

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

STEVEN ROBERT TOMLINSON,
(CRD No. 723330),

Respondent.

Disciplinary Proceeding
No. 2009017527501

Hearing Officer—LOM

HEARING PANEL DECISION

March 21, 2013

Respondent violated NASD Conduct Rule 2110 by secretly downloading confidential, non-public customer information from the firm he was leaving to his personal flash drive without authorization, and then giving personnel of the firm that he was joining access to the information on his flash drive. For this violation, Respondent is suspended from associating with any FINRA member firm in any capacity for ten business days and ordered to pay a fine of \$10,000.

Appearances

Bonnie S. McGuire, Boston, Massachusetts, and Noel Downey, Woodbridge, New Jersey, represent the Department of Enforcement.

Matthew Farley, Drinker Biddle & Reath, LLP, New York, New York, represents Respondent.

I. Introduction

The Financial Industry Regulatory Authority, Inc. (“FINRA”) Department of Enforcement (“Enforcement”) brought this disciplinary action against Respondent, Steven Robert Tomlinson (“Respondent” or “Tomlinson”), alleging that Tomlinson violated NASD

Conduct Rule 2110.¹ That Rule requires that industry members conduct themselves in accordance with high standards of commercial honor and just and equitable principles of trade. It broadly prohibits not just acts in bad faith, but also conduct inconsistent with ethical standards in the securities industry.

Tomlinson does not dispute the critical facts. When he decided to change firms he secretly downloaded confidential, non-public information belonging to customers of his old firm onto his personal flash drive without authorization. The information included social security numbers, account numbers, account balances, and the like, both for his customers and the customers of other credit union representatives. Tomlinson then gave the flash drive to an administrative assistant at his new firm to use in assisting him to contact clients. He did not supervise her use of the flash drive. She and other personnel at the new firm had unfettered access to the files on the flash drive and were never warned that confidential, non-public information was on it. The flash drive was unencrypted and not password-protected.

The administrative assistant took the flash drive with her overnight to a hotel. She used the flash drive the next morning at the new firm, leaving it plugged into a computer in a public reception area until sometime in the afternoon. She testified that technology personnel at the new firm had to access that computer remotely to help her use the flash drive. At least one of the downloaded files was later found on a secretary's computer at the new firm.

¹ FINRA, which is responsible for regulatory oversight of securities firms and associated persons who do business with the public, was formed in July 2007 by the consolidation of NASD and the regulatory arm of the New York Stock Exchange ("NYSE"). FINRA is developing a new "Consolidated Rulebook" of FINRA Rules that includes NASD Rules. The first phase of the new Consolidated Rulebook became effective on December 15, 2008. See FINRA Regulatory Notice 08-57 (Oct. 2008). Because the Complaint in this case was filed after December 15, 2008, FINRA's Procedural Rules apply to the proceeding. The applicable FINRA and/or NASD Conduct Rules are those that existed when the conduct in issue occurred. FINRA's Rules (including NASD Rules) are available at www.finra.org/Rules.

Tomlinson's old firm received information that caused it to launch an investigation. When Tomlinson learned of the investigation, he began – as he admits – to delete the confidential non-public customer files that he had downloaded. He only stopped deleting files after an attorney for his new firm told him to stop.

The confidential non-public customer information that Tomlinson downloaded to his flash drive is the type of information that is by regulation required to be protected. In its compliance manual, Tomlinson's old firm prohibited financial advisors like Tomlinson from transmitting such non-public personally identifiable information to a third party except for business purposes and with the client's consent. Tomlinson also had a signed agreement with his old firm not to disclose non-public customer information. Furthermore, before Tomlinson joined his new firm that firm instructed him that he was not permitted to bring with him customer account information like that on the flash drive. Tomlinson told neither firm about the confidential non-public information he downloaded onto the flash drive. Nor did he obtain permission from any of the customers whose information he downloaded.

Tomlinson mainly argues that he was thoughtless, but that he meant no harm. He also contends that, in any event, no harm was done because only the names and addresses of his own clients were used to create address labels for "tombstone" announcements of his move to his new firm.

Based on the record, and for the reasons discussed below, the Hearing Panel finds that

Respondent violated NASD Conduct Rule 2110, as alleged, and imposes sanctions.² Tomlinson will be suspended for ten business days and fined \$10,000.

