

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Lisa Ann Tomiko Nouchi
Los Angeles, CA,

Respondent.

DECISION

Complaint No. E102004083705

Dated: August 7, 2009

Respondent improperly obtained contingent deferred sales charge waivers for customers selling Class B mutual fund shares by falsely claiming that those customers were disabled, in violation of NASD Rules 3110 and 2110. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Cynthia A. Kittle, Esq., and Soo H. Im, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Gregory J. Sherwin, Esq.

Decision

Pursuant to NASD Rule 9311, Lisa Ann Tomiko Nouchi (“Nouchi”) appeals a February 7, 2008 Hearing Panel decision.¹ In that decision, the Hearing Panel found that Nouchi misrepresented that certain customers of hers were disabled in order to obtain waivers of

¹ Following the consolidation of NASD and the member regulation, enforcement and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new “Consolidated Rulebook” of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. See *FINRA Regulatory Notice 08-57* (Oct. 2008). Because the complaint in this case was filed before December 15, 2008, the procedural rules that apply are the NASD Rule 9000 Series, as it existed on December 14, 2008. The conduct rules that apply are those that existed at the time of the conduct at issue.

contingent deferred sales charges (“CDSCs”) for these customers.² The Hearing Panel found that Nouchi’s misrepresentations caused her firm to maintain inaccurate books and records, in violation of NASD Rule 3110. The Hearing Panel also found that Nouchi’s conduct failed to observe high standards of commercial honor and just and equitable principles of trade, in violation of NASD Rule 2110.³ The Hearing Panel imposed a 90-day suspension and \$10,000 fine upon Nouchi for her violations. Nouchi does not challenge the Hearing Panel’s findings that she violated Rules 3110 and 2110.⁴ Our review therefore focuses on whether the sanctions the Hearing Panel imposed for these violations were appropriate.

After reviewing the record, we affirm both the findings and sanctions the Hearing Panel imposed.

I. Background

Nouchi first became registered with FINRA as a general securities representative in July 1992. During the time relevant to our decision, Nouchi was associated with UBS PaineWebber, Inc. (“UBS”). On May 10, 2004, UBS filed a Uniform Termination for Securities Industry Registration (“Form U5”), stating that Nouchi had been terminated for “miscoding mutual fund order tickets.” Nouchi is currently associated with another FINRA member as a general securities representative.

II. Procedural History

On December 18, 2006, FINRA’s Department of Enforcement (“Enforcement”) filed a one-cause complaint against Nouchi alleging that she falsely represented that 15 customers were disabled in order to obtain CDSC waivers for these customers. The complaint further alleged that she caused her firm’s books and records to contain false and misleading information as a result of her misrepresentations. On January 12, 2007, Nouchi filed an answer to the complaint and requested a hearing.

The Hearing Panel conducted a hearing on October 24, 2007. In a decision issued on February 7, 2008, the Hearing Panel found Nouchi liable for the violations alleged in the complaint. The Hearing Panel imposed a 90-day suspension and \$10,000 fine for her

² A CDSC is “a sales charge that mutual fund companies impose on investors who sell or redeem their Class B or C mutual fund shares within a certain [holding] period after purchase.” *Dep’t of Enforcement v. John C. Correro*, Complaint No. E102004083702, 2008 FINRA Discip. LEXIS 29, at *1 n.1 (FINRA NAC Aug. 12, 2008).

³ A violation of an SEC or FINRA rule also constitutes a violation of Rule 2110. *See Steven J. Gluckman*, 54 S.E.C. 175, 185 (1999).

⁴ NASD Rule 0115 makes all FINRA rules, including Rules 3110 and 2110, applicable to both FINRA members and all persons associated with FINRA members.

misconduct. Nouchi appealed the Hearing Panel's decision, but only requested a review of the sanctions imposed.

III. Facts

The material facts in this case are undisputed. Nouchi admits that from March 14, 2003, through September 15, 2003, she obtained CDSC waivers for 15 non-disabled clients by falsely representing on UBS's electronic order entry system that the clients were disabled. These waivers were associated with 21 mutual fund redemptions and totaled approximately \$4,986.72.

FINRA discovered Nouchi's misconduct following a 2003 examination of UBS. FINRA's 2003 examination showed that there were a significant number of requests for CDSC waivers by UBS brokers claiming to represent disabled clients. As a result, FINRA staff asked UBS to identify brokers who had placed five or more requests for disability waivers during a period from March through December 2003. UBS identified Nouchi and about 40 brokers in response to FINRA's request.

Nouchi participated in an on-the-record interview with FINRA investigators on April 6, 2005. At this interview, Nouchi confirmed that she improperly obtained disability waivers for non-disabled clients in some cases where either the client was upset with the fund's performance or the client needed money and was within 6-12 months of the holding period expiring. Nouchi testified that she learned about the practice of waiving CDSCs based on a client's disability from "talking around the water cooler" with other UBS employees. Nouchi further testified that she was "just thinking about the client" when she sought the CDSC waivers.

