

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

NICHOLAS P. VARGAS
(CRD No. 4317358),

Respondent.

Disciplinary Proceeding
No. 2012034946901

Hearing Officer—Andrew H. Perkins

DEFAULT DECISION

June 9, 2015

Respondent is barred from associating with any FINRA member firm in any capacity for (i) conversion, in violation of FINRA Rule 2010, and (ii) failing to respond completely to requests for information and documents, in violation of FINRA Rules 8210 and 2010.

Appearances

John S. Han, Esq., for the Department of Enforcement.

No appearance by or for Nicholas P. Vargas.

DECISION

Respondent Nicholas P. Vargas was a broker with Charles Schwab & Co., Inc. While associated with Schwab, Vargas engaged in a “check-kiting” scheme whereby he converted funds from the Firm’s bank affiliate. Check-kiting is a crime involving an account holder (i) writing a check on an account (Account A) knowing that there are insufficient funds available to cover the check amount, (ii) depositing the check in a second account (Account B), and then (iii) withdrawing the funds from Account B before the bank has time to clear the check written on Account A.

Schwab terminated Vargas after the firm began an internal review of Vargas’s activities in his personal bank accounts. Schwab filed a Uniform Termination Notice for Securities Industry Registration (Form U5) with FINRA’s Central Registration Depository (“CRD”), disclosing the reason the firm terminated him.

Upon receipt of the Form U5 Schwab filed on Vargas’s behalf, FINRA began an investigation into Vargas’s suspected check-kiting. During FINRA’s investigation, FINRA staff

sent Vargas a series of information and document requests. Vargas complied with all but the last two requests.

The Department of Enforcement initiated this disciplinary proceeding by filing a Complaint with the Office of Hearing Officers. The Complaint alleges that Vargas violated FINRA Rule 2010 by converting funds from his firm's affiliate bank through a check-kiting scheme, and FINRA Rules 8210 and 2010 by failing to respond to the two written requests for additional information and documents requested by FINRA staff. Vargas did not file an Answer or otherwise respond to the Complaint.

On February 20, 2015, the Department of Enforcement filed a Motion for Entry of Default Decision. The motion is supported by a declaration and ten exhibits.¹ Vargas did not respond to the motion. Thus, I grant the Department of Enforcement's motion and deem the facts alleged in the attached Complaint admitted pursuant to FINRA Rules 9215(f) and 9269(a).

I. Findings of Fact and Conclusions of Law

A. Background

Vargas was most recently registered with FINRA through Schwab as a General Securities Representative from May 2001 until November 30, 2012.² Vargas is not currently registered with FINRA or associated with a FINRA member firm.

B. Jurisdiction

FINRA has jurisdiction over Vargas pursuant to Article V, Section 4(a) of FINRA's By-Laws. Enforcement filed the Complaint within two years after the effective date of termination of his FINRA registration, and the Complaint charges him with misconduct while he was subject to FINRA's jurisdiction.

C. Vargas Defaulted by Failing to Answer the Complaint

Enforcement served Vargas with the Complaint, First Notice of Complaint, and Second Notice of Complaint in accordance with FINRA Rules 9131 and 9134. Enforcement served the Complaint and First Notice of Complaint on November 18, 2014, and the Complaint and Second Notice of Complaint on December 17, 2014.³ In each case, Enforcement served Vargas by first-

¹ Citations to Enforcement's exhibits are noted as "CX-___."

² CX-1, at 2.

³ Decl. ¶¶ 9, 13.

class certified mail addressed to his last known residential address recorded in CRD.⁴ Thus, Vargas received valid constructive notice of this proceeding.⁵

Pursuant to Rule 9215, Vargas's Answer was due on or before January 5, 2015. Vargas did not respond to the Complaint and Second Notice of Complaint. Thus, Vargas is in default.⁶

D. Vargas Engaged in Check-Kiting

From July 2012 through October 31, 2012, Vargas converted funds from Schwab's affiliate bank by means of a check-kiting scheme using three bank accounts at Schwab's affiliate bank.⁷ On numerous occasions, Vargas issued a check drawn on one account (the issuing account) and deposited it into one of the other two accounts (the receiving account). At the time Vargas issued each check, he knew that the issuing account held insufficient funds to honor the check.

