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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application of

Steven R. Tomlinson

For Review of Disciplinary Action

Taken by

FINRA

File No. 3-15824

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

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I. INTRODUCTION

Applicant Steven R. Tomlinson ("Tomlinson") has appealed the March 4, 2014 decision of the National Adjudicatory Council ("NAC") to the Securities and Exchange Commission. The record convincingly demonstrates that Tomlinson violated NASD Rule 2110 by misusing confidential customer information that is protected as "nonpublic personal information" under Regulation S-P—including social security numbers, dates of birth, account numbers, and account balances. In the final days of his employment as a branch manager with a credit union affiliated with Raymond James Financial Services ("Raymond James"), Tomlinson downloaded confidential customer information for thousands of customers from his firm's computer system onto a personal, unencrypted flash drive that was not password protected. Then, despite ample notice that he was not permitted to possess that confidential information after his resignation or disclose it to third parties, Tomlinson took the confidential information to his new firm, and allowed its employees unfettered and unsupervised access to it. Tomlinson's self-interested actions prevented his former firm from giving its customers a reasonable opportunity to opt out of the disclosures, as required by Regulation S-P, and caused his new firm to receive improperly nonpublic personal information. Most importantly, his actions put thousands of customers' confidential personal information at risk. The NAC's findings that Tomlinson violated NASD Rule 2110 are well supported by the record.

The NAC properly imposed a 90-day suspension for Tomlinson's serious breach of customer confidentiality. Tomlinson took sensitive, confidential information for thousands of customers. Most of these were customers with whom Tomlinson had no previous business relationship. The NAC found Tomlinson's actions particularly egregious in light of his heightened responsibilities as a supervisor. Indeed, it was his role as a supervisor that gave Tomlinson access to the information he took and disclosed in the first place. Under these circumstances, the NAC's 90-day suspension is appropriately remedial and serves as a deterrent to future violations by Tomlinson and others.

Accordingly, FINRA urges the Commission to affirm the NAC's findings and sanctions in all respects, and to dismiss Tomlinson's application for review.

II. BACKGROUND

Tomlinson stipulated and admitted to most of the facts underlying the allegations in the complaint. (*See* Stipulations at RP 225-28.) [1] We briefly discuss the relevant facts below.

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1 "RP" refers to the page number in the certified record.

A. Steven Tomlinson

Tomlinson entered the securities industry in 1981 when he registered as a general securities representative and, in 1984, he became a general securities sales supervisor. (RP 225.) In 2001, Tomlinson joined the Corning Federal Credit Union (the "CU") as a financial advisor within its investment services group, and later became the group's manager. (RP 592-93.) During the relevant period, the CU was affiliated with Raymond James, a FINRA member firm. (RP 225.) Tomlinson was dually employed by Raymond James and the CU, and was registered with Raymond James as a general securities representative, investment company products/variable contracts limited representative, and general securities sales supervisor. (RP 225, 653-692.) He also served as Raymond James' branch manager. (*Id.*)

In late November 2008, Tomlinson left Raymond James and the CU to join Wachovia Securities, LLC, which later became Wells Fargo Advisors, LLC ("Wells Fargo"). (RP 225.) Tomlinson is currently registered with Wells Fargo as a general securities representative and general securities sales supervisor. (RP 225, 653-92.)

B. Tomlinson Meets with Wells Fargo and Is Instructed on Procedures for Bringing Information to His New Firm

Sometime in 2008, Tomlinson began contemplating leaving the CU and Raymond James for another broker-dealer. (RP 598-99.) Tomlinson was interested in moving to a firm with a traditional commission structure. (*Id.*) At the CU, Tomlinson was paid a salary and received no commissions. (RP 592.) Accounts at the CU were distributed amongst advisors with the goal of achieving even workloads. (RP 592-93.) Tomlinson wanted a structure that would allow him to build an individual business that he might one day either pass on to his son or sell to another advisor. (RP 598-99.)

In mid-2008, Tomlinson began talking with Frank Albanese ("Albanese"), a Wells Fargo manager he had known for many years, about joining Wells Fargo as a branch manager in its Painted Post, New York office. (RP 599.) At Wells Fargo, Tomlinson's compensation would be primarily based on commissions, providing the potential for greater total compensation and the development of a book of business. (RP 585-86, 599.)

In October 2008, Tomlinson visited Wells Fargo's offices in St. Louis for a recruiting meeting, accompanied by Albanese. (RP 519, 569-70.) Wells Fargo personnel informed Tomlinson that, if he decided to join the firm, he would *only* be allowed to take from Raymond James and the CU customer names, account titles, addresses, emails and phone numbers. (RP 519, 570.) Wells Fargo also told Tomlinson that he was *not* permitted to take any other information, including client statements, customer account numbers or social security numbers. (RP 565.)

Tomlinson ultimately decided to leave Raymond James and the CU to join Wells Fargo. (RP 599.) In connection with his anticipated move, Wells Fargo provided Tomlinson with a document entitled "Financial Adviser Integration Plan" (the "Plan"), which included directions concerning the kinds of customer information Tomlinson could and could not take when he left Raymond James and the CU. (RP 698-711.) Tomlinson acknowledged that he received the Plan on October 18, 2008. (RP 564.) The Plan specifically set forth the "allowable customer information" that advisors could bring to Wells Fargo. (RP 700.) The Plan stated that "[u]pon resignation, [a]dvisors may only bring the following client information: client name, account title, address, phone numbers and email addresses." (*Id.*) The Plan also directed recruits that they were "not allowed to bring client statements, account numbers, social security numbers . . .

or any electronically stored client data outside of the 'allowable' information" specifically set forth. (*Id.*)

At the time it gave Tomlinson these instructions, Wells Fargo mistakenly believed that the Raymond James entity which employed Tomlinson was, like itself, a signatory to the Protocol for Broker Recruiting (the "Protocol").[2] In fact, it was not. The mistake was caught and corrected prior to Tomlinson's departure from Raymond James, and Wells Fargo gave him the proper instructions for departing from a non-protocol firm. (RP 570.) Tomlinson was instructed that since his firm was not part of the Protocol, he would only be allowed to take the so-called "Christmas card list"—i.e., customer name, address and phone number. Albanese testified that he personally had conversations with Tomlinson instructing him that he was limited to bringing the Christmas card list for his customers. (RP 515-16.)

In addition to the specific instructions from Wells Fargo, both Raymond James and the CU had policies and agreements concerning the handling of confidential customer information. Raymond James' compliance manual (the "Manual") provided that associates like Tomlinson were "responsible for protecting information used in company business from unauthorized access unless expressly approved for public disclosure or client use." (RP 713.) The Manual stated that associates "may not share customer information with third parties unless specifically authorized by the client," and cautioned associates that it is "not acceptable . . . to email, or otherwise transmit, non-public or personally identifiable information . . . to a third-party for any

[2] The Protocol 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 from which he is departing, takes limited customer information, including names, mailing addresses, telephone numbers, and account titles.

reason other than a bona fide business purpose with the client's consent." (*Id.*) The Manual also prohibited the removal of confidential information from a Raymond James office without permission, and cautioned that it was the "responsibility of all financial advisors who disassociates [sic] with [Raymond James] to ensure that they have obtained prior consent from each client prior to maintaining any client's personally identifiable information." (RP 713, 715.) Finally, the Manual directed advisors to use only encrypted devices to store confidential customer information, including, specifically, encrypted flash drives. (RP 715.)

