SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66113 / January 6, 2012

Admin. Proc. File No. 3-14195

In the Matter of the Application of

DANTE J. DIFRANCESCO
56 Batten Road
Croton on Hudson, NY 10520

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDINGS

Conduct Inconsistent with Just and Equitable Principles of Trade

Registered securities association found that former registered representative of member firm engaged in conduct inconsistent with just and equitable principles of trade when he downloaded confidential nonpublic information concerning 36,000 customers and sent that information to another member firm with whom he was to become associated. *Held*, association's findings of violations and sanctions imposed are *sustained*.

APPEARANCES:

Dante J. DiFrancesco, pro se.

Marc Menchel, *Alan Lawhead*, and *Colleen E. Durbin*, for FINRA.

Appeal filed: January 18, 2011
Last brief received: April 1, 2011

I.

Dante J. DiFrancesco, a registered representative formerly associated with member firm Banc of America Investment Services, Inc. ("BAIS"), appeals from FINRA disciplinary action.[1] FINRA found that DiFrancesco violated NASD Conduct Rule 2110[2] by misusing confidential customer information that constituted "nonpublic personal information" under Regulation S-P, privacy rules promulgated pursuant to the Gramm-Leach-Bliley Act of 1999 ("GLBA").[3] FINRA suspended DiFrancesco in all capacities for ten business days and fined him $10,000.[4] We base our findings on an independent review of the record.

II.

A. DiFrancesco Joins BAIS.

The facts are largely undisputed. DiFrancesco first became registered in the securities industry in 1994 and joined BAIS in October 2004. As an associate of BAIS, DiFrancesco was

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[1] In July 2007, the National Association of Securities Dealers, Inc. ("NASD") was consolidated with the regulatory arm of the New York Stock Exchange ("NYSE"), resulting in the formation of the Financial Industry Regulatory Authority, Inc. ("FINRA"). *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517 (approving proposed rule change to reflect NASD's name change to FINRA). Because the conduct took place before the consolidation, NASD's Conduct Rules apply.

[2] NASD Conduct Rule 2110 (now FINRA Rule 2010) requires members, "in the conduct of [their] business, [to] observe high standards of commercial honor and just and equitable principles of trade." Rule 2110 applies to DiFrancesco through NASD General Rule 115 (now FINRA Rule 140), which provides that persons associated with a member have the same duties and obligations as a member.

[3] The GLBA required the Commission and other federal agencies to adopt rules implementing notice requirements and restrictions on a financial institution's ability to disclose nonpublic personal information about consumers. *See* 15 U.S.C. § 6801 *et seq*. Under the GLBA, a financial institution must provide its customers with notice of its privacy policies and practices, and must not disclose nonpublic personal information about a consumer to a nonaffiliated third party unless the institution provides certain information to the consumer and the consumer does not opt out of the disclosure. The GLBA also required the Commission to establish appropriate standards to protect customer information for the financial institutions subject to its jurisdiction. Regulation S-P implements those requirements with respect to registered investment advisers, broker-dealers, and investment companies. *See Privacy of Consumer Financial Information (Regulation S-P)*, Exchange Act Rel. No. 42974 (June 22, 2000), 72 SEC Docket 2114.

[4] FINRA also assessed costs totaling $4,229.52.

subject to the BAIS Code of Conduct ("BAIS Code"). The BAIS Code stated, in relevant part, that "[BAIS] respects the privacy of customer records, and access to personal information should be restricted to a business need-to-know basis. Absent the customer's consent, [a]ssociates should not disclose personal information to nonaffiliated third parties, except to the extent required by law or customer agreements." The BAIS Code also stated:

> Confidential information obtained from or about a customer, which is specifically identifiable to that customer (such as customer account numbers, customer account balances and transaction information, financial condition, anticipated changes in management, business plan or projections) must be accorded a high level of confidentiality. We provide information to other companies only in order to conduct our business, comply with applicable law, protect against fraud or other suspected illegal activity, or help us meet customer needs, or when the customer specifically consents or has been given an opportunity to request that the information not be shared. Any information shared will be limited to that needed or legally required and may be subject to confidentiality agreements. In addition, [a]ssociates are only authorized to access customer information for legitimate business purposes of [BAIS] or its affiliates on a need-to-know basis.[5]

Upon associating with BAIS, DiFrancesco entered into three written agreements: a "Confidentiality Agreement," a "Series 7 Agreement," and a "Multiple Employment Agreement." Under the Confidentiality Agreement, DiFrancesco "specifically underst[oo]d and agree[d]" that confidential customer information, including names, addresses, and account numbers, was "the sole and exclusive property of [BAIS]"; that he would "not reproduce or appropriate for [his] own use, or for the use of others, any property of" BAIS; and that, for a period of twelve months after his termination, he would not solicit any customers to whom he had provided services while employed by BAIS. The other agreements contained similar provisions.

