BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. David Kristian Evansen New Lisbon, WI, Respondent.	DECISION Complaint No. 2010023724601 Dated: June 3, 2014

Respondent answered FINRA information requests late and failed to appear and provide testimony requested by FINRA in an investigation. Held, findings affirmed and sanctions modified but affirmed in their effect.

Appearances

For the Complainant: Aimee L. Williams, Esq., David B. Klafter, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

David Kristian Evansen ("Evansen") appeals an August 24, 2012 default decision in which a Hearing Officer found that Evansen responded to two FINRA information requests late and failed to appear and provide testimony sought by FINRA on three occasions, in violation of FINRA Rules 8210 and 2010.[1] For his failure to provide testimony requested during a FINRA investigation, the Hearing Officer barred Evansen. In light of the bar, the Hearing Officer declined to impose additional sanctions for Evansen's untimely response to FINRA's demands for information.

---

[1] The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

We affirm the Hearing Officer's decision to enter a default, and we conclude Evansen failed to establish good cause for his failure to participate in the proceedings below. Based upon the written record before us, we affirm the Hearing Officer's findings. Although we modify the sanctions imposed by the Hearing Officer, we nevertheless affirm them in their effect and bar Evansen from associating with any FINRA member in any capacity.

I. Background

Evansen entered the securities industry in 1987. From October 20, 2003, to May 6, 2009, Evansen was associated with Newbridge Securities Corp. ("Newbridge"), where he was registered as a general securities representative. From May 1, 2009, to July 14, 2010, Evansen was associated with Jessup & Lamont Securities Corp. ("Jessup"), also as a general securities representative.[2] Evansen is not currently associated with a FINRA member.

II. Procedural History

The Department of Enforcement ("Enforcement") commenced disciplinary proceedings against Evansen on June 12, 2012, when it filed a two-cause complaint alleging he: 1) provided a late response to two FINRA information requests, in violation of FINRA Rules 8210 and 2010; and 2) failed to appear and provide investigative testimony requested by FINRA on three occasions, also in violation of FINRA Rules 8210 and 2010. Enforcement sent the complaint by first-class, certified mail to Evansen's Central Registration Depository ("CRD"®) residential address in New Lisbon, Wisconsin.[3]

Evansen did not file an answer or otherwise respond by the deadline specified in the notice of complaint that accompanied Enforcement's initial mailing of the complaint—July 10, 2012.[4] Consequently, on July 12, 2012, Enforcement sent the complaint and a second notice of

---

[2] Jessup filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") on July 14, 2010, stating that it terminated Evansen's association with the firm on June 29, 2010, because it ceased operations as a broker-dealer.

[3] FINRA Rule 9212(a) requires that Enforcement serve a complaint upon each party pursuant to FINRA Rules 9131 and 9134. Under FINRA Rule 9131(b), a complaint initiating proceedings shall be served pursuant to FINRA Rule 9134. FINRA Rule 9134, in turn, permits Enforcement to serve the complaint by, among other means, mailing it to a natural person's residential address as reflected in CRD by first-class, certified mail. *See* FINRA Rules 9134(a)(2), (b)(1). In this case, Enforcement's first-class mailing of the complaint was not returned to FINRA. The certified mailing receipt, however, was returned to FINRA on June 22, 2012, with the signature "Jim Evansen."

[4] FINRA Rule 9215(a) requires that a respondent answer the complaint within 25 days after service of the complaint. Under FINRA Rule 9134(b)(3), service by mail is complete upon mailing. FINRA Rule 9138(c), however, requires that three days be added to the period for any

[Footnote continued on next page]

the complaint by first-class, certified mail to Evansen's Wisconsin CRD address.[5] In accordance with FINRA Rule 9215(f), Enforcement's second notice of complaint informed Evansen that his failure to answer the complaint by July 30, 2012, would allow the Hearing Officer to treat as admitted the complaint's allegations and to issue a default decision against him.[6]

Evansen did not file an answer to the complaint or otherwise respond by the deadline set in Enforcement's second notice of complaint. Enforcement therefore filed a motion on August 7, 2012, requesting that the Hearing Officer issue a default decision deeming the complaint's allegations admitted, enter findings of liability consistent with the complaint's claims, and impose sanctions for Evansen's alleged misconduct. Enforcement supported its motion with a declaration prepared by counsel that detailed FINRA's jurisdiction in this matter, summarized the evidentiary support for the allegations and claims in the complaint, and detailed, with exhibits, Enforcement's efforts to obtain from Evansen an answer to its disciplinary charges.[7] Enforcement sent a copy of its motion and supporting documents to Evansen's Wisconsin CRD address by first-class, certified mail.

Evansen did not respond to Enforcement's motion. The Hearing Officer therefore issued, under FINRA Rule 9269, the default decision that is the subject of Evansen's appeal in this matter. Considering the allegations in the complaint admitted, the Hearing Officer barred Evansen for his failure to appear and provide requested testimony to FINRA. Although the Hearing Officer concluded that a $25,000 fine and two-year suspension from associating with any FINRA member would serve as appropriate sanctions for Evansen's late response to FINRA's information requests, the Hearing Officer declined to impose these additional sanctions in light of the bar he imposed for Evansen's other misconduct.

[Cont'd]

response required under FINRA's Rule 9000 Series when service is made by first-class, certified, or registered mail.

[5] The first-class mailing of the complaint and second notice of complaint was not returned to FINRA. The certified mailing receipt, which reflected delivery on July 17, 2002, was returned to FINRA with the signature "J. Evansen."

[6] If a respondent does not file an answer to the complaint within the time required under FINRA Rule 9215(a), FINRA Rule 9215(f) states that Enforcement shall send a second notice of the complaint to the respondent that requires an answer within 14 days after service of the second notice of complaint and notifies the respondent of the Hearing Officer's powers under FINRA Rule 9269 to enter a default in the event of the respondent's failure to file an answer.

[7] The default motion and counsel's declaration, however, were not otherwise accompanied by any independent evidence of Evansen's alleged misconduct.

Evansen's appeal followed timely under FINRA Rule 9311.[8] On November 16, 2012, after the Hearing Officer certified the record for this matter, the subcommittee of the National Adjudicatory Council empanelled to consider Evansen's appeal ("Subcommittee") ordered Enforcement, under FINRA Rule 9346(f), to supplement the record with evidence supporting the allegations and contentions detailed in the complaint.[9] Enforcement filed the requested supplementary evidence on December 18, 2012. As we discuss in greater detail below, *infra* Part IV.A., we considered this matter on the basis of the written record, including the supplemental record evidence submitted by Enforcement pursuant to the Subcommittee's order and briefs filed by the parties under FINRA Rule 9347.[10]

---

[8] On August 24, 2012, the Hearing Officer issued a notice of default decision that incorrectly referenced the date of the default decision as August 20, 2012, and thus suggested an earlier deadline for Evansen to file a notice of appeal than that required under FINRA Rule 9311(a). Therefore, on September 7, 2012, the Hearing Officer issued an amended notice of default decision that correctly noted the date of the default decision and set October 2, 2012, as the deadline for Evansen's appeal. Evansen filed his notice of appeal on October 1, 2012.