The Manual also contained provisions that gave a branch manager like Tomlinson heightened responsibilities with respect to Raymond James' data security policies. Branch managers were required to ensure compliance with the policies by the advisors under their supervision. (*Id.*) Specifically, the Manual directed branch managers to "determine if financial advisors adequately safeguard sensitive client and firm data" and charged managers with the "responsibility for implementing changes to address deficiencies in information security." (*Id.*)

Tomlinson acknowledged that he was familiar with the Manual, that he understood his responsibilities as an advisor and a supervisor, and that he was obligated to abide by the Manual's requirements. (RP 559-61.) He also testified that he understood the types of information that constituted protected "personally identifiable information." (RP 560.)

Tomlinson also executed a Financial Advisor Agreement with Raymond James and the CU (the "Advisor Agreement") that required Tomlinson to "protect and keep confidential all nonpublic personal information obtained from customers while conducting business." (RP 1827.) By executing the Advisor Agreement, Tomlinson also agreed "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 CU]" and acknowledged that any customer-related information provided to him or that he became aware of during the term of the Advisor Agreement was the proprietary information of Raymond James. (*Id.*) Tomlinson acknowledged signing the Advisor Agreement and admitted that he was bound by its terms. (RP 563-64.)

C. Tomlinson Secretly Downloads Confidential Nonpublic Information to Solicit Clients to Wells Fargo

In the weeks leading up to his departure from Raymond James and the CU, Wells Fargo provided Tomlinson with a formatted flash drive to use in transferring information to Wells Fargo. (RP 570-71, RP 515-16.) Tomlinson testified that he decided to use his personal flash drive instead because he was unable to get the Well Fargo device to work properly. (RP 571.) Tomlinson's personal flash drive was neither encrypted, nor password protected. (RP 226, 582.)

Tomlinson admitted that shortly before Thanksgiving 2008, he began downloading confidential, nonpublic information for more than 2,000 CU customers to his personal flash drive. (RP 226-27, 571-81.) Tomlinson downloaded this information over several days. (RP 630-31.) The information included, among other things, customers' names, addresses, account balances, social security numbers, dates of birth, and quarterly account statements.[3] (226, 571-81.) Tomlinson downloaded this information from Raymond James' and the CU's systems and, in certain instances, by accessing web-based systems of other companies through which CU customers had invested. (*Id.*)

Significantly, Tomlinson secretly downloaded much of this information late in the evening, just days before he resigned from Raymond James and the CU. (RP 226.) Tomlinson

[3] Copies of many of the documents Tomlinson downloaded to the flash drive can be found at RP 717-1418.

admitted that on the evening of Thursday, November 20, 2008, he downloaded numerous files to his flash drive. (RP 571-81.) Tomlinson began downloading files at 8:32pm, and did not leave the CU offices until 11:17pm. (RP 226, 417, 1839.) Many of the files he downloaded that evening required him to access third-party websites of companies with which CU customers were invested. (RP 571-81, 1839-40.) Those files contained information concerning customer names, account numbers, account balances, quarterly statements, social security numbers, dates of birth and other confidential information that Tomlinson was not permitted to take to his new firm. (*Id.*) The next day, Tomlinson continued to download files containing similar sensitive information. (RP 226-27, 1840.)

Tomlinson acknowledged 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 to Wells Fargo. (RP 572.) Nonetheless, Tomlinson testified that he downloaded the information so he could contact customers about his move and to service accounts they opened at Wells Fargo. (RP 581, 602, 613.) Approximately 200 of the customers whose information Tomlinson downloaded were customers assigned to him; the remainder were customers of other financial advisors at the CU. (RP 226, 572, 580.) Tomlinson acknowledged that he had no previous business relationship with most of these customers. (RP 625-26.)

Tomlinson did not tell anyone at Raymond James or the CU that he had downloaded this information to take with him to Wells Fargo. (RP 578, 620-21.) Nor did he inform anyone at Wells Fargo, which had previously instructed him that taking such information was not permitted. (RP 578.) Most importantly, Tomlinson neither informed any customers that he had taken their nonpublic personal information, nor obtained any customer's permission to do so. (RP 227, 579.)

D. Tomlinson Resigns from Raymond James and the CU and Discloses Nonpublic Personal Information to Wells Fargo

On Monday, November 24, 2008, Tomlinson resigned from the CU and Raymond James. (RP 227.) He spent much of that day at the CU offices. (*Id.*) He returned his keys, a VPN token, and other items belonging to the CU. (RP 605.) Tomlinson also met with an IT employee who "wiped clean" his cell phone of all information related to the CU. (*Id.*) The CU had purchased the cell phone for Tomlinson, but allowed him keep it after his resignation. (*Id.*) Tomlinson did not mention to any CU representative that day that he also had a substantial amount of confidential customer information saved to his personal flash drive and on his personal laptop computer.[4] (RP 605, 620-21.)

Tomlinson arrived at his new Wells Fargo office early in the evening on November 24, 2008. (RP 227, 538.) He met with a Wells Fargo administrative assistant, Lisa Dutcher ("Dutcher"), who had come from another Wells Fargo office to help Tomlinson prepare announcements of his move to send to his customers. (RP 227, 357.) When Tomlinson arrived, he told Dutcher that he had forgotten the flash drive at home, and he left to retrieve it. (RP 538, 606.)

By the time Tomlinson returned, it was late and it had started to snow. (RP 227, 539, 607.) Tomlinson gave Dutcher his flash drive, and they agreed to wait until the next day to work on the announcements. (*Id.*) Dutcher put the flash drive in her purse, and spent the evening in a local hotel. (*Id.*) Tomlinson admitted that when he gave Dutcher the flash drive he did not tell

[4] The CU's chief information officer testified that the CU would not have known to ask about these personal devices because it was against the CU's policies to save the CU's data to a personal device, including a personal flash drive or laptop. He testified that, had Tomlinson used a company flash drive or laptop, as he was required to do under the relevant policies, the CU IT employee would have taken back these devices at this point. (RP 383, 385, 396.)

her that it contained nonpublic personal information, and that it was unencrypted and not password protected. (RP 582-84.) Indeed, Tomlinson did not give her any instructions at all with respect to securing the extremely sensitive, confidential information contained on the flash drive. (*Id.*)

The next day, Dutcher used Tomlinson's flash drive to create labels for his announcements. (RP 227.) Dutcher worked at the front reception desk in the Wells Fargo office. (RP 540.) The receptionist worked alongside Dutcher while she used the flash drive. (RP 540-41.) 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. (RP 585.)

Dutcher had difficulty accessing the information on Tomlinson's flash drive and called Wells Fargo IT personnel to assist her. (RP 541.) Dutcher gave IT personnel permission to remotely access the computer to help her create the labels. (RP 542-43.) Dutcher eventually printed mailing labels from the flash drive, and she returned the flash drive to Tomlinson later that afternoon.[5] (RP 227, 544.) Wells Fargo sent announcements of Tomlinson's employment to approximately 160 individuals. (RP 227.)

E. The CU Discovers Tomlinson's Misconduct and Tomlinson Deletes the CU's Confidential Information from His Personal Flash Drive

Shortly after his departure, the CU learned that Tomlinson had contacted CU customers, and began an investigation into whether Tomlinson had violated his non-compete agreement with the CU. (RP 386.) During the course of the investigation, the CU's chief information

5 Dutcher testified that she retained possession of the flash drive through lunch, and likely left the flash drive plugged into the computer at the reception desk while she was at lunch. (RP 544.)

officer, Todd Dauchy ("Dauchy"), examined Tomlinson's CU desktop computer and discovered that Tomlinson had downloaded customer information onto a flash drive shortly before his resignation.[6] (RP 376, 394-96.) Dauchy also discovered that Tomlinson had created a directory called "WS", which Dauchy testified seemed to refer to Tomlinson's new firm.[7] (RP 395.)