B. DiFrancesco Seeks to Leave BAIS.

In March 2007, DiFrancesco began looking for employment at other securities firms. His search led to discussions with Dan Kasht, manager of the Elmsford, New York branch office of National Securities Corp. ("NSC"), about associating with NSC. DiFrancesco told Kasht that he intended to bring his 180 to 200 clients from BAIS with him. According to Kasht, DiFrancesco also told him that he did not have any employment contracts with BAIS, and that there were no impediments to his bringing his clients to NSC.[6]

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[5] While the BAIS Code did not cite to either the GLBA or Regulation S-P, its language tracked those privacy provisions.

[6] DiFrancesco testified that he did not remember whether Kasht asked him about any impediments, but that a person named "Glen" at NSC would have been the one to ask about such matters. DiFrancesco testified that he could not recall whether "Glen" had raised the subject

(continued...)

DiFrancesco testified that he believed it was standard industry practice for a registered representative to take his "client book" with him when leaving a firm. Because DiFrancesco did not have a physical book of clients, he decided that he would copy his clients' information, *e.g.*, names, addresses, telephone numbers, account numbers, and net worth information, from BAIS's computer database. On May 24, 2007, while still employed at BAIS, DiFrancesco downloaded his clients' information and attempted to email it to his home email account. However, BAIS's email review system intercepted the email and prevented it from being transmitted. That same day, his manager came by his office and told him that the email with his client list had been quarantined. Both he and his manager then agreed that he would leave BAIS immediately. According to DiFrancesco, he asked his manager if he could take his client list with him, and his manager answered, "Don't worry about that."[7] DiFrancesco interpreted this response to mean, "basically[,] good luck and good-bye," and did not believe that his manager would send him his client list. Consequently, before leaving BAIS, he downloaded his clients' information onto a portable flash drive that he placed into his pocket and took home with him. He admitted that he used the flash drive because he thought another email "would get blocked off," and because he wanted to get "[his] accounts over" to NSC.

C. DiFrancesco Leaves BAIS and Joins NSC.

DiFrancesco's employment at BAIS ended on May 25, 2007. DiFrancesco testified that he did not realize until after he had left BAIS and transferred the customer data from the flash drive to an Excel spreadsheet that he mistakenly had downloaded the names, addresses, telephone numbers, account numbers, and net worth information for approximately 36,000 additional BAIS customers. DiFrancesco claimed that he only intended to download the information relating to his 180 to 200 clients, in order to maintain his client relationships when he changed firms. FINRA accepted this claim, although it made no explicit finding as to his credibility.

On June 6, 2007, DiFrancesco sent Kasht an email with the Excel spreadsheet as an attachment from his home email address. In the email, DiFrancesco wrote: "Dan, as mentioned I am having trouble exporting the client files from this list. Here it is with 31k [sic] names.[8] I will call you to review the items so we can get this stuff out pronto. Thanks."[9] DiFrancesco admitted that he knew at the time that he was sending Kasht a list of tens of thousands of BAIS customers.

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[6] (...continued)
with him, but admitted that, if asked, his answer would have been that there were "no" impediments.

[7] DiFrancesco's manager did not testify at the hearing.

[8] DiFrancesco stipulated prior to the hearing that the Excel spreadsheet actually included approximately 36,000 customer names.

[9] Kasht testified that, contrary to the suggestion in the email, DiFrancesco had not said anything to him previously about having trouble "exporting" client files.

By way of explanation, he testified that he was not "Ex[c]el savvy" and intended to "scratch out" the names of those customers who were not his clients.