II. Findings Of Fact And Conclusions Of Law

A. Respondent's Background

Tomlinson entered the financial industry in 1981.³ He worked for various firms for about twenty years before joining a credit union located in Corning, New York, in 2001.⁴ The credit union recruited Tomlinson to be a financial advisor within its investment services group.⁵ He became a manager of the group in September 2003.⁶

At the time of the alleged misconduct in November 2008, the credit union was affiliated with Raymond James Financial Services, Inc. ("RJ Financial"), a FINRA member firm, and Tomlinson was an employee of both the credit union and RJ Financial.⁷ Tomlinson was registered with FINRA through RJ Financial.⁸

As discussed in more detail below, in June 2008 Tomlinson began exploring the possibility of becoming the branch manager of what was then a branch office of Wachovia

² A two-day hearing was held on November 29 and 30, 2012, before a three-person panel consisting of the Hearing Officer and two industry representatives. Five witnesses testified. They included Tomlinson, the Chief Information Officer of Tomlinson's old firm at the time of the alleged misconduct (referred to here as the "CIO"), a FINRA examiner (referred to here as "Examiner"), the person who recruited Tomlinson to his new firm (referred to here as "WS senior vp"), and the administrative assistant at Tomlinson's new firm who used the flash drive (referred to here as "WS admin."). Exhibits were admitted into evidence (JX-1 et seq. for Joint Exhibits, CX-1 et seq. for Enforcement Exhibits, and RX-1 et seq. for Respondent's Exhibits).

³ Hearing Transcript ("Hearing Tr.") (Tomlinson) at 235; JX-1 (Tomlinson CRD as of 06/19/2012) at 25.

⁴ Hearing Tr. (Tomlinson) at 235-37; JX-1 (Tomlinson CRD as of 06/19/2012) at 23-25.

⁵ Hearing Tr. (Tomlinson) at 237.

⁶ *Id.* at 238.

⁷ Hearing Tr. (WS senior vp) at 159-60, Hearing Tr. (Tomlinson) at 207-09; JX-1 (Tomlinson CRD as of 06/19/2012) at 21.

⁸ JX-1 (Tomlinson CRD as of 06/19/2012) at 22-23.

Securities (now Wells Fargo) in Painted Post, New York.⁹ In October 2008, he decided to leave the credit union, and in November 2008, just prior to Thanksgiving, he resigned to join Wachovia.¹⁰ Tomlinson still works for the successor to Wachovia, Wells Fargo, and is registered with FINRA through that firm.¹¹

B. Jurisdiction

FINRA has jurisdiction over this disciplinary proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because the Complaint alleges misconduct that occurred while Tomlinson was a registered representative, and it was filed on December 7, 2011, while he still was registered with a FINRA member firm.

C. NASD Conduct Rule 2110

NASD Conduct Rule 2110 requires the observance of "high standards of commercial honor and just and equitable principles of trade." This Rule applies to all business-related conduct.¹² It concerns "enforcing ethical standards of practice in the securities industry and is violated by a breach of confidence if such breach amounts to unethical conduct."¹³ The Securities and Exchange Commission ("SEC"), which oversees the promulgation and implementation of NASD and FINRA Rules, has long held that NASD Conduct Rule 2110 (and likewise its successor, FINRA Rule 2010) "is not limited to rules of legal conduct but rather ... states a *broad ethical principle* which implements the requirements of Section 15A(b)" of the

⁹ Hearing Tr. (Tomlinson) at 243-44.

¹⁰ Hearing Tr. (Tomlinson) at 214-15, 248.

¹¹ JX-1 (Tomlinson CRD as of 06/19/2012) at 1-2.

¹² *Dep't of Enforcement v. Trende*, No. 2007008935010, 2011 FINRA Discip. LEXIS 54, *11 and nn.12 & 13 (OHO Oct. 4, 2011).

¹³ *Heath v. SEC*, 586 F.3d 122, *131 (2d Cir. 2009), *cert denied*, 130 S. Ct. 2351 (2010).

Exchange Act.¹⁴ “‘Bad faith’ in the sense of malicious intent or deceitfulness need not be established.”¹⁵ Recently, the SEC described NASD Rule 2110 “as an industry backstop for the representation, inherent in the relationship between a securities professional and a customer, that the customer will be dealt with fairly and in accordance with the standards of the profession.”¹⁶ As long ago as 1966, Judge Friendly noted that this Rule “preserves power to discipline members for a wide variety of misconduct, including merely unethical behavior.”¹⁷ Where the allegation is that a registered representative has breached a duty of confidentiality, as Enforcement alleges here, the allegation “implicates quintessential ethical considerations,” and NASD Conduct Rule 2110 (now FINRA Rule 2010) applies.¹⁸

The SEC has made it plain that firms and persons involved in the securities industry have a duty to protect confidential, non-public customer information. It said in a decision later upheld by the Second Circuit Court of Appeals, *Heath*, “Any reasonably prudent securities professional would recognize that the disclosure of confidential client information violates the ethical norms

¹⁴ *Id.* at 132 (emphasis in original).

¹⁵ *Dep’t of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS 6, at *16 (NAC June 2, 2000).

¹⁶ *Dep’t of Enforcement v. Golonka*, No. 2009017439601, 2013 FINRA Discip. LEXIS 5, at *22 (NAC Mar. 4, 2013) (quoting *Dante J. DiFrancesco*, Exchange Act Rel. No. 66113, 2012 SEC LEXIS 54, at *17 (Jan. 6, 2012)).