On December 1, 2008, the credit union hand-delivered a letter to Tomlinson, demanding that he return the flash drive with all the confidential information on it, and destroy any other versions of the information in his possession. (RP 228, 1419-23, 586.) Tomlinson admitted in his testimony that upon receiving the CU's letter, he began deleting all the files from the flash drive, and left only a single file containing data relating solely to his own customers. (RP 228, 587-88.) Tomlinson subsequently deleted CU files from his personal laptop. (RP 610.) Tomlinson testified that he stopped deleting files when directed to by a Wells Fargo attorney. (*Id.*)

Wells Fargo turned over Tomlinson's flash drive to the CU. (RP 397-98). Dauchy testified that when he received it, the flash drive did not appear to contain the files that he knew had been downloaded from the desktop computer. (RP 398, 400-01.) Dauchy, however, was able to recover the files Tomlinson had deleted. (RP 401-02).

Concerned about the amount of sensitive data that had been found on Tomlinson's flash drive, the focus of the CU's investigation changed and it acted to recover all confidential customer information from Tomlinson. (RP 407-08.) Accordingly, the CU requested

6 Dauchy testified that he was able to determine from log files on Tomlinson's CU desktop computer that files had been downloaded to a flash drive. (RP 421.)

7 At the time, Tomlinson's new firm was named Wachovia Securities and had not yet changed its name to Wells Fargo.

Tomlinson's personal laptop and Wells Fargo provided it. (RP 408.) Again, Dauchy initially was unable to find any data on the laptop because Tomlinson had deleted it. (*Id.*) And this time, the data recovery program Dauchy had used successfully on the flash drive did not work because, as Dauchy later discovered, Tomlinson had run a program on the laptop after deleting the files that prevented the recovery. (RP 408-10.) Dauchy was, however, able to find a significant number of CU files on Tomlinson's personal laptop using an alternative method. (RP 411-12.) Dauchy was able to determine that CU files had been accessed and deleted after Tomlinson received the CU's letter. (RP 412, 434-35.)

Dauchy's review of Tomlinson's laptop further revealed that Tomlinson had also restored data to the cell phone that the CU had previously "wiped clean." (RP 412-13.) The CU requested that Tomlinson turn over the cell phone for inspection. (RP 413.) When Dauchy examined the cell phone, he found that most of previously restored CU files had been deleted. (*Id.*) However, Dauchy was able to confirm that Tomlinson had restored data to the cell phone after his resignation because Tomlinson's laptop contained a record of the restoration, and, additionally, Dauchy was able to find a program file on the cell phone that Tomlinson had missed in his efforts to delete CU files.[8] (RP 413-14.)

Based on his review of Tomlinson's desktop, flash drive, laptop and cell phone, Dauchy determined that Tomlinson had downloaded and taken confidential personal information for more than 2,000 CU customers, including hundreds of customers with whom Tomlinson had not had any previous business relationship. (RP 389-90, 1833-47.) Dauchy was also able to create a

8 Tomlinson claimed that he did not intentionally restore the cell phone and that he had connected it to the laptop only to charge it. (RP 612.) However, Dauchy testified that the type of cell phone Tomlinson used would have required Tomlinson to confirm that he wanted to restore the data before it would do so. (RP 424.)

timeline of Tomlinson's computer activity which was authenticated and admitted as evidence at the hearing, with no objection from Tomlinson. (RP 415-16, 1833-47.)

III. PROCEDURAL BACKGROUND

In December 2011, FINRA's Department of Enforcement ("Enforcement") filed a complaint alleging that Tomlinson misused nonpublic, personal customer information, in violation of NASD Rule 2110.[9] (RP 6-10.) Specifically, the complaint alleged that, on several occasions in November 2008, and just prior to terminating his employment with Raymond James and the CU, Tomlinson downloaded onto a flash drive nonpublic personal information protected by Regulation S-P for more than 2,000 customers without authorization from Raymond James, the CU, or any customers, and that he subsequently disclosed this information to his new firm. (*Id.*) After conducting a hearing, the Hearing Panel found that Tomlinson violated NASD Rule 2110 as alleged in the complaint, and imposed sanctions of a $10,000 fine and a ten business day suspension. (RP 1857-79.)

Tomlinson appealed the Hearing Panel's findings and sanctions, and Enforcement cross-appealed the Hearing Panel's sanctions, to the NAC. On March 5, 2014, the NAC issued its decision, affirming that Tomlinson had misused confidential information, and modifying the sanction to a 90-day suspension. (RP 2248-61.) The NAC also affirmed the $10,000 fine, but did not impose it based on Tomlinson's demonstrated inability to pay. (RP 2259-61.)

The NAC found that Tomlinson violated Rule 2110 by taking to Wells Fargo customer information that constituted nonpublic personal information under Regulation S-P, without

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9 Enforcement charged Tomlinson under the rule that existed at the time of his misconduct.

consent from the customers, the CU, or Raymond James. (RP 2254.) The NAC further found that Tomlinson disclosed that information when he gave a Wells Fargo employee "unfettered access to all of the information on the flash drive." (RP 2255.)

With respect to sanctions, the NAC found that Tomlinson's conduct warranted a longer suspension in order to be appropriately remedial and to deter similar misconduct. (RP 2257-58.) In imposing a 90-day suspension, the NAC cited the serious threats to the safety of customer information. (RP 2258.) The NAC also found aggravating that Tomlinson: (1) should have known he was not permitted to take and disclose the information; (2) had heightened responsibilities as a supervisor; (3) downloaded the information secretly over a several day period; and (3) attempted to conceal his misconduct by deleting the information from his flash drive after receiving the CU's letter. (*Id.*) This appeal followed.

IV. ARGUMENT

Tomlinson's taking of customers' nonpublic personal information violated NASD Rule 2110, which requires associated persons of FINRA firms to observe high standards of commercial honor and just and equitable principles of trade. The evidence shows that Tomlinson took customer information deemed nonpublic personal information under Regulation S-P, and then disclosed it to his new employer, without the consent of those customers or his prior employers. Tomlinson did so in violation of firm policies that prohibited his actions and against Wells Fargo's instructions to take only limited customer information.

The NAC correctly found that Tomlinson's violation of Rule 2110 warranted a 90-day suspension. The obligation to keep nonpublic personal information confidential is fundamental to the broker-customer relationship. Tomlinson's actions showed a careless disregard for these obligations and the safety of customers' nonpublic personal information. Tomlinson's misconduct prevented his former employers from giving their customers the opportunity to opt out of the disclosures, as required by Regulation S-P, and also caused his new employer to improperly receive nonpublic personal information. This is an aggravating factor for assessing sanctions. Tomlinson compromised the privacy and the security of sensitive personal information for thousands of customers, all in an effort to facilitate his solicitation of customers at his new firm for his own financial benefit. As a supervisor, his disregard for basic ethical rules is particularly troubling. These factors are also aggravating. Based on Tomlinson's violation, and recognizing important aggravating factors, the NAC's sanctions are appropriately remedial and are consistent with FINRA's Sanction Guidelines ("Guidelines").

A. The Commission Should Affirm the Finding That Tomlinson Violated NASD Rule 2110

NASD Rule 2110 provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[10] "In analyzing a securities professional's conduct under [just and equitable principles of trade] rules, [the Commission] frequently [has] focused on whether the conduct implicates a generally recognized duty owed to clients or the firm." *See Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54, at *19 (Jan. 6, 2012). The Commission has found that "[t]he duty to maintain the confidentiality of client information is grounded in fundamental fiduciary principles." *See Thomas W. Heath, III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *10 (Jan. 9, 2009).

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10 NASD Rule 2110 is applicable to associated persons pursuant to NASD Rule 0115(a), which provides that "[t]hese Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under these Rules."