DiFrancesco became associated with NSC on June 11, 2007, and immediately began using the downloaded information to send letters to his clients introducing them to NSC. DiFrancesco testified that Kasht printed out the Excel spreadsheet, and together they reviewed it to obtain information related to his clients.[10] DiFrancesco stated that he later "destroyed" the flash drive, but that he did not know what Kasht did with either the email or the Excel spreadsheet.[11] FINRA found no evidence that DiFrancesco used, intended to use, or expected NSC to use, the confidential information of the 36,000 BAIS customers who were not his clients.

On June 18, 2007, Kasht arrived at his office to find a fax waiting for him: a "cc" of a letter from BAIS's attorneys to DiFrancesco threatening legal action against him for failing to adhere to his written agreements with BAIS. The letter accused DiFrancesco of misappropriating confidential customer information and improperly soliciting BAIS's customers to transfer their accounts to NSC. The letter demanded that DiFrancesco "immediately cease and desist using [BAIS] confidential and proprietary customer information."

Kasht testified that NSC would not have hired DiFrancesco had it known he was subject to an employment contract with BAIS that impeded his ability to bring his clients with him. In fact, DiFrancesco represented, in his "Application for Association" with NSC, that he was not subject to "any contract or non-compete agreement." On June 21, 2007, NSC terminated DiFrancesco. He associated with another member firm in July 2007 and is currently registered with that firm.

D. FINRA Proceedings.

DiFrancesco admitted at the hearing that he did not "respect the confidentiality" of BAIS's customers' nonpublic information.[12] On questioning by the Hearing Officer, DiFrancesco also admitted that he intentionally violated his Confidentiality Agreement with BAIS because he

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[10] Kasht contradicted this statement, testifying that he never printed out the Excel spreadsheet. FINRA noted the discrepancy in their testimony, but did not make any credibility finding with respect to DiFrancesco's and Kasht's divergent testimony, and left unresolved the conflict between the two. We do not find the conflicts in their testimony to be material to our disposition of this case.

[11] Kasht testified that he deleted the email, along with the Excel spreadsheet, after reviewing it.

[12] DiFrancesco testified: "I didn't respect the confidentiality of the information [relating to the financial affairs of BAIS's customers], yes, because quite frankly, that information as my understanding -- as my clients would have been -- that confidentiality would have been between me and the clients."

believed his right to his clients' information outweighed BAIS's contractual rights to keep that information:

Q: So if I can try to articulate what I think you're saying, you understood fully that Banc of America did not believe you were entitled to take your client list with you?

A: That's correct, sir.

Q: You understood that the import of the confidentiality agreement was to bind you to the view that Banc of America had that that client information was proprietary to Banc of America?

A: Of course, sir.

Q: But you disagreed with that?

A: Yes, sir.

Q: Even though you signed it?

A: Yes, sir.

Q: So you intentionally violated the confidentiality agreement because you believed that your right to your client information base was -- overrode the Banc of America's right to make you leave it with them?

A: Yes, sir.

DiFrancesco admitted that he did not tell anyone at BAIS that he was taking his clients' information with him, nor did he ask his clients to provide him with any written documentation authorizing him to take their information to NSC. When asked by the Hearing Officer why he did not write down the names and addresses of his clients before leaving BAIS, DiFrancesco replied, "[l]aziness."

DiFrancesco further testified that he did not believe he was "stepping over the bounds" of Regulation S-P's privacy rules by transmitting private customer information to a competitor firm. DiFrancesco acknowledged that he might have been "blinded," but he thought that Kasht would assist him in extracting his clients' confidential information and that the rest would be "shredded and in the trash":

Q: . . . The question is, and it's a very simple point that [R]eg[ulation] S[-]P makes, that information about those clients is private, and you shared that . . . with a competitor. Did that ever cross your mind that that was stepping over the bounds of the regulations that you were supposed to be living under?

A: I can't answer you. Honestly, it didn't. It really didn't. Again, maybe I was blinded. I believed basically that if Dan [Kasht] would have assisted me basically in breaking down the accounts and everything else, that basically everything else would have been shredded and in the trash, and he would have protected that. I wouldn't have allowed him to basically look at the rest.

Q: But he had it, he had it on E-mail. He could have done anything he wanted with it.