¹⁷ *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 182 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966).

¹⁸ *Heath*, 586 F.3d 137.

of the industry.”¹⁹ The SEC noted that disclosure of confidential information is even more indefensible where, as here, a firm has imposed “express restrictions on the use of client information.”²⁰

The SEC has also made it plain that the specific conduct in issue here is a violation of NASD Conduct Rule 2110. In a decision affirming sanctions imposed by FINRA, *DiFrancesco*, the SEC held that a registered representative “breached his duty of confidentiality when he ‘surreptitiously’ downloaded [his old firm’s] customers’ confidential nonpublic information, including account numbers and net worth figures, and transmitted that information to his future branch manager at a competitor firm.”²¹ As the SEC explained in that decision, the privacy requirements of Regulation S-P, promulgated under Section 504 of the Gramm-Leach-Bliley Act, impose a duty on broker-dealers to adopt written policies and procedures to safeguard customer records and information. Regulation S-P also specifically prohibits a broker-dealer from disclosing any non-public personal information about a customer to a nonaffiliated third party unless the customer receives notice and a reasonable opportunity to opt out of the disclosure.²² Under NASD Rule 0115 (now FINRA Rule 0140), individuals registered with NASD (now FINRA) through a firm are subject to the same duties as member firms.

¹⁹ *Thomas W. Heath, III*, Exchange Act Rel. No. 59,223, 2009 SEC LEXIS 14, at *29 (Jan. 9, 2009), (quoted in *Heath, supra*, 586 F.3d at 141).

²⁰ *Id.* at 37.

²¹ *Dante J. DiFrancesco*, Exchange Act Rel. No. 66113, 2012 SEC LEXIS 54, at *21-22 (Jan. 6, 2012) (in preparing to change firms, a registered representative violated NASD Rule 2110 by downloading confidential, non-public customer information to a flash drive and sharing the information with a person at the new firm).

²² *DiFrancesco*, 2012 SEC LEXIS 54, at *3 at n.3, and at *23-24.

D. Respondent's Conduct

(1) Respondent Decides To Change Firms In Order To Build A Business

Tomlinson's credit union, unlike many brokerage firms, compensated its investment services employees by paying a straight salary. Tomlinson and the other registered representatives at the credit union did not receive commissions.²³ The credit union encouraged the members of the investment services group to service credit union members regardless of how the clients were assigned to different advisors, and clients were reassigned from time to time in a process sometimes referred to as "equalization."²⁴ Tomlinson explained at the hearing, "[B]ecause we were all on salary, we were really just there to service the members...."²⁵

Tomlinson became dissatisfied with the salary system at the credit union in early 2008, after reading a magazine article about a registered representative with whom Tomlinson had trained in his early days in the financial services industry. The article described how the other man had built a business at another broker-dealer firm to pass along to his son.²⁶ Tomlinson recognized that he could not do the same for his son and began to think "about how do I build a business to maybe bring him into it if he so chose to do so. I wasn't able to do that at the credit union...."²⁷

Tomlinson's dissatisfaction with his position as a salaried employee and his ambition to build a business for his son set in motion the events leading to this disciplinary proceeding.

²³ Hearing Tr. (Tomlinson) at 237-38.

²⁴ Hearing Tr. (Tomlinson) at 237-40.

²⁵ Hearing Tr. (Tomlinson) at 239.

²⁶ Hearing Tr. (Tomlinson) at 243-44.

²⁷ *Id.*

Toward the end of June 2008, he began talking to a friend at Wachovia about an opening in a nearby branch office.²⁸ In October 2008, Tomlinson visited a Wachovia office in St. Louis, and shortly thereafter decided to leave the credit union and RJ Financial to join Wachovia.²⁹ The new position at Wachovia offered a small payment for managing the branch but the potential for much greater compensation in the form of commissions.³⁰

(2) Respondent Secretly Downloads Confidential Non-Public Customer Information To His Personal, Unencrypted And Nonpassword-Protected Flash Drive In Violation Of Both His Old Firm's And His New Firm's Policies

Tomlinson admits that in November 2008, shortly before Thanksgiving, he downloaded confidential, non-public information of over 2000 credit union customers to his personal flash drive and his personal laptop without authorization. He did so both during business hours and late at night, just days before resigning to move to Wachovia.³¹ Tomlinson downloaded some of the information on Tuesday, November 18, 2008, six days before he resigned from the credit union.³² Then, on Thursday, November 20, 2008, Tomlinson went into the credit union's offices after hours and downloaded more information. He was downloading as late as 10:30 p.m. that night.³³ Some of the clients whose information Tomlinson took were his clients; some were customers of other financial advisors at the credit union with whom he had previously had

²⁸ Hearing Tr. (Tomlinson) at 244.

²⁹ Hearing Tr. (Tomlinson) at 209.

³⁰ Hearing Tr. (Tomlinson) at 230-31.