Tomlinson violated Rule 2110 by taking and disclosing to third parties customer information that constituted nonpublic personal information under Regulation S-P, without customer authorization. Tomlinson's actions violated Rule 2110 because his conduct was: (1) business related; and (2) inconsistent with high standards of commercial honor and just and equitable principles of trade.

1. Tomlinson's Misconduct Was Business Related

The Commission has construed NASD Rule 2110 broadly to apply to all business related misconduct, regardless of whether the misconduct involved securities. "[T]he [Commission] 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). *See also, e.g., DWS Securities Corp.*, 51 S.E.C. 814, 822 (1993) ("We have repeatedly held that a self-regulatory organization'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.").

Here, Tomlinson's misconduct was undoubtedly business related. An associated person's "'business' includes his business relationship with his employer, as well as his commercial relationships with his customers." *DiFrancesco*, 2012 SEC LEXIS 54, at *17 n.18. Tomlinson's actions satisfy both parts of this description. Tomlinson's misconduct involved his business relationship with his employers, Raymond James and the CU, because his work for them was the reason he had access to the account information of customers. Moreover, Tomlinson's misconduct also involved his commercial relationship with customers because he took confidential customer information for the purpose of transferring the accounts of the CU's customers to Wells Fargo. (RP 581.) Tomlinson's misconduct was business related.

2. Tomlinson's Actions Were Inconsistent with High Standards of Commercial Honor and Just and Equitable Principles of Trade

a. The Customer Information Taken by Tomlinson Constituted Nonpublic Personal Information Under Regulation S-P

The Gramm-Leach-Bliley Act ("Gramm-Leach") sets forth privacy requirements for the use of "nonpublic personal information" by banks, securities industry members, insurance companies, and other financial institutions. Gramm-Leach required the Commission and other federal regulators to issue regulations governing the collection, use, and safeguarding of nonpublic personal financial information. In 2000, the Commission issued Regulation S-P, Exchange Act Release No. 42974, 2000 SEC LEXIS 1338 (June 22, 2000). The regulation became mandatory on July 1, 2001. Rule 10(a)(1) of Regulation S-P provides that, unless a specific exemption applies, a covered financial institution, including registered broker-dealers, may not disclose any "nonpublic personal information" about a consumer to a nonaffiliated third party unless it has provided the consumer with proper notice and "a reasonable opportunity" to "opt out of the disclosure" before the disclosure takes place. 17 C.F.R. § 248.10(a)(1). [11]

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

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11 Regulation S-P 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).

customer records and information, which must be reasonably designed to insure the security and confidentiality of customer records and information. 17 C.F.R. § 248.30. Additionally, Rule 10 of Regulation S-P requires broker-dealers to provide consumers a reasonable opportunity, before disclosing any "nonpublic personal information" to a nonaffiliated third party, to opt out of the disclosure. 17 C.F.R. § 248.10(a)(1). "Nonpublic personal information" includes, among 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). In September 2000, the NASD 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*, 2005 Notice to Members 49 (July 2005) (reminding members of their obligations to protect customer information under Regulation S-P).

It is undisputed that the customer information Tomlinson downloaded onto his personal flash drive constituted "nonpublic personal information" under Regulation S-P. Tomlinson admittedly downloaded, among other things, customers' names, addresses, account balances, social security numbers, dates of birth, and quarterly account statements. (RP 226-227, 571-581.) This information constituted nonpublic information under Regulation S-P. *See DiFrancesco*, 2012 SEC LEXIS 54, at *26.

Under Regulation S-P, Tomlinson should not have taken or disclosed this information unless Raymond James and the CU had given their customers a reasonable opportunity to opt out of the disclosure, before it was made to Wells Fargo, and those customers, after receiving notice, did not choose to opt out. *See* Regulation S-P, Rule 10; 17 C.F.R. § 248.10(a)(1). Tomlinson's misconduct made it impossible for Raymond James and the CU to notify their customers, and the customers were not warned that their personal information was being disclosed to a third-party brokerage firm. Thus, because of Tomlinson's actions, the customers' nonpublic personal information was not treated confidentially, as required by Regulation S-P.

b. Tomlinson Disclosed Nonpublic Personal Information by Giving Unfettered Access to That Information to Wells Fargo

While Tomlinson admits that he took nonpublic personal information when he left Raymond James and the CU, he maintains that he did not violate NASD Rule 2110 because there was never any disclosure of the information. (Br. at 1-2).[12] Tomlinson misunderstands the meaning of "disclosure" here, and the NAC rightly rejected this position.

Tomlinson has admitted to the facts underlying his disclosure. Tomlinson admits that he gave the flash drive to Dutcher, a Wells Fargo employee. (RP 606-07.) The flash drive was not encrypted or password protected. (RP 582-84.) Tomlinson neither told Dutcher that the flash drive contained nonpublic personal information for thousands of CU customers, nor gave her any instructions for safely handling and keeping the flash drive. (*Id.*) The flash drive remained in Dutcher's possession overnight. (RP 607.)

12 "Br. __" refers to Tomlinson's brief. Tomlinson's brief omits page numbers. For the purposes of citation, page numbers are inferred.

The next day, Tomlinson allowed Dutcher to access the flash drive without his supervision. (RP 585.) Dutcher worked with the flash drive in a reception area accessible to other Wells Fargo employees, including the receptionist whose computer Dutcher was using. (RP 540-41.) When she had trouble accessing the information on the flash drive, Wells Fargo IT staff accessed remotely the computer on which Dutcher was working with the flash drive. (RP 541-43.)

As the NAC found, Tomlinson's actions allowed Wells Fargo employees to have "unfettered access" to all the information on the flash drive, including the nonpublic personal information for thousands of the CU's customers. (RP 2255.) Providing third parties with "access" to nonpublic customer information is all that is required to constitute an improper disclosure in violation of NASD Rule 2110. *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). The NAC called the fact that the information on the flash drive was used only for sending Tomlinson's announcements and for no other purpose "serendipitous." (RP 2255.) But, the fact that it was not used for any purpose other than the announcements does not negate the disclosure or excuse Tomlinson's misconduct.[13] Indeed, the ethical prohibition on disclosing confidential information is not dependent on future harm. *See DiFrancesco*, 2012 SEC LEXIS

13 For the same reasons, Tomlinson's arguments concerning his settlement agreement with the CU and the supposed determinations of other regulators are irrelevant. There is no evidence concerning Tomlinson's assertions in the record, but, in any event, these matters are completely irrelevant to Tomlinson's misconduct here, and do not negate his disclosure of confidential information or lessen the risks his conduct posed to thousands of customers.

54, at *2. It is Tomlinson's careless disclosure that created an obvious risk to thousands of customers' privacy.

c. Tomlinson's Disclosure of Nonpublic Personal Information Violated High Standards of Commercial Honor and Just and Equitable Principles of Trade

The Commission has held that a registered person's breach of confidentiality is a violation of the just and equitable principles of trade rule. *See DiFrancesco*, 2012 SEC LEXIS 54, at *23 (finding a violation of NASD Rule 2110 where respondent mistakenly downloaded and disclosed to a new employer nonpublic personal information of customers of his former firm); *see also Heath*, 2009 SEC LEXIS 14 (finding a violation of the New York Stock Exchange's just and equitable principles of trade rule when an investment banker disclosed nonpublic information regarding a corporate acquisition), *aff'd*, 586 F.3d 122 (2d Cir. 2009). Tomlinson's misconduct falls squarely within *DiFrancesco* and *Heath*.

Tomlinson improperly disclosed confidential customer information by giving his new employer, a nonaffiliated third party, access to information that is considered "nonpublic personal information" under Regulation S-P. (RP 227, 539-43, 585, 606-7, 620-21.) Tomlinson did not obtain the consent of Raymond James, the CU, or any of his customers prior to disclosing their nonpublic personal information. Thus, customers were not provided with the notice or given the opportunity to opt out of the disclosure, as required under Regulation S-P, prior to Tomlinson's disclosure of their information.

