

**NASD OFFICE OF HEARING OFFICERS**

---

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

---

Disciplinary Proceeding  
No. 2006004494201

Hearing Officer—Andrew H. Perkins

**ORDER QUASHING POST-COMPLAINT  
RULE 8210 REQUEST FOR INFORMATION**

On May 7, 2007, the Department of Enforcement (the "Department") issued a request for information to the Respondent pursuant to NASD Procedural Rule 8210 (the "Rule 8210 Request"). The Rule 8210 Request amounts to 13 contention interrogatories,<sup>1</sup> which ask the Respondent to provide detailed information about the facts he claims supports his defenses.

When the Respondent failed to respond to the Rule 8210 Request by the specified deadline, the Department requested that the Hearing Officer convene a pre-hearing conference. The conference was held on June 11, 2007, by conference call. The Department asserted that it has an unrestricted right to use Procedural Rule 8210 to gather information after it initiates a disciplinary proceeding. The Respondent opposed the Rule 8210 Request on the ground that it is

---

<sup>1</sup> Contention interrogatories are permitted with limitations under Fed. R. Civ. P. 33(c), which provides in relevant part:

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

unfair to permit the Department to conduct discovery of this nature because the Respondent is not granted a similar right to discovery.

**I. The Rule 8210 Request**

The Complaint charges the Respondent with willfully failing to update his Form U-4 to disclose two unsatisfied federal tax liens. In his Answer, the Respondent asserted that the tax liens were the subject of an amended federal tax return and in dispute. He further asserted that his accountant advised him that the tax liens were not final and therefore need not be disclosed.

In preparation for the hearing, the Department sent the Respondent the following contention interrogatories directed at uncovering the facts the Respondent contends supports the defenses he raised in his Answer.

1. What is the basis of your believe that the two federal tax liens, in the amounts of \$21,960.75 and \$69,932, that were identified in the Department of Enforcement's Complaint dated January 16, 2007, were in "dispute?"
2. What, specifically, was in "dispute" about each tax lien?
3. As of the date of this letter, has the "dispute" surrounding each tax lien been resolved?
4. As of the date of this letter, has each tax lien been satisfied?
5. If so, how was each tax lien satisfied (i.e., payment made to satisfy the liens)?
6. If you satisfied the tax liens by making payments, how much did you pay to satisfy each lien and when were the payments made? Please provide documentation, including, but not limited to, copies of canceled checks, evidencing payments on the liens.
7. If the liens have not been satisfied, please explain the current status of each lien.
8. Was the accountant who purportedly advised you that the "tax liens were not final" a licensed securities professional at the time of his or her advice to you?
9. Was the accountant who purportedly advised you that the "tax liens were not final" associated with an NASD member firm at the time of his or her advice to you? If so, which member firm?

10. What is the basis of your belief that the tax liens were not final and could not be satisfied?
11. What steps did you take, beyond consulting with your accountant, to verify that the tax liens were not final and could not be satisfied?
12. Did you consult with anyone at your employing member firm about whether the tax liens were disclosable on Form U-4?
13. If so, with whom did you consult, and what was the nature your discussion with that person or persons?

## **II. Discussion**

The Department correctly notes that the Code of Procedure does not prohibit Enforcement from issuing post-complaint requests for information pursuant to Procedural Rule 8210. However, principles of fairness and efficiency in the conduct of the proceeding dictate that the Department's ability to use Rule 8210 during the pendency of a proceeding is not unfettered. The Hearing Officer has the authority under Procedural Rule 9235(a) to monitor and limit the Department's use of Rule 8210 during the course of a proceeding to ensure a fundamentally fair proceeding.<sup>2</sup>

Information requests in the nature of contention interrogatories, such as those at issue here, may be employed by the Department in the proper circumstances to narrow the issues in dispute, and to minimize the possibility of surprise at the hearing. But contention interrogatories have the potential for imposing an unfair burden on respondents.<sup>3</sup> Ultimately, the Hearing Officer must balance the Department's need for the requested information and its value to resolving the issues in dispute in the proceeding on the one hand against the prejudice, if any,

---

<sup>2</sup> Rule 9235(a) states in part: "The Hearing Officer shall . . . have authority to do all things necessary and appropriate to discharge his or her duties."

<sup>3</sup> *Cf., e.g., McCormack-Morgan, Inc. v. Teledyne Indus.*, 134 F.R.D. 275, 286 (N.D.Cal.), *rev'd on other grounds*, 765 F.Supp. 611 (N.D. Cal. 1991) (discussing contention interrogatories under Fed. R. Civ. P. 33(c)).

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 07-23 (2006004494201).**

that the respondent will suffer if the Department is permitted to engage in unilateral discovery of this nature.<sup>4</sup> In each case, the Hearing Officer must determine if such contention interrogatories are overly broad or unduly burdensome.<sup>5</sup>

Here, the Hearing Officer concludes that the Department's Rule 8210 Request will impose an undue burden and expense on the Respondent. The Hearing Officer notes that the Respondent filed a statement from his tax advisor with his Answer, which chronicles the Respondent's efforts to resolve his disputed federal tax liability.<sup>6</sup> The statement provides substantially all of the information requested in the Department's Rule 8210 Request. Thus, the Hearing Officer finds that requiring the Respondent to restate the same information will neither narrow the scope of the issues in dispute nor minimize the possibility for surprise at the hearing.

In addition, on August 20, 2007, the Respondent is obligated to provide to the Department a list of his witnesses, including a brief description of their anticipated testimony, copies of all proposed exhibits, and a pre-hearing brief. The Hearing Officer further notes that the Order Modifying Pre-Hearing Procedures dated May 14, 2007, requires that the Respondent's pre-hearing brief include a narrative summary of his defense and a discussion of the legal theories upon which he relies. Through these filings, the Department will receive a statement of the Respondent's contentions well in advance of the hearing. Accordingly, the Hearing Officer concludes that the Rule 8210 Request is unduly cumulative and burdensome

---

<sup>4</sup> Respondents have the burden of convincing the Hearing Officer that a post-complaint request for information is objectionable.

<sup>5</sup> *Cf., Bell v. Woodward Governor Co.*, 2005 U.S. Dist. LEXIS 19602, at \*5-6 (N.D. Ill. Sept. 8, 2005) (limiting scope of contention interrogatories under Fed. R. Civ. P. 33(c)).

<sup>6</sup> The statement of a Director at \_\_\_\_\_ is Exhibit A to the Respondent's Answer.

**This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 07-23 (2006004494201).**

under the facts and circumstances of this proceeding. Accordingly, the Respondent is relieved of his obligation to respond to the Rule 8210 Request.

**IT IS SO ORDERED.**

---

Andrew H. Perkins  
Hearing Officer

Dated: June 13, 2007