³¹ Hearing Tr. (Tomlinson) at 216-27, 270-71, 275-76; JX-5 through JX-11 (downloaded information regarding customers), and JX-14 through JX-18 (downloaded information regarding customers).

³² Hearing Tr. (CIO) at 63, Hearing Tr. (Tomlinson) at 224-27; JX-14 through JX-18 (downloaded information regarding customers).

³³ Hearing Tr. (Tomlinson) at 216-24; JX-5 through JX-11 (downloaded information regarding customers).

contact; and still others were strangers to Tomlinson.³⁴ Approximately 60% of the customers were not Tomlinson's.³⁵ The confidential non-public information included social security numbers, birth dates, account numbers, and account balances, among other items.³⁶ Tomlinson did not give notice to the credit union or RJ Financial; nor did he tell Wachovia about the information he had downloaded.³⁷ He also did not seek permission from any of the customers whose information he downloaded on the flash drive to take with him to his new firm.³⁸ As Tomlinson further acknowledged at the hearing, his personal flash drive was neither encrypted nor password-protected.³⁹

Tomlinson testified that his purpose was to enable him to contact his clients about his move to Wachovia and to assist him in servicing customers' accounts if they moved their accounts to Wachovia.⁴⁰ Tomlinson admitted, however, that he did not need information like account balances for the limited purpose of contacting his clients to inform them of his move to Wachovia.⁴¹

Tomlinson admitted that his conduct violated his old firm's compliance manual. He acknowledged that the compliance manual prohibited its affiliates from transmitting non-public

³⁴ Hearing Tr. (Tomlinson) at 216-21, 224-27, 270-71.

³⁵ Hearing Tr. (Tomlinson) at 217.

³⁶ Hearing Tr. (Tomlinson) at 219-24; JX-5 through JX-11 (downloaded information regarding customers); JX-14 through JX-18 (downloaded information regarding customers).

³⁷ Hearing Tr. (Tomlinson) at 223-24.

³⁸ Hearing Tr. (Tomlinson) at 224.

³⁹ Hearing Tr. (Tomlinson) at 227. Downloaded files also ended up on Tomlinson's personal laptop and mobile telephone. Hearing Tr. (Tomlinson) at 225, Hearing Tr. (CIO) at 54, 58-60.

⁴⁰ Hearing Tr. (Tomlinson) at 226

⁴¹ Hearing Tr. (Tomlinson) at 217.

personally identifiable information to a third party “for any reason other than a bona fide business purpose with the client’s consent.” He also acknowledged that he had an obligation to abide by the compliance manual.⁴²

Tomlinson further admitted that his conduct violated an agreement he had signed with RJ Financial. In that document he agreed not to disclose to any person any information obtained from RJ Financial customers unless that information was publicly available.⁴³

Tomlinson also admitted that he had been instructed by his new firm, Wachovia, to bring no other information than what could be used to address announcements of his move. That information was called a “Christmas card list.” Wachovia had expressly informed him that he was not allowed to bring client statements, account numbers, social security numbers, performance reports, or other electronically stored client data. It also provided Tomlinson with a Wachovia flash drive that he was supposed to use to download only the limited information that he was permitted to take with him. Tomlinson explained, however, that he had difficulty making the software work and so decided instead to download information onto his personal flash drive.⁴⁴

(3) Respondent Resigns And Turns Over His Mobile Telephone – But Not His Flash Drive – To Be Scrubbed Of Confidential Information

It was standard procedure at the credit union for an IT person to conduct an exit interview with a departing employee and to take away from a departing employee any physical keys and badges, including the VPN token used to access the credit union’s computer systems. If a departing employee had access to the credit union’s computer network through a mobile

⁴² Hearing Tr. (Tomlinson) at 204-09; JX-4 at 1 (RJ Financial Compliance Manual on Information Security and Data Privacy).

⁴³ Hearing Tr. (Tomlinson) at 207-09; JX-31 (Financial Advisor Agreement signed by Tomlinson).

⁴⁴ Hearing Tr. (Tomlinson) at 244-45, Hearing Tr. (WS senior vp) at 163-170, 175.

telephone owned by the employee any credit union software and information would be erased from the device. The device would then be returned. If the departing employee had a corporate-issued laptop, the laptop would be taken back. It was against policy for employees to use personal laptops for credit union work, and so a personal laptop would not ordinarily be requested or examined in the exit interview.⁴⁵

Tomlinson officially resigned on Monday, November 24, 2008.⁴⁶ That day he spoke with a number of people at the credit union and a credit union IT person conducted an exit interview with Tomlinson. Tomlinson returned a VPN token and turned over his keys and other things to staff at the credit union. That afternoon a credit union IT person “wiped clean” the telephone that the credit union had purchased for Tomlinson’s use.⁴⁷ The IT person returned the telephone to Tomlinson, leaving only his personal information on it. There was no discussion of Tomlinson’s flash drive or personal laptop.⁴⁸

(4) Respondent Gives Wachovia Personnel Access To The Confidential Non-Public Information On The Flash Drive

Tomlinson left the credit union shortly before 6 p.m. the day he resigned and went to the Wachovia branch office. An administrative assistant from a different Wachovia office had come especially to the Wachovia branch office that day to help Tomlinson prepare announcements about his move. She had been waiting all afternoon for his arrival. She asked him for the flash

⁴⁵ Hearing Tr. (CIO) at 26-31.