Tomlinson's duty of confidentiality also was reflected in Raymond James' compliance manual ("Manual") and the Advisor Agreement, all of which he violated. (RP 713-15, 1827.) *See DiFrancesco*, 2012 SEC LEXIS 54, at *22-23 (finding that respondent breached his duty of confidentiality, which was reflected in his firm's code of conduct). Tomlinson completely disregarded his obligations under the Manual and the terms of the Advisor Agreement.

By downloading and disclosing the nonpublic confidential information of Raymond James' and the CU's customers, Tomlinson placed important and confidential customer information at risk and favored his own interests above 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, prevented Raymond James and the CU from stopping his disclosures, and put his new firm at risk of ethical violations.

Tomlinson's misconduct reflects poorly on his ability to comply with regulatory requirements and his ability to protect the privacy interests of the investing public. "[D]isciplinary hearings to require compliance with 'high standards of commercial honor and just and equitable principles of trade' [under Rule 2110] are ethical proceedings; hence the concern is with ethical implications of the Applicant's conduct." *Timothy L. Burkes*, 51 S.E.C. 356, 360 (1993), *aff'd*, 29 F.3d 630 (9th Cir. 1994); *see also James A. Goetz*, 53 S.E.C. 472, 477 (1998) (finding that respondent's false representation that he would not personally benefit from his firm's matching gifts program violated Rule 2110 because it reflected "directly on [his] ability both to comply with regulatory requirements fundamental to the securities business and to fulfill his fiduciary responsibilities in handling other people's money"). The NAC correctly found that Tomlinson violated NASD Rule 2110.

d. Tomlinson's Taking of Customers' Nonpublic Personal Information Without the Consent of the Customers or His Former Employers Was a Violation of NASD Rule 2110

Tomlinson's position also fails to acknowledge that fact that, once he left Raymond James and the CU, he was no longer authorized to possess customers' nonpublic personal information. The Manual and Advisor Agreement underscore this point. (RP 713-15, 1827.) The Manual directs an advisor leaving the firm to get the consent of every customer before maintaining their confidential information—something Tomlinson admittedly failed to do. (RP 227, 579, 715.) The Advisor Agreement further provides that this information was proprietary information of the CU and Raymond James and prohibited Tomlinson from taking it. (RP 1827.) Thus, Tomlinson's possession of the information after he resigned from Raymond James and the CU was itself a violation of NASD Rule 2110.

Tomlinson argues that his misconduct should be excused because when he downloaded the information, he was authorized as a supervisor to access it. (Br. at 2.) However, the fact that Tomlinson was authorized to access confidential customer information while employed as a branch manager at Raymond James and the CU did not mean he was authorized to take it with him after his resignation. To the contrary, Tomlinson was expressly forbidden from doing so. When he took the information on the flash drive he violated Raymond James' policies, his agreement with Raymond James and the CU, and the explicit instructions given to him by his new firm.

Similarly, Tomlinson's assertion that the CU knew he used the flash drive for years to work at home does not lessen his ethical violation. Even assuming that this is true, it did not change the fact that Tomlinson was not authorized to take the information on the flash drive when he resigned and moved to Wells Fargo. Indeed, Tomlinson admitted that he should have deleted all customer information from the flash drive before he resigned. (RP 566.) Accordingly, Tomlinson's taking of information that constituted nonpublic personal information under Regulation S-P and maintaining possession of it was a breach of his customer confidentiality obligations, and a violation of NASD Rule 2110.

e. Tomlinson's Arguments Concerning His Lack of Intent to Harm Customers, and the CU's Supposed Retaliation are Irrelevant

Tomlinson argues that he did not violate NASD Rule 2110, because he had no intent to cause harm to customers. (Br. at 2.) As the NAC rightly found, however, proof of intent or scienter is not necessary to show a violation of NASD Rule 2110. (RP 2256.) *DiFrancesco*, Exchange Act Release No. 66113, at *18. All that is required is a showing that Tomlinson violated high standards of commercial honor and just and equitable principles of trade in a business relationship. This is plainly the case here.

Notwithstanding that there is no requirement to show intent, the NAC found that there was ample evidence that Tomlinson should have known his actions were wrong. (RP 2257-58.) Raymond James' policies prohibited Tomlinson's actions. (RP 713-15, 1827.) As a branch manager, Tomlinson was not only required to understand those policies concerning confidential information, he was also charged with ensuring the compliance of the advisors under his supervision. (RP 715.) Tomlinson testified that he was aware of these policies. (RP 559-61.) Moreover, in the weeks prior to his resignation, Wells Fargo had given Tomlinson explicit instructions concerning the information he would be allowed to take from his former employers. (RP 515-16, 519, 565, 570, 698-711.) Tomlinson completely disregarded these policies and instructions.

Tomlinson also accuses the CU of treating him unfairly and retaliating against him for joining a competitor. (Br. at 3-4.) Even assuming Tomlinson's accusations are true, they are completely irrelevant to whether his own actions violated Rule 2110. It is Tomlinson's admitted conduct in taking and disclosing nonpublic personal information that is the basis for his violation. The CU's response to his misconduct is not at issue, and Tomlinson's attempt to shift blame with unsupported allegations of unfairness on the part of his former employer should be rejected.[14] *See Joseph Abbondante*, 58 S.E.C. 1082, 1113-14 (2006) (rejecting respondent's "blame-shifting arguments" where respondent attempted to lessen his misconduct by pointing to the misconduct of others).

Tomlinson also argues that the CU used FINRA as part of its retaliation, and that FINRA overreached in its enforcement because it acted upon the complaint of a non-member, and to supposedly vindicate a non-member's rights. (Br. at 4.) It is in this argument that Tomlinson's failure to appreciate the seriousness of his own misconduct is most apparent.

First, it is well settled that FINRA's enforcement jurisdiction is independent of any complaint. *See Bernard D. Gorniak*, 52 S.E.C. 371, 373 n. 5 (1995) ("The NASD's power to enforce its rules is independent of a customer's decision not to complain, which may be influenced by many factors."); *See Raymond M. Ramos*, 49 S.E.C. 868, 871-72 (1988) (imposing a bar and $15,000 fine for conversion of customer funds despite the customer's having sought leniency for the salesman); *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"),

[14] Similarly, Tomlinson's suggestion that Dauchy knew of other security breaches at the CU and intentionally lied should be flatly rejected. (Br. at 3.) There is absolutely no evidence in the record to support Tomlinson's accusations against Dauchy. Moreover, the CU's response to other supposed breaches is irrelevant to Tomlinson's unethical conduct here.

aff'd, 47 F. App'x 198 (3d Cir. 2000). Tomlinson was a registered person subject to FINRA's rules and enforcement jurisdiction. (RP 653-92); *see Toni Valentino*, Exchange Act Release No. 49255, 2004 SEC LEXIS 330, at *13-14 (February 13, 2004) (finding that by registering, a registered representative "consent[s] to abide by [FINRA's] rules"); *Joseph G. Chiulli*, Exchange Act Release No. 42359, 2000 SEC LEXIS 112, at *18 (January 28, 2000) (same). FINRA had the authority to investigate Tomlinson's conduct and pursue an enforcement action against him, no matter what the source of the investigation.

Moreover, the purpose of FINRA's sanctions was to "reflect the importance of a registered representative's obligation to safeguard confidential customer information"—not to vindicate a non-member firm, as Tomlinson seems to think. (RP 2259.) Tomlinson's failure to understand this reveals the depth of his lack of appreciation for the risks his misconduct posed to customers.