A: That is true. That is absolutely true. I did ask him. I did ask him after the fact, sometime after Chris Ortiz [Kasht's superior] called me and basically said gee, I have the E-mail. I said are you returning that E-mail back to me and the client list, and he said no, we're holding this for . . . future reference. I'm not doubting that I did something foolish and stupid. I'm again, trying to explain. I'm not denying it. I said as much since the very beginning, but my intent was clear. My intent was that I was attempting to move my clients over, and that basically is the structure of this.

Following the hearing, a FINRA Hearing Panel ("Panel") determined that DiFrancesco violated NASD Conduct Rule 2110.[13] It suspended him for ten business days and imposed a $10,000 fine.[14] On appeal, FINRA's National Adjudicatory Council ("NAC") affirmed the Panel's finding that DiFrancesco violated Rule 2110 based on his misuse of customer information that constituted "nonpublic personal information" under Regulation S-P.[15] The NAC noted that we had "affirmed that a registered representative's breach of confidentiality is a violation of the ethical principles expressed in a just and equitable principles of trade rule," citing our decision in

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[13] In its decision, the Panel expressly stated that it did not reach the issue of whether DiFrancesco would have violated Rule 2110 by taking only the information relating to his 180 to 200 clients, because the complaint charged him with misusing information with respect to 36,000 BAIS customers, and because the evidence sustained the charge. Because FINRA did not reach this issue, we decline to address it in the first instance and express no opinion as to its merits.

[14] The Panel assessed $2,702.77 in hearing costs.

[15] The Panel further had found that DiFrancesco violated Rule 2110 based on a breach of contract theory. The NAC acknowledged Commission precedent holding that "a breach of contract alone is not automatically unethical conduct in violation of [just and equitable principles of trade], but that such breach may constitute a violation if it was 'unethical or dishonorable' or 'without equitable excuse or justification.'" *Heath*, 2009 WL 56755, at *5 (footnote omitted). While the NAC "doubt[ed] that DiFrancesco had any valid justification for breaching his contracts with BAIS," it expressly declined to find that he violated Rule 2110 based on a breach of contract theory.

Thomas W. Heath, III.[16] The NAC also affirmed the Panel's decision to impose a ten-business-day suspension and $10,000 fine, stating that these sanctions were "necessary to remediate DiFrancesco's misconduct and to deter others who might consider shirking their ethical obligations under NASD Conduct Rule 2110 in favor of their potential for financial gain."[17] This petition for review followed.

III.

A. DiFrancesco Violated NASD Conduct Rule 2110.

NASD Conduct Rule 2110 requires the observance of "high standards of commercial honor and just and equitable principles of trade."[18] "[W]e have long applied a disjunctive 'bad faith or unethical conduct' standard to disciplinary action under" just and equitable principles of trade rules ("J&E Rules").[19] J&E Rules state "broad ethical principles" and center on the "ethical implications" of an applicant's conduct.[20] J&E Rules "serve[] as an industry backstop for the representation, inherent in the relationship between a securities professional and a customer, that the customer will be dealt with fairly and in accordance with the standards of the profession."[21]

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[16] Exchange Act Rel. No. 59223 (Jan. 9, 2009), 2009 WL 56755, *aff'd*, 586 F.3d 122 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2351 (2010).

[17] The NAC affirmed the Panel's order that DiFrancesco pay $2,702.77 in hearing costs and assessed an additional $1,526.75 in appeal costs.

[18] DiFrancesco does not dispute that his activities arose "in the conduct of his business," as required by NASD Conduct Rule 2110. It is well established that FINRA's disciplinary authority under Rule 2110 "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) (per curiam); *see Daniel D. Manoff*, 55 S.E.C. 1155, 1162 & n.8 (2002) (quoting *Vail* and citing cases). We find that DiFrancesco's actions in taking and downloading confidential nonpublic information relating to approximately 36,000 BAIS customers involved both his business relationship with BAIS and his commercial relationship with his customers. As such, his conduct was "business-related."

[19] *Heath*, 2009 WL 56755, at *4 (discussing NYSE Rule 476, counterpart to NASD Conduct Rule 2110) (footnote omitted).

[20] *Id.* & nn.10-11.

[21] *Id.* & n.12.