⁴⁶ Hearing Tr. (Tomlinson) at 248.

⁴⁷ Hearing Tr. (CIO) at 28-31. The CIO explained what it meant to “wipe clean” the device. “In the case of how Corning Credit Union does it, we install software on all our windows mobile devices, an encryption security software. 100 percent of the device is encrypted. All the data files there are encrypted. When we turn that device back over to the individual, we would do a hard reset on that device returning it to factory settings, eliminating all our license keys and all the encryption keys and things like that and it would go through a disk format of the device and relay a standard copy of the device. Just as if you opened it from its package and turned it on for the first time.”

⁴⁸ Hearing Tr. (Tomlinson) at 250.

drive, but Tomlinson had neglected to bring it with him. He told her he would go home to get it and then return, which he did. By the time he returned, it was late and a snow storm had started. The administrative assistant and Tomlinson agreed that they would wait until the next day to create the mailing announcing his move. The assistant put the flash drive in her purse and went to a hotel. Tomlinson went home. He never cautioned her that there was confidential non-public information on the flash drive or that it was unencrypted.⁴⁹

The next day, Tuesday, November 25, 2008, the administrative assistant used the flash drive at a computer in the public reception area of the Wachovia office. Tomlinson did not supervise her work and was in a separate office that had been assigned to him. She had difficulty using the flash drive and called the IT department at Wachovia. Someone in IT remotely accessed the disk to assist her. The disk remained in the reception area until some unspecified time after lunch and after the administrative assistant and Tomlinson had examined and culled labels to be used to mail the announcements. Sometime before the end of the day, perhaps around 2-3 p.m., the assistant gave the flash drive back to Tomlinson.⁵⁰

In connection with a forensic investigation, discussed below, a copy of at least one credit union file downloaded to Tomlinson's flash drive was later found to reside on a secretary's computer in the Wachovia system.⁵¹

(5) The Credit Union Investigates And Respondent Attempts To Conceal What He Has Done

On Wednesday, one day before Thanksgiving, the credit union CEO asked the credit union CIO to begin an investigation, because the CEO had been informed that a credit union

⁴⁹ Hearing Tr. (Tomlinson) at 227-29, 250-52, Hearing Tr. (WS admin.) at 181-93.

⁵⁰ Hearing Tr. (Tomlinson) at 229-30, Hearing Tr. (WS admin.) at 181-86.

⁵¹ Hearing Tr. (CIO) at 73-74.

customer had received a mailing from Tomlinson. The initial concern was whether Tomlinson had violated his non-compete agreement by taking a list of his clients.⁵² The investigation proceeded in stages through early December. It ultimately revealed that Tomlinson had exposed the confidential non-public information of approximately 2000 customers to third parties – various personnel at Wachovia.⁵³

The CIO started by looking at Tomlinson’s desktop computer at the credit union. From the desktop computer the CIO could determine what files had been accessed and when. The CIO learned that credit union customer information had been downloaded onto a remote storage device such as a flash drive and that some credit union customer information had been put into a directory that Tomlinson had labeled in a way to denote a connection with Wachovia Securities.⁵⁴

The credit union drafted and delivered a letter to Tomlinson at Wachovia on Monday, December 1, 2008, demanding, among other things, the return of the flash drive with the “stolen” information on it.⁵⁵ Tomlinson testified that he found the letter “scary.”⁵⁶ He deleted from the

⁵² Hearing Tr. (CIO) at 32, 35.

⁵³ JX-5 through JX-8 (downloaded information regarding customers), and JX-11 through JX-20 (downloaded information regarding customers).

⁵⁴ Hearing Tr. (CIO) at 41-60.

⁵⁵ Hearing Tr. (Tomlinson) at 231-34; JX-22 (transcript of Tomlinson investigative testimony, September 1, 2010) at 312-15.