For the reasons explained above, the NAC correctly found that Tomlinson violated just and equitable principles of trade and high standards of commercial honor.

B. Tomlinson's Procedural Arguments Are Baseless

Tomlinson makes an unsupported claim that the NAC's review was unfair, and continues to protest the exclusion of a document at the hearing. (Br. at 1-2.) Tomlinson's arguments have no merit. There is no evidence in the record of any bias or irregularity in the NAC's review. Moreover, the NAC reviewed the exclusion of the document in question *de novo* and found that it was properly excluded. The Commission should reject Tomlinson's baseless arguments.

1. The NAC's Decision Is Well Supported by the Evidence, Including Tomlinson's Admissions

As an initial matter, the Commission should reject Tomlinson's argument that the NAC appeal was somehow unfair. The proceedings were conducted in accordance with fair procedures, as required by Section 15A(b)(8) of the Securities Exchange Act of 1934. *See also Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *51 (Jan. 30, 2009) (holding that FINRA must provide fair procedures for its disciplinary actions). Section 15A(h)(1) of the Exchange Act requires that FINRA, in a disciplinary proceeding, "bring specific charges, notify such member or person of, and give him an opportunity to defend against such charges, and keep a record." *See Mark H. Love*, Exchange Act Release No. 49248, 2004 SEC LEXIS 318, at *16 (Feb. 13, 2004). Fairness is determined by examining the entirety of the record. (*Id.*) The record demonstrates that FINRA's proceedings were fair and conducted in accordance with FINRA's rules, and that Tomlinson had notice of the charges, an opportunity to defend himself, and an opportunity to present his case before the NAC. (RP 2083-2146.)

Moreover, Tomlinson does not point to any bias, irregularity, or other evidence that the NAC did not follow the applicable rules and procedures. Tomlinson's complaint seems to be that he did not prevail in his appeal. Because he did not get the result he wanted and expected, he claims the process is a "sham" and the outcome predetermined. The Commission has held, however, that an adverse ruling alone is not evidence of bias. *See Epstein*, 2009 SEC LEXIS 217, at *62.

Tomlinson's specific complaint appears to be the supposed "refusal of FINRA to disclose the recommendations" of the NAC subcommittee members. (Br. at 2-3.) He asserts that this is important because it is his "sense" that the subcommittee's recommendation was "not taken into consideration." (Br. at 3.) First, there is no rule that provides for what Tomlinson requests.

Moreover, Tomlinson fails to recognize that the subcommittee members who heard oral argument in his case are members of the NAC. It is the NAC's final decision that is relevant on appeal, not Tomlinson's interpretation of the subcommittee members' questions at oral argument.

In short, there is no evidence in the record of any bias on the part of the NAC, nor of any irregularities in the proceedings here. *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 (2000), *aff'd*, 47 F. App'x 198 (3rd Cir. 2002). The NAC followed all the applicable rules, and its decision is abundantly supported by the record, including Tomlinson's many admissions and other undisputed facts. Moreover, the Commission's *de novo* review will confirm the NAC's findings, and cure any purported procedural errors. *See Heath v. SEC*, 586 F.3d at 142. Simply put, Tomlinson did not prevail in his appeal because he failed to comply with his ethical obligations.

2. The 2012 Raymond James Policy Was Properly Excluded Because There Is No Evidence That It Was in Effect at the Time of Tomlinson's Misconduct or That It Was Provided to Customers

Tomlinson argues that the NAC improperly affirmed the exclusion from evidence of a Raymond James "Privacy Notice" dated July 2012. (Br. at 2.) The Privacy Notice provided in part that financial advisors may change brokerage firms and that nonpublic personal information might be provided to the new firm, and also included a toll free number customers could call to opt out. The NAC found, however, that the Hearing Officer properly excluded this document. (RP 2256.) FINRA Rule 9263 allows the Hearing Officer to exclude evidence that is irrelevant or immaterial. There is no evidence that the Privacy Notice was in effect at the time of

Tomlinson's misconduct or that the Privacy Notice was provided to customers along with an opportunity to opt out, as required by Regulation S-P. Indeed, Tomlinson admitted that he did not notify anyone, including customers, that he would be taking and disclosing their confidential information to a third party.[15] (RP 578-79, 620-21.)

Rather than point to any evidence establishing the relevance of this document, Tomlinson complains that while the Hearing Officer excluded the Privacy Notice based on its date, documents on the flash drive were admitted despite the fact that there was no evidence about when each particular document was downloaded. In that regard, Tomlinson alleges that there were documents on the flash drive that had been previously downloaded for legitimate business purposes. Tomlinson's comparison here ignores his own admissions and other undisputed evidence, and misses the point.

First, Tomlinson admitted and stipulated that he downloaded and updated much of the information on his flash drive in the days before his resignation for the purpose of bringing that information to Wells Fargo. (RP 226-27, 571-81.) Second, the CU's chief information officer who conducted the investigation, testified to the times when many of the documents on the flash drive were downloaded, and his report was admitted into evidence without objection by Tomlinson. (RP 415-16, 1833-47.) Finally, even if there are open questions as to when certain documents were downloaded, this does not help Tomlinson. He did not have the right to take these documents with him when he left or to disclose them to Wells Fargo, irrespective of when

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[15] Tomlinson asserts that it is unlikely that Raymond James would have relaxed their policies in 2012, and, accordingly, the document should have been admitted. Tomlinson, however, misses the key requirement of Regulation S-P that the customer be given notice of a disclosure before it is made. There is no evidence that customers were given this Privacy Notice, or any other notice, prior to Tomlinson's disclosure of their nonpublic personal information. To the contrary, Tomlinson admitted they were not informed of the disclosure. (RP 579.)

they may have been downloaded or for what purpose. Tomlinson's objections are irrelevant to his admitted misconduct.

C. The Sanctions Imposed by the NAC Are Neither Excessive nor Oppressive and Should Be Affirmed

Exchange Act Section 19(e)(2) directs the Commission to sustain the sanctions imposed by FINRA unless it finds, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. *See* 15 U.S.C. § 78s(e)(2); *Jack H. Stein*, 56 S.E.C. 108, 121 (2003). The Commission considers the principles articulated in the Guidelines persuasive and uses them as a benchmark in conducting its review under Exchange Act Section 19(e)(2). *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *62 (Nov. 9, 2012) (explaining that the Guidelines serve as a benchmark); *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *39 (Oct. 20, 2011) (same).

While the Guidelines contain no specific recommendations concerning the misconduct in this case, the NAC properly applied the Guidelines' "Principal Considerations in Determining Sanctions."[16] The NAC's sanctions are supported by the Guidelines and Tomlinson's serious misconduct, and the Commission should affirm them.

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16 *See FINRA Sanction Guidelines* 7 (2013) (Principal Considerations in Determining Sanctions), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf. Attached as Appendix A.

1. The NAC's Sanctions Are Supported by the Serious Nature of Tomlinson's Misconduct and the Presence of Several Aggravating Factors

The NAC carefully considered the violation, evaluated Tomlinson's arguments, and explained the basis for its sanctions. It found that several factors weighed in favor of increasing the suspension here. First, the NAC noted that improperly disclosing customers' nonpublic information "jeopardizes the foundation of trust and confidence crucial to any professional advising relationship." (RP 2257, *citing DiFrancesco*, 2012 SEC LEXIS 54, at *35.) This is particularly the case given that, as the NAC found, the "threats to the safety of customers' confidential information have only increased in the last 10 years." (RP 2258.) Tomlinson admitted that he secretly downloaded confidential data concerning approximately 2,000 Raymond James and CU customers to his personal flash drive, and then gave unsupervised access to that information to his new employer. (RP 226-27, 571-85.) Tomlinson's actions violated the trust of those customers and put their sensitive, nonpublic personal information at serious risk.

