Please acknowledge receipt of these documents and appeal to the following email addresses:

Steven Tomlinson - Respondent

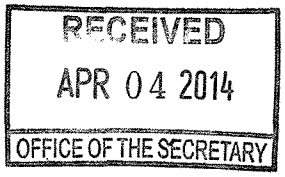
[redacted]

Jeff Coverdell – Managing Counsel Wells Fargo Law Department

jeffrey.coverdell@wellsfargoadvisors.com

SECURTY and EXCHANGE COMMISSION

Appeal Request Dated April 3, 2014 by Respondent



In the Matter of

Department of Enforcement,

Complainant,

vs.

Steven Robert Tomlinson

Painted Post, NY

Respondent.

Appeal to Decision by NAC of FINRA

Complaint No. 2009017527501

Dated March 5, 2014

Delivered March 8, 2014

Request for Appeal of the decision by the NAC.

Respondent requests suspension to be reduced as precedent has been set by FINRA in previous enforcement actions where "actual disclosure to third party" occurred, which is not the case in this incident. 10 days for "actual disclosure to third party" of Personally Identifiable Information. It also appears the increase in suspension time was to offset inability to pay monetary fine.

The reasons for the appeal are as follows:

1. Disclosure of Personal Identifiable Information never occurred, in spite of assertions made by FINRA. FINRA's position is based on the "possibility" and not on actual disclosure.
2. Personally Identifiable Information was never transmitted, downloaded or viewed by a third party, as was the case of FINRA DOE v DiFransesco SEC LEXIS 54 2012.
3. Disclosure is defined as "revealing" information where the third party actually was exposed or viewed or downloaded the Personally Identifiable Information. This never occurred as it had in the DiFransesco case. Testimony affirmed that "disclosure" never occurred and was supported by forensic analysis by those that were supposedly granted access and agreed to be the Corning Credit Union in their agreement reached with Respondent and Wachovia Dec 2008/Jan. 2009.
4. "Intent" by respondent has been inserted by FINRA into their decision, where evidence of actual "intent" by actions of the respondent was discounted as "inconsequential".
5. The evidence of the Personally Identifiable Information presented and used by FINRA and the Corning Credit Union in their case "lacked" any "dating" on the actual documents. But evidence provided by respondent, Raymond James Privacy Statement dated 2012 was dismissed by FINRA for a wrong date. In the environment over the past few years it is hard to believe that Raymond James would "relax" their protection of Personally Identifiable Information.

These evidenced documents by the Corning Credit Union could have come from the previous 3+ years of working at home, using the method "suggested" by the Corning Credit Union, with their "full knowledge" of the information being transported, the reports generated from this information and the frequency of the work they required. These reports required by the Corning Credit Union of respondent were produced weekly/monthly/quarterly/annually. This type of work was done right up until the very end of my employment with the Corning Credit Union.

6. Lastly, FINRA's complete dismissal of the "torturous business interference" actions of the Corning Credit Union after they executed the settlement agreement with Respondent and Wachovia where they were "completely satisfied" that there was no "damage, danger or disclosure" regarding the client information in question. Or was there any weight given to The Corning Credit Union's responsibility in protecting the information they knew I worked with for years "regularly" at home "transported" by their suggested method.

The last sentence of section 6 regarding the responsibility of the Corning Credit Union to the Personally Identifiable Information, in their defense, was probably an oversight as no "exit interview" occurred with technology other than the "phone wipe".

As to the testimony of the Corning Credit Union's Chief Information Officer, Todd Dauchy, Mr. Dauchy was aware of the breach that occurred in May of 2008 and also was aware of the subsequent 2 breaches after I left in 2009 and 2010. (as mentioned in my previous submissions to the NAC/FINRA) His "omission" when asked is concerning. It shows the "attitude" of the Corning Credit Union to "paint" as "harmful" a picture of respondent as possible. It also shows the "selective" nature of the Corning Credit Union's actions when it comes to "protecting" member's Personally Identifiable Information.

I am asking for the appeal to look at the facts of the "lack of disclosure" in this case, the "actual intent" as demonstrated by the respondent and consider the impact already felt by the respondent from the harmful actions taken by the Corning Credit Union to preserve assets, revenue and clients for their benefit.

In closing, I would be remiss in not recognizing the NAC decision to "not" require respondent to pay the financial fine and costs assessed due to the financial situation experienced by the respondent from all that has taken place since November 2008. This is extremely helpful, but the suspension imposed, is "far more costly" as it is "career ending" to a career that has lasted 32 years without a customer complaint. My career has been "severely impacted" by the "retaliatory" actions (which the complaint to FINRA was just one of the many actions done) by a disgruntled former employer for their benefit. An employer that came to a monetary agreement with respondent and was completely satisfied that no harm was done to client's personal information and that the use of FINRA 4 months after the settlement was only to bring harm to respondent financially and to his career. The complaint by the Corning Credit Union to FINRA was not supported by all of the various FINRA members whose client information was evidenced by the Corning Credit Union in their complaint and FINRA's enforcement action.

Respondent respectfully requests that the suspension be reduced and allow a severely damaged career the opportunity to rebuild. A lot has been learned over the past 5 ½ years.

I offer apologies up front, regarding format, lack of case study supporting my assertions, as I am acting Pro Se and do not have access to the cases referenced or possibly provide cases to support my claims.

I also request of FINRA NAC, the written recommendation of the two non FINRA hearing panel members to the NAC regarding this case.

Sincerely

Steven Tomlinson

Steven R Tomlinson

[redacted]

FINRA

Financial Industry Regulatory Authority

HARD COPY

3-15824

Andrew Love
Associate General Counsel

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March 5, 2014

VIA MESSENGER

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: Complaint No. 2009017527501: Steven Robert Tomlinson

Dear Ms. Murphy:

Enclosed please find the decision of the National Adjudicatory Council ("NAC") in the above-referenced matter. The FINRA Board of Governors did not call this matter for review, and the attached NAC decision is the final decision of FINRA.