IV. Discussion

NASD Rule 2110 requires FINRA members, in conducting their business, to "observe high standards of commercial honor and just and equitable principles of trade." NASD Rule 3110(a) requires FINRA member firms to "make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws," including Exchange Act Rule 17a-3.⁵

The Commission has found that entering inaccurate information in a member firm's books and records violates both Rule 2110's requirement that members observe high standards of commercial honor and just and equitable principles of trade and Rule 3110's requirement to keep accurate books and records. *Fox & Co. Inv., Inc.*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822, at *30-32 (Oct. 28, 2005).

Here, it is undisputed that Nouchi entered inaccurate information into UBS's books and records. Nouchi did this by submitting false information into UBS's electronic order system to

⁵ Exchange Act Rule 17a-3 requires member firms to make and keep "[a] memorandum of each brokerage order, and of any other instruction, given or received from the purchase or sale of securities." 17 C.F.R. §240.17a-3(a)(6)(i).

obtain CDSC disability waivers for customers who were not eligible for such waivers. We previously have concluded that virtually identical conduct violates Rules 3110 and 2110. See *Correro*, 2008 FINRA Discip. LEXIS 29, at *14-17 (finding that another UBS employee who entered false information into the firm's electronic order entry system in order to obtain CDSC disability waivers violated Rules 3110 and 2110). Moreover, Nouchi does not dispute that her actions violated Rules 3110 and 2110. Consequently, we affirm the Hearing Panel's findings that Nouchi violated these rules by falsely obtaining CDSC disability waivers for non-disabled customers.

V. Sanctions

The Hearing Panel fined Nouchi \$10,000 and suspended her for 90 days in all capacities. We have considered the FINRA Sanction Guidelines ("Guidelines")⁶ in determining the appropriate sanction for Nouchi's violations, as well as the potentially mitigating factors raised by Nouchi on appeal. We find that the sanctions imposed by the Hearing Panel for Nouchi's violations are appropriately remedial.

As an initial matter, we conclude that we should apply the Guidelines for falsification of records to determine sanctions for Nouchi's misconduct. Here, Nouchi did not accidentally enter false information into UBS's order entry system. Instead, she deliberately entered the information to allow her clients to avoid CDSC fees. We previously have found that the falsification of records Guidelines are applicable to such deliberate acts involving the false entry of disability waivers, and we apply them here as well.⁷

For falsification of records, the Guidelines recommend the imposition of a fine of \$5,000 to \$100,000 and a suspension in any or all capacities for a period of up to two years when mitigation is present.⁸ The Guidelines recommend a bar in egregious cases.⁹ The Guidelines for falsification of records also provide that in determining the appropriate sanction, adjudicators

⁶ *FINRA Sanction Guidelines* (2007), <http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf> [hereinafter *Guidelines*].

⁷ Compare *Correro*, 2008 FINRA Discip. LEXIS 29, at *17 (applying falsification of records guidelines in case where respondent deliberately entered CDSC disability waivers into his firm's order entry system to benefit his customers), with *Carl Martin Trevisan*, Complaint No. E9B2003026301, 2008 FINRA Discip. LEXIS 12, at *31 n.14 (FINRA NAC Apr. 30, 2008) (concluding that where respondent's actions were negligent, and not intentional, it is more appropriate to determine sanctions using the Guidelines for recordkeeping violations rather than the Guidelines for falsification of records).

⁸ *Guidelines*, at 39 (2007).

⁹ *Id.*

should consider: (1) the nature of the documents forged or falsified, and (2) whether the respondent had a good-faith, but mistaken, belief of express or implied authority.¹⁰

We find the nature of the customer order information that Nouchi falsified to be an aggravating factor in this case. It is essential for registered representatives to provide their firms with accurate information. *See Charles E. Kautz*, 52 S.E.C. 730, 734 (1996) (stating that “[t]he entry of accurate information on official Firm records is a predicate to the NASD’s regulatory oversight of its members [and] [i]t is critical that associated persons, as well as firms, comply with this basic requirement”). By miscoding order tickets, Nouchi deliberately ignored this fundamental responsibility. It also is aggravating that Nouchi had no good faith belief that her falsification of the order tickets was authorized by UBS. Indeed, Nouchi consistently has admitted throughout the proceedings that she knew her conduct was improper, and there is no evidence that she had any belief that she had authority to miscode the order tickets. In addition, we find it aggravating that Nouchi’s misconduct lasted for a period of approximately six months.¹¹

There are, however, several factors that when considered together lead us to conclude that the sanctions for Nouchi’s violations should fall within the lower range of the Guidelines. First, it appears that Nouchi’s violations were motivated in part by her desire to assist her clients, some of whom needed money immediately, but could not redeem the mutual funds at issue without incurring a penalty.¹² Second, Nouchi consistently accepted responsibility for her actions.¹³ Third, we have considered the fact that Nouchi’s 21 violative transactions generated less than \$5,000 in CDSC waivers.¹⁴ Finally, the Hearing Panel found Nouchi’s expression of sincere remorse to be mitigating, and we do not disturb this finding.¹⁵

In its discussion of sanctions, the Hearing Panel also considered the fact that Nouchi fully cooperated with FINRA’s investigation. We note, however, that the Guidelines recognize as generally mitigating a respondent’s *substantial assistance* to FINRA in its investigation of

¹⁰ *Id.*

¹¹ *Id.* at 6-7 (Principal Considerations in Determining Sanctions, No. 9).

