outside the area of definite illegality, are nevertheless unfair both to customer and to decent competitor, and are seriously damaging to the mechanism of the free and open market."[78]

Because industry participation carries an expectation of regulatory compliance, any conduct that runs afoul of FINRA or SEC rules necessarily violates the J&E rule.[79] Even lawful practices breach the J&E rule where surrounding facts and circumstances reveal that an associated person acted in "bad faith" or "unethically."[80] Although proof of scienter is not required, the concept of "bad faith" in this context requires a showing of "dishonesty of belief or purpose."[81]

Here, Biney did not act in bad faith. We cannot conclude that Biney acted with "dishonesty of belief or purpose" by approving two cashed checks for the customer. There is no evidence that he knowingly disregarded any bank policy. Nor is there proof Biney intended to obtain any unfair advantage over the customer or his employer by his actions. He acted for the sole purpose of legitimately furthering Wells Fargo's business by promoting customer goodwill through an accommodation to a business customer based upon his judgment as a supervisory employee.

Enforcement asserts that irrespective of bad faith, Biney acted unethically in "facilitating conversion"[82] by the bank customer. It contends "Biney engaged in unethical misconduct . . . when he falsified and processed two credit memos without deposits on hand, in derogation of the

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[76] *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558, *22 n.20 (Feb. 13, 2015), available at https://www.sec.gov/litigation/opinions/2015/34-74269.pdf ("[T]his general ethical standard . . . is broader and provides more flexibility than prescriptive regulations and legal requirements. [The Rule] protects investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market, even though those practices may not be illegal or violate a specific rule or regulation.").

[77] *Dep't of Enforcement v. Wiley*, No. 2011028061001, 2015 FINRA Discip. LEXIS 21, at *20-21 (NAC Feb. 27, 2015) (collecting additional cases), *aff'd*, Exchange Act Release No. 76558, 2015 SEC LEXIS 4952 (Dec. 4, 2015).

[78] *Thomas W. Heath III*, 586 F.3d 122, 132 (2d Cir. 2009).

[79] *Shvarts*, 2000 NASD Discip. LEXIS 6, at *12-13.

[80] *Calvin David Fox*, Exchange Act Release No. 48731, 2003 SEC LEXIS 2603, at *8 (Oct. 31, 2003).

[81] *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 SEC LEXIS 3583, at *33 (Nov. 15, 2013).

[82] "Conversion generally is an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it." FINRA Sanction Guidelines at 36 n.2 (2015), http://www.finra.org/Industry/Sanction-Guidelines. We conclude that Biney was authorized to permit the customer to cash the check, notwithstanding the resulting overdraft, by virtue of the authority the bank provided him.

authority the Bank gave him, thereby enabling [the customer] to convert thousands of dollars from the Bank."[83]

To be sure, an associated person who provides falsified documents to an employer engages in unethical conduct that violates the J&E Rule.[84] But we disagree that Biney "falsified" credit memo notations. According to Enforcement, when Biney processed a credit memo and entered as justification for the credit "pending deposit," this really meant, "the deposit was in hand and . . . pending being pushed onto the account and that it was right there."[85] But this is less interpretation than a wholesale recasting of Biney's words. The most reasonable construction of Biney's phrase "pending deposit," is a deposit not yet made.[86] Applying this construction, we conclude that Biney's notation was accurate.

Enforcement similarly contends that when Biney made the notation "incoming wire" as justification for the second credit memo, he really meant "[t]hat there is a wire that has already been sent and it is pending deposit right there and you have already proven evidence that the wire has been sent and it is en route."[87] But again, Enforcement mischaracterizes Biney's notation. An "incoming wire" is a wire that is about to come in.[88] No evidence suggests the notation was inconsistent with Biney's belief at the time he created the document. Biney did not falsify the credit memos.

The question then is whether Biney's approval of the two cashed checks was otherwise unethical. "Unethical conduct is defined as conduct that is not in conformity with moral norms or standards of professional conduct."[89] Enforcement claims that Biney's application of a credit memo without a deposit on hand was an ethical breach contrary to his authority and inconsistent "with the bank's specific policies, . . . common banking practices," as well as professional norms

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[83] Enforcement's Post-Hearing Submission, p. 11.