Very truly yours,

Andrew J. Love

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Steven Robert Tomlinson Painted Post, NY, Respondent.	DECISION Complaint No. 2009017527501 Dated: March 5, 2014

Respondent misused confidential customer information. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Bonnie S. McGuire, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

Pursuant to FINRA Rule 9311, Steven Robert Tomlinson ("Tomlinson") appeals, and FINRA's Department of Enforcement ("Enforcement") cross appeals, a March 21, 2013 Hearing Panel decision. The Hearing Panel found that, in connection with Tomlinson's move from one member firm to another, he violated NASD Rule 2110 by misusing confidential customer information. The Hearing Panel fined Tomlinson $10,000 and suspended him in all capacities for 10 business days.

After an independent review of the record, we affirm the Hearing Panel's findings. We increase the 10 business-day suspension imposed by the Hearing Panel to a 90-day suspension in all capacities. Finally, we affirm the Hearing Panel's assessment of a $10,000 fine against Tomlinson. We refrain, however, from imposing the fine because Tomlinson has demonstrated a bona fide inability to pay it.

I. Background

Tomlinson entered the securities industry in 1981, when he associated with a FINRA member firm as a general securities representative. In 2001, a credit union hired Tomlinson to serve as a financial advisor within its investment services group. Tomlinson became the group's manager in 2003. At the time of the alleged misconduct, the credit union was affiliated with Raymond James Financial Services, Inc. ("Raymond James"), a FINRA member. Tomlinson was dually employed by Raymond James and the credit union and was registered with FINRA through Raymond James as a general securities representative, investment company products/variable contracts limited representative, and general securities sales supervisor. Tomlinson also served as a Raymond James branch manager. In late November 2008, Tomlinson left Raymond James and the credit union and joined Wachovia Securities, LLC (now Wells Fargo Advisors, LLC, and hereinafter "Wells Fargo"). Tomlinson is currently registered with Wells Fargo as a general securities representative and general securities sales supervisor.

II. Procedural History

On December 7, 2011, Enforcement filed a complaint alleging that Tomlinson misused nonpublic, personal customer information, in violation of NASD Rule 2110.[1] Specifically, the complaint alleged that, on several occasions in November 2008, and just prior to terminating his employment with Raymond James and the credit union, Tomlinson downloaded onto a flash drive confidential information for more than 2,000 customer accounts. Enforcement alleged that Tomlinson did so without authorization from Raymond James, the credit union, or any customers. Enforcement asserted that this information was nonpublic personal information under Regulation S-P privacy rules promulgated under Section 504 of the Gramm-Leach-Bliley Act.[2] Enforcement further alleged that Tomlinson provided his flash drive to an administrative assistant employed by Wells Fargo so that she could create mailing labels for announcements that he had joined Wells Fargo. Enforcement thus claims that his actions compromised the customers' privacy, deprived Raymond James of the opportunity to prevent disclosure of the information, and violated NASD Rule 2110.

Tomlinson answered the complaint and admitted that his flash drive contained customers' confidential and nonpublic personal information. Tomlinson also admitted that he did not inform his prior employers or customers that he possessed the confidential information. He denied, however, that he transferred or disclosed confidential nonpublic information to a third party, and

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[1] We apply the conduct rules that existed at the time of the conduct at issue.

[2] The Gramm-Leach-Bliley Act, codified at 15 U.S.C. §§ 6801-6831, sets forth privacy requirements for the use of "nonpublic personal information" by banks, securities industry members, insurance companies, and other financial institutions. In June 2000, the SEC issued Regulation S-P, Exchange Act Release No. 42974, 2000 SEC LEXIS 1338 (June 22, 2000). Regulation S-P became mandatory on July 1, 2001. *See* 17 C.F.R. §§ 248.1-.30.

he denied any wrongdoing. After conducting a two-day hearing, the Hearing Panel issued a decision finding that Tomlinson violated NASD Rule 2110, as alleged in the complaint.

Tomlinson appealed the Hearing Panel's findings and sanctions. Enforcement cross-appealed the Hearing Panel's sanctions.

III. Facts

Tomlinson admitted or stipulated to most of the facts underlying the allegations in the complaint. We briefly discuss the relevant facts below.

A. Tomlinson Meets with Wells Fargo

In mid-2008, Tomlinson began talking with an acquaintance at Wells Fargo about joining the firm as a branch manager in its Painted Post, New York office. Tomlinson received a salary from the credit union, but no commissions. Wells Fargo offered Tomlinson an opportunity to receive commissions and greater total compensation. In October 2008, Tomlinson visited with Wells Fargo in St. Louis for a recruiting meeting and decided to leave Raymond James and the credit union and join Wells Fargo. Wells Fargo personnel explained to Tomlinson what customer information he could and could not take from his existing firm when he joined Wells Fargo.[3] Wells Fargo informed Tomlinson that he could not bring any client statements, customer account numbers, social security numbers, or any other information other than "allowable customer information" (which consisted of customer names, account titles, addresses, emails and

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[3] Raymond James' compliance manual also provided Tomlinson with guidance concerning customer information. The compliance manual stated:

> Associates affiliated with Raymond James Financial Services . . . are responsible for protecting information used in company business from unauthorized access unless expressly approved for public disclosure or client use. Associates may not share customer information with third parties unless specifically authorized by the client. . . . It is not acceptable for associates . . . to email, or otherwise transmit, non-public or personally identifiable information . . . to a third party for any reason other than a bona fide business purpose with the client's consent.