J&E Rules set forth a standard intended to encompass "a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace."[22] As a result, J&E Rules "focus[] on the securities professional's conduct rather than on a subjective inquiry into the professional's intent or state of mind."[23] Thus, proving motive or scienter is not required,[24] and a showing of unethical conduct, even if not in bad faith, can be sufficient to establish liability.[25]

In analyzing a securities professional's conduct under J&E Rules, we frequently have focused on whether the conduct implicates a generally recognized duty owed to clients or the firm.[26] For instance, in *Thomas W. Heath, III*, [27] a former investment banker and managing director (Heath) at an NYSE member firm (JPMorgan Securities, Inc.) disclosed confidential information about the pending acquisition of a client to a future colleague at a competitor firm. The NYSE held that, although Heath did not act in bad faith, his disclosure constituted unethical conduct in violation of NYSE's J&E rule.

On review, we found that Heath, in disclosing confidential client information, violated "one of the most fundamental ethical standards in the securities industry."[28] We stated that "[t]he duty to maintain the confidentiality of client information is grounded in fundamental fiduciary principles, and is further codified in the [JPMorgan] Code of Conduct."[29] We observed that the JPMorgan Code "expressly prohibits the disclosure of confidential information to anyone outside the firm unless . . . authorized to do so, and instructs that, even when disclosure is permitted,

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[22] *Id.* at *5 & n.13.

[23] *Id.* & n.14.

[24] *Id.* & n.15.

[25] *See Heath*, 586 F.3d at 139 (stating that "the SEC has made clear that no scienter is required and mere unethical conduct is sufficient outside the breach of contract context").

[26] *See, e.g.*, *Heath*, 2009 WL 56755, at *5 (applicant's disclosure of client's material nonpublic information breached his duty of confidentiality and violated J&E Rules); *Manoff*, 55 S.E.C. at 1163 (applicant's unauthorized use of customer's credit card constituted breach of his fiduciary duties and violated J&E Rules); *Louis Feldman*, 52 S.E.C. 19, 22 (1994) (applicant's transfer of customer accounts to new firm without prior consent violated J&E Rules because "under fundamental principles of agency law such prior consent is required").

[27] Exchange Act Rel. No. 59223 (Jan. 9, 2009), 2009 WL 56755.

[28] *Id.* at *4.

[29] *Id.*

employees should use [their] judgment to limit the amount of information shared and disclose it only on a need-to-know basis."[30]

We also found that Heath's disclosure was "self-interested and for his, not his principal's, purposes."[31] In making the disclosure, Heath favored his own interest in establishing a collegial relationship with a future colleague over his client's interest in the confidentiality of its material nonpublic information.[32] Nor were we persuaded that the absence of demonstrable client harm excused his breach, stating that "[t]he ethical prohibition on the disclosure of confidential client information is not contingent upon future harm."[33]

Like *Heath*, this case "is a breach of confidence case, which implicates quintessential ethical considerations not necessarily implicated in a breach of contract case."[34] DiFrancesco breached his duty of confidentiality when he "surreptitiously" downloaded BAIS's customers' confidential nonpublic information, including account numbers and net worth figures, and transmitted that information to his future branch manager at a competitor firm.[35] As in *Heath*, we find that this duty is grounded in agency law principles and reflected in the BAIS Code. The BAIS Code stated, *inter alia*, that "[c]onfidential information obtained from or about a customer, which is specifically identifiable to that customer (such as customer account numbers, customer account balances and transaction information, financial condition, anticipated changes in management, business plan or projections) must be accorded a high level of confidentiality"; that "access to personal information should be restricted to a business need-to-know basis"; and that, "[a]bsent the customer's consent, [a]ssociates should not disclose personal information to nonaffiliated third parties . . . ."

We also find that DiFrancesco's conduct was "self-interested" and for his own purposes. In downloading and transmitting BAIS's customers' confidential nonpublic information to Kasht and NSC, DiFrancesco favored his own interest in maintaining his client base over customers' interest in the confidentiality of their nonpublic information. Nor do we find that the absence of

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30 *Id.* (footnote and internal quotations omitted).

31 *Id.*

32 *Id.* at *9.

33 *Id.*

34 *Heath*, 586 F.3d at 137.

35 DiFrancesco argues that Enforcement's statements that his conduct was "surreptitious" were untrue. During the hearing, a Hearing panelist asked DiFrancesco, "So what is it you thought you were risking, even just taking your 200 [clients'] names? What was the risk? Obviously you did it surreptitiously." DiFrancesco replied, "Yes."

demonstrable customer harm excuses or mitigates his actions,[36] particularly in light of the volume of information and number of customers involved.