⁵⁶ Hearing Tr. (Tomlinson) at 232.

flash drive all the files he had downloaded except for the one file containing data relating only to his own clients.⁵⁷ He also deleted credit union files from his personal laptop.⁵⁸ When he confessed that he had deleted files, Wachovia's attorney told him to stop and "that's when it ceased."⁵⁹

Eventually, in the course of the investigation Tomlinson turned over his flash drive, mobile telephone, and personal laptop. The credit union's CIO determined that credit union customer information had been on all three of Tomlinson's devices and that most of those files had been deleted after Tomlinson was informed of the credit union's investigation.⁶⁰ Tomlinson admits that his personal laptop had confidential non-public information belonging to credit union customers on it and that he used the laptop at Wachovia.⁶¹

The credit union's CIO requested that Wachovia check its computers for identified files that Tomlinson took from the credit union. The CIO was told that Wachovia identified at least one of those files as residing on a secretary's computer at Wachovia.⁶²

⁵⁷ Hearing Tr. (Tomlinson) at 232-33, 254-55. The letter from the credit union also demanded "that you collect all other versions of the stolen information and destroy them completely [and provide the credit union's attorney with proof of destruction]." Hearing Tr. (Tomlinson) at 233; JX-22 (transcript of Tomlinson investigative testimony, September 1, 2010) at 313. Tomlinson claimed that he misread the letter to request that he destroy the files on the flash drive. Hearing Tr. (Tomlinson) at 232-33.

⁵⁸ Hearing Tr. (Tomlinson) at 255.

⁵⁹ *Id.*

⁶⁰ Hearing Tr. (CIO) at 41-60. A "defrag" program had been run on the laptop which made it impossible to recover most of the credit union files that were believed to have been on it. While the CIO viewed this fact with suspicion, Tomlinson testified that he periodically ran the "defrag" program to improve performance and had been unaware that the program overwrote deleted files. It is unnecessary to determine whether Tomlinson intended to overwrite the deleted files when he ran the defrag program. His admitted conduct in downloading the credit union customer files and giving access to unaffiliated third parties is sufficient to prove a violation.

⁶¹ Hearing Tr. (Tomlinson) at 267-68.

⁶² Hearing Tr. (CIO) at 73-75.

(6) *Both His Old Firm And His New Firm Prohibited Tomlinson's Conduct*

The credit union's compliance manual expressly provided, "Associates may not share customer information with third parties unless specifically authorized by the client. Customer and confidential information may not be removed from a Raymond James office without the branch manager's permission."⁶³ The compliance manual also prohibited financial associates from transmitting non-public or personally identifiable information "to a third party for any reason other than [sic] a bona fide business purpose with the client's consent."⁶⁴ The compliance manual defined personally identifiable information to include a customer's social security number, financial account numbers, net worth, income, tax bracket, and other non-public information unique to an individual or entity.⁶⁵

Tomlinson admits he was familiar with the compliance manual and had a duty to comply with it.⁶⁶ As a manager at the credit union, Tomlinson also was responsible for determining whether the financial advisors he supervised were adequately protecting sensitive customer information, including account numbers and information about customer net worth.⁶⁷ In addition, Tomlinson signed a financial advisor agreement with RJ Financial and the credit union in which he agreed, among other things, not to remove records from the premises of the

⁶³ JX-4 (RJ Financial Compliance Manual) at 1.

⁶⁴ JX-4 (RJ Financial Compliance Manual) at 1; Hearing Tr. (Tomlinson) at 204.

⁶⁵ Hearing Tr. (Tomlinson) at 205; JX-4 (RJ Financial Compliance Manual) at 2. His credit union also required employees to certify annually that "you won't take data, you won't access data, you won't talk about data." Hearing Tr. (CIO) at 90. Tomlinson both would have signed that certification annually and would have made sure that every one of his subordinates signed it in connection with their annual reviews. Hearing Tr. (CIO) at 90-91.

⁶⁶ Hearing Tr. (Tomlinson) at 204-05.

⁶⁷ Hearing Tr. (Tomlinson) at 206.

investment group without prior authorization and not to disclose to any person any non-public customer information.⁶⁸

Tomlinson's new firm had separately instructed him that the only information he could bring with him was in the nature of a "Christmas card list," the names, phone numbers and addresses of his clients.⁶⁹ Wachovia conveyed the instruction several times in several different ways. It was a topic of discussion when Tomlinson attended a recruiting meeting at the firm's St. Louis office.⁷⁰ The senior vice president who recruited Tomlinson also provided him a document titled "Financial Advisor Integration Planner" that stated in bold-face type that financial advisors were not allowed to bring "client statements, account numbers, social security numbers, client files, confirmation, performance reports, copies of notes or any electronically stored client data" outside of certain allowable information.⁷¹ Allowable information consisted of "customer name, client name, account title, their address, phone numbers, and their e-mail addresses."⁷²

E. Violation Found

Tomlinson admits all the facts necessary to find a violation of NASD Conduct Rule 2110. He downloaded confidential non-public customer information without authorization. He then

⁶⁸ Hearing Tr. (Tomlinson) at 207-09; JX-31(Financial Advisor Agreement).

⁶⁹ Hearing Tr. (Tomlinson) at 274-75, Hearing Tr. (WS senior vp) at 161-64.

⁷⁰ Hearing Tr. (Tomlinson) at 209-11, 214-15.