Vargas artificially inflated the balance in the receiving account by making withdrawals when there were insufficient funds in the issuing account. Each deposit was credited immediately to the receiving account, while the funds were not immediately withdrawn from the issuing account. Vargas then withdrew funds from the receiving account for his personal use. By continuing to deposit checks drawn on an account with insufficient available funds and then withdrawing funds in the receiving account, Vargas converted approximately \$49,390 from Schwab's bank affiliate, in violation of FINRA Rule 2010.

FINRA Rule 2010 requires FINRA members to observe high standards of commercial honor and just and equitable principles of trade in connection with the conduct of their business. FINRA Rule 0140 applies this requirement to associated persons such as Vargas. FINRA Rule 2010 "states a broad ethical principle" and is violated when a respondent engages in unethical conduct.⁸ "FINRA's authority to pursue disciplinary action for violations of FINRA Rule 2010 encompasses unethical business-related misconduct, regardless of whether the misconduct involves a security."⁹

⁴ *Id.* The Department of Enforcement does not have knowledge of Vargas's current residential address. Decl. ¶ 17.

⁵ See, e.g., *Dep't of Enforcement v. Evansen*, No. 2010023724601, 2014 FINRA Discip. LEXIS 10, at *20-21 n.21 (NAC June 3, 2014), *appeal docketed*, SEC Admin. Proc. No. 3-15964 (July 3, 2014).

⁶ Vargas is notified that he may move to set aside the default pursuant to FINRA Rule 9269(c) upon a showing of good cause.

⁷ Mot. at 3.

⁸ *Heath v. SEC*, 586 F.3d 122, 132 (2d Cir. 2009) (citing *Benjamin Werner*, 44 S.E.C. 622 (1971)). See *Dep't of Enforcement v. Taylor*, No. C8A050027, 2007 NASD Discip. LEXIS 11, at *22 (NAC Feb. 27, 2007); *Dep't of Enforcement v. Davenport*, No. C05010017, 2003 NASD Discip. LEXIS 4, at *8 (NAC May 7, 2003).

⁹ *Dep't of Enforcement v. West*, No. 2009018076101, 2014 FINRA Discip. LEXIS 1, at *21 (NAC Feb. 20, 2014).

E. Vargas Failed to Respond to Requests for Information

Between December 2012 and June 2013, FINRA staff sent various Rule 8210 requests to Vargas, seeking information and documents concerning his check-kiting scheme. Vargas responded to these requests.

On January 27, 2014, pursuant to FINRA Rule 8210, FINRA staff sent another request for information and documents to Vargas at his CRD address by first-class and certified mail. This request sought information and documents that FINRA staff had not requested previously, including (i) account statements for a credit card that received payments from the check-kiting scheme, (ii) the identity of the persons who appeared to be joint owners on the bank accounts, and (iii) copies of all the checks used in the scheme. Vargas was required to provide the information and documents by February 10, 2014. However, he did not respond in any fashion.

On February 13, 2014, FINRA staff made another attempt to obtain the information and documents specified in the letter dated January 27, 2014, as well as information and supporting documentation concerning the source of funds he used to repay the Schwab bank affiliate. FINRA staff sent the request letter pursuant to FINRA Rule 8210 to Vargas at his CRD address by first class and certified mail. The letter required Vargas to respond no later than February 20, 2014.

Vargas never provided the information and documents described in the Rule 8210 request letters dated January 27 and February 13. Thus, Vargas violated FINRA Rules 8210 and 2010.

II. Sanctions

A. Conversion

Vargas intentionally engaged in a check-kiting scheme by which he converted \$49,390 from Schwab's bank affiliate. FINRA's Sanction Guidelines ("Guidelines") for conversion of funds instruct that a bar is the standard sanction.¹⁰ This case presents no mitigating factors that warrant consideration of a lesser sanction.