We conclude that DiFrancesco violated the professional standards of ethics covered by NASD Conduct Rule 2110.[37] This conclusion finds support in the privacy requirements of Regulation S-P,[38] which imposes certain duties on broker-dealers.[39] Rule 30 of Regulation S-P requires broker-dealers to "adopt written policies and procedures that address administrative, technical, and physical safeguards for the protection of customer records and information."[40] Rule 10 of Regulation S-P prohibits broker-dealers from "disclos[ing] any nonpublic personal information about a consumer to a nonaffiliated third party unless" the consumer receives proper notice and a "reasonable opportunity" to opt out of the disclosure.[41] FINRA has reminded members of their obligations relating to the protection of confidential customer information.[42]

Under Regulation S-P, "nonpublic personal information" means "personally identifiable financial information."[43] "Personally identifiable financial information" means information a consumer provides to a broker-dealer to obtain a financial product or service; information about a

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[36] *See Heath*, 2009 WL 56755, at *9.

[37] *See id.* at *5 & n.21 (stating that the Commission looks to internal firm compliance policies to inform its determination of whether the conduct at issue violates J&E Rules).

[38] *See Heath*, 586 F.3d at 139-40 (stating that "the SEC has made clear that industry norms and fiduciary standards are determinative as to what constitutes unethical conduct").

[39] *See In re S.W. Bach & Co.*, 435 B.R. 866, 891 (Bankr. S.D.N.Y. 2010) (stating that the GLBA "'places the duty to protect the customer's financial privacy and to safeguard the customer's records and information on the covered financial institution, not the individual representative'") (quoting *Next Fin. Group*, Initial Decision No. 349 (June 18, 2008), 93 SEC Docket 6899, 6925 (ALJ opinion), *declared final*, Exchange Act Rel. No. 58192 (July 18, 2008), 93 SEC Docket 7987).

[40] 17 C.F.R. § 248.30(a). It also requires these written policies and procedures to be "reasonably designed to: (1) [i]nsure the security and confidentiality of customer records and information; (2) [p]rotect against any anticipated threats or hazards to the security or integrity of customer records and information; and (3) [p]rotect against unauthorized access to or use of customer records or information that could result in substantial harm or inconvenience to any customer." *Id.*

[41] 17 C.F.R. § 248.10(a)(1).

[42] *See, e.g.*, *Notice to Members* 05-49 (July 2005).

[43] 17 C.F.R. § 248.3(t)(1)(i).

consumer resulting from a transaction involving a financial product or service between a broker-dealer and consumer; or information a broker-dealer otherwise obtains about a consumer in connection with providing a financial product or service to the consumer.[44] We previously have stated that names, addresses, and telephone numbers are "financial" information and covered under the GLBA.[45] In September 2000, FINRA advised 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."[46]

DiFrancesco's hearing testimony demonstrates that he understood the import of Regulation S-P and that it protected some, if not all, of the customer information he downloaded as "nonpublic personal information." But DiFrancesco turned a "blind[]" eye to its privacy requirements and the obvious risk his actions posed to customers when he downloaded and transmitted that information to Kasht and NSC, third parties not affiliated with BAIS, for his own use and benefit. As FINRA found, DiFrancesco's conduct prevented BAIS from giving customers proper notice and an opportunity to opt out of the disclosures, as required by Regulation S-P, and caused NSC to improperly receive BAIS's customers' "nonpublic personal information."

B. DiFrancesco's Arguments Against Liability Lack Merit.

1. DiFrancesco's primary argument against liability is that his conduct conformed to ethical standards and practice in the securities industry. He points to a 2004 agreement, "Protocol for Broker Recruiting," entered into by a number of large broker-dealers whereby the signatories agreed not to sue one another for recruiting one another's registered representatives if the representative took only limited customer information to another participating firm.[47] A departing

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[44] 17 C.F.R. § 248.3(u)(1)(i)-(iii). A "consumer" is "an individual who obtains or has obtained a financial product or service from [a broker-dealer] that is to be used primarily for personal, family, or household purposes, or that individual's legal representative." 17 C.F.R. § 248.3(g)(1). A "customer" is a consumer who has a continuing relationship with a broker-dealer under which the broker-dealer provides one or more financial products or services that are to be used primarily for personal, family, or household purposes. 17 C.F.R. §§ 248.3(j), (k)(1).