[84] *See, e.g.*, *Dep't of Enforcement v. Mielke*, No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *40 (NAC July 18, 2014), *aff'd*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927 (Sept. 24, 2015), *appeal dismissed*, No. 15-15199-EE (11th Cir. May 19, 2016) (misstatements on firm's compliance questionnaires violated predecessor to Rule 2010); *Dep't of Enforcement v. Butler*, No. 2012032950101, 2015 FINRA Discip. LEXIS 35, at *26 (NAC Sept. 25, 2015), *aff'd*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989 (June 2, 2016) (affirming finding that respondent violated the J&E rule by making a false statement on an annuity beneficiary change form).

[85] Enforcement's Post-Hearing Submission, p. 14, citing Tr. (Millard) 284-86.

[86] Tr. (Biney) 86-87; *see* Merriam-Webster.com (defining "pending" as "while awaiting"), http://www.merriam-webster.com/dictionary/pending (accessed Aug. 31, 2016).

[87] Enforcement's Post-Hearing Submission, p. 14, citing Tr. (Millard) 284-86.

[88] Tr. (Biney) 98-99; *see* Merriam-Webster.com (defining "incoming" as "coming in; arriving"), http://www.merriam-webster.com/dictionary/incoming (accessed Aug. 31, 2016).

[89] *Brokaw*, 2013 SEC LEXIS 3583, at *33 (quotation omitted).

in the industry.[90] But the actual evidence presented at the hearing of "common banking practices" or "professional norms" was insubstantial.[91]

Regarding the bank's policies, there was no proof that Biney's conduct violated any code of ethics or conduct formally implemented at Wells Fargo.[92] Enforcement presented the internal procedures document that explained credit memos "[s]hould only be performed after completing a deposit transaction."[93] But there was scant evidence as to how—or whether—the company disseminated this policy to Biney or other employees. Biney credibly testified he never saw the procedures document regarding "credit memo posts" prior to the investigation.[94] Biney's description of how the training he personally received differed from the procedures document was consistent with testimony from other bank employees explaining credit memo practices actually employed at the bank. This evidence of training and practices supported the propriety of Biney actions.

Although Biney did not follow the procedures document—and his failure to do so resulted in his termination—this does not necessarily render his conduct unethical. A respondent's "violation of his Firm's policies and procedures is not automatically a violation of the ethical conduct Rule."[95] Rather, consideration of whether Biney comported with ethical norms should focus on "fundamental principles of agency law"[96] and "whether the conduct implicates a generally recognized duty to clients or the firm."[97] From this perspective, absent a persuasive showing that he had notice of the procedures, Biney did not act unethically by failing to follow those procedures, particularly where another bank policy document permitted Biney to approve a credit memo when presented with a "missing deposit." Longstanding agency principles provide that absent such notice, an agent may act on what he reasonably believes to be

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[90] Enforcement's Post-Hearing Submission, p. 13-14.

[91] *See* Enforcement's Post-Hearing Submission, p. 13-14 (citing the testimony of Biney's manager that she was "shocked" that he issued the credit memos as proof that he breached industry norms and common banking practices). Where, as here, the J&E rule is applied to enforce norms of a profession outside the securities industry, proof of the nature of the claimed standards or norms should be concrete. *See Thomas W. Heath III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *35 (Jan. 9, 2009), *aff'd*, 586 F.3d 122 (2d Cir. 2009) (In light of due process concerns regarding fair notice, "courts have evaluated the conduct at issue against the professional 'norms' of the vocation or profession '*as embodied in codes of professional conduct.*'" (emphasis supplied) (quoting *In re Snyder*, 472 U.S. 634, 645 (1985))).

[92] Enforcement presented no evidence of the substance of Wells Fargo's Code of Conduct.

[93] CX-2.

[94] Tr. (Biney) 52-59.

[95] *Dep't of Mkt. Regulation v. Dotson*, No. 20090208031-02, 2015 FINRA Discip. LEXIS 47, at *26 (OHO Aug. 7, 2015).

[96] *Louis Feldman*, 52 S.E.C. 19, 22 (1994) (J&E rule violated by conduct inconsistent with "fundamental principles of agency law").

[97] *Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54, at *19 (Jan. 6, 2012).

his authorization from his principal.[98] Biney did no more by approving the cashed checks; his conduct was not unethical.

Because Biney's conduct was neither unethical nor in bad faith, he did not violate the J&E rule. Thus, we dismiss the first claim.