[9] Although FINRA Rule 9269(a)(2) permits a Hearing Officer to deem the allegations against a defaulting respondent admitted, the Commission nevertheless requires that the record contain sufficient independent evidence to support FINRA's findings and enable the Commission to discharge its statutory review functions under Section 19 of the Securities Exchange Act of 1934. *See, e.g.*, *James M. Russen, Jr.*, 51 S.E.C. 675, 678 (1993) (noting approvingly in its review of an appeal stemming from a default decision that FINRA, rather than simply basing its conclusion on the allegations in the complaint, reviewed the record evidence and determined that it supported a finding of violation). Accordingly, and consistent with our past practice in cases involving defaults, the Subcommittee ordered that Enforcement supplement the record with independent evidence of the violations alleged in the complaint. *See, e.g.*, *Dep't of Enforcement v. Verdiner*, Complaint No. CAF020004, 2003 NASD Discip. LEXIS 42, at *4 (NASD NAC Dec. 9, 2003) ("[T]he NAC Subcommittee ordered Enforcement to produce supplemental evidence in support of the allegations in the complaint.").

[10] Evansen attached to his notice of appeal and appeal briefs a large volume of documents that were not part of the record below. Except as noted, *infra* note 26, Evansen did not seek leave to introduce this additional evidence, and, more importantly, he failed to demonstrate why this proposed evidence is material to the proceeding. *See* FINRA Rule 9346(b). Nevertheless, where necessary to give full consideration to Evansen's arguments, we have considered the substance of the documents and find that they are irrelevant to liability and sanctions in this matter.

III. Facts

A. FINRA Requests Information

In late 2010, FINRA began investigating Evansen after Newbridge made certain regulatory filings and disclosures stemming from customer complaints and arbitration claims logged by four Newbridge customers. The customers alleged that Evansen, among other things, recommended unsuitable transactions, engaged in unauthorized trading, traded excessively or churned their accounts, and fraudulently misrepresented and omitted material facts.

On November 9, 2010, FINRA sent Evansen a letter requesting that he provide information and documents under FINRA Rule 8210. FINRA sent the information request by first-class, certified mail to Evansen's then-current CRD address in Boca Raton, Florida.[11] FINRA's request letter instructed Evansen to provide a detailed statement responding to the allegations of each of the four Newbridge customers and asked that he answer 91 questions (roughly 20 to 25 questions for each customer) concerning his treatment of their accounts. FINRA requested that Evansen respond by November 22, 2010.

Evansen did not respond to FINRA's information request by the stated deadline. Therefore, on December 3, 2010, FINRA sent Evansen a second letter requesting that he provide information and documents under FINRA Rule 8210. FINRA sent the second information request by first-class, certified mail to Evansen's Florida CRD address.[12] FINRA's second information request enclosed a copy of the first request letter and required that Evansen provide all of the information FINRA sought therein by December 17, 2010. Evansen failed to respond by this second deadline.

B. FINRA Suspends Evansen

On March 7, 2011, FINRA provided written notice to Evansen that it was initiating expedited proceedings under FINRA Rule 9552 to suspend him from associating with any FINRA member in any capacity because he failed to provide information that FINRA had requested under FINRA Rule 8210.[13] Specifically, FINRA informed Evansen that it intended to

---

[11] The first-class mailing was not returned to FINRA. The certified mailing was returned to FINRA unclaimed on December 1, 2010, although notice of the mailing was left at Evansen's Florida CRD address on November 13, and November 19, 2010.

[12] The first-class mailing was not returned to FINRA. The certified mailing was returned to FINRA unclaimed on January 5, 2011, with notice of the mailing again being left at Evansen's Florida CRD address on December 7, and December 29, 2010.

[13] FINRA Rule 9552(a) permits FINRA staff, in the event a member or person associated with a member fails to provide any information, report, material, data, or testimony requested or required to be filed pursuant to the FINRA By-Laws or FINRA rules, to serve written notice to

[Footnote continued on next page]

suspend him on March 31, 2011, unless he took corrective action by that date to comply with FINRA's first and second information requests, copies of which FINRA enclosed.[14] FINRA sent the suspension notice by overnight courier and first-class mail to Evansen's Florida CRD address.[15]

Evansen did not respond to FINRA's suspension notice by March 31, 2011, and otherwise did not request a hearing. Therefore, FINRA staff provided written notice to Evansen on that date that he was suspended from associating with any FINRA member in any capacity under FINRA Rule 9552. In accordance with FINRA Rule 9552(f), FINRA advised Evansen that he could file a written request to terminate the suspension on the ground of full compliance with FINRA's suspension notice. FINRA further warned Evansen that, if he failed to request termination of his suspension within three months, it would automatically bar him, under FINRA Rule 9552(h), from associating with any FINRA member in any capacity on June 10, 2011. FINRA sent this notice by overnight courier and first-class mail to Evansen's Florida CRD address.

Subsequently, on June 6, 2011, Evansen wrote to FINRA from his Florida CRD address requesting that it terminate his suspension. In his letter, Evansen stated: "I've been in Atlantic City for six months, and only recently have been back in Boca Raton. Therefore please accept this as my formal written Request for Termination of the Suspension, as I was never noticed."

Evansen nevertheless provided no information responsive to FINRA's suspension notice. Consequently, in a letter dated June 8, 2011, again sent by overnight courier and first-class mail to Evansen's Florida CRD address, FINRA denied Evansen's request that it terminate his suspension. FINRA informed Evansen that, pursuant to FINRA Rule 9552(f), it would lift his suspension only if he complied with FINRA's information requests dated November 9, and December 3, 2010. FINRA also reminded Evansen that, if he failed to comply fully with those requests by June 10, 2011, it would automatically bar him.

[Cont'd]

such member or person specifying the nature of the failure and stating that the failure to take corrective action within 21 days after service of the notice will result in the suspension of membership or of association of the person with any member.

[14] In accordance with FINRA Rule 9552(c), FINRA also advised Evansen of his right to file a written request for a hearing under FINRA Rules 9552(e) and 9559, which would serve to stay the effectiveness of any suspension.

[15] FINRA Rule 9552(b) provides for service of a notice of suspension in accordance with FINRA Rule 9134, which permits service by both mail and courier service at an individual's residential CRD address. *See* FINRA Rules 9134(a), (b)(1).

C. FINRA Reinstates Evansen After Initially Barring Him

On June 10, 2011, FINRA issued a written notice stating that it had barred Evansen under FINRA Rule 9552(h) for his failure to comply fully with the suspension notice and provide information responsive to FINRA's information requests. On June 13, 2011, however, FINRA received a letter in which Evansen responded to FINRA's first and second information requests and asked that FINRA terminate his suspension on the ground of his full compliance with them.[16] In his letter, Evansen stated that he had performed a "reasonable search" to locate responsive information and had produced "[a]ll responsive information" of which he was aware.

Accordingly, on June 14, 2011, FINRA terminated Evansen's suspension and vacated the bar it imposed upon him. FINRA staff nonetheless informed Evansen, notwithstanding its decision to terminate his suspension and vacate the bar, it reserved the right to ask him questions, request that he provide additional information, and pursue an action against him, including a disciplinary action for his untimely response to FINRA's information requests issued under FINRA Rule 8210.

D. FINRA Requests Evansen's Testimony

FINRA later attempted to question Evansen in person. On April 13, 2012, FINRA sent Evansen a letter requesting, under FINRA Rule 8210, that he appear at FINRA's Florida offices on April 25, 2012, at 9:30 a.m., so that FINRA staff could take his testimony under oath. FINRA sent the testimony request to Evansen's Florida CRD address by first-class, certified mail.[17] Evansen, however, did not appear before FINRA staff and provide testimony at the appointed location and time, and he did not otherwise attempt to contact FINRA staff to reschedule his on-the-record interview.

