

**FINANCIAL INDUSTRY REGULATORY AUTHORITY<sup>1</sup>**  
**OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

LISA ANN TOMIKO NOUCHI  
(CRD No. 2367719),

Respondent.

Disciplinary Proceeding  
No. E102004083705

Hearing Officer – AWH

**HEARING PANEL DECISION**

February 7, 2008

**Registered representative 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 Conduct Rules 2110 and 3110. Respondent is suspended from associating with any FINRA member in any capacity for 90 days and fined \$10,000. Respondent is also assessed costs.**

Appearances:

Soo H. Im, Esq., and Jeff Kern, Esq., for the Department of Enforcement.

Gregory J. Sherwin, Esq., for Lisa Ann Tomiko Nouchi.

**DECISION**

**Procedural History**

On December 18, 2006, the Department of Enforcement filed a Complaint against Lisa Ann Tomiko Nouchi, alleging that, in order to obtain contingent deferred sales charge waivers for certain of her customers, she misrepresented that those customers were disabled, and thereby caused her member firm's books and records to contain false and misleading information with regard to those customers, in violation of NASD

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<sup>1</sup> 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.

Conduct Rules 2110 and 3110. On January 12, 2007, Nouchi filed an Answer to the Complaint and requested a hearing. On October 24, 2007, a hearing was held in San Francisco, California, before a Hearing Panel composed of the Hearing Officer and two current members of the District 1 Committee.

### **Findings of Fact<sup>2</sup>**

#### **The Respondent**

Lisa Ann Tomiko Nouchi was associated with Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch”), where she was registered as a General Securities Representative from August 13, 1993, to June 5, 2001. While at Merrill Lynch, she focused on clients who were 50 to 60 years old and approaching retirement. In a rising stock market, she built her business up to about 200 families, the majority of which had accounts that were worth less than \$100,000. Because Merrill Lynch cut its payout on accounts of less than \$100,000, in June 2001, she left Merrill Lynch and became registered as a General Securities Representative with UBS Financial Services, Inc. (“UBS”).<sup>3</sup>

On May 10, 2004, UBS filed a Uniform Termination Notice for Securities Industry Registration (“Form U5”), stating that Nouchi had been terminated from UBS for “miscoding mutual fund order tickets to allow certain clients to avoid backend mutual fund sales charges by coding those clients as ‘disabled’ when, in fact, they were not disabled.” Since April 13, 2004, she has been registered as a General Securities

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<sup>2</sup> References to the Department of Enforcement’s exhibits are designated C-; Factual Stipulations, as Stip.\_; and the transcript of the hearing, as Tr.\_.

<sup>3</sup> C-1; Stip. ¶¶ 1-2; Tr. 43-45.

Representative with another FINRA member firm, and later, its merger partner. She has no disciplinary history with FINRA or any other state or federal securities regulator.<sup>4</sup>

### **The Violations**

The essential facts are not in dispute. Nouchi readily admitted to UBS and to FINRA that, during her employment with UBS, she used the firm's electronic mutual fund order entry system to claim waivers of a contingent deferred sales charge ("CDSC") for customers selling Class B mutual fund shares by falsely claiming that those customers were disabled. From March 14, 2003, through September 15, 2003, Nouchi obtained CDSC waivers, totaling approximately \$4,986.72, for 15 customers in connection with 21 mutual fund redemptions by falsely representing on UBS's electronic order entry system that those customers were disabled.<sup>5</sup>

### **The Investigation**

As a result of a 2003 cycle examination of UBS, FINRA Staff found that there were many CDSC waivers being placed where it was noted that the customers were disabled. As a result, the Staff requested information on brokers who had placed five or more requests for such waivers during the period of March through December 2003.

UBS provided the names of about 40 brokers in a number of different offices of UBS.

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<sup>4</sup> C-1; Stip. ¶¶ 3-6; Tr. 43.

<sup>5</sup> Tr. 24-25; Stip. ¶ 12. The specific amount of CDSC waivers could not be calculated precisely due to the fact that a number of the mutual fund positions were purchased outside of UBS, and the exact date of purchase was not determined by the FINRA Staff. The Staff calculated an approximate CDSC loss on an estimated 3% CDSC waiver. The specific amount of loss that could be calculated was \$3,053.99. Tr. 39. Seven of the redemptions involved CDSC waivers of \$1.50 to \$101.25. Stip. ¶¶ 26, 36, 41, 46, 51, 56, and 66.

Nouchi was one of those brokers.<sup>6</sup>

During the examination, Nouchi described four reasons for waiving CDSCs for her customers: (1) legitimate disability or the client was in a nursing home or assisted living facility; (2) the purchase date was incorrect in the system; (3) the client was upset with the fund's performance; and (4) the client needed money and was within 6-12 month of the holding period expiring. Nouchi understood that reasons (2) through (4) are not acceptable reasons under CDSC rules, and that, "[a]lthough wrong, it was easier to miscode than to update correct information or add to client dissatisfaction with investment by incurring fee to sell."<sup>7</sup> Nouchi also wrote to the Staff examiner that:

My only motivation was to facilitate the clients (sic) request to sell their funds without a sales charge, due to underperformance and concerns of integrity of the managers of mutual fund investments over the last several years. In essence, I was complying with the clients (sic) request to claim the disability waiver in my attempt to manage client anger and frustration as they chose to move out of poorly performing mutual funds.<sup>8</sup>

In her on-the-record interview, Nouchi stated that she learned about waiving CDSCs based on disabilities through "talking around the water cooler," and that it was common practice in the office.<sup>9</sup> Several months after learning that others were requesting disability waivers for non-disabled clients, she began to process disability waivers in an effort to mollify clients who were upset about the performance of their mutual funds during an extended decline in the stock market.<sup>10</sup>

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<sup>6</sup> Tr. 34-35. See, e.g., *Dep't of Enforcement v. John Christopher Correo*, No. E102004083702 (July 13, 2007), *appeal pending*, (CDSC waivers in District 5); *Dep't of Enforcement v. Harvey M. Schwartz*, No. E102004083703 (November 16, 2007) (CDSC waivers in District 7).