[45] *See Privacy of Consumer Financial Information (Regulation S-P),* 72 SEC Docket at 2124; *see also TransUnion LLC v. FTC,* 295 F.3d 42, 49-51 (D.C. Cir. 2002) (rejecting argument that names, addresses, and telephone numbers are not "financial" information and thus should not come within GLBA's definition of "nonpublic personal information" as including "personally identifiable financial information").

[46] *Notice to Members* 00-66 (Sept. 2000).

[47] *See Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Personal Information,* Exchange Act Rel. No. 57427 (Mar. 4, 2008), 92 SEC Docket 2900, 2910 n.91 (discussing Protocol). Neither party introduced the Protocol into

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representative could take names, mailing addresses, telephone numbers, addresses, and account titles, but not other information such as account numbers, net worth, and annual income.[48] BAIS became a signatory to the Protocol in November 2008, after the events at issue, and therefore the Protocol did not apply to DiFrancesco. Even so, his conduct fell outside its provisions because he took customer account and net worth information.

DiFrancesco also points to a March 2008 proposed amendment to Regulation S-P that would have allowed for the limited disclosure of certain customer information, *e.g.*, names, contact information, and general description of account types and products held, when a broker moved from one firm to another.[49] However, this amendment was never adopted and, in all events, would not have aided DiFrancesco. It applied only to firms, not to individual brokers; did not provide for the disclosure of net worth information; specifically excluded the disclosure of account numbers; and authorized disclosure of customer information only when the departing representative provided his firm, prior to his departure, with a written record of the information to be disclosed.[50]

2. DiFrancesco argues that he only intended to take financial information relating to his 180 to 200 clients, and his downloading of financial information relating to approximately 36,000 additional customers was inadvertent. Proof of scienter is not required to establish a violation of J&E Rules.[51] DiFrancesco's state of mind therefore has no bearing on the question of his liability, but, instead, only potentially as to sanctions. While FINRA accepted his claim that he had no intention to take information relating to any BAIS customers other than his own,[52] once DiFrancesco learned of the error, he took no action to remedy his mistake. He did not attempt to return the data to BAIS or to notify BAIS about what had occurred. Nor did he seek to separate the confidential information pertaining to his 180 to 200 clients from that pertaining to the other BAIS customers before transmitting all the information to Kasht and NSC. Instead, DiFrancesco

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[47] (...continued)
evidence, and it is not part of the record.

[48] *See Next Fin. Group*, 93 SEC Docket at 6928-29.

[49] *See Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Personal Information*, 92 SEC Docket at 2910-12 (discussing proposed amendment to Regulation S-P adding new exception to notice and opt out requirements to permit limited disclosure of investor information when registered representative moves from one firm to another).

[50] *See id.*

[51] *See supra* text accompanying note 24.

[52] We typically defer to a fact-finder's credibility findings in the absence of substantial evidence to the contrary. *See Manoff*, 55 S.E.C. at 1161-62.

knowingly emailed the spreadsheet with the confidential, nonpublic information of approximately 36,000 BAIS customers to Kasht, a person he had just met and barely knew, and to NSC, a competitor firm. He took no precautions to ensure that the information would not be misused or disseminated further.

3. DiFrancesco argues that his clients' accounts belonged to him, not to BAIS, and that the Panel erred in finding that he "misused property of his employer under Regulation S-P." As an initial matter, it is the NAC's, not the Panel's, decision that is the final action of FINRA subject to Commission review.[53] That aside, it has been held that, "[u]nder Regulation S-P, '[t]he departing representative has no property right to a customer's nonpublic personal information[,]' and thus '[t]he longstanding dispute about whether the brokerage firm or the registered representative 'owns' the customer relationship is irrelevant.'"[54]

4. DiFrancesco objects that the FINRA Board of Governors erred by declining to review this disciplinary proceeding. Under FINRA Rule 9349, the FINRA Board "may" call a disciplinary proceeding for review.[55] If the FINRA Board, acting in its discretion, does not call the matter for review, as was the case here, then the NAC's determination becomes the final disciplinary action of FINRA.[56]

IV.