C. Biney Violated FINRA Rule 8210 by Not Timely Producing Phone Records

FINRA Rule 8210 requires an associated person provide information orally or in writing with respect to any matter involved in a FINRA investigation, complaint, examination, or proceeding. "FINRA Rule 8210 is unequivocal and grants FINRA broad authority to obtain information concerning an associated person's securities-related business ventures."[99] Moreover, "[a]ssociated persons therefore must cooperate fully in providing FINRA with information and may not take it upon themselves to determine whether the information FINRA has requested is material."[100]

Delay or neglect on the part of members and their associated persons in responding to Rule 8210 requests for information and documents undermines FINRA's ability to conduct investigations and thereby protect the public interest.[101] "If there is a problem meeting any deadlines set by FINRA, applicants should raise and resolve such problem with FINRA staff in a cooperative and prompt manner."[102]

Here, although Biney made timely and comprehensive responses to Enforcement's initial requests, he did not timely respond to Enforcement's request for his telephone records, and he did not provide an adequate response or explanation as to why he was unable to comply with the request. Although Biney ultimately produced all records requested, he failed to do so in a timely manner and without excuse for his delay.

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[98] Restatement (Second) of Agency § 44 ("If an authorization is ambiguous because of facts of which the agent has no notice, he has authority to act in accordance with what he reasonably believes to be the intent of the principal although this is contrary to the principal's intent."); *see Dist. Bus. Conduct Comm. v. Heller*, No. TEX-757, 1991 NASD Discip. LEXIS 30, at *10-11 (Bd. of Governors Mar. 11, 1991) (broker did not violate J&E Rule by opening an account at another brokerage without notification to his firm despite firm policy requiring such disclosure where broker did not receive a copy of the firm's compliance alert and "[t]he evidence does not support a finding that [respondent] had knowledge of the firm's policy in this regard.").

[99] *Dep't of Enforcement v. Gallagher*, No. 2008011701203, 2012 FINRA Discip. LEXIS 61, at *12 (NAC Dec. 12, 2012).

[100] *Id.* at *13 (citing *CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21 (Jan. 30, 2009)).

[101] *See, e.g.*, *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *12-13 (Apr. 11, 2008), *petition for review denied*, 566 F.3d 1172 (D.C. Cir. 2009).

[102] *Dep't of Mkt. Regulation v. Lane*, No. 20070082049, 2013 FINRA Discip. LEXIS 34, at *69 (NAC Dec. 26, 2013), *aff'd*, 2015 SEC LEXIS 558.

Biney's contention that he had difficulty obtaining the documents from his phone provider—and thus the documents were not within his custody or control—is unsupported by evidence. And there is no evidence Biney communicated any claimed difficulties in obtaining documents to Enforcement while it awaited his response. Biney did not act to produce records until after being subject to suspension pursuant to Rule 9552, delaying his response by months. His failure to timely produce records violated Rule 8210.[103] The eventual termination of Biney's Rule 9552 suspension once he did produce his phone records does not cure or otherwise undermine the fact of his violation.[104] A violation of Rule 8210 also constitutes a violation of Rule 2010.[105]

IV. Sanctions

Biney did not produce his phone records in a timely fashion and thereby violated Rule 8210. FINRA must rely upon this provision "to police the activities of its members and associated persons" because it lacks subpoena power.[106] "[A member's] failure to respond to [FINRA's] information requests frustrates [FINRA's] ability to detect misconduct, and such inability in turn threatens investors and markets."[107] Accordingly, we will impose an appropriate sanction.

FINRA's Sanction Guidelines ("Guidelines") recommend that we should consider a suspension in all capacities for up to two years and a fine between $2,500 and $37,000 for failure to respond in a timely manner to requests for information.[108] Relevant considerations include the importance of the information, the degree of regulatory pressure necessary to obtain a response, and the length of time to respond.[109]

We first observe that Biney made prompt productions in response to each of Enforcement's initial requests for documents without requesting any accommodation or

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[103] *See North Woodward Fin. Corp.*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, at *21 (May 8, 2015), *aff'd sub nom. Troszak v. SEC*, No. 15-3729 (6th Cir. June 29, 2016) ("If such a person cannot readily provide the information sought by FINRA, such a person has an obligation to explain, as completely as possible, his efforts, and his inability to do so."), quoting *CMG Inst. Trading*, 2009 SEC LEXIS 215, at *22-23 (rejecting claim that associated person fully responded to Rule 8210 request for his firm's foreign exchange dealer account statements where he "merely stated" that he could not access the online account and did not explain his efforts to obtain the requested information or why, as an account holder, he did not possess hard copies of the statements).