Tomlinson also executed a Financial Advisor Agreement with Raymond James and the credit union. That agreement required Tomlinson, among other things, to "protect and keep confidential all nonpublic personal information obtained from customers while conducting business . . . [and Tomlinson] agrees not to disclose, either directly or indirectly, to any person (e.g., individual, firm or business) any information obtained from clients of [Raymond James] or customers of [the credit union.]" Tomlinson further acknowledged that any customer-related information provided to him or that he became aware of during the term of the agreement was proprietary information of Raymond James.

phone numbers).[4] Wells Fargo provided Tomlinson with a flash drive for him to use so that he would download only allowable customer information.

B. Tomlinson Downloads Confidential Nonpublic Information and Gives it to Wells Fargo Staff

Shortly before Thanksgiving 2008, Tomlinson, on several different occasions, admittedly downloaded confidential, nonpublic information for more than 2,000 customers to his personal flash drive and laptop.[5] Tomlinson downloaded, among other things, customers' names, addresses, account balances, social security numbers, dates of birth, and quarterly account statements. Tomlinson testified that he downloaded the information so he could contact his customers about his move to Wells Fargo and assist them if they moved their accounts to Wells Fargo, although he admitted that he did not need most of the information he downloaded for the limited purpose of contacting his customers to inform them of his move. Tomlinson downloaded numerous files containing confidential, nonpublic information, and in certain instances he obtained the confidential information by accessing web-based systems of companies through which customers had invested. Approximately 200 of the customers whose information Tomlinson downloaded were his customers; the remainder were customers of other financial advisors at the credit union.[6] Tomlinson downloaded this information during business hours, and also late in the evening, just days before he resigned from Raymond James and the credit union on November 24, 2008.

When he resigned, Tomlinson returned to credit union personnel keys, a VPN token and other items. Tomlinson's cell phone that the credit union purchased for him was also "wiped clean" of all information related to the credit union and returned to Tomlinson with only his personal information on it. Tomlinson did not discuss his personal flash drive, laptop, or the confidential nonpublic information contained on these devices.

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[4] At the time, Wells Fargo mistakenly believed that the Raymond James entity at issue was, like itself, a signatory to the Protocol for Broker Recruiting. The Protocol for Broker Recruiting is an agreement entered into by a number of broker-dealers providing that the signatories will not sue one another for recruiting registered representatives if the departing representative, after providing notice to the firm he is departing, takes limited customer information (names, mailing addresses, telephone numbers, and account titles). Regardless, as discussed below, Tomlinson did not comply with the Protocol and took information beyond what the Protocol permits.

[5] Tomlinson could not get the flash drive provided by Wells Fargo to work, so he used his personal flash drive (which was neither encrypted nor password protected).

[6] The credit union encouraged its employees to service customer accounts regardless of how each customer was assigned to a particular financial advisor, and Tomlinson sometimes reassigned customers, including his own, to other financial advisors depending on advisors' workloads.

Tomlinson left the credit union's offices early in the evening on November 24 and met a Wells Fargo administrative assistant, Lisa Dutcher ("Dutcher"), at the Wells Fargo Painted Post branch office. Dutcher worked at another Wells Fargo office and had been specifically assigned to help Tomlinson prepare announcements of his move. Tomlinson gave Dutcher his flash drive but, because it was already late and it had started to snow, Dutcher and Tomlinson agreed that they would create the announcements the next day. Dutcher took the flash drive, placed it in her purse, and spent the evening in a hotel. Tomlinson never informed Dutcher that the flash drive contained confidential nonpublic information, was unencrypted, and was not password protected. Moreover, Tomlinson did not give Dutcher any specific instructions concerning the confidential information contained on the flash drive.

On November 25, 2008, Dutcher used Tomlinson's flash drive at a computer at the front reception desk (where a receptionist was working) in the Wells Fargo office. Tomlinson did not supervise Dutcher's work and was in his office at Wells Fargo for most of the time she worked with the flash drive. Dutcher had difficulty accessing the information on Tomlinson's flash drive and called Wells Fargo IT personnel to assist her. IT personnel remotely accessed the computer to assist Dutcher, and she eventually printed mailing labels from the flash drive. Tomlinson reviewed the mailing labels, discarded some of them as duplicates or unlikely to be responsive to his move, and Dutcher returned the flash drive to Tomlinson later that afternoon. Wells Fargo sent announcements of Tomlinson's employment to approximately 160 individuals.

C. The Credit Union Investigates Tomlinson's Departure

After Tomlinson departed Raymond James and the credit union, the credit union's chief information officer began an investigation concerning whether Tomlinson violated his non-compete agreement with the credit union after a customer had reported receiving a mailing from him. In the course of that investigation, the chief information officer discovered that customer information had been downloaded onto a flash drive. He also discovered a directory created by Tomlinson that denoted a connection to Wells Fargo. On December 1, 2008, the credit union delivered to Tomlinson a letter at his Wells Fargo office. The letter demanded that Tomlinson return the flash drive containing the confidential customer information and destroy all other versions of the information in his possession.

Tomlinson testified that he found the letter to be "scary" and panicked. Tomlinson promptly deleted from the flash drive all the files he had downloaded except for a single file containing data relating solely to his own customers. Tomlinson also deleted files from his personal laptop, and he only stopped deleting files when he conferred with a Wells Fargo attorney who advised him to stop.

IV. Discussion

NASD Rule 2110 requires "[a] member, in the conduct of his business, [to] observe high standards of commercial honor and just and equitable principles of trade."[7] "[T]he SEC has consistently held that [FINRA's] disciplinary authority is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security." *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (citations omitted). Unethical conduct or conduct undertaken in bad faith violates NASD Rule 2110. *See Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54, at *17 (Jan. 6, 2012). "In analyzing a securities professional's conduct under [just and equitable principles of trade] rules, we frequently have focused on whether the conduct implicates a generally recognized duty owed to clients or the firm." *Id.* at *19.

