

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

NICHOLAS MICHAEL RUBINO  
(CRD No. 5327284),

Respondent.

Disciplinary Proceeding  
No. 2008014873201

Hearing Officer – MAD

**HEARING PANEL DECISION**

June 15 , 2010

**Respondent cheated on the Series 7 examination, in violation of Membership and Registration Rule 1080 and Conduct Rule 2110. The Respondent is barred from association with any member firm in any capacity.**

*Appearances*

For Complainant: Kevin G. Kulling, Senior Regional Counsel, Chicago, Illinois, and Mark A. Koerner, Associate Vice President and Regional Chief Counsel, Chicago, Illinois.

For Respondent: Nicholas Michael Rubino, pro se.

**DECISION**

**I. Procedural History**

The Department of Enforcement (“Enforcement”) filed the Complaint in this proceeding on September 18, 2009. The Complaint charges that Respondent Nicholas Michael Rubino (“Rubino”) violated Membership and Registration Rule 1080 and Conduct Rule 2110 by

cheating on a General Securities Representative qualification examination.<sup>1</sup> On November 30, 2009, Rubino filed an Answer denying the charges. Following the initial pre-hearing conference, the Hearing Officer set the case for hearing on March 3-4, 2010.

On March 1, 2010, Rubino sent an email to the Officer of Hearing Officers, stating that he would need to leave the hearing at 2:30 pm on March 3, 2010. A pre-hearing conference call was held on March 2, 2010, to discuss Rubino's attendance at the hearing. During the conference call, Rubino stated that he did not want a hearing, and would like to file a written submission in lieu of a hearing. Accordingly, on March 2, 2010, the Hearing Officer canceled the hearing and entered an Order granting the parties leave to file written submissions. On March 29, 2010, Enforcement filed its written submission, which consisted of sworn declarations from Janine Slattery ("Slattery Decl."), an Examination Manger at FINRA's Chicago District Office, and Ontario Durns ("Durns Decl."), a District Manager for Prometric, the company that administered the qualification examination at issue. In addition, Enforcement submitted 11 exhibits with its pre-hearing submission, which were all admitted into evidence.<sup>2</sup> Rubino did not file a sworn declaration, any exhibits, or a pre-hearing submission.

Based on a careful review of the entire record, the Hearing Panel, which is comprised of the Hearing Officer, a current member of the District 9 Committee, and a current member of the District 5 Committee, makes the following findings of fact.

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<sup>1</sup> As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008, including certain conduct rules and procedural rules. *See* Regulatory Notice 08-57 (Oct. 2008). This decision refers to and relies on the conduct rules that were in effect at the time of Respondent's misconduct. The applicable rules are available at [www.finra.org/rules](http://www.finra.org/rules).

<sup>2</sup> In this decision, "CX" refers to Enforcement's exhibits; and "RX" to Respondent's exhibits.

## **II. Findings of Fact and Conclusions of Law**

### **A. Respondent**

Rubino first registered with FINRA as an Investment Company and Variable Contracts Representative in August 2007.<sup>3</sup> In March 2008, he became registered with FINRA member firm Rydex Distributors, Inc. (“Rydex”).<sup>4</sup> Rubino’s position at Rydex required him to maintain a Series 7 license, and his employment was contingent on him obtaining the Series 7 license within three times of taking the examination.<sup>5</sup> To assist Rubino with the examination, Rydex paid for a licensing examination class and study materials.<sup>6</sup> After completing the class, Rubino took the Series 7 examination on April 21, 2008, June 2, 2008, and July 2, 2008. Rubino resigned from Rydex on July 7, 2008.<sup>7</sup>

Although Rubino is not currently associated with a member firm, FINRA has jurisdiction over this disciplinary proceeding, pursuant to Article V, Section 4 of FINRA’s Bylaws, because (1) the Complaint charges him with misconduct that occurred while he was registered with a FINRA member firm, and (2) the Complaint was filed within the two-year period following the termination of his registration.<sup>8</sup>

### **B. Testing Procedures**

In July 2008, Prometric had a testing center facility in Sycamore, Illinois.<sup>9</sup> Prometric followed testing procedures developed by FINRA.<sup>10</sup> Pursuant to those procedures, when a

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<sup>3</sup> CX-1, at 4-5; Slattery Decl. ¶ 8.

<sup>4</sup> CX-1, at 3; Slattery Decl. ¶ 8.

<sup>5</sup> CX-9, at 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Article V, Sec. 4(a), FINRA By-Laws, available at [www.finra.org/rules](http://www.finra.org/rules) (then follow “FINRA Manual” hyperlink to “Corporate Organization: Bylaws”).

<sup>9</sup> Durns Decl. ¶ 3.