<sup>7</sup> C-19; Tr. 27-28.

<sup>8</sup> C-18, p. 3; Tr. 28-29.

<sup>9</sup> C-3, pp. 21-22.

<sup>10</sup> Tr. 46-47.

## Discussion

NASD Conduct Rule 2110 articulates a “broad ethical principle,” rather than specific acts that are prohibited. The focus of NASD rules is the “professionalization of the securities industry.”<sup>11</sup> To that end, NASD Conduct Rule 2110 obliges an associated person<sup>12</sup> to “observe high standards of commercial honor and just and equitable principles of trade.”<sup>13</sup> Falsifying records submitted to FINRA or maintained in a member firm’s official records is inconsistent with that obligation, and the obligation under Conduct Rule 3110 to make and preserve accurate book and records.<sup>14</sup> Submitting false information about customers to mutual funds, in order to obtain sales charge waivers to which those customers would not otherwise be entitled, is a violation of NASD Conduct Rule 2110.<sup>15</sup> Even if the goal were to benefit the customers and not enrich herself, it was unethical and improper for Nouchi to falsify the information to accomplish that goal. Entering false disability waiver information in the books and records of a member firm also violates Conduct Rule 3110.<sup>16</sup> Accordingly, Nouchi violated Conduct Rules 2110 and 3110.

## Sanctions

For falsification of records, the FINRA Sanction Guidelines recommend the imposition of a fine of \$5,000 to \$100,000, as well as a bar in egregious cases, or a

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<sup>11</sup> *Department of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, \*11 (NAC June 2, 2000).

<sup>12</sup> General Provision 0115 extends the obligations of Conduct Rule 2110 to associated persons, as well as members.

<sup>13</sup> *DBCC v. Roach*, No. C02960031, 1998 NASD Discip. LEXIS 11, \*16 (NBCC Jan. 20, 1998) (citations omitted).

<sup>14</sup> *DBCC v. Sickels*, No. C9A950036, 1997 NASD Discip. LEXIS 23, \*\*10-11 (NBCC Jan. 22, 1997) (citing *Charles E. Kautz*, Exchange Act Release No. 37,072, 1996 SEC LEXIS 994, \*7 (Apr. 5, 1996)).

<sup>15</sup> See, e.g., *Department of Enforcement v. Prout*, No. C01990014, 2000 NASD Discip. LEXIS 18, \*6 (NAC Dec. 18, 2000) (submitting false information about customers on variable annuity applications).

<sup>16</sup> See, e.g., *Department of Enforcement v. Charles J. Cuzzo, Jr.*, No. C9B050011, (NAC Feb. 27, 2007).

suspension of up to two years where there are mitigating factors.<sup>17</sup> Enforcement requested that the Hearing Panel impose a two-year suspension on Nouchi and a \$10,000 fine. While the Hearing Panel agrees that a fine of \$10,000 would be an appropriate sanction, under the circumstances of this case, the Hearing Panel concludes that a suspension of 90 days will be sufficient to remediate her misconduct and protect the investing public.

Nouchi's misconduct was serious, but not egregious. She acted to benefit her customers' interests during an extended decline in the stock market, a phenomenon that she had not experienced before. Because she had recommended investments that did not perform, she felt responsible for her customers' dissatisfaction and their desire to get out of those investments. The number of customers involved was not great. The economic impact was modest – as little as \$1.50 for one waiver. She did not attempt to conceal her actions; rather, she cooperated fully in the investigation and admitted at the outset to UBS, FINRA, and the Hearing Panel that she entered information that she knew was false into the UBS system.

Although she acted in an office atmosphere that suggested it was not unusual to avoid CDSCs by entering disability waivers, she has recognized the seriousness of her actions and has not attempted to excuse her misconduct. In her hearing testimony, she appeared shaken and chagrined as she recounted her failure to consider the full implications of her misconduct at the time she engaged in it. The Hearing Panel found that her expressions of remorse arising out of repentance for her misconduct were sincere.

In determining sanctions, the Hearing Panel concluded that a fine that is substantially larger than the amount of the fees waived will offset a longer suspension

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<sup>17</sup> FINRA SANCTION GUIDELINES, at 39 (2007 ed.).

that it might otherwise impose, recognize the seriousness of the misconduct, and serve to remediate it. The shorter suspension will not be punitive, nor will it do significant harm to Nouchi's long-term clients and her business with them. Accordingly, the Hearing Panel will suspend Nouchi for 90 days and fine her \$10,000. She will also be assessed costs.

### **Conclusion**

Lisa Ann Tomiko Nouchi is suspended from associating with any FINRA member in any capacity for 90 days and fined \$10,000 for violating NASD Conduct Rules 2110 and 3100 as set forth above. She is also assessed costs in the total amount of \$1,622.25, consisting of a \$750 administrative fee and a \$872.25 transcript fee.

These sanctions shall become effective on a date set by FINRA, but not earlier than 30 days after this decision becomes FINRA's final disciplinary action in this matter, except that if this decision becomes FINRA's final disciplinary action, Nouchi's suspension shall begin at the opening of business on April 7, 2008, and end on July 5, 2008.

**SO ORDERED.**

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Alan W. Heifetz  
Hearing Officer  
For the Hearing Panel

Copies to:

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