Downloading confidential, nonpublic customer information and providing that information to a third party, without customer authorization, is a violation of NASD Rule 2110. *See DiFrancesco*, 2012 SEC LEXIS 54, at *21-22 (holding that a registered representative violated NASD Rule 2110 by downloading confidential customer information and transmitting that information to his new firm); *see also Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *10, 29 (Jan. 9, 2009) (finding that Heath's disclosure to a third party of confidential information concerning a corporate acquisition "violated one of the most fundamental ethical standards in the securities industry" and that "[a]ny reasonably prudent securities professional would recognize that the disclosure of confidential client information violates the ethical norms of the industry" as set forth in NYSE's rule governing just and equitable principles of trade), *aff'd*, 586 F.3d 122 (2d Cir. 2009). The duty to maintain the confidentiality of customer information "is grounded in fundamental fiduciary principles." *See Heath*, 2009 SEC LEXIS 14, at *4.

Regulation S-P, which governs broker-dealers' treatment of "nonpublic personal information" about consumers and customers, generally prohibits the disclosure of "nonpublic personal information" about a consumer to a nonaffiliated third party unless a broker-dealer has provided the consumer with proper notice and "a reasonable opportunity to opt out of the disclosure."[8] 17 C.F.R. § 248.10(a)(1). "Nonpublic personal information" includes, among

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[7] NASD Rule 2110 applies to associated persons of members pursuant to NASD Rule 0115(a).

[8] Under Rule 30 of Regulation S-P, every broker-dealer must adopt written policies and procedures that address administrative, technical, and physical safeguards for the protection of customer records and information, which must insure the security and confidentiality of customer records and information. 17 C.F.R. § 248.30. The regulation defines "consumer" broadly to mean any individual who obtains a financial product or service from a broker-dealer, among others, that is primarily for personal, family, or household use. 17 C.F.R. § 248.3(g). A "customer" is a consumer who has a continuing relationship with a broker-dealer, among others, in which the broker-dealer provides one or more financial products or services that are primarily for personal, family, or household use. 17 C.F.R. § 248.3(j)-(k).

other things, "personally identifiable financial information." 17 C.F.R. § 248.3(t)(1). "Personally identifiable financial information" includes: (1) information a consumer provides to a broker-dealer to obtain a financial product; (2) information about a consumer resulting from any transaction involving a financial product or service between a broker-dealer and a consumer; or (3) information a broker-dealer otherwise obtains about a consumer in connection with providing a financial product or service to that consumer. 17 C.F.R. § 248.3(u)(1). FINRA has advised its members that, "[u]nder Regulation S-P, any information given by consumers or customers to broker/dealers to obtain a product or service will generally be considered to be nonpublic financial information." *NASD Notice to Members 00-66*, 2000 NASD LEXIS 75, at *8 (Sept. 2000); *see also NASD Notice to Members 05-49* (July 2005) (reminding members of their obligations to protect customer information under Regulation S-P).

We find that Tomlinson violated NASD Rule 2110 by, in this instance, taking and disclosing to Wells Fargo customer information that constituted nonpublic personal information under Regulation S-P. *See DiFrancesco*, 2012 SEC LEXIS 54, at *23 (holding that the privacy requirements set forth in Regulation S-P support a finding that respondent violated his ethical obligations under Rule 2110). First, Tomlinson's conduct was business-related. *Id.* at *17 n.18 (holding that respondent's actions in taking and downloading confidential nonpublic information relating to customers at his former firm were business-related and "involved both his business relationship with [his prior firm] and his commercial relationship with his customers").

Second, it is undisputed that the customer information Tomlinson downloaded onto his personal flash drive constituted "nonpublic personal information" under Regulation S-P. Tomlinson downloaded, among other things, customers' names, addresses, account balances, social security numbers, dates of birth, and quarterly account statements. *See id.* at *26 (finding that such information constitutes nonpublic personal information).

Third, we find that Tomlinson disclosed the downloaded nonpublic personal information to Wells Fargo. Tomlinson gave Dutcher, a Wells Fargo employee, the flash drive containing confidential information of more than 2,000 Raymond James and credit union customers. The flash drive was neither encrypted nor password protected. Dutcher had access to all of the information on the flash drive, and pulled information from the flash drive at the receptionist's desk at Wells Fargo's Painted Post office.[9] Tomlinson admittedly did not supervise Dutcher

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[9] Enforcement asserts that the Hearing Panel credited the testimony of the credit union's chief information officer that a credit union file was found on a Wells Fargo computer in Syracuse, New York. Enforcement argues that this credibility determination is entitled to deference under well-established precedent. *See, e.g., Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *18 (Aug. 22, 2008) (holding that credibility determinations can only be overcome by substantial evidence). Tomlinson argues that the evidence contradicts Enforcement's assertion that a credit union file was found on a Wells Fargo computer. We need not resolve this issue because we find that Tomlinson violated NASD Rule 2110 regardless of whether a credit union file was also discovered on a Wells Fargo computer. We note, however, that the Hearing Panel did not make any express credibility findings concerning the chief information officer's testimony on this point.

while she worked with the flash drive. Dutcher further testified that Wells Fargo IT staff accessed remotely the computer she was working on to download Tomlinson's address labels. Tomlinson did not obtain the consent of Raymond James, the credit union, or any of his customers prior to disclosing their nonpublic personal information, and the record does not demonstrate that customers were provided with the notice required under Regulation S-P prior to Tomlinson's disclosure of their information.