B. Failure to Respond to Information Requests

FINRA's Guidelines recommend that, if an individual did not respond in any manner, a bar in all capacities should be standard.¹¹ The Guidelines further provide that, where an individual provided a partial but incomplete response, a bar is standard unless the person can demonstrate that the information provided substantially complied with all aspects of the request.¹² Additionally, the Guidelines contain certain principal considerations in determining

¹⁰ FINRA Sanction Guidelines at 36 (2015), www.finra.org/Industry/Sanction-Guidelines.

¹¹ Guidelines at 33.

¹² *Id.*

sanctions for a partial but incomplete response: (1) the importance of the information requested but not provided (as viewed from FINRA's perspective), and whether the information provided was relevant and responsive to the request; (2) the number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response; and (3) whether the respondent thoroughly explained valid reasons(s) for deficiencies in the response.¹³

Here, Vargas responded to FINRA staff's initial requests for information. Thus, I applied the Guidelines for a partial, rather than complete, failure to respond.¹⁴ The evidence reflects a number of aggravating factors.

First, Vargas failed to substantially comply with FINRA's information requests. The last two requests asked Vargas to provide information and documents that it had not requested in the earlier Rule 8210 requests. This additional information was material to the staff's investigation of Vargas's check-kiting scheme.

Second, the conduct under investigation was serious. Check-kiting is a fraudulent criminal scheme.

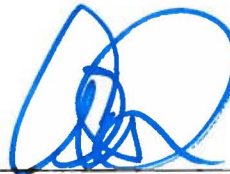
Third, Vargas failed to respond in any manner to the last two Rule 8210 requests. The evidence shows no reason for his failure to respond.

In summary, Vargas failed to respond completely to Enforcement's information requests. There are no mitigating factors present in this case. Thus, I conclude that the appropriate sanction is a bar in all capacities.

III. Order

Nicholas P. Vargas is barred from associating with any FINRA member firm in any capacity for conversion, in violation of FINRA Rule 2010, and failing to respond completely to Rule 8210 requests for documents and information, in violation of FINRA Rules 8210 and 2010.

The bars shall become effective immediately if this Default Decision becomes FINRA's final disciplinary action.



Andrew H. Perkins
Hearing Officer

¹³ *Id.*

¹⁴ See *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *55-56 (June 14, 2013) (citing *Kent M. Houston*, Exchange Act Release No. 66014, 2011 SEC LEXIS 4491, at *25 & *27 (Dec. 20, 2011)).

Copies to:

Nicholas P. Vargas (*via first-class mail*)

John S. Han, Esq. (*via email and first-class mail*)

Jeffrey D. Pariser, Esq. (*via email*)

ORIGINAL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

v.

Nicholas P. Vargas (CRD No. 4317358),

Respondent.

DISCIPLINARY PROCEEDING

No. 2012034946901



COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Respondent Nicholas P. Vargas converted funds from his firm's bank affiliate. He also failed to provide information requested by FINRA staff pursuant to FINRA Rule 8210 in connection with its investigation of that misconduct.

RESPONDENT AND JURISDICTION

2. Vargas entered the securities industry in November 2000, when he became associated with FINRA member Charles Schwab & Co., Inc. (the Firm).
3. From on or about May 21, 2001, through on or about November 30, 2012, Vargas was registered at the Firm as a General Securities Representative. He has not since become associated with or registered at any other FINRA member.

4. Although Vargas is no longer registered or associated with a FINRA member, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because:
 - a. the Complaint was filed within two years after the effective date of termination of Vargas' registration with the Firm, namely, November 30, 2012; and
 - b. the Complaint charges him with misconduct committed while he was registered or associated with a FINRA member and with failing to respond to FINRA requests for information during the two-year period after the date upon which he ceased to be registered or associated with a FINRA member.