Therefore, on April 25, 2012, FINRA issued a second letter under FINRA Rule 8210 requesting an on-the-record interview with Evansen and demanding that he appear at FINRA's

---

[16] Evansen's letter was dated Thursday, June 9, 2011, and states that Evansen sent it from his Florida CRD address by fax and overnight mail to FINRA. A fax transmittal report that Evansen provided with both his notice of appeal and opening appeal brief, however, indicates he faxed his letter to FINRA's Los Angeles offices, the offices from which FINRA issued Evansen's suspension and bar notices under FINRA Rule 9552, on Friday, June 10, 2011, at 5:17 p.m. Evansen did not provide proof of service of his overnight mailing. In his declaration filed in support of Enforcement's motion for entry of a default decision, counsel for Enforcement attested, under penalty of perjury, that FINRA staff did not receive Evansen's June 9, 2011 letter until Monday, June 13, 2011.

[17] The first-class mailing was not returned to FINRA. The certified mailing was returned to FINRA unclaimed on May 14, 2012, although notice of the mailing was left at Evansen's Florida CRD address on April 17, 2012.

Florida offices on May 9, 2012, at 9:30 a.m., to provide his testimony. FINRA sent this second testimony request to Evansen's Florida CRD address by first-class, certified mail.[18] Although the request advised Evansen that a failure to satisfy his obligations under FINRA Rule 8210 could expose him to disciplinary sanctions, including a bar from the securities industry, Evansen once more failed to appear and provide testimony to FINRA staff at the appointed location and time, and he again did not contact FINRA to reschedule his on-the-record interview.

On May 9, 2012, after Evansen failed to appear and provide requested testimony to FINRA a second time, FINRA staff verified that they sent the first and second letters requesting that Evansen appear and provide testimony to his residential address reflected in CRD as of the dates of those letters. FINRA staff confirmed that Evansen's CRD address on those dates was the same Boca Raton, Florida address to which FINRA sent the letters.

A subsequent review of CRD records, however, on May 10, 2012, indicated a new address for Evansen – the New Lisbon, Wisconsin CRD address to which FINRA would later send notice of these disciplinary proceedings. This was the first time CRD reflected Evansen's residential address as being in Wisconsin. Therefore, on May 10, 2012, FINRA sent a third letter under FINRA Rule 8210 requesting an on-the-record interview with Evansen and requiring that he appear to provide testimony at FINRA's Florida offices on May 21, 2012, at 9:30 a.m. FINRA sent this third testimony request to Evansen at his Wisconsin CRD address by first-class, certified mail.[19] Evansen nevertheless again failed to appear to testify before FINRA staff at the appointed location and time date, and he never contacted FINRA staff to reschedule his on-the-record interview.

IV. Discussion

We conclude that the Hearing Officer properly entered a default against Evansen, and Evansen failed to establish good cause for his failure to participate in the proceedings below. Having considered this matter on the basis of the written record, we affirm the Hearing Officer's findings that Evansen violated FINRA Rules 8210 and 2010, as alleged in Enforcement's complaint. Although Evansen, on appeal to the NAC, attacks these proceedings on a number of alternative grounds, we find that each of Evansen's claimed defenses is factually or legally deficient and none of them offers Evansen any respite from FINRA's disciplinary action.

---

[18] The first-class mailing was not returned to FINRA. The certified mailing was returned to FINRA unclaimed on May 17, 2012, although notice of the mailing was left at Evansen's Florida CRD address on April 26, and May 5, 2012.

[19] The first-class mailing was not returned to FINRA. The certified mailing receipt, reflecting that FINRA's third testimony request was delivered on May 17, 2012, was returned to FINRA with the signature "James Evansen."

A. Evansen Defaulted and Failed to Show Good Cause for His Failure to Participate in the Proceedings Below

FINRA Rule 9269(a)(1) authorizes a Hearing Officer to issue a default decision against a respondent that fails to answer a complaint within the time afforded under FINRA Rule 9215. The record in this case is without dispute. Enforcement twice effectively served Evansen with the complaint and notice of the complaint in compliance with FINRA rules. Evansen, however, failed to file an answer. We thus conclude that the Hearing Officer acted within his discretion when he issued the default decision against Evansen. *See Verdiner*, 2003 NASD Discip. LEXIS 42, at *6 ("We find that Verdiner was properly served with the complaint, that he failed to file an answer to the complaint, and that the Hearing Officer properly found that Verdiner was in default.").

Under FINRA Rule 9344(a), we consider an appeal of a default decision on the basis of the record and other documents permitted under FINRA Rules 9346 and 9347, without the opportunity for oral argument, unless the respondent demonstrates good cause for his failure to participate in the proceedings below.[20] Evansen has not provided any discernible reason for his failure to participate in the disciplinary proceedings before the Hearing Officer and afforded to him under FINRA's rules.[21] He instead ostensibly ignored Enforcement's disciplinary charges until the Hearing Officer in this case issued the default decision and barred him from the securities industry. We therefore find that Evansen failed to establish good cause for his failure participate in the proceedings below, and we have considered this matter on the basis of the

[20] If the respondent establishes good cause for his default, FINRA Rule 9344(a) permits us to dismiss the appeal and remand the matter for further proceedings or order that the appeal proceed.

[21] Evansen's notice of appeal and appeal briefs are replete with cursory, oblique references to FINRA's "illusory hearings" and "improper notice." To the extent Evansen intended to imply that Enforcement failed to effectively notify him of the disciplinary charges filed against him, and of his opportunity to contest those charges in the proceedings below, we reject these assertions. As we stated above, *supra* note 3, FINRA Rules 9131 and 9134 permit Enforcement to serve a complaint by a first-class, certified mailing to the respondent's residential CRD address. FINRA rules therefore allow for constructive notice of disciplinary proceedings, which Evansen undoubtedly possessed in this case. *See Verdiner*, 2003 NASD Discip. LEXIS 42, at *5 n.1 (citing *Lubeck v. SEC*, No. 97-70537, 1998 U.S. App. LEXIS 18849, at *20 (9th Cir. Aug. 12, 1998)). Moreover, the receipts for the certified mailings of the complaint and notices of complaint were returned to FINRA with the signatures, respectively, "Jim Evansen" and "J. Evansen." These signatures are apparently those of Evansen's father, James Evansen, and are further evidence that Enforcement achieved actual delivery, if not actual notice, of the complaint and notices of complaint at Evansen's Wisconsin CRD address. *See PAZ Sec., Inc.*, Exchange Act Release No. 52693, 2005 SEC LEXIS 2802, at *15 (Oct. 28, 2005) ("The certified second notices of the complaint were delivered as evidenced by return receipts for both mailings."), *remanded for redetermination of sanctions*, 494 F.3d 1059 (D.C. Cir. 2007).

written record. *See Dep't of Enforcement v. Merhi*, Complaint No. E072004044201, 2007 NASD Discip. LEXIS 9, at *14 (NASD NAC Feb. 16, 2007).

B. Evansen Violated FINRA Rule 8210

FINRA Rule 8210 requires members and persons associated with members to provide information in writing or orally with respect to any matter involved in a FINRA investigation, complaint, examination, or proceeding.[22] "The rule is at the heart of the self-regulatory system for the securities industry" and "'provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations.'" *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008) (quoting *Richard J. Rouse*, 51 S.E.C. 581, 584 (1993)), *aff'd*, 347 F. App'x 692 (2d Cir. 2009). "Delay and neglect on the part of members and their associated persons undermine the ability of [FINRA] to conduct investigations and thereby protect the public interest." *Rouse*, 51 S.E.C. at 588. Consequently, a violation of FINRA Rule 8210 is serious and subverts FINRA's ability to carry out its responsibilities as a regulator, threatening both investors and the markets. *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *33 (June 14, 2013).

Evansen held a duty to give his "full and prompt cooperation" under FINRA Rule 8210 when he responded to FINRA's information requests. *See Brian L. Gibbons*, 52 S.E.C. 791, 794 (1996); *see also CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21 (Jan. 30, 2009) ("[A] member firm and its associated persons have an obligation to respond to NASD's requests fully and promptly."). Evansen failed to abide by his duty. In late 2010, FINRA staff commenced an investigation after four of Evansen's Newbridge customers claimed that he engaged in serious misconduct while he handled their accounts. During this investigation, FINRA staff sent Evansen two information requests, on November 9, and December 3, 2010, asking that he provide a detailed statement responding to his customers' allegations and answer specific questions concerning his treatment of their accounts. Evansen did not provide the requested information until June 13, 2011—greater than seven months after FINRA's initial request for information and only after FINRA suspended and, momentarily, barred him under FINRA Rule 9552. Accordingly, we find that Evansen violated FINRA Rules 8210 and 2010 when he responded to two FINRA information requests late, as alleged in the first

---

[22] FINRA Rule 8210, formerly NASD Rule 8210, provides, "[f]or the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an Adjudicator or FINRA staff shall have the right to: require a member, person associated with a member, or any other person subject to FINRA's jurisdiction to provide information orally, in writing, electronically . . . and to testify at a location specified by FINRA staff." FINRA Rule 8210(a)(1). The rule further states that "[n]o member or person shall fail to provide information or testimony . . . pursuant to this Rule." FINRA Rule 8210(c).

cause of Enforcement's complaint.[23] *See CMG Inst. Trading*, 2009 SEC LEXIS 215, at *29 ("[W]e find that Applicants violated NASD Rules 8210 and 2110 by failing to respond completely and in a timely manner to NASD's . . . request for information."); *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *24 (Nov. 8, 2007) (finding that the respondent failed to timely respond to information requests in violation of NASD Rules 8210 and 2110).

Evansen also possessed a duty to appear and provide testimony requested by FINRA staff. *See Joseph Patrick Hannan*, 53 S.E.C. 854, 860 (1998) ("Hannan, as a former associated person, had an obligation to make himself available and to provide whatever information he possessed to the NASD."); *see also Dep't of Enforcement v. Sciascia*, Complaint No. CMS040069, 2006 NASD Discip. LEXIS 22, at *12 (NASD NAC Aug. 7, 2006) ("Failure to attend an [on-the-record interview] falls squarely within the scope of conduct that violates Rule 8210."). To be sure, after Evansen provided information responsive to FINRA's information requests, FINRA staff advised him that, notwithstanding FINRA's decision to terminate his suspension and vacate his bar, it reserved the right to ask him questions and seek his testimony. Thereafter, on three occasions, April 13, April 25, and May 10, 2012, FINRA staff requested that Evansen appear and provide testimony under oath at FINRA's Florida offices. Evansen failed to appear at the appointed location and times, and he never contacted FINRA staff.[24] We therefore find that Evansen likewise violated FINRA Rules 8210 and 2010 when he failed to appear at three scheduled on-the-record interviews and testify, as alleged in the second cause of Enforcement's complaint. *See Howard Brett Berger*, Exchange Act Release No. 55706, 2007 SEC LEXIS 895, at *28 (May 4, 2007) (finding that the respondent violated NASD Rules 8210 and 2110 when he failed to appear at two on-the-record interviews), *disciplinary action aff'd*, 347 F. App'x 692; *Charles C. Fawcett*, *IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *11 (Nov. 8, 2007) ("Fawcett has admitted . . . that he failed to provide information and to appear for testimony as requested by NASD. Such failure establishes a prima facie violation of NASD Procedural Rule 8210.").

Evansen does not contest that he failed to respond to FINRA's information requests until after FINRA pursued expedited proceedings under FINRA Rule 9552. In his appeal filings, however, Evansen argues that this untimely response rendered FINRA's subsequent requests for his testimony "superfluous" and excused his failure to appear and answer questions before FINRA staff. He is grossly mistaken. Evansen possessed an "unequivocal" duty to cooperate with FINRA. *See Michael Markowski*, 51 S.E.C. 553, 557 (1993). He possessed this duty even

---

[23] A violation of FINRA Rule 8210 is also a violation of FINRA Rule 2010. *See Nolan Wayne Moore*, Complaint No. 2008015105601, 2012 FINRA Discip. LEXIS 45, at *29 n.24 (FINRA NAC July 26, 2012) (citing *CMG Inst. Trading*, 2009 SEC LEXIS 215, at *29-30 n.36). FINRA Rule 0140 subjects associated persons to all rules applicable to FINRA members.

[24] If Evansen had difficulty testifying at the location and times set by FINRA, he should have "raised, discussed, and resolved" these issues with FINRA staff in the "cooperative spirit and prompt manner" contemplated by FINRA Rule 8210. *See CMG Inst. Trading*, 2009 SEC LEXIS 215, at *23-24 (internal quotations omitted).

if he believed he had already provided FINRA with other, relevant information. *See Ashton Noshir Gowadia*, 53 S.E.C. 786, 790 (1998). Evansen therefore was not permitted to second guess FINRA staff's request for his testimony. *See Michael David Borth*, 51 S.E.C. 178, 181 (1992) ("The Rules do not permit second guessing the NASD's requests."). His apparent belief that FINRA did not need his testimony "provides no excuse for his failure to provide it." *Id*. FINRA Rule 8210 provides FINRA staff with broad discretion to ask questions of its members and their associated persons during on-the-record interviews concerning any matter involved in a FINRA investigation, complaint, examination, or proceeding. *See Dep't of Enforcement v. Gallagher*, Complaint No. 2008011701203, 2012 FINRA Discip. LEXIS 61, at *17 (FINRA NAC Dec. 12, 2012) (finding that the respondent violated FINRA Rules 8210 and 2010 when he failed to respond to questions posed by FINRA during his on the-record testimony). FINRA staff was under no obligation to justify or explain to Evansen its several requests that he appear and testify.[25] *See Erenstein*, 2007 SEC LEXIS 2596, at *13 ("The rule does not require that NASD explain the reasons for making the information request or justify the relevance of any particular request."). "The determination of when it is appropriate for an investigation to proceed is a matter for [FINRA] to decide, not the respondent." *Michael J. Markowski*, 54 S.E.C. 830, 838 (2000).

In sum, we affirm the Hearing Officer's findings. Evansen violated FINRA Rules 8210 and 2010 when he responded to two FINRA information requests late and failed to appear and provide on-the-record testimony requested by FINRA staff on three occasions. Evansen's duties as a person subject to FINRA's jurisdiction are clear, and he failed to abide by them.

C. <u>Evansen's Claimed Defenses Fail</u>

In his appeal filings, Evansen asserts several supposed defenses that he claims preclude FINRA disciplinary action in this case. Each of these claims is without merit, and we reject them all.

1. <u>FINRA Properly Exercised Its Jurisdiction</u>

First, Evansen argues that he resigned from Jessup in "early June of 2010," and that his resignation predated Enforcement's complaint by more than two years. He therefore claims that FINRA lacked jurisdiction to discipline him. Evansen is incorrect.

---

[25] FINRA was undoubtedly entitled to ask Evansen questions about his response to FINRA's earlier information requests and to assess whether it should proceed with a disciplinary action against him. *See Plunkett*, 2013 SEC LEXIS 1699, at *35 ("FINRA was entitled to test the accuracy of the assertions Plunkett made. Moreover, the documents and information were not only important for it to determine whether it should proceed with a formal disciplinary action against Plunkett, but also could have assisted its investigation of others in the industry."); *see also Hannan*, 53 S.E.C. at 859 ("The NASD had the right to summon Hannan to appear and give the NASD whatever information he did have, which hopefully would resolve these discrepancies.").

Article V, Section 4(a)(i) of FINRA's By-Laws provides that FINRA retains jurisdiction to file a complaint against a person whose association with a member has been terminated for "two years after the effective date of termination of registration." The termination upon which FINRA's continuing jurisdiction is predicated therefore "is not termination of employment or association, but termination of registration."[26] *Donald M. Bickertsaff*, 52 S.E.C. 232, 234 (1995). Termination of registration is effective upon the date that FINRA receives a Form U5 from the individual's member firm. *See Dep't of Enforcement v. Imbruce*, Complaint No. 2008012137601, 2012 FINRA Discip. LEXIS 41, at *31 (FINRA NAC Mar. 7, 2012) (citing *Bickertsaff*, 52 S.E.C. at 234). In this case, Jessup filed a Form U5 indicating that the firm terminated Evansen's association with the firm in all capacities for which registration was required on July 14, 2010.[27] Enforcement's complaint, which was filed within two years of this date, was therefore timely filed. FINRA possessed jurisdiction to discipline Evansen.

2. Evansen Possessed Constructive Notice of FINRA's Information and Testimony Requests

Second, Evansen argues that FINRA failed to properly serve him with its information and testimony requests. These arguments also fail.

It is undisputed that FINRA staff sent two information requests to Evansen. It is also undisputed that each request was sent to Evansen's Florida CRD address by first-class, certified mail. FINRA thus achieved valid service of the information requests on Evansen. *See* FINRA Rule 8210(d) (stating that a notice issued under FINRA Rule 8210 is "deemed received" by a

---

[26] Pursuant to FINRA Rule 9346(b), Evansen filed a motion on November 16, 2012, seeking leave to adduce additional evidence (pay stubs and a Form W-2) that he asserts establishes that the complaint in this case was not filed within two years of the last day upon which Evansen associated with Jessup. As we state above, however, the date upon which Evansen's association with Jessup was terminated is irrelevant for purposes of establishing FINRA's jurisdiction to pursue disciplinary charges against him. Evansen's motion to adduce additional evidence is therefore denied. *See* FINRA Rule 9346(b) ("The motion shall describe each item of proposed new evidence, demonstrate that there was good cause for failing to introduce it below, *demonstrate why the evidence is material to the proceeding*, and be filed and served." (emphasis added)).

[27] Evansen asserts that Jessup failed to timely file a Form U5 providing notice that the firm terminated his registrations with it within 30 days of his leaving the firm, as required by Article V, Section 3(a) of FINRA's By-Laws. The alleged late filing of Evansen's Form U5 by Jessup, however, has no bearing on the two-year jurisdictional provision within Article V, Section 4(a)(i) of FINRA's By-Laws. *See Dep't of Enforcement v. Liu*, Complaint No. C04970050, 1999 NASD Discip. LEXIS 32, at *14-15 (NASD NAC Nov. 4, 1999) ("Failure of a member firm to file a Form U-5 within 30 days does not affect the date of an individual's termination for purposes of Article V, Section 4.").

formerly registered person to whom it is sent when mailed to that person's last known residential CRD address); *see also Moore*, 2012 FINRA Discip. LEXIS 45, at *28 ("The record in this case demonstrates that Enforcement properly sent the requests for information and documents pursuant to the service provisions of FINRA Rule 8210(d), and Moore had constructive notice of the requests.").

Evansen maintains that he did not respond timely to FINRA's two information requests because he had been traveling and working in Atlantic City, New Jersey, and he thus did not receive the requests until he returned to his Florida CRD address in early June 2011. Even if these assertions are true, they are insufficient to excuse his late response. Evansen retained a duty to keep his CRD address current, and he must bear the consequences if he failed to do so.[28] *See Perpetual Sec., Inc.*, Exchange Act Release No. 56613, 2007 SEC LEXIS 2353, at *35 (Oct. 4, 2007) (rejecting a claim that the respondent "promptly" responded to FINRA information requests when the respondent claimed she did not receive the requests sent to her CRD address until they were forwarded, several months later, to secondary addresses of which FINRA was unaware). Evansen's failure to respond timely to FINRA's information requests is not excused because, as he claims, he temporarily moved from his residential address as reflected in CRD. *See Dennis A. Pearson, Jr.*, Exchange Act Release No. 54913, 2006 SEC LEXIS 2871, at *23-24 (Dec. 11, 2006) ("It is the responsibility of NASD members and their associated persons to keep NASD apprised of any changes in their address, and a failure to respond . . . is not excused by that person's having temporarily moved from the address listed in the CRD.").

With respect to FINRA's requests for Evansen's testimony, he claims that he changed his residential CRD address to the New Lisbon, Wisconsin address in March 2012, and that FINRA staff thereafter improperly served the April 13, and April 25, 2012 testimony requests upon him at the wrong address. In support of his assertions, Evansen included with his appeal filings a notarized letter, ostensibly executed on March 27, 2012, requesting that CRD update and change his CRD address to the Wisconsin address. This document, however, did not show when Evansen sent the letter or when CRD received it. On the other hand, independent evidence submitted by Enforcement during this appeal, and other record evidence, showed that CRD reflected the Boca Raton, Florida address as Evansen's current residential address on both April 13, and April 25, 2012, and CRD did not reflect the Wisconsin address as Evansen's residential address until May 10, 2012. The preponderance of the evidence before us thus shows that FINRA staff sent the first two testimony requests to Evansen's then-current CRD address. *See* FINRA Rule 8210(d); *Moore*, 2012 FINRA Discip. LEXIS 45, at *28.

---

[28] If FINRA staff knows that a person's CRD address is out of date or inaccurate, then a copy of a FINRA Rule 8210 notice shall also be mailed or otherwise transmitted to any more current address known to FINRA staff. *See* FINRA Rule 8210(d). There is no evidence in the record, and Evansen does not allege, that FINRA staff knew that his CRD address was out of date or that he was residing at a more current address when FINRA staff sent the two information requests to him. Indeed, the correspondence that Evansen sent to FINRA in June 2011, concerning FINRA's information requests, provided Evansen's Florida CRD address as his return address.

Even were we to find that Evansen's current residential CRD address as of April 13 and April 25, 2012, was the New Lisbon, Wisconsin address, and that FINRA thus failed to properly serve Evansen with the first two testimony requests, it would not alter our conclusions of liability in this case. The record is clear that FINRA staff properly sent the third, and final, testimony request, dated May 10, 2012, to Evansen's Wisconsin CRD address by first-class, certified mail. *See* FINRA Rule 8210(d); *Moore*, 2012 FINRA Discip. LEXIS 45, at *28. Unable to dispute this fact, Evansen switches tacks and complains that he nevertheless did not receive personal service of the May 10, 2012 request for his testimony. Evansen's argument is immaterial. Constructive notice, not actual notice, is all that FINRA Rule 8210 demands. *See Dep't of Enforcement v. Steinhart*, Complaint No. FPI020002, 2003 NASD Discip. LEXIS 23, at *7 (NASD NAC Aug. 11, 2003) ("[E]ven if Steinhart had not admitted that he received the request, we find that he received constructive notice of the request for information because it was sent to his current CRD address pursuant to Procedural Rule 8210(d)."). Evansen received constructive notice of FINRA's May 10, 2012 testimony request, and his assertion that he failed to receive personal service cannot justify his failure to appear and testify.[29]

3. Evansen's Perceived Whistleblower Status Does Not Preclude FINRA's Action

Third, Evansen avers that he "has good reason to believe" that FINRA filed the complaint in this matter in retaliation for what he claims is his "whistleblowing" to the Commission concerning the alleged unlawful activities of Jessup's clearing firm. Such retaliatory acts, Evansen contends, provide him with protection from FINRA disciplinary action. Evansen's claims, however, find no merit in the record or the law.

As an initial matter, Evansen provided no evidence in his extensive appeal filings that FINRA staff in this case acted with any improper motives in pursuing disciplinary charges against him. Instead, his claims are based upon his faulty attempt to link a series of unrelated, irrelevant events to impute an alleged retaliatory intent to FINRA staff.[30] They are speculative, and, by his admission, supported by nothing more than "information and belief" and

---

[29] Although there is no evidence that Evansen received personal service of FINRA's May 10, 2012 testimony request, the record nonetheless reflects that FINRA's certified mailing was delivered to Evansen's Wisconsin CRD address on May 17, 2012, and Evansen's father, James Evansen, signed the certified mailing receipt. *Cf. PAZ Sec.*, 2005 SEC LEXIS 2802, at *15.

[30] Among other things, Evansen claims: he filed a "whistleblower suit" with the Commission that resulted in the closure of Jessup's clearing firm, Penson Financial Services, Inc. ("Penson"); FINRA conspired with Penson to shut down a former Jessup unit, Empire Financial Group, Inc. ("Empire"); Penson's demise caused FINRA embarrassment; FINRA had a "substantial litigious relationship" with Jessup; he was, at some point, represented by Jessup's counsel; these "innocuous relationships, . . . inferred into something much more"; and he is "collateral damage" from "over handed regulator interference," whereby FINRA staff abused their powers to "mask" their own wrongdoing with respect to Penson and Empire.

"scuttlebutt." As an evidentiary matter, Evansen's claims of retaliation must therefore fail. *See, e.g.*, *Plunkett*, 2013 SEC LEXIS 1699, at *37 (rejecting for failure of proof claims that the respondent was "persecuted and prosecuted by FINRA to keep [him] silent about their cover up of their failure to act on the evidence of . . . the Ponzi scheme" (internal quotations omitted)); *John B. Busacca, III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *52 (Nov. 12, 2010) ("[W]e find no evidence that FINRA unfairly targeted Busacca or was biased against him."), *aff'd*, 449 F. App'x 886 (11th Cir. 2011); *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *53-54 (Jan. 30, 2009) ("Nor does the record support Epstein's claim that this proceeding was instituted in retaliation for any efforts to alert regulators about misconduct at the FAC."), *aff'd*, 416 F. App'x 142 (3d Cir. 2010); *Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572, at *39 (Nov. 8, 2006) ("[T]here is no evidence that NASD gave any consideration to any alleged whistleblowing by Sathianathan . . . .").

More importantly, Evansen's self-professed whistleblower status does not provide him with immunity from discipline in these proceedings. *See Sathianathan*, 2006 SEC LEXIS 2572, at *37-38 ("Even assuming . . . that Sathianathan had knowledge of unlawful activity about which he informed federal or state authorities, the statutes that Sathianathan cites do not provide him with immunity in this disciplinary proceeding."). Given the broad discretion accorded to prosecutors in determining who should be charged with wrongdoing, we presume that FINRA staff properly performed their duties to pursue disciplinary charges against Evansen. *See Busacca*, 449 F. App'x at 891 (rejecting arguments raised by the respondent, after seeking review of a Commission order sustaining FINRA disciplinary action, that he was singled out for prosecution and punishment based on his criticisms of FINRA and the securities industry); *see also Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) ("NASD disciplinary proceedings are treated as an exercise of prosecutorial discretion.").

This is not to suggest that FINRA may pursue disciplinary actions against its members and their associated persons with unfettered discrimination. Decisions to institute FINRA disciplinary proceedings may not be premised upon an unjustified standard such as race, religion, or other arbitrary classification. *See Busacca*, 449 F. App'x at 891 (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). To establish a claim of unlawful, selective prosecution, Evansen was nonetheless required to present evidence that he was unfairly singled out and that FINRA's disciplinary action was motivated by a discriminatory purpose or desire to prevent his exercising a constitutionally protected right. *See Sathianathan*, 2006 SEC LEXIS 2572, at *38 ("To establish a claim of selective prosecution, a petitioner must demonstrate that he was unfairly singled out and that his prosecution was motivated by improper consideration such as race, religion, or the desire to prevent the exercise of a constitutionally protected right."). Evansen made no such showing, and we find no evidence in the record that FINRA staff unfairly or unlawfully targeted Evansen with discipline. Indeed, the record shows that FINRA's investigation and complaint were amply warranted. The disciplinary action filed against Evansen resulted from an investigation by FINRA into allegations that Evansen seriously mishandled the accounts of four Newbridge customers, an investigation with which Evansen failed to fully and promptly cooperate as required under FINRA Rule 8210.

4. Evansen May Not Hide Behind a Grand Jury's Subpoena

Finally, Evansen argues that he was not required to provide investigative testimony to FINRA staff because he "was a grand jury witness in a high profile criminal case against one or more of the parties for which [FINRA] was enquiring about."[31] Therefore, he avers, he "couldn't disclose anything about any of the parties, in any testimony [before FINRA], because that then, would allow FINRA hearing officers to be able to deduce who Mr. Evansen was a party to a grand jury criminal proceeding against." Evansen misperceives the secrecy protections of grand jury proceedings both generally and as they applied to him.

It is true that the Federal Rules of Criminal Procedure commonly prohibit disclosure of matters occurring before a grand jury. *See generally SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980) (citing Fed. R. Crim. P. 6(e)). They do not require, however, "that a veil of secrecy be drawn over all matters occurring in the world that happen to be investigated by a grand jury." *Id*. "It is well settled that 'when testimony or data is sought for its own sake for its intrinsic value in the furtherance of a lawful investigation . . . it is not a valid defense to disclosure that the same information was revealed to a grand jury . . . .'" *Id*. (quoting *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960)). In this case, the grand jury subpoena that Evansen references in his appeal filings does not excuse his failure to appear and provide testimony lawfully requested by FINRA staff under FINRA Rule 8210.[32] *Cf. Dresser Indus.*, 628 F.2d at 1382 ("Dresser is obligated under the securities laws to provide documents to the SEC in obedience to a lawful subpoena. The existence of a grand jury proceeding neither adds to nor detracts from Dresser's rights before the SEC.").

Additionally, the list of persons that are subject to grand jury secrecy requirements is not all-encompassing. *See* Fed. R. Crim. P. 6(e)(2)(A) ("No obligation of secrecy may be imposed on a person except in accordance with Rule 6(e)(2)(B)."); Fed. R. Crim. P. 6(e)(2)(B) ("[T]he following persons must not disclose a matter occurring before a grand jury: (i) a grand juror; (ii) an interpreter; (iii) a court reporter; (iv) an operator of a recording device; (v) a person who transcribes recorded testimony; (vi) an attorney for the government; or (vii) [certain government attorneys and personnel] to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii)."). As a witness before a grand jury, Evansen simply was under no requirement, as he now maintains

---

[31] In support of his claims, Evansen included with his appeal filings a copy of a subpoena issued to him on April 1, 2012, and commanding him to appear and testify before a grand jury in the United States District Court for the Southern District of Georgia on May 8, 2012.

[32] We note, as a factual matter, there is no evidence in the record that FINRA staff were even aware, at the time they issued the requests for Evansen's testimony, of the grand jury proceedings that Evansen now attempts to use as a shield from FINRA disciplinary action. Nor, for that matter, could Evansen possibly speculate that FINRA staff intended to ask him questions concerning the grand jury proceedings during an on-the-record interview taken pursuant to FINRA Rule 8210—he never appeared to testify or otherwise attempted to contact FINRA staff.

self-servingly, to invoke his silence in the face of FINRA's testimony requests. *See In re Application of Lance Eisenberg*, 654 F.2d 1107, 1113 (5th Cir. 1981) ("Witnesses before the grand jury are not obliged to keep silent."); *see also In re Adler, Coleman, Clearing Corp.*, No. 95-08203 (JLG), 1999 Bankr. LEXIS 2032, at *21-22 (Dec. 8, 1999) ("Even if Moran had testified before a federal grand jury, he would not be precluded from revealing either that he testified or the nature of his testimony.").

V. Sanctions

The Hearing Officer barred Evansen from associating with any FINRA member in any capacity as a sanction for his failure to appear and testify as requested by FINRA staff on three occasions. In light of this sanction, the Hearing Officer declined to impose additional sanctions for Evansen's late response to FINRA's two information requests.[33]

After carefully considering the FINRA Sanction Guidelines ("Guidelines") and relevant Commission precedent, we modify the sanctions imposed by the Hearing Officer.[34] Although we assess sanctions differently, imposing a unitary sanction for both causes of Evansen's misconduct, we nevertheless agree with the consequence of the Hearing Officer's decision and bar Evansen for his misconduct.

First, we conclude that the Guidelines, which state that "a bar should be standard" if an individual did not respond to a FINRA Rule 8210 request for information or testimony "in any manner," endorse a bar for each element of Evansen's misconduct.[35] Starting with the second cause of Enforcement's complaint, the record concerning Evansen's failure to provide testimony requested by FINRA staff is clear. His failure, in the face of three requests demanding his appearance at an on-the-record interview, was complete. Evansen thus failed to respond "in any manner" and a bar is unquestionably warranted. *See Berger*, 2008 SEC LEXIS 3141, at *24 ("[T]he risks presented by persons who, in the absence of mitigating factors, completely fail to respond to Rule 8210 requests [for testimony] are appropriately remedied by a bar."); *Elliott M. Hershberg*, Exchange Act Release No. 53145, 2006 SEC LEXIS 99, at *11-12 (Jan. 19, 2006) ("In these circumstances, Hershberg's conduct amounted to a complete failure to respond [and testify], and NASD acted consistently with the purposes of the Exchange Act in imposing a bar."), *aff'd*, 210 F. App'x 125 (2d Cir. 2006); *Toni Valentino*, Exchange Act Release No. 49255, 2004 SEC LEXIS 330, at *15-16 (Feb. 13, 2004) ("Valentino's attempts to delay and ultimately avoid her appearance are especially troubling . . . . The standard sanction of a bar is

---

[33] The Hearing Officer concluded that the sanctions appropriate for Evansen's late response, if imposed, would be a $25,000 fine and a two-year suspension from associating with any FINRA member in any capacity.

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

[35] *Id*. at 33.

warranted."); *see also Moore*, 2012 FINRA Discip. LEXIS 45, at *33-34 ("As we review the evidence in the record, particularly the fact that Moore's repeated failures to provide testimony thwarted [FINRA's] efforts to perform its regulatory functions and investigate serious allegations of wrongdoing by Moore, we conclude there is no evidence of mitigation and the standard sanction should apply.").

The Guidelines also support a bar for the misconduct alleged in the first cause of the complaint concerning Evansen's late response to FINRA's two information requests. "When a respondent does not respond [to a FINRA Rule 8210 notice] until after FINRA files a complaint," the Guidelines instruct us to "apply the presumption that the failure constitutes a complete failure to respond," in which case a bar is the standard sanction.[36] Here, Evansen responded to staff's information requests only after FINRA suspended and briefly barred him through expedited proceedings brought under FINRA Rule 9552. Under these facts, a bar is in order.[37] *See Ricupero*, 2010 SEC LEXIS 2988, at *25 ("Ricupero provided no information before NASD filed its complaint and therefore failed to respond in any manner. Such conduct warrants a bar . . . ."), *aff'd*, 436 F. App'x 31 (2d Cir. 2011); *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *16 (Apr. 11, 2008) ("The failure to respond until after NASD barred Applicants is not merely a 'slow' response; such failure is tantamount to a complete failure to respond."), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009); *Hershberg*, 2006 SEC LEXIS 99, at *11-12 ("Hershberg expressed his willingness to testify only after his automatic bar became imminent [under the predecessor to FINRA Rule 9552] . . . . In these circumstances, Hershberg's conduct amounted to a complete failure to respond.").

---

[36] *Guidelines*, at 33 & n.1.

[37] In reaching this conclusion, we are cognizant of recent Commission precedent that remanded for our reconsideration of sanctions matters in which FINRA barred the respondents after FINRA concluded that their conduct constituted a complete non-response to FINRA information and testimony requests. *See Plunkett*, 2013 SEC LEXIS 1699, at *55 ("We disagree with FINRA's analysis."); *Kent M. Houston*, Exchange Act Release No. 66014, 2011 SEC LEXIS 4491, at *27 (Dec. 20, 2011) ("A remand is appropriate here."). The individuals that the Commission found FINRA erroneously barred in *Plunkett* and *Houston*, however, provided partial responses to FINRA Rule 8210 requests *prior* to FINRA initiating proceedings against them. *See Plunkett*, 2013 SEC LEXIS 1699, at *55 ("In response to those earlier requests, Plunkett provided information . . . . FINRA failed to take any of this into account when assessing sanctions."); *Houston*, 2011 SEC LEXIS 4491, at *25 ("[B]ecause Houston did respond in some manner to NASD's request, any sanction imposed . . . should analyze factors other than the presumptive unfitness indicated by a failure to respond in any manner."). These cases, and others like them, are therefore distinguishable and the guidance they provide does not apply under the facts that confront us here. *See generally Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at *25 (Sept. 10, 2010) ("In each of those cases, the applicants provided some information responsive to NASD's Rule 8210 requests before NASD filed a complaint." (citations omitted)).

Second, we discern in the record no evidence of mitigation that merits our deviating from a bar in this matter.[38] For instance, Evansen asks us to consider it mitigating that he responded "the next day" after he received FINRA's information requests. To the contrary, we conclude that the nature of the information sought by FINRA, the number of FINRA Rule 8210 notices issued, the degree of regulatory pressure FINRA applied, and the length of time required to obtain Evansen's response to FINRA's requests is highly aggravating.[39] *See Dep't of Enforcement v. Lane*, Complaint No. 20070082049, 2013 FINRA Discip. LEXIS 34, at *98 (FINRA NAC Dec. 26, 2013) ("[T]he degree of regulatory pressure that [FINRA] had to bring to obtain the category of information was substantial and is a highly aggravating factor."), *appeal pending*, No. 3-15701 (SEC). Because Evansen responded to FINRA's information requests only when his bar became imminent under FINRA Rule 9552, a stringent sanction is warranted. *See Hershberg*, 2006 SEC LEXIS 99, at *11-12 ("Hershberg expressed his willingness to testify only after his automatic bar became imminent . . . ."). As the Commission has stated consistently, FINRA should not, as happened here, be required to initiate disciplinary or expedited proceedings, with their threat of debilitating sanctions, to elicit a response to information requests made under FINRA Rule 8210. *See Ricupero*, 2010 SEC LEXIS 2988, at *12 ("We have emphasized repeatedly that NASD should not have to initiate disciplinary action to elicit a response to its information requests made pursuant to Rule 8210."); *Hershberg*, 2006 SEC LEXIS 99, at *10 (finding that FINRA should not have to institute expedited proceedings to secure a respondent's testimony).

Nor may Evansen find relief in his claims that FINRA served notice of its information and testimony requests at the wrong address. The record before us established that FINRA staff effectively notified Evansen of each of its requests for information and testimony by sending them, in accordance with FINRA rules, to Evansen's then-current residential CRD address. Evansen, who asserts he was often traveling to another state, nevertheless ostensibly made no effort to receive FINRA correspondence sent to his CRD address while he was working elsewhere. Therefore, far from establishing mitigation, Evansen's justification for his misconduct instead evidences a risk that he will engage in future misconduct. *See PAZ Sec.*, 2008 SEC LEXIS 820, at *28-29 ("Because Mizrachi thus has demonstrated a disregard for his duty to ensure that he or PAZ respond to requests sent to their CRD addresses while he is out of the country, NASD faces a great risk of being unable to obtain from Applicants information necessary for the protection of investors."). The bar we impose herein "appropriately remed[ies] that risk." *See id*. at 29.

---

[38] *See Guidelines*, at 33 ("Where mitigation exists, or the person did not respond in a timely manner, consider suspending the individual in any or all capacities for up to two years.").

[39] *See id*. (Principal Considerations in Determining Sanctions, Failure to Respond in a Timely Manner).

Lastly, we find troubling Evansen's long-playing pattern of indifference to his responsibilities under FINRA Rule 8210.[40] *See Ricupero*, 2010 SEC LEXIS 2988, at *19 ("Throughout the investigative phase and disciplinary process relevant to this matter, Ricupero ignored staff's Rule 8210 requests."); *PAZ Sec.*, 2008 SEC LEXIS 820, at *28 ("Applicants' cavalier disregard of the need to ensure that PAZ and Mizrachi respond to requests for information in a timely fashion . . . poses a clear risk of future misconduct."); *Hershberg*, 2006 SEC LEXIS 99, at *13 ("Hershberg's refusal to testify for a fourteen-month period and his attempt to avoid a bar by reversing his position at the last minute justified a stringent sanction."). FINRA staff first requested that Evansen provide information concerning his customers' claims of serious misconduct in November 2010, and he did not respond until seven months later, after FINRA staff was forced to send a second request for information and pursue his suspension and bar under FINRA Rule 9552. When FINRA decided to lift his suspension and bar after he responded, albeit late, FINRA staff specifically warned him that it reserved the right to ask him questions, request additional information, and pursue a disciplinary action against him, including for his untimely response to FINRA's two information requests. Despite this warning, and in the face of three requests that he appear and testify before FINRA staff, issued in April and May 2012, Evansen failed completely to make himself available for questioning and ignored FINRA's testimony requests, choosing instead to remain on the sidelines until the Hearing Officer barred Evansen in August 2012 as a result of his default.[41]

Evansen does not accept responsibility for his actions, blaming others, namely FINRA staff, for the position in which he finds himself, and he persists in his second-guessing of FINRA's need for his investigative testimony.[42] *See Lane*, 2013 FINRA Discip. LEXIS 34, at *99 ("[T]he way in which each brother attempted to blame, or pass off his responsibilities to, his other brother reflects a failure to accept personal responsibility."); *see also Epstein*, 2009 SEC LEXIS 217, at *75 ("We agree with FINRA that Epstein's 'demonstrated insouciance and indifference towards his responsibilities under NASD rules poses a serious risk to the investing public.'"); *Berger*, 2008 SEC LEXIS 3141, at *26-27 ("To allow Berger to justify his refusal to testify by using an after-the-fact assessment of the results of NASD's investigation would shift the focus from NASD's perspective at the time it seeks the information and disregard intervening events."); *PAZ Sec.*, 2008 SEC LEXIS 820, at *21 (accepting FINRA's argument on appeal that "[m]itigation cannot be based on a respondent's second guessing the importance of the investigation"). Based on the foregoing, and in light of the totality of circumstances considered, we conclude that a unitary sanction—a bar—serves as an appropriate remedy for Evansen's entire course of misconduct.[43] *See Ricupero*, 2010 SEC LEXIS 2988, at *26 ("We conclude that

---

[40] *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, Nos. 8, 9).

[41] *See Guidelines*, at 7 (Principal Consideration in Determining Sanctions, No. 15).

[42] *See id.* at 6 (Principal Consideration in Determining Sanctions, No. 2).

[43] *See Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 4); *see also Erenstein*, 2007 SEC LEXIS 2596, at *35-36 (concurring with FINRA's assessment

[Footnote continued on next page]

the bar is remedial because it will prevent Ricupero and others from failing to respond to NASD requests for information and protect the investigating public by encouraging timely cooperation."); *Berger*, 2008 SEC LEXIS 3141, at *51 ("Based on the rationale behind the recommendation of a bar as the standard sanction for a complete failure to respond to an NASD request for information, and given the absence of mitigating factors in this case, we find that the bar against Berger is neither excessive nor oppressive."); *Hershberg*, 2006 SEC LEXIS 99, at *8 ("[T]he bar protects investors by encouraging the timely cooperation that assists in the prompt discovery and correction of wrongdoing.").

VI. Conclusion

We agree with the Hearing Officer that Evansen defaulted. We also find that Evansen failed to establish good cause for this failure to participate in the proceedings below; we thus have considered this matter on the basis of the written record. After reviewing the record evidence, we affirm the Hearing Officer's findings and conclude that Evansen violated FINRA Rules 8210 and 2010 by responding to two information requests late and by failing to appear and provide testimony requested by FINRA staff on three occasions. We nevertheless modify the sanctions imposed by the Hearing Officer in that we impose a unitary sanction for Evansen's misconduct. Accordingly, Evansen is hereby barred from associating with any FINRA member in any capacity for violating FINRA Rules 8210 and 2010, as alleged in the complaint's first and second causes of action.[44]

On Behalf of the National Adjudicatory Council,

____

Marcia E. Asquith
Senior Vice President and Corporate Secretary

[Cont'd]

of a unitary or aggregate sanction where the respondent failed both to answer FINRA's information requests and answer FINRA's questions, as alleged in two separate causes of action in the complaint initiating disciplinary action).

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