Tomlinson failed to comply with high standards of commercial honor and just and equitable principles of trade, in violation of NASD Rule 2110. By downloading and disclosing nonpublic confidential information of his customers and other Raymond James and credit union customers, Tomlinson placed important and confidential customer information at risk and his own interests before his customers' privacy interests. *See DiFrancesco*, 2012 SEC LEXIS 54, at *23 (finding that by downloading and disclosing nonpublic customer information to his new firm, respondent acted in his own interest by favoring his personal interest in maintaining his client base over customers' interest in their confidential information). Tomlinson's actions compromised the privacy of his customers' nonpublic personal information under Regulation S-P and prevented Raymond James and the credit union from stopping his disclosures of nonpublic personal information to Wells Fargo. Tomlinson also breached Raymond James' policies and his employment agreement with Raymond James and the credit union. *See id.* at *22-23 (finding that respondent breached his duty of confidentiality, which was reflected in his firm's code of conduct).

Tomlinson argues that he did not disclose any nonpublic customer information to Dutcher. He argues that Dutcher used the information on the flash drive solely to print out labels to send "tombstone" announcements to his customers. Further, Tomlinson argues that unlike the respondent in *DiFrancesco*, he did not email customer information to his new firm and was acting within the scope of his authority as a Raymond James branch manager and credit union supervisor.

We reject Tomlinson's arguments. Regardless of precisely how Tomlinson transmitted the confidential information to Dutcher, and whether she used information other than the names and addresses of Tomlinson's 200 customers, Tomlinson disclosed nonpublic customer information and placed his customers' confidential information at risk by granting Dutcher unfettered access to all of the information on the flash drive. *See John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *32 (June 14, 2013) (focusing on whether respondent provided a competitor with access to confidential customer records and rejecting respondent's argument that he did not violate NASD Rule 2110 because that information was never used at the new firm). We also find that the Wells Fargo receptionist and IT staff also had, at a minimum, access to all of the files contained on the flash drive, and reject Tomlinson's argument that a lack of demonstrable customer harm excuses his misconduct. *See DiFrancesco*, 2012 SEC LEXIS 54, at *21 (holding that "the ethical prohibition on the disclosure of confidential client information is not contingent upon future harm"). That customers' confidential and private information was not misused despite Tomlinson's actions is serendipitous and does not alter our finding that Tomlinson violated NASD Rule 2110.

Moreover, whether Tomlinson was authorized to download confidential customer information while serving as a Raymond James branch manager and credit union supervisor is

not relevant to whether he breached his duties under NASD Rule 2110 when he downloaded confidential customer information and then disclosed it to a non-affiliated third party upon leaving Raymond James and the credit union. The fact that Tomlinson's actions violated Raymond James' express policies and procedures, as well as the employment agreement Tomlinson had entered into with Raymond James and the credit union, undermine his argument that he was simply acting within the scope of his employment.[10]

We further reject Tomlinson's arguments that he did not violate FINRA's rules because he acted without intent or malice. Proof of intent or scienter is not necessary to show a violation of NASD Rule 2110. *Id.* at *18. We also reject Tomlinson's argument that, because no customer or FINRA member firm complained about his conduct, he did not violate NASD Rule 2110. FINRA may bring a disciplinary action against a registered representative even in the absence of a customer complaint or complaint from a member. *See Maximo Justo Guevara*, 54 S.E.C. 655, 664 (2000) (holding that FINRA's "power to enforce its rules is independent of a customer's decision not to complain"), *aff'd*, 47 F. App'x 198 (3d Cir. 2000). Similarly, the record does not support Tomlinson's arguments that FINRA served as the credit union's "tool of retaliation" against him. *See Dist. Bus. Conduct Comm. v. Guevara*, Complaint No. C9A970018, 1999 NASD Discip. LEXIS 1, at *39 n.16 (NASD NAC Jan. 28, 1999) (holding that "unsubstantiated assertions of bias are an insufficient basis to invalidate NASD proceedings"), *aff'd*, 54 S.E.C. 655, *aff'd*, 47 F. App'x 198.

Finally, Tomlinson argues that the Hearing Panel improperly excluded from evidence a Raymond James "Privacy Notice" dated July 2012, which provides in part that financial advisors may change brokerage firms and nonpublic personal information collected by financial advisors may be provided to the new firm. The notice further provides that customers may opt out of this sharing of information by calling a toll-free number. The Hearing Panel excluded this document because there was no evidence that this notice was in effect at the time of the misconduct in this case. We agree that the record does not show that the July 2012 notice was in effect in 2008. *See* FINRA Rule 9263 (providing that a Hearing Officer may exclude evidence that is irrelevant or immaterial). Moreover, Tomlinson admitted that he did not notify anyone, including customers, that he would be taking and disclosing their confidential information to a third party, and nothing in the record demonstrates that, under Regulation S-P, Raymond James provided information to the customers at issue concerning the firm's privacy policies and practices or that the customers opted out so that their nonpublic personal information could be disclosed to Wells Fargo. *See* 17 C.F.R. § 248.10(a)(1) (providing that a broker-dealer may not disclose any nonpublic personal information to a nonaffiliated third party unless certain information has been provided to the customer and the customer has not opted out).

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[10] We also reject Tomlinson's arguments that the record does not show when Tomlinson downloaded the confidential customer information and that the Hearing Panel improperly relied exclusively upon the testimony of the credit union's chief information officer to establish these facts. Tomlinson stipulated to these facts and testified about them unequivocally.

V. Sanctions

The Hearing Panel fined Tomlinson $10,000 and suspended him from associating with any member firm in any capacity for 10 business days. Tomlinson argues that these sanctions are too harsh, a suspension of any length is the equivalent of "a permanent suspension in today's environment," and that he is unable to pay monetary sanctions. Enforcement argues, as it did before the Hearing Panel, that a 90-day suspension and $10,000 fine are appropriate. For the following reasons, we increase the 10 business-day suspension imposed by the Hearing Panel to a 90-day suspension in all capacities. We affirm the $10,000 fine imposed by the Hearing Panel. In light of Tomlinson's financial condition, however, we decline to impose both the fine and the Hearing Panel's order that he pay costs in the amount of $2,900.42.