FIRST CAUSE OF ACTION
Conversion (FINRA Rule 2010)

5. **The Department re-alleges and incorporates by reference paragraphs 1 through 4, above.**
6. From on or about July 1, 2012, through on or about October 31, 2012, Vargas engaged in a pattern of conduct to obtain funds from the Firm's bank affiliate without authorization.
7. Vargas controlled three bank accounts at the bank affiliate. On numerous occasions, Vargas issued a check drawn on one account (the issuing account) and deposited it into one of the other two accounts (the receiving account). At the time he issued each such check, Vargas knew that the issuing account held insufficient funds to honor the check.
8. Although the values of the checks were immediately credited to the receiving account upon deposit, they were not debited from the issuing account for a period of days.

9. Vargas' scheme resulted in artificially inflated balances in the three accounts. He chose to take advantage of these artificially inflated balances by withdrawing money from automated teller machines, using debit cards for point-of-sale purchases and electronically transferring funds to various vendors.
10. Vargas never deposited sufficient funds into the accounts to cover the checks and withdrawals.
11. Vargas thereby converted approximately \$49,390.00 from the Firm's bank affiliate, in violation of FINRA Rule 2010.

SECOND CAUSE OF ACTION
Failure to Provide Information (FINRA Rules 8210 and 2010)

12. The Department re-alleges and incorporates by reference paragraphs 1 through 10, above.
13. Between December 2012 and June 2013, FINRA staff sent various requests to Vargas, pursuant to FINRA Rule 8210, for information and documents in connection with FINRA's investigation of the misconduct described in paragraphs 6 through 10, above. All such requests were sent to Vargas' residential address as listed in the Central Registration Depository (CRD address). Vargas provided responses to each of these requests.
14. On or about January 27, 2014, FINRA staff sent a letter to Vargas, pursuant to FINRA Rule 8210, again in connection with its investigation of the misconduct described in paragraphs 6 through 10 (the First Request). The First Request asked for information and documents not previously requested by FINRA, to wit:

- a. statements pertaining to a credit card account that received payments from the bank accounts described in paragraphs 6 through 10;
 - b. information about individuals who appeared to be joint owners of the bank accounts; and
 - c. copies of all checks, front and back, drawn from the bank accounts during the relevant period.¹
15. The First Request was sent by first class and certified mail to the CRD address and included a due date of February 10, 2014.
 16. The first class mailing of the First Request was not returned.
 17. The certified mailing of the First Request was returned to FINRA by the U.S. Postal Service, marked, "UNCLAIMED."
 18. Vargas never provided the information and documents described in the First Request.
 19. On or about February 13, 2014, FINRA staff sent a second letter to Vargas, pursuant to FINRA Rule 8210 (the Second Request). In addition to the items described in the First Request, the Second Request also asked him to provide information and supporting documentation concerning the source of funds he had used to repay the bank affiliate.
 20. The Second Request was sent by first class and certified mail to the CRD address and included a due date of February 20, 2014.
 21. The first class mailing of the Second Request was not returned.
 22. The certified mailing of the Second Request was returned to FINRA by the U.S. Postal Service, marked, "UNCLAIMED."

¹ FINRA staff ultimately obtained some, though not all, of the requested checks from another source.

23. Vargas never provided the information and documents described in the Second Request.
24. At all relevant times herein, FINRA staff had no knowledge that the CRD address was out of date or inaccurate. Nor was FINRA staff aware of any other more current address for Vargas.
25. Vargas received proper notice of the First Request and the Second Request.
26. By failing to provide information requested by FINRA staff in connection with an investigation, Vargas violated FINRA Rules 8210 and 2010.


RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. make findings of fact and conclusions of law that Vargas committed the violations charged and alleged herein;
- B. order that one or more of the sanctions provided under FINRA Rule 8310(a), including monetary sanctions, be imposed; and
- C. order that Vargas 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: November 18, 2014



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Aimee Williams-Ramey, Regional Chief
Counsel

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