[104] *Dep't of Enforcement v. Evansen*, No. 2010023724601, 2014 FINRA Discip. LEXIS 10, at *13-16 (NAC June 3, 2014), *aff'd*, Exchange Act Release No. 75531, 15 SEC LEXIS 3080 (July 27, 2015) (Rule 9552 suspension does not preclude subsequent finding of Rule 8210 violation).

[105] *See CMG Inst. Trading*, 2009 SEC LEXIS 215, at *30.

[106] *Joseph Patrick Hannan*, Exchange Act Release No. 40438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998).

[107] *PAZ Sec.*, 2008 SEC LEXIS 820, at *13.

[108] Guidelines at 33.

[109] *Id*.

extension, including productions of "voluminous" bank records.[110] Document production delays did not occur until Biney retained counsel. And once Biney retained counsel, there were clearly discussions between counsel and Enforcement—including an extension of deadlines—not evidenced in the documentary record.[111] Even though Biney "always retained the responsibility to comply with FINRA staff's requests . . . [he] was entitled to delegate to his attorneys the task of communicating with FINRA . . . provided that he diligently monitored his attorneys' performance."[112] We consider Biney's decision to proceed through counsel reasonable based upon the totality of the circumstances here,[113] and that delays in production after Biney retained counsel were not the result of any intention on his part to hinder or frustrate the investigation.[114]

These factors, along with the fact that Biney's failure to produce phone records was an isolated occurrence after several previous timely and comprehensive productions, favor some leniency.[115] Nevertheless, the Panel concludes that Biney's violation was serious. The information regarding Biney's phone contacts was potentially significant in that it may have shown collusion or collaboration with the bank customer.[116] Thus, in light of the importance of the requested materials, Biney's months-long delay in producing the records, and the fact that the staff was ultimately required to initiate a Rule 9552 proceeding to obtain compliance, a meaningful sanction is appropriate.[117]

Given the particular facts and circumstances of this case, we find that Biney's untimely response to the staff's request for phone records warrants a six-month suspension in all capacities and a $2,500 fine. The sanction we impose is appropriately remedial under the circumstances, reflects the substantial nature of the violation and that the misconduct frustrated FINRA's ability

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[110] Tr. (Brown) 352-53; CX-18.

[111] *Id*. at 364-66.

[112] *Dep't of Enforcement v. Walblay*, No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at *24 (NAC Feb. 25, 2014). As a person who never worked in any capacity for a FINRA member firm, and therefore less familiar with pertinent expectations than the typical associated person, Biney was not well positioned to second guess his counsel's response to the request.

[113] *See* Guidelines at 6 (Principal Considerations in Determining Sanctions, No. 7) (directing adjudicators to consider whether the respondent "demonstrated reasonable reliance on competent legal or accounting advice").

[114] *See* Guidelines at 7 (Principal Considerations in Determining Sanctions, Nos. 12, 13) (directing adjudicators to consider whether the respondent "attempted to delay FINRA's investigation [or] conceal information from FINRA" and whether the respondent's misconduct "was the result of an intentional act, recklessness or negligence").

[115] *See* Guidelines at 6, 7 (Principal Considerations in Determining Sanctions, Nos. 8, 18) (directing adjudicators to consider whether the respondent "engaged in a numerous acts and/or a pattern of misconduct" and "the number, size and character of the transactions at issue").

[116] Such collusion or collaboration, if proven, could well have materially affected our consideration of the first cause of action.

[117] *See Dep't of Enforcement v. King*, No. 2007010236401, 2009 FINRA Discip. LEXIS 11, at *11 (OHO Apr. 27, 2009) ("Staff should not have to bring a disciplinary proceeding to obtain responses to its requests for information.").

to carry out its self-regulatory functions, including its ability to protect investors. Moreover, the sanction will discourage others from engaging in similar misconduct.

V. Order

For his failure to timely comply with a request for documents pursuant to FINRA Rule 8210, we order that Respondent Modesto Biney be suspended for six months in all capacities and fined $2,500. Biney is also ordered to pay costs in the amount of $5,162.32, which includes a $750 administrative fee and the cost of the hearing transcript.

If this decision becomes FINRA's final disciplinary action, Biney's suspension shall commence at the opening of business on November 7, 2016. The fine and costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.[118]

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David Williams
Hearing Officer
For the Hearing Panel

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[118] The Hearing Panel considered and rejected without discussion all other arguments of the parties.