A. Tomlinson's Misconduct Warrants a Longer Suspension

As an initial matter, both parties point to *DiFrancesco* to support their respective positions regarding sanctions. Enforcement argues that, based upon the sanctions assessed in *DiFrancesco* (a $10,000 fine and 10 business-day suspension), Tomlinson should be sanctioned more severely because of several additional aggravating factors not present in *DiFrancesco*. Conversely, Tomlinson argues that the facts and circumstances of this case warrant lesser sanctions than those imposed in *DiFrancesco*. "It is well recognized that the appropriate sanction depends upon the facts and circumstances of each particular case and cannot be determined precisely by comparison with actions taken in other proceedings or against other individuals in the same proceeding." *Christopher J. Benz*, 52 S.E.C. 1280, 1285 (1997), *aff'd*, 168 F.3d 478 (3d Cir. 1998). Regardless, as described below, we find that Tomlinson's serious misconduct warrants a longer suspension than the 10-business day suspension imposed by the Hearing Panel. We find that a 90-day suspension and $10,000 fine are appropriately remedial and will serve to deter others who might consider shirking their important obligations under NASD Rule 2110 to safeguard confidential customer information.

The FINRA Sanction Guidelines ("Guidelines") do not contain recommended sanctions for the specific misconduct at issue. We therefore have considered the recommendations included in the Guidelines' Principal Considerations in Determining Sanctions and other relevant factors in setting appropriately remedial sanctions.[11]

Disclosing customers' confidential nonpublic information "jeopardizes the foundation of trust and confidence crucial to any professional advising relationship." *DiFrancesco*, 2012 SEC LEXIS 54, at *35. Even if we credit Tomlinson's assertions that he did not intend to harm his customers, he carelessly placed more than 2,000 customers' confidential information at risk

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[11] *See FINRA Sanction Guidelines* 6-7 (2013), http://www.finra.org/web/groups /industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

when he moved to Wells Fargo.[12] Tomlinson should have known that he had an obligation to maintain and safeguard customer information. Raymond James's and Wells Fargo's policies put Tomlinson on notice of his obligations in this respect, and during his recruiting trip Wells Fargo expressly informed Tomlinson what customer information he could, and could not, take. Tomlinson, however, disregarded the policies and admonitions and used his own personal flash drive to download confidential customer information, instead of the Wells Fargo-formatted flash drive. Tomlinson's actions violated those policies and he failed to uphold his obligations under NASD Rule 2110.

Moreover, threats to the safety of customers' confidential information have only increased in the last 10 years. While all registered persons must safeguard confidential customer information, we also consider that Tomlinson is a supervisor and should have known that he could not disclose confidential customer information to a third party.[13] *See, e.g.*, *Harry Friedman*, Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at *30 (May 13, 2011) (finding respondent's industry experience to be aggravating); *Dep't of Enforcement v. Cooper*, Complaint No. C04050014, 2007 NASD Discip. LEXIS 15, at *16 (NASD NAC May 7, 2007) (finding that Cooper's status as a principal was aggravating). Tomlinson's actions also resulted in his potential for monetary gain with respect to the Raymond James customers who decided to open an account with him at Wells Fargo.[14]

We also find aggravating that Tomlinson's misconduct occurred over a several-day period, and that he downloaded some of the confidential customer information late at night prior to leaving Raymond James and the credit union (which indicates that Tomlinson acted in a surreptitious manner).[15] Similarly, we find it aggravating that when he received the credit union's letter indicating that they had discovered his misconduct, he deleted most of the information on his flash drive.[16]

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[12] A lack of customer harm is not mitigating. *See Dep't of Enforcement v. Golonka*, Complaint No. 2009017439601, 2013 FINRA Discip. LEXIS 5, at *31 (FINRA NAC Mar. 4, 2013) (citing cases).

[13] In assessing sanctions, the Hearing Panel did not consider that Tomlinson should have known, by virtue of his supervisory role, that taking and disclosing confidential customer information when moving firms violates NASD Rule 2110.

[14] The Guidelines instruct us to consider whether the respondent's misconduct "resulted in the potential for monetary or other gain." *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 17).

[15] *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 8) (instructing adjudicators to consider whether the respondent engaged in numerous acts).

[16] *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 10) (instructing adjudicators to consider whether the respondent attempted to conceal his misconduct).

At the same time, we note that there is no evidence that Tomlinson intended to harm customers or place their confidential information at risk, and Tomlinson now acknowledges the potential harm that his mishandling of confidential customer information could have caused customers with respect to the privacy of their nonpublic personal information.[17] Given all of the foregoing factors, we find that a $10,000 fine and a 90-day suspension in all capacities are appropriately remedial. These sanctions reflect the importance of a registered representative's obligation to safeguard confidential customer information and Tomlinson's careless breach of that obligation. We decline, however, to impose the fine as described below.[18]

B. Tomlinson's Inability to Pay

We have carefully considered Tomlinson's assertion on appeal that he is unable to pay any monetary sanctions imposed by FINRA.[19] Tomlinson has the burden of demonstrating a bona fide inability to pay. *See Guidelines,* at 5 (General Principles Applicable to All Sanction Determinations, No. 8); *Dep't of Enforcement v. Cipriano*, Complaint No. C07050029, 2007 NASD Discip. LEXIS 23, at *43-44 (NASD NAC July 26, 2007) (citing *Toney L. Reed*, 52 S.E.C. 944, 947 n.12 (1996)). A respondent must show that, in seeking to pay a fine, he is unable to obtain the necessary funds by, among other things, raising capital or borrowing. *See Dep't of Enforcement v. Merrimac Corp. Sec., Inc.*, Complaint No. 2007007151101, 2012 FINRA Discip. LEXIS 43, at *43-44 (FINRA NAC May 2, 2012); *see also ACAP Fin., Inc.*, Exchange Act Release No. 70046, 2013 SEC LEXIS 2156, at *77 (July 26, 2013) (holding that respondent failed to demonstrate an inability to pay where it had failed to demonstrate that it could not obtain financing, employ other sources of funds, or agree to an installment plan).