⁷¹ Hearing Tr. (Tomlinson) at 210, Hearing Tr. (WS senior vp) at 166-70; JX-3 (Financial Advisor Integration Planner) at 4.

⁷² Hearing Tr. (Examiner) at 111-16; JX-3 (Financial Advisor Integration Planner) at 4. The Hearing Panel's finding of a violation is not based on a breach of contract theory. However, Tomlinson's failure to follow the policies and procedures of the two firms is relevant. That both firms prohibited Tomlinson from doing what he did, and that he breached an agreement forbidding him from disclosing non-public credit union customer information, both undercut Tomlinson's portrayal of his misconduct as innocent or inadvertent. These facts are also aggravating factors in assessing sanctions.

gave third parties (Wachovia personnel) access to that information. He did so in violation of the duty he owed to the customers to protect their information, and in violation of specific requirements imposed by both the credit union and Wachovia. This conduct falls well short of the high standards of commercial honor and just and equitable principles of trade required by Rule 2110, as made plain by the SEC in its decision in *DiFrancesco*.

At the Hearing, Tomlinson made three somewhat inchoate arguments against finding a violation. These arguments are not persuasive.

First, Tomlinson argued that he lacked intent to do wrong or to cause harm, confessing that he “just didn’t think at the time.”⁷³ Intent, however, is not an element of a Rule 2110 violation.⁷⁴ Furthermore, the evidence suggests consciousness of wrongdoing even if it is not conclusive. Tomlinson returned to the credit union after hours and conducted much of the downloading late at night, when he was less likely to be discovered. On the day that he resigned, he did not mention that he had credit union customer information on a flash drive and on his personal laptop, even though it was apparent that the credit union did not want him to have its information on his devices. That was the reason that credit union IT personnel removed credit union information from his mobile telephone. Tomlinson also told no one at his old firm or his new firm what he was doing, suggesting that he knew that his conduct was contrary to the procedures and policies of both firms.

Second, Tomlinson argued that he had used only a limited portion of the downloaded information and only for a legitimate purpose. He asserted at the Hearing that he had only used

⁷³ Hearing Tr. (Tomlinson) at 224.

⁷⁴ See, e.g., *DiFrancesco*, 2012 SEC LEXIS 54, at *18 (discussing NASD Rule 2110 and stating that “proving motive or scienter is not required, and a showing of unethical conduct, even if not in bad faith, can be sufficient to establish liability” (internal citations omitted)). See also *Dep’t of Enforcement v. Brokaw*, No. 2007007792902, 2012 FINRA Discip. LEXIS 53, at *18-21 (NAC Sept. 14, 2012) (failure to perform duty of due diligence was a violation without any intent to manipulate).

his own client file to send “tombstone” notices of his move to Wachovia.⁷⁵ Tomlinson maintained that he did not give the names and addresses of clients other than his own to the Wachovia administrative assistant because he had directed her to the file containing his own clients’ information.⁷⁶

To the extent that this testimony was intended to show that no disclosure was made, Tomlinson misunderstands the nature of his violation.⁷⁷ By giving the administrative assistant unsupervised access to the confidential, non-public information, Tomlinson disclosed the information to a third party. When the administrative assistant then gave access to Wachovia’s IT personnel and left the unencrypted, nonpassword-protected flash drive in a public area of the office, more unauthorized disclosures occurred. That at least one of the downloaded files was stored on a Wachovia secretary’s computer only confirms that disclosure occurred and that an even larger group of unknown third parties had access to the credit union customers’ files.

If Tomlinson points to his limited use of the confidential, non-public information as showing that no harm occurred, Tomlinson again misunderstands the nature of the violation. It is the disclosure of customers’ confidential non-public information to third parties such as the administrative assistant that constitutes the harm. It matters not whether Tomlinson sent “tombstone” announcements to any or all of the customers. He disclosed credit union customers’ private information to third persons who were not authorized to have the information when he gave Wachovia personnel access to it.

⁷⁵ Hearing Tr. (Tomlinson) at 252-53, 265, 268.

⁷⁶ Hearing Tr. (Tomlinson) at 247-48.

⁷⁷ Hearing Tr. (Tomlinson) at 261 (Q: Did you disclose any of the information to anyone? A: No.).

Third, Tomlinson asserted that the credit union had known for a long time prior to his departure that he had used his personal devices for business purposes, downloading client information in order to work at home.⁷⁸ By that assertion, he attempted to explain away his actions as an innocent or inadvertent mistake. He also attempted to suggest that the credit union had treated him unfairly and overly harshly when it pursued its investigation and, ultimately, notified its customers that their confidentiality had been breached. In that regard, Tomlinson focuses not on the customers' interest in keeping their highly sensitive information private, but rather on his view that the credit union has nothing to complain about.

Again, these assertions and arguments are beside the point. Whether or not Tomlinson's old firm permitted him to take customer information home with him to work on his old firm's business, he had no authority to take that information with him to Wachovia and give Wachovia personnel access to it.