<sup>10</sup> *Id.* ¶ 7.

candidate for a FINRA examination enters the testing facility, he is required to put any personal items in a locker.<sup>11</sup> In addition, candidates are required to empty their pockets; they are not allowed to bring any notes, books, examination aids, or cell phones into the testing lab where the test is administered.<sup>12</sup> After doing so, the testing center administrator checks the candidate's identification.<sup>13</sup>

Before entering the testing lab, FINRA examination candidates are shown the test center Rules of Conduct ("Rules").<sup>14</sup> In addition, the test center administrator reads the Rules to the candidates.<sup>15</sup> The Rules are also presented to the candidates electronically before beginning the examination.<sup>16</sup> The Rules prohibit candidates from accessing study materials or notes during the examination.<sup>17</sup>

The testing center administrator monitors the testing lab on a regular basis to ensure compliance with the Rules.<sup>18</sup> In addition, in July 2008, there were surveillance cameras throughout the testing facility, including the locker and lobby areas.<sup>19</sup> The testing center administrator was able to view the images on the surveillance cameras through video monitors on her desk.<sup>20</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* ¶ 9.

<sup>13</sup> *Id.* ¶ 8.

<sup>14</sup> *Id.* ¶ 11; CX-5.

<sup>15</sup> Durns Decl. ¶ 11.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* ¶ 12; CX-5.

<sup>18</sup> Durns Decl. ¶ 13.

<sup>19</sup> *Id.* ¶ 14.

<sup>20</sup> *Id.* ¶ 15.

### **C. Rubino's Conduct at the Testing Center**

On July 2, 2008, Rubino took the Series 7 qualification examination for the third time, and again failed the examination.<sup>21</sup> Upon his arrival at the Prometric testing center in Sycamore, Illinois, he placed some personal items, including his Series 7 Study Guide, in a locker.<sup>22</sup> Prior to beginning the examination, Rubino acknowledged that he had read the Rules and agreed to abide by them.<sup>23</sup> The sign-in sheets for the July 2, 2008, examination reflect that Rubino signed in at 7:38 a.m. and signed out at 10:22 a.m., completing Part 1 of the Series 7 examination.<sup>24</sup> Rubino started Part II of the examination at 10:53 a.m., and completed the examination at 1:34 p.m.<sup>25</sup> At 12:02 p.m., he left the test lab for an unscheduled four minute break.<sup>26</sup> During that break, he went to his locker and reviewed his Series 7 Study Guide.<sup>27</sup> Rubino's actions were captured by the testing center's surveillance video, which showed Rubino standing next to his locker and looking through his Study Guide.<sup>28</sup>

### **D. Rubino's Explanation**

In his answer, Rubino states that he did not read the Rules, but simply clicked on the acknowledgement button in order to be able to proceed with the examination.<sup>29</sup> Rubino admits that, after using the restroom, he went to his locker and removed the Series 7 Study Guide.<sup>30</sup>

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<sup>21</sup> CX-4.

<sup>22</sup> CX-6, at 2-3; CX-7, at 1-2.

<sup>23</sup> CX-7, at 2.

<sup>24</sup> Durns Decl. ¶ 26; CX-3, at 1.

<sup>25</sup> Durns Decl. ¶ 27; CX-3, at 2.

<sup>26</sup> Durns Decl. ¶ 27.

<sup>27</sup> CX-10, at 30.

<sup>28</sup> CX-11.

<sup>29</sup> Answer ¶ 6.

<sup>30</sup> *Id.* ¶ 10.

Rubino states that he opened the Study Guide to look for a term that was on the examination.<sup>31</sup>

He asserts that the Study Guide could not have assisted him because the term he was looking for was not in the Study Guide.<sup>32</sup>

Based on all the evidence, the Hearing Panel concludes that Rubino cheated on the Series 7 examination by leaving the testing lab during an unscheduled break and reviewing his Series 7 Study Guide. Even accepting Rubino's explanation, he reviewed his Study Guide to locate a term that could have assisted him on the examination. The fact that his search was unsuccessful does not excuse his conduct: reviewing a study guide during the course of a qualification examination. Here, Rubino had a motive to cheat because he had failed the examination on two prior occasions, and his employment with Rydex was contingent on his successful completion of the Series 7 examination. Accordingly, the Hearing Panel finds that Rubino violated Membership and Registration Rule 1080 and Conduct Rule 2110 as alleged in the Complaint.

### **III. Sanctions**

The FINRA Sanction Guidelines provide that for cheating during a qualification examination a bar is standard.<sup>33</sup> The principal consideration is whether the nature of the unauthorized material indicated that it would not be useful for taking the examination, and therefore would make clear that the respondent did not intend to cheat. Here, the material that Rubino reviewed, the Series 7 Study Guide, would certainly be useful when taking the Series 7 examination. Even accepting Rubino's assertion that he did not read the test center's Rules, he had taken the examination two other times and should have been familiar with the testing requirements. Plus, common sense dictates that it is not permissible to review a study guide

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<sup>31</sup> *Id.* ¶ 11.

<sup>32</sup> *Id.*

<sup>33</sup> FINRA SANCTION GUIDELINES, at 43 (2007).

during an examination. The Hearing Panel finds no mitigating factors that would justify allowing Rubino to remain the securities industry. Accordingly, the Hearing Panel concludes that a bar is warranted.

#### **IV. Order**

Nicholas Michael Rubino is barred from associating with any member firm in any capacity for cheating during a qualification examination, in violation of Membership and Registration Rule 1080 and Conduct Rule 2110.

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Maureen A. Delaney  
Hearing Officer  
For the Hearing Panel

Copies to: Nicholas M. Rubino (*via electronic, first-class mail, and overnight courier*)  
Kevin G. Kulling, Esq. (*via electronic and first-class mail*)  
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