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[17] Although the absence of customer harm is not mitigating, we note that the record does not show that customer information was misused as a result of Tomlinson's misconduct.

[18] Tomlinson argues that a suspension of any length would essentially end his career because Wells Fargo's policy is to terminate any representative who has been suspended. Even assuming the veracity of this claim, in determining appropriately remedial sanctions, we do not consider as evidence of mitigation the possible impact a disciplinary action might have on a respondent's career. *See DiFrancesco*, 2010 FINRA Discip. LEXIS 37, at *22 n.17 (stating that "we do not consider as evidence of mitigation the possible impact a disciplinary action might have on a respondent's career"). For similar reasons, we find that any actions taken by the credit union against Tomlinson, and the possible detrimental effects of such actions on Tomlinson, have no bearing on our imposition of sanctions. *Cf. Dep't of Enforcement v. Nouchi*, Complaint No. E102004083705, 2009 FINRA Discip. LEXIS 8, at *13 n.18 (FINRA NAC Aug. 7, 2009) (holding that the sanctions FINRA imposes are independent of firm's actions against an employee).

[19] Although Tomlinson expressly raised this argument for the first time on appeal, the NAC subcommittee empaneled to hear this matter afforded Tomlinson the opportunity to supplement the record with evidence of his financial condition. Tomlinson filed a notarized Statement of Financial Condition, along with supporting documentation.

Tomlinson has demonstrated a bona fide inability to pay. The record shows that since 2010 nearly all of Tomlinson's monthly net income has serviced a loan to him from Wells Fargo, and consequently, he does not have sufficient funds remaining to pay his family's other living expenses (which are significant).[20] The bank holding liens on Tomlinson's real property (a primary residence and a home that for years has been in his family) has initiated foreclosure proceedings, and he is delinquent on numerous payments to other creditors. Tomlinson has also borrowed against his retirement savings, and represents that he has listed his primary residence and a boat for sale (which also appears to be encumbered). Simply put, Tomlinson does not earn nearly enough monthly income to pay his expenses on a going basis, has not for some time, and does not appear to have any realistic ability to borrow or otherwise raise additional funds. *See id.*; *Dep't of Mkt. Regulation v. Castle Sec. Corp.*, Complaint No. CMS030006, 2005 NASD Discip. LEXIS 2, at *32 (NASD NAC Feb. 14, 2005) ("A respondent claiming inability to pay must demonstrate insolvency."); *Black's Law Dictionary* 799 (9th ed. 2009) (defining insolvency as "the condition of being unable to pay debts as they fall due or in the usual course of business").

Enforcement argues that Tomlinson's reported assets, by virtue of his own calculations, significantly exceed his reported liabilities. Enforcement, however, fails to account for the fact that the large majority of Tomlinson's net worth consists of equity in real property that is currently in foreclosure.[21] We would be remiss if we did not consider that realization of any equity in these illiquid assets is no longer entirely in Tomlinson's control. In these unusual circumstances, a simple, mechanical calculation of net worth does not accurately and completely reflect Tomlinson's financial condition and ability to pay monetary sanctions. *Cf., e.g.*, 11 U.S.C. § 101(32) (defining "insolvent" in federal bankruptcy matters as a financial condition where the sum of a person's debts, exclusive of property that may be exempt from the bankruptcy estate, exceeds a person's property at a fair valuation). While we acknowledge that Tomlinson did not initially explain how he determined the value of his assets and did not provide complete documentation for each of his numerous liabilities, we find that Tomlinson has shown that he has a bona fide inability to pay the monetary sanctions we otherwise would impose upon him. Thus, given these facts, we do not impose the fine, nor do we order that Tomlinson pay costs.

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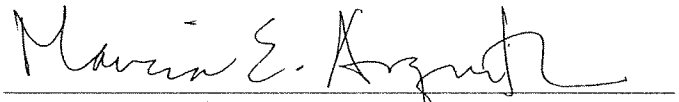
[20] Upon joining Wells Fargo, Tomlinson received funds from the firm pursuant to a forgivable, eight-year loan. The terms of the loan required that Tomlinson reach certain performance thresholds in order for the loan to be forgivable. Tomlinson asserts that he did not reach those thresholds and has depleted his savings over the past few years to cover living expenses. The record shows that since 2010, Tomlinson's net income remaining after paying the loan to Wells Fargo totals approximately $12,000.

[21] Tomlinson states that if these properties are sold at auction, "the auction prices will more than likely be closer to the mortgage balance owed."

VI. Conclusion

We affirm the Hearing Panel's finding that Tomlinson violated NASD Rule 2110 because he misused confidential customer information when he downloaded and disclosed nonpublic personal information to his new firm. For that misconduct, we suspend Tomlinson in all capacities for 90 days. We also assess, but do not impose, a $10,000 fine upon Tomlinson.[22] Finally, we do not order that Tomlinson pay costs in this matter.

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith
Senior Vice President and Corporate Secretary

[22] We also have considered and reject without discussion all other arguments advanced by the parties.