Second, the NAC found that Tomlinson "should have known that he could not disclose confidential customer information to a third party." (RP 2258.) Raymond James' policies specifically prohibited his conduct here, as did his agreement with Raymond James and the CU. (RP 713, 715, 1827.) Tomlinson was also put on notice of his obligations with respect to confidential customer information by Wells Fargo, which gave him explicit instructions about what he could take. (RP 515-16, 570, 698-711.) Tomlinson, however, disregarded these policies, agreements and instructions.

Finally, the NAC found that Tomlinson's role as a supervisor for Raymond James and the CU further supported that he should have known that his actions violated NASD Rule 2110, and supported the imposition of an increased suspension. (RP 2258.) See, e.g., *Harry Friedman*, Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at *30 (May 13, 2011) (finding aggravating that respondent was responsible for regulatory compliance at his firm); *Dep't of Enforcement v. Cooper*, Complaint No. C04050014, 2007 NASD Discip. LEXIS 15, at *16 (NASD NAC May 7, 2007) (finding that respondent's status as a principal was aggravating). As a supervisor, Tomlinson was responsible for understanding his obligations with respect to confidential information, and for ensuring the compliance of the advisors he supervised. Rather than protect this information as he was obligated to do, Tomlinson used the access he had as a supervisor to misappropriate it for his own purposes. Significantly, the NAC found that the Hearing Panel failed to consider this important factor in assessing sanctions. (RP 2258.)

The NAC also found several additional aggravating factors from the Guidelines applicable to Tomlinson's misconduct. First, the NAC found that when he received the CU's letter, Tomlinson compounded his misconduct by trying to conceal it. He deleted all but a single document concerning his own customers from the flash drive. (RP 2258.) As the CU's subsequent ability to recover these files shows, Tomlinson did not successfully destroy the confidential customer information by deleting it. Thus, his attempt at concealment could have put this sensitive data at additional risk. Tomlinson's attempt to conceal his misconduct is an aggravating factor. *Guidelines*, at 6 (Principal Considerations, No. 10.)

Second, the NAC found that Tomlinson's misconduct occurred over a several day period. In the days leading up to his resignation, Tomlinson secretly downloaded nonpublic personal customer information at a number of different times, and from a number of different sources, including third-party websites, and to multiple personal devices. (RP 226-27, 571-85, 1833-44.) After he joined Wells Fargo, his misconduct continued as he disclosed that information to Wells

Fargo employees, and then deleted files in an attempt to conceal his actions. (RP 227-28, 539-41, 587-88, 607, 610.) This was plainly not a one-time lapse in judgment. It is an aggravating factor that Tomlinson's misconduct occurred over an extended period of time. *Guidelines*, at 6 (Principal Considerations, No. 9.)

Finally, the NAC found Tomlinson's misconduct resulted in the potential for monetary gain with respect to the Raymond James and CU customers who decided to open accounts with him at Wells Fargo. (RP 2258.) Indeed, Tomlinson admitted that he took the confidential information so that he could successfully contact Raymond James and CU customers about opening an account at Wells Fargo, as well as for his convenience in servicing any customers who decided to do so. (RP 572.) Under Wells Fargo's commission-based compensation structure, Tomlinson would plainly benefit from using the confidential information to solicit and open accounts at Wells Fargo. It is an aggravating factor that Tomlinson acted in his own self-interest, for his own monetary gain. *Guidelines*, at 7 (Principal Considerations, No. 17.)

The NAC also noted that there was no evidence that Tomlinson intended to harm customers or put their confidential information at risk, and that, by the time of the NAC appeal, Tomlinson recognized the potential harm his actions could have caused customers. (RP 2259.) In light of the seriousness of Tomlinson's breach of his important obligations, however, and the numerous applicable aggravating factors, the NAC found that a 90-day suspension was appropriately remedial and an adequate deterrent to others. (*Id.*) The NAC's sanctions are supported in the record and the Guidelines, and should be affirmed.

2. Tomlinson's Mitigation Arguments Are Irrelevant and Should Be Rejected

Tomlinson argues that the NAC's sanctions should be reduced because he did not intend to harm customers. (Br. at 3.) The Commission, however, has consistently held that a lack of customer harm is not mitigating. *See Mayer A. Amsel*, 52 S.E.C. 761, 768 (1996) (affirming bar despite fact that no customer suffered as a result of any of appellant's actions); *Ronald H. V. Justiss*, 52 S.E.C. 746, 750 (1996) (finding a bar because even though conduct did not involve direct harm to customers, "it flouts the ethical standards to which members of this industry must adhere"). Thus, while the NAC noted that there was no evidence that Tomlinson intended to cause harm, it also correctly pointed out that the absence of customer harm is not mitigating. (RP 2258.) Moreover, the NAC found that the relevant concern was the obvious risks to customer privacy that Tomlinson's actions presented. (RP 2259.)

Tomlinson also asserts that the sanctions imposed by the NAC are improper as compared to *DiFrancesco*. (Br. at 1-2); *see DiFrancesco*, 2012 SEC LEXIS 54. Tomlinson's argument has no merit. The Commission has repeatedly stated that "[i]t 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); *see also Jeffrey D. Field*, 51 S.E.C. 1074 (1994). Moreover, "[a] sanction is not invalid simply because it is more severe than a sanction imposed in a similar case." *Peter W. Schellenbach*, 50 S.E.C. 798, 803 (1991), *quoting Carter v. SEC*, 726 F.2d 472, 474 (9th Cir. 1983); *see also Michael David Borth*, 51 S.E.C. 178, 182 (1992) (stating that "whether a sanction is too severe cannot be determined by comparison to with sanctions imposed in other cases").

As the NAC's explanation of its sanction demonstrates, the facts and circumstances of Tomlinson's case fully support a 90-day suspension. In an environment where the threats to the safety of customer's confidential information have increased, Tomlinson showed careless disregard for customer confidentiality. Despite being repeatedly instructed not to take or disclose nonpublic personal information, he did so for his own financial benefit. Then, when his misconduct was discovered, he attempted to conceal it by deleting information on his flash drive. As a supervisor, Tomlinson should have known that his actions violated NASD Rule 2110. The NAC evaluated these and other aggravating factors in concluding that the length of a suspension can be at least 90 days for this misconduct. Neither the NAC nor the Commission set an upper limit on a suspension in the *DiFrancesco* case. Indeed, such a fixed rule is contrary to the individualized consideration of sanctions that the NAC conducts. *See Guidelines*, at 3 (General Principles Applicable to All Sanction Determinations, No. 3, Adjudicators should tailor sanctions to respond to the misconduct at issue.).

In any case, the facts here are distinguishable from *DiFrancesco* in two important respects. First, as the NAC correctly noted, Tomlinson *knowingly* downloaded and took confidential information for more than 2,000 customers, most of whom were customers of other financial advisors with whom Tomlinson had no prior business relationship. (RP 2251.) In *DiFrancesco*, the respondent intended to download information only for his customers and inadvertently accessed information for other customers. *DiFrancesco*, 2012 SEC LEXIS 54, at *8. Second, the NAC found that Tomlinson should have known as a supervisor that taking and disclosing confidential customer information violated NASD Rule 2110, and that this was an aggravating factor that supported the imposition of the 90-day suspension. (RP 2258.) The respondent in *DiFrancesco* was not a supervisor. See *DiFrancesco*, 2012 SEC LEXIS 54, at *1.

Indeed, the NAC noted that the Hearing Panel had failed to consider the importance of Tomlinson's position as a supervisor in determining sanctions. (RP 2258, FN 13.)