¹² *See Correro*, 2008 FINRA Discip. LEXIS 29, at *18 (finding it mitigating that respondent entered false disability waivers to benefit customers, where at least two of the customers had recently lost their employment).

¹³ *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2).

¹⁴ *Id.* at 7. (Principal Considerations in Determining Sanctions, No. 18).

¹⁵ The Hearing Panel evaluated Nouchi’s testimony and found that her expressions of remorse were credible. We find nothing in the record that would lead us to overturn the Hearing Panel’s finding. *See Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *17-18 (Feb. 10, 2004).

misconduct. *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 12) (emphasis added). In this case, Nouchi provided forthcoming testimony as she was obligated to do under FINRA's rules. We do not consider this alone to be a mitigating factor under the Guidelines. See *Philippe N. Keyes*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631, at *23 (Nov. 8, 2006) (emphasizing that a person registered with FINRA agrees to abide by its rules, which are "unequivocal with respect to the obligation to cooperate").

Nouchi argues that it is mitigating that she did not benefit personally from the violations.¹⁶ Nouchi's argument is misplaced. The Guidelines direct adjudicators to consider "[w]hether the respondent's misconduct resulted in the *potential* . . . for monetary gain" in determining sanctions.¹⁷ Nouchi's claim that she did not realize any profit from her misconduct is therefore irrelevant, and we previously have rejected such a claim as a mitigating factor. See *Mark F. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *20 (NASD NAC Dec. 21, 2004) (overturning Hearing Panel's finding that respondent's failure to benefit personally from misconduct was a mitigating factor).¹⁸

Nouchi also asserts that in imposing a 90-day suspension, the Hearing Panel failed to consider the harm that such a suspension will do to her elderly customer base. Nouchi's assertion has no merit. The Commission has previously rejected similar arguments by respondents who cite customer hardship as a reason to find that a sanction was excessive. See *Hans N. Beerbaum*, Exchange Act Rel. No. 55731, 2007 SEC LEXIS 971, at *20 (May 9, 2007) (rejecting respondent's argument that bar imposed was excessive where respondent claimed FINRA did not consider the impact of the bar on his clients). We therefore reject Nouchi's claim that the 90-day suspension is excessive.

We find that Nouchi's misconduct was serious and merits a significant sanction. We therefore impose a sanction for her misconduct consisting of a 90-day suspension and \$10,000 fine.¹⁹ We note that the Hearing Panel imposed an identical sanction after concluding that "a fine that is substantially larger than the amount of [CDSC waivers would] offset a long

¹⁶ *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 17).

¹⁷ *Id.* (emphasis added).

¹⁸ Nouchi also claims that we should consider it mitigating that she was terminated by UBS for her misconduct. The sanctions we impose, however, are independent of whether a member firm decides to fire an employee. See *Dep't of Enforcement v. Prout*, Complaint No. C01990014, 2000 NASD Discip. LEXIS 18, at *11 (NASD NAC Dec. 18, 2000) (stating that "[a]s a general matter, we give no weight to the fact that a respondent was terminated by a firm when determining the appropriate sanction in a disciplinary case").

¹⁹ We do not award any restitution here because FINRA's policy is to provide restitution to injured customers whenever possible, not to injured member firms. See e.g., *Correro*, 2008 FINRA Discip. LEXIS 29, at *22 n.10.

suspension that it might otherwise impose.” In our sanctions determination, however, we explicitly reject this reasoning and any inference from the Hearing Panel decision that a respondent should be able to pay a fine: (1) as a substitute for a suspension, or (2) to reduce the length of a suspension that would otherwise be imposed for a violation of FINRA rules.

VI. Conclusion

We find that Nouchi violated Rules 3110 and 2110 because she obtained CDSC waivers by falsely claiming that 15 of her customers were disabled.²⁰ Accordingly, we impose a sanction consisting of a 90-day suspension and a \$10,000 fine.²¹ We also affirm the Hearing Panel’s order directing Nouchi to pay hearing costs in the amount of \$1,622.25, and we impose \$1,557.80 in appeal costs.

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith, Senior Vice President and
Corporate Secretary

²⁰ We have considered and reject without discussion all other arguments advanced by the parties.

²¹ Pursuant to FINRA Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days’ notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days’ notice in writing, will summarily be revoked for non-payment.