3-15214

FINRA

Financial Industry Regulatory Authority

Marcia E. Asquith
Senior Vice President and Corporate Secretary
(202) 728-8831 - Direct
(202) 728-8300 - Fax

March 5, 2014

VIA CERTIFIED AND FIRST CLASS MAIL

Steven Robert Tomlinson
[redacted]

RE: Complaint No. 2009017527501: Steven Robert Tomlinson

Dear Mr. Tomlinson:

Enclosed is the decision of the National Adjudicatory Council ("NAC") in the above-referenced matter. The FINRA Board of Governors did not call this matter for review, and the attached NAC decision is the final decision of FINRA. In the enclosed decision, the NAC imposed a 90-day suspension in all capacities.

* * *

The 90-day suspension imposed by the NAC shall begin with the opening of business on Monday, May 5, 2014 and end on Sunday, August, 3, 2014. Please note that under IM-8310-1 ("Effect of a Suspension, Revocation or Bar"), you are not permitted to associate with any FINRA member firm in any capacity, including a clerical or ministerial capacity, during the period of your suspension. Further, member firms are not permitted to pay or credit any salary, commission, profit or other remuneration that results directly or indirectly from any securities transaction that you may have earned during the period of suspension.

* * *

Pursuant to Article V, Section 2 of the FINRA By-Laws, if you are currently employed with a member of FINRA, you are required immediately to update your Form U-4 to reflect this action.

You are also reminded that the failure to keep FINRA apprised of your most recent address may subject you to entry of a default decision. Article V, Section 2 of the FINRA By-Laws requires all persons who apply for registration with FINRA to submit a Form U-4 and to keep all information on the Form U-4 current and accurate. Accordingly, you must keep your member firm apprised of your current address.

In addition, FINRA may request information from, or file a formal disciplinary action against, persons who are no longer registered with a member for at least two years after their termination from the member. See Article V, Sections 3 and 4 of the FINRA's By-Laws. Requests for information and disciplinary complaints issued by FINRA during this two-year period will be mailed to such persons at their last known address as reflected in FINRA's records. Such individuals are deemed to have received correspondence sent to that address, whether or not the individuals have actually received them. Thus, individuals who are no longer associated with an FINRA member firm and who have failed to update their addresses during the two years after they end their association are subject to the entry of default decisions against them. See *Notice to Members 97-31*. Letters notifying FINRA of such address changes should be sent to:

CRD
P.O. Box 9495
Gaithersburg, MD 20898-9401

* * *

You may appeal this decision to the U.S. Securities and Exchange Commission ("SEC"). To do so, you must file an application with the SEC within 30 days of your receipt of this decision. A copy of this application must be sent to FINRA's Office of General Counsel for Regulatory Policy and Oversight, as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to FINRA by similar means.

The address of the SEC is:
Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

The address of FINRA is:
Andrew J. Love
FINRA – Office of General Counsel
1735 K Street, NW
Washington, DC 20006

If you file an application for review with the SEC, the application must identify the FINRA case number and set forth in summary form a brief statement of alleged errors in the NAC decision and supporting reasons therefor. You must include an address where you may be served and a phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and FINRA. Attorneys must file a notice of appearance.

The filing with the SEC of an application for review shall stay the effectiveness of any sanction, other than a bar or an expulsion, imposed in a NAC decision. Thus, the 90-day suspension imposed by the NAC in the enclosed decision will be stayed pending

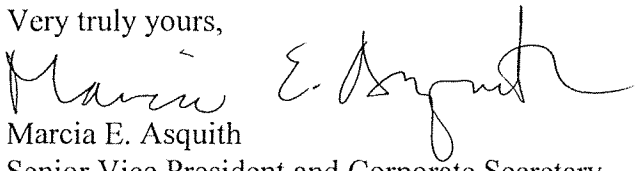
appeal to the SEC. Additionally, orders in the enclosed NAC decision to pay fines and/or costs will be stayed pending appeal.

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-551-5400.

* * *

If you do not appeal this NAC decision to the SEC and the decision orders you to pay fines and/or costs, you do not need to pay these amounts until after the 30-day period for appeal to the SEC has passed. Any fines and costs assessed should be paid to (via regular mail) FINRA, P.O. Box 7777-W8820, Philadelphia, PA 19175-8820 or (via overnight delivery) FINRA, W8820-c/o Mellon Bank, Room 3490, 701 Market Street, Philadelphia, PA 19106.

Very truly yours,



Marcia E. Asquith
Senior Vice President and Corporate Secretary

cc: Bonnie S. McGuire
Michelle Glunt, Finance
Jeffrey Pariser

3-15824

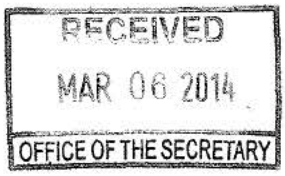
FINRA

Financial Industry Regulatory Authority

Andrew Love
Associate General Counsel

Direct: (202) 728-8281
Fax: (202) 728-8264

March 5, 2014



VIA CERTIFIED MAIL

David Miller Labourdette
Wells Fargo Advisors
First Vice President - Investments
160 N. Main Street
Elmira, NY 14901-2918

RE: Complaint No. 2009017527501: Steven Robert Tomlinson

Dear Mr. Labourdette:

Rule 9349(c) of the FINRA Code of Procedure specifies that current employers be notified and provided a copy of National Adjudicatory Council decisions involving their employees. This is to advise you that FINRA named Steven Robert Tomlinson as a respondent in the National Adjudicatory Council decision referenced above. A photocopy of the National Adjudicatory Council's March 5, 2014 decision is enclosed.

If you have any questions, you may contact Ciara Gray, Legal Assistant, at (202) 728-8408.

Very truly yours,

Andrew J. Love

Enclosure

cc: Steven Robert Tomlinson
Jeffrey Pariser