In asking the Commission to reduce his sanction to essentially no sanction at all, Tomlinson cites the financial harm he has already suffered as a result of his misconduct. He blames much of this harm on the alleged actions of his former employer, the CU. However, any collateral consequences Tomlinson may have suffered are the result of his own misconduct, and are not a proper consideration for the NAC in imposing sanctions. Indeed, it is well settled that the financial, reputational or other collateral impact on a respondent, either from the existence of the disciplinary proceeding or the sanctions imposed as a result of it, is not a factor in determining sanctions. *See Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994) (declining to overturn a sanction where appellant argued that while the sanction by its terms did not impose a permanent bar, it would be ruinous to appellant's career); *Gowadia*, 53 S.E.C. 786, 793 (1998) (declining to overturn a sanction where appellant claimed he had already suffered damages in excess of the sanction and could not find employment, and stating "economic harm alone is not enough to make the sanctions imposed upon him by the NASD excessive or oppressive"); *Fundclear*, 51 S.E.C. 1316, 1322 (1994) (finding no reason to overturn an NASD sanction where appellant argued that the sanction threatened his livelihood and hurt his reputation); *Dep't of Enforcement v. Evans*, Complaint No. 2006005977901, 2011 FINRA Discip. LEXIS 36, at *39 (FINRA NAC Oct. 3, 2011) (finding that economic hardship endured by appellant were not mitigating of the sanction imposed); *Dep't of Enforcement v Jordan*, Complaint No. 2005001919501, 2009 FINRA Discip. LEXIS 15, at * 54 (FINRA NAC Aug. 21, 2009) (finding that considerations of financial hardship "would not warrant a reduction in the sanctions").

Finally, Tomlinson contends that the NAC increased his suspension to offset its decision to not impose the assessed fine, and as "retribution" for his appeal to the NAC. Tomlinson does not point to any evidence in support of his accusations and, indeed, there is no such evidence in the record. Rule 9348 of the FINRA Code of Procedure provides that in any appeal, the NAC may, among other things, modify or increase any sanction. The Commission has held that the "mere fact that the NAC increased the sanctions . . . does not render the [sanctions] invalid on fairness grounds." *Abbondante*, 58 S.E.C. 1082, at 1111 (affirming the NAC's decision in which it increased the sanction from a suspension to a bar). In this case, the NAC found that Tomlinson's misconduct warranted a longer suspension based on a key factor not considered by the Hearing Panel—i.e., that Tomlinson should have known as a supervisor that his misconduct violated the ethics rule. The NAC found that a 90-day suspension, would be "appropriately remedial and will serve to deter others who might consider shirking their important obligations under NASD Rule 2110 to safeguard confidential customer information." (RP 2257.)

The NAC affirmed, but did not impose, the Hearing Panel's $10,000 fine because of Tomlinson's demonstrated inability to pay. Now, Tomlinson tries to use the fact that the NAC granted *his* request for relief from the fine to argue that its decision with respect to his suspension is unfair. The NAC, however, reviewed the evidence, applied the Guidelines, and carefully explained the basis for the sanction in its decision.

Tomlinson's admitted conduct and the relevant aggravating factors justify the NAC's imposition of a 90-day suspension. As the NAC found, these sanctions "reflect the importance of a registered representative's obligation to safeguard confidential customer information and Tomlinson's careless breach of that obligation." (RP 2259.) The sanctions are appropriately remedial, are sufficient to serve as a deterrent for similar unethical behavior, and should be affirmed by the Commission.

V. CONCLUSION

As the risks to confidential personal information grow, the data security responsibilities of registered representatives become more ever more critical. The record fully supports the NAC's finding that Tomlinson violated NASD Rule 2110 when he failed to fulfill these responsibilities. Morever, Tomlinson's careless disregard for, and cavalier attitude about, the safety of customers' nonpublic personal information warrant the sanctions imposed by the NAC. Tomlinson put his own financial interests above the interests of customers, prevented his former employers from complying with Regulation S-P, and also caused his new employer to improperly receive nonpublic personal information. His actions compromised the privacy of thousands of customers, and put their sensitive personal information at risk. As a supervisor, his violation of basic ethical rules is particularly inexcusable. Accordingly, the Commission should affirm the NAC's findings that Tomlinson violated NASD Rule 2110, as well its sanctions, and dismiss this application for review.

Respectfully Submitted,

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APPENDIX A

FINRA

Financial Industry Regulatory Authority

Sanction Guidelines

Table of Contents

Principal Considerations in Determining Sanctions

The following list of factors should be considered in conjunction with the imposition of sanctions with respect to all violations. Individual guidelines may list additional violation-specific factors.

Although many of the general and violation-specific considerations, when they apply in the case at hand, have the potential to be either aggravating or mitigating, some considerations have the potential to be only aggravating or only mitigating. For instance, the presence of certain factors may be aggravating, but their absence does not draw an inference of mitigation.[1] The relevancy and characterization of a factor depends on the facts and circumstances of a case and the type of violation. This list is illustrative, not exhaustive; as appropriate, Adjudicators should consider case-specific factors in addition to those listed here and in the individual guidelines.

1. The respondent's relevant disciplinary history (see General Principle No. 2).
2. Whether an individual or member firm respondent accepted responsibility for and acknowledged the misconduct to his or her employer (in the case of an individual) or a regulator prior to detection and intervention by the firm (in the case of an individual) or a regulator.
3. Whether an individual or member firm respondent voluntarily employed subsequent corrective measures, prior to detection or intervention by the firm (in the case of an individual) or by a regulator, to revise general and/or specific procedures to avoid recurrence of misconduct.
4. Whether the respondent voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct.
5. Whether, at the time of the violation, the respondent member firm had developed reasonable supervisory, operational and/or technical procedures or controls that were properly implemented.
6. Whether, at the time of the violation, the respondent member firm had developed adequate training and educational initiatives.
7. Whether the respondent demonstrated reasonable reliance on competent legal or accounting advice.
8. Whether the respondent engaged in numerous acts and/or a pattern of misconduct.
9. Whether the respondent engaged in the misconduct over an extended period of time.
10. Whether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, deceive or intimidate a customer, regulatory authorities or, in the case of an individual respondent, the member firm with which he or she is/was associated.
11. With respect to other parties, including the investing public, the member firm with which an individual respondent is associated, and/or other market participants, (a) whether the respondent's misconduct resulted directly or indirectly in injury to such other parties, and (b) the nature and extent of the injury.

1 *See, e.g., Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006) (explaining that while the existence of a disciplinary history is an aggravating factor when determining the appropriate sanction, its absence is not mitigating).

12. Whether the respondent provided substantial assistance to FINRA in its examination and/or investigation of the underlying misconduct, or whether the respondent attempted to delay FINRA's investigation, to conceal information from FINRA, or to provide inaccurate or misleading testimony or documentary information to FINRA.

13. Whether the respondent's misconduct was the result of an intentional act, recklessness or negligence.

14. Whether the member firm with which an individual respondent is/was associated disciplined the respondent for the same misconduct at issue prior to regulatory detection. Adjudicators may also consider whether another regulator sanctioned a respondent for the same misconduct at issue and whether that sanction provided substantial remediation.

15. Whether the respondent engaged in the misconduct at issue notwithstanding prior warnings from FINRA, another regulator or a supervisor (in the case of an individual respondent) that the conduct violated FINRA rules or applicable securities laws or regulations.

16. Whether the respondent member firm can demonstrate that the misconduct at issue was aberrant or not otherwise reflective of the firm's historical compliance record.

17. Whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain.

18. The number, size and character of the transactions at issue.

19. The level of sophistication of the injured or affected customer.

CERTIFICATE OF COMPLIANCE

I, Celia L. Passaro, certify that this brief complies with the length limitation set forth in Commission Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 11,614 words, exclusive of the pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits.

Respectfully submitted,

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