III. Sanctions

As noted by the SEC in its decision in *DiFrancesco*, there are no specific Sanction Guidelines⁷⁹ for the type of misconduct alleged here.⁸⁰ Accordingly, for guidance on sanctions, the Hearing Panel relies upon overarching goals and General Principles applicable to all disciplinary proceedings.

FINRA has stated in an overview of the Sanction Guidelines that building public confidence in the financial markets and protecting investors are two important goals of its

⁷⁸ Hearing Tr. (Tomlinson) at 240-43.

⁷⁹ FINRA Sanction Guidelines (2011) ("Sanction Guidelines"), available at www.finra.org/oho (then follow "Enforcement" hyperlink to "Sanction Guidelines").

⁸⁰ *DiFrancesco*, 2012 SEC LEXIS 54, at *33.

disciplinary proceedings and regulatory oversight.⁸¹ A General Principle in all disciplinary proceedings is that the sanctions should be significant enough to deter a respondent and others from engaging in such misconduct in the future. The purpose is to improve business conduct in the industry, not merely to resolve a single case.⁸²

These goals are served by imposing significant sanctions in this matter. The investing public cannot be expected to have confidence in the financial industry if investors' confidential, non-public information is not protected from disclosure. The sanctions here must be severe enough to deter Respondent and others from engaging such misconduct in the future. As the SEC "admonished" in *Heath* and repeated in *DiFrancesco*, "[t]he ability to credibly assure a client that [confidential non-public information] will be used solely to advance the client's own interests is central to any securities professional's ability to provide informed advice to clients. Disclosure of such information jeopardizes the foundation of trust and confidence crucial to any professional advising relationship."⁸³

There are at least three aggravating factors in this case, as well. First, as noted above, Tomlinson attempted to conceal what he had done after he learned of the credit union's investigation by deleting the confidential non-public information belonging to credit union customers from his electronic devices. Concealing one's misconduct is an aggravating factor.⁸⁴ Second, Tomlinson downloaded confidential non-public customer information over the course of several nights and days, sometimes late at night, which suggests an effort to avoid detection.

⁸¹ Sanction Guidelines at 1.

⁸² Sanction Guidelines at 2.

⁸³ *DiFrancesco*, 2012 SEC LEXIS 54, at *34-35 (quoting *Heath*, 2009 SEC LEXIS 14, at *43-44).

⁸⁴ Sanction Guidelines at 6, Principal Consideration 10.

Such conduct involves intentional acts, another aggravating factor.⁸⁵ Third, Tomlinson engaged in the misconduct for his potential financial gain. His purpose was to see if credit union customers would move their business to him at Wachovia.⁸⁶ Misconduct that has the potential for financial gain to the respondent is yet another aggravating factor.⁸⁷

The Hearing Panel deems a suspension for ten business days and a \$10,000 fine appropriately remedial. It is important to impress upon members of the securities industry that customers' confidential non-public information must be protected.⁸⁸

IV. Order

The Hearing Panel finds that Respondent, Steven Robert Tomlinson, violated NASD Rule 2110. Accordingly, Respondent is suspended for ten business days, fined \$10,000, and ordered to pay costs in the amount of \$2990.42, which includes a \$750 administrative fee and the cost of the transcript.⁸⁹

If this decision becomes FINRA's final disciplinary action, Tomlinson's suspension shall commence on Monday, May 20, 2013, and end at the close of business on June 3, 2013. The

⁸⁵ *Id.* at 7, Principal Consideration 13.

⁸⁶ Tomlinson made much of the fact that he only sent announcements of his move to around 160 of his own clients at the credit union and not all of the some 2000 customers whose information he downloaded and took with him to Wachovia. This is not a mitigating factor. He and the Wachovia administrative assistant sent out the 160 announcements on the Tuesday before Thanksgiving. Tomlinson was contacted on the Monday following Thanksgiving about his unauthorized downloads and he deleted most of the files from his flash drive. He did not have time to do anything more with most of the confidential non-public information he had downloaded, and it is unclear what he might have done if the credit union had not immediately sought the return of the flash drive and destruction of any other copies of the information. If Tomlinson's only purpose was to send announcements to his own clients, as he asserted at the Hearing, it is inexplicable why he downloaded the information belonging to customers of other credit union financial advisors. He had his own client information segregated in a separate file, and the client information of customers of other financial advisors was in their own separate files. There simply was no need to download so much confidential, non-public information if his purpose was limited to sending announcements to his own customers.

⁸⁷ Sanction Guidelines at 7, Principle Consideration 17.

⁸⁸ *DiFrancesco*, 2012 SEC LEXIS 54, at *33-35.

⁸⁹ The Hearing Panel has considered and rejects without discussion any other arguments made by the Parties that are inconsistent with this decision.

fine and assessed 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.

Lucinda O. McConathy
Hearing Officer
For the Hearing Panel