Section 19(e)(2) of the Securities Exchange Act of 1934 directs us to sustain FINRA's sanctions unless we find, having due regard for the public interest and protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on

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[53] *Kevin M. Glodek*, Exchange Act Rel. No. 60937 (Nov. 4, 2009), 97 SEC Docket 22027, 22035 n.16, *aff'd*, 416 F. App'x 95 (2d Cir. 2011).

[54] *In re S.W. Bach & Co.*, 435 B.R. at 891 (quoting *Next Fin. Group*, 93 SEC Docket at 6925).

[55] *See* FINRA Rule 9349(c) ("The National Adjudicatory Council shall provide its proposed written decision to the FINRA Board. The FINRA Board may call the disciplinary proceeding for review pursuant to Rule 9351. If the FINRA Board does not call the disciplinary proceeding for review, the proposed written decision of the National Adjudicatory Council shall become final, and the National Adjudicatory Council shall serve its written decision on the Parties and provide a copy to each member of FINRA with which a Respondent is associated. The decision shall constitute the final disciplinary action of FINRA for purposes of SEA Rule 19d-1(c)(1), unless the National Adjudicatory Council remands the proceeding.").

[56] *Id.*

competition.[57] DiFrancesco does not argue that FINRA's sanctions impose an unnecessary or inappropriate burden on competition. Rather, he argues only that they are "extremely onerous and unfair."

We initially observe that the sanctions imposed by FINRA are consistent with the Sanction Guidelines ("Guidelines").[58] The Guidelines contain no specific recommendation for the conduct at issue. Accordingly, FINRA properly considered the Guidelines' Principal Considerations in Determining Sanctions applicable to all violations.[59]

In imposing a ten-business-day suspension and $10,000 fine, FINRA stated that "it provide[d] some measure of mitigation that DiFrancesco ha[d] been forthcoming in admitting throughout these proceedings that he improperly downloaded confidential customer information and forwarded that information to a third party not affiliated with BAIS." However, FINRA found that this mitigating factor was outweighed by numerous aggravating factors, including the seriousness of DiFrancesco's misconduct, his potential for financial gain with respect to BAIS clients who decided to open an account with him at NSC, and his failure to recognize the potential harm his misconduct could have caused customers concerning the privacy of their nonpublic financial information.

We agree with FINRA's assessment. As we admonished in *Heath*, "[t]he ability to credibly assure a client that [confidential nonpublic information] will be used solely to advance the client's own interests is central to any securities professional's ability to provide informed advice to clients. Disclosure of such information jeopardizes the foundation of trust and confidence crucial to any professional advising relationship."[60] Given DiFrancesco's lack of understanding or appreciation of his obligations as a securities professional and his continued employment in the securities industry, a ten-business-day suspension and $10,000 fine will have the remedial effect of protecting the investing public from harm by impressing upon DiFrancesco and others the importance of maintaining the privacy of customers' confidential nonpublic

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[57] 15 U.S.C. § 78s(e)(2).

[58] Although we are not bound by the Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). *Paz Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5125, *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

[59] *See FINRA Sanction Guidelines* 6-7 (2007), setting forth a nonexhaustive list of factors that should be considered.

[60] *Heath*, 2009 WL 56755, at *10.

information.[61] We find that FINRA's sanctions achieve the goals of being remedial and deterring future violations, without being excessive or oppressive.

An appropriate order will issue.[62]

By the Commission (Commissioners WALTERS, AGUILAR and PAREDES); Chairman SCHAPIRO and Commissioner GALLAGHER not participating.

Elizabeth M. Murphy
Secretary

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[61] *See McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2006) (stating that, "[a]lthough general deterrence is not, by itself, sufficient justification for expulsion or suspension, we recognize that it may be considered as part of the overall remedial inquiry"); *PAZ Sec.*, 494 F.3d at 1066 (quoting *McCarthy*).

[62] We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66113 / January 6, 2012

Admin. Proc. File No. 3-14195

In the Matter of the Application of

DANTE J. DIFRANCESCO
56 Batten Road
Croton on Hudson, NY 10520

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by the Financial Industry Regulation Authority against Dante J. DiFrancesco be, and it hereby is, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary