

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C3A030001
v.	:	
	:	
Respondent 1	:	Hearing Officer – DMF
	:	
and	:	
	:	
Respondent 2	:	
	:	
	:	
Respondents.	:	

ORDER DENYING MOTION FOR ISSUANCE OF 8210 REQUESTS

On September 17, 2003, respondents moved, pursuant to Rule 9252, for the issuance of Rule 8210 requests for documents to four NASD member firms.¹ Respondents indicate that the Department of Enforcement does not oppose their motion.

Rule 9252 requires that any such motion be filed “no later than 21 days before the scheduled hearing date” The hearing in this case is scheduled for September 29 and 30, so the motion is untimely. Timeliness is particularly important here, as a matter of fairness to the firms to which the requests would be directed, because Rule 9252 requires that, if the motion is granted, the firms be required to provide the requested documents to the parties “not less than 10 days before the hearing,” or, if the motion is granted less than 10 days prior to the hearing, “immediately.”

¹ According to the motion, one of the firms “is defunct,” and respondents ask that the request for information to that firm be directed to its former president, who, according to the motion, is currently associated with another NASD member.

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 03-17 (C3A030001).

Rule 9252 also requires that any such motion include a showing that the moving party “has previously attempted in good faith to obtain the desired Documents ... through other means but has been unsuccessful in such efforts” Respondents’ motion does not include such a showing, and thus fails for that reason as well.

Even apart from these defects, the motion fails to establish that the requested documents are “relevant, material, and non-cumulative,” as required by Rule 9252. Respondents request that each of the four firms be required to produce “[a]ny and all documentation [the firm] has in its possession relating to the commission structure with any and all German Money Managers, or entities, that it may have had or continues to have a relationship with, including but not limited to [several named entities and individuals].”² Respondents do not adequately explain why this information would be material to the issues in this case. They assert that the information “is directly related to ... the allegation that Respondents charged unfair commissions,” but the commission structures of the other firms, by themselves, would appear to have little or no relevance to whether the commissions respondents charged were allowable under NASD’s rules.

On the other hand, respondents’ request encompasses “any and all documentation ... relating to the commission structure with any and all German Money Managers, or entities, that [the firm] may have had or continues to have a relationship with,” without any time limitation. Identifying and producing the documents responsive to such a broad request, particularly within the very short time period available, could impose significant burdens on the firms. While such

² As to one of the firms, respondents also seek to require the firm to provide “any response to the information requested in the NASD’s information request letter dated December 4, 2003 [sic] regarding retail option commission schedule used in 1999.” Obviously, the date given by respondents for NASD’s request must be incorrect. Assuming that NASD did request and obtain such information, however, it is not clear whether Enforcement was required to produce it to respondents pursuant to Rule 9251. Therefore, Enforcement is directed to file, within seven days, a statement indicating whether it has the requested information, whether it was included in Enforcement’s Rule 9251 production, and, if production was not required under Rule 9251, whether Enforcement will provide it to respondents voluntarily.

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a burden might be justified if it were clear that the requested information was critical to the defense, respondents have not shown that it would be. Therefore, the Hearing Officer finds that proposed requests would be unreasonable, oppressive, excessive in scope, and unduly burdensome.

For all these reasons, respondents' motion is denied.

SO ORDERED.

David M. FitzGerald
Hearing Officer

Dated: September 18, 2003