

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

_____	:	<u>DECISION</u>
In the Matter of	:	
	:	
Department of Enforcement,	:	Complaint No. C02000037
	:	
	:	
Complainant,	:	Dated: November 2, 2001
	:	
vs.	:	
	:	
	:	
Paul John Hoyer	:	
Newport Beach, CA	:	
	:	
	:	
	:	
Respondent.	:	
_____	:	

Former registered representative failed to respond to a request for documents issued by NASD Regulation, Inc. until after a complaint was issued. Respondent violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Held, findings and sanctions affirmed. Respondent barred from association with any NASD member firm in any capacity.

Respondent, Paul John Hoyer ("Hoyer"), appeals the March 6, 2001 decision of the NASD Regulation, Inc. ("NASD Regulation") Hearing Panel in this matter pursuant to NASD Procedural Rule 9310. After a review of the entire record in this matter, we affirm the findings of the Hearing Panel that Hoyer violated NASD Rules 8210 and 2110 as alleged in the complaint. In addition, we affirm the Hearing Panel's imposition of a bar in all capacities, giving proper weight to the gravity of the violation.

Background

Hoyer entered the securities industry in 1993. From January 4, 1999 through March 19, 1999, Hoyer was associated with NASD member firm Raymond James Financial Services, Inc. ("RJFS") as a general securities representative (Series 7) and a general securities sales supervisor (Series 8). He is not currently registered with any NASD member firm.

Facts

The relevant facts are undisputed. On March 23, 1999, RJFS received a complaint from one of Hoyer's customers alleging that on two occasions Hoyer had failed to effect trades in accordance with the customer's instructions. RJFS notified NASD Regulation staff of the complaint. On March 20, 2000, staff sent a request for information to Hoyer pursuant to Rule 8210, asking him to respond to the customer's allegations. The staff served the request by first class mail addressed to Hoyer at his most recent residential address as listed in the Central Registration Depository ("CRD"). The letter requested a written response by April 4, 2000. Hoyer did not respond.

On April 6, 2000, staff sent Hoyer another Rule 8210 request by both certified and first class mail to Hoyer's CRD address, reiterating the March 20 request for a response to the customer's complaint. The staff did not receive a receipt showing delivery of the certified mailing, but the Postal Service did not return either the certified or the first class mailing. The April 6 request required Hoyer to submit a written response by April 17, 2000.

On April 13, Hoyer called Denise Evans ("Evans"), a District No. 1 examiner. Hoyer admitted to Evans that he had received the March 20 request and had received notification from the Postal Service that he could pick up the certified mailing of the April 6 request. Hoyer requested more time to respond to the requests, and Evans agreed to extend Hoyer's time to respond until April 24, 2000. Evans sent Hoyer a written confirmation of the extension. Hoyer did not, however, respond to the requests.

On June 19, 2000, the Department of Enforcement ("Enforcement") filed a single-count complaint alleging that Hoyer violated NASD Rules 8210 and 2110 by failing to respond to two requests for information issued by NASD Regulation staff. On August 3, 2000, Hoyer filed an untimely answer to the complaint, without Enforcement objection. During the initial pre-hearing conference, Hoyer expressly waived his right to a hearing. Enforcement filed written submissions in support of the allegations of the complaint on September 29, 2000; Hoyer made no filings in opposition.

On December 28, 2000, Enforcement filed a supplemental declaration with the Hearing Panel stating that it had "received what appears to be a written response to" the requests for information at issue. This response was received nine months after the original requests were sent, and more than six months after the filing of the complaint. Enforcement suggested that the charge against Hoyer could thus be considered a failure to respond to the requests in a timely manner, rather than a failure to respond.

On March 6, 2001 the Hearing Panel reached a decision based on the written record, finding that Hoyer violated Rules 8210 and 2110 by failing to respond to requests for information. The Hearing Panel observed that Hoyer offered in his own defense only the explanation that his "failure to respond to requests made by all NASD offices was caused by multiple home moves over the response period." Finding that the respondent had been properly served with the requests but had offered no valid excuse for ignoring the production dates set

forth in the requests, the Hearing Panel barred him in all capacities, concluding that "it would be inappropriate to treat Hoeper's belated response as mitigating his earlier failure to respond."

Proceedings on Appeal

In a brief on appeal and during an appeal hearing held on June 21, 2001, Hoeper argued that he should not have been barred, and in fact should not have been suspended for any amount of time and should only have been fined. Hoeper sought to mitigate the gravity of the violation by claiming that he had intended to respond to the Rule 8210 requests. Hoeper also claimed that he could not provide a "complete" response until he had time to review all of the relevant documents. Hoeper also reiterated his contention that his failure to respond to the requests was caused by multiple home moves over the response period.

Discussion

A person violates Rule 8210 when he fails to provide full and prompt cooperation when a request for information and documents is made. Brian L. Gibbons, 52 S.E.C. 791 (1996), aff'd, 112 F.3d 516 (9th Cir. 1997). Further, a violation of Rule 8210 constitutes a violation of Conduct Rule 2110. See Joseph Patrick Hannan, 53 S.E.C. 854 (1998)

The uncontested record reflects that Hoeper received the Rule 8210 request dated March 20, 1999, and he had at least constructive notice of the April 6, 2000 Rule 8210 request because it was served in strict accordance with the notice provisions of Rule 8210.¹

Hoeper admits he had actual notice of the staff's written requests for information and documents in March 2000 and that he failed to respond to the requests until December 2000, nearly six months after this disciplinary proceeding had commenced. The response was received by Enforcement after the matter had been submitted to the Hearing Panel for decision.

Hoeper claimed that multiple residential moves made it impossible to access documents necessary to frame a complete rather than a partial response. Hoeper offered no support for this contention, which at any rate would not excuse his failure to respond to investigatory requests

¹ Rule 8210(d) provides that "[a] notice under the Rule shall be deemed received by the member or person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository. If the Adjudicator or Association staff responsible for mailing or otherwise transmitting the notice to the member or person has actual knowledge that the address in the Central Registration Depository is out of date or inaccurate, then a copy of the notice shall be mailed or otherwise transmitted to: (1) the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository, and (2) any other more current address of the member or the person known to the Adjudicator or Association staff who is responsible for mailing or otherwise transmitting the notice."

that he received and acknowledged. The NASD has consistently rejected similar arguments. For example, in a proceeding sustaining a bar for failing to respond to staff inquiries in District Business Conduct Committee for District No. 10 v. David A. Blech, Complaint No. C10960019 (NBCC Dec. 1, 1997), the National Business Conduct Committee dealt with a respondent's claim of impossibility as follows:

Even if we credit Blech's explanation regarding the destruction of the Firm's documents, that does not excuse Blech's failure to respond, nor does it provide mitigation. Blech failed to inform staff that the documents were destroyed until after the complaint was issued . . . The NASD should not have to resort to filing a complaint in order to have received a response from Blech.

Similarly, in this case, if Hoeper did not have access to the requested documents, he was required to respond with that information; he could not simply ignore the requests. In addition, the requests asked Hoeper to provide "a detailed, signed statement" addressing specific questions regarding the customer's complaint. Even if Hoeper did not have access to the requested documents, he was required to make a good faith effort to respond as fully as possible to the questions posed. See Robert A. Quiel, 53 S.E.C. 165 (1997) (sustaining NASD findings of violation, the SEC stated that "even if Quiel could not access readily the information that the NASD requested, we find that he failed to . . . answer as completely as he was able"). The evidence establishes that Hoeper made no such effort.

Sanctions

In the face of Hoeper's unreasonable avoidance of NASD Regulation's requests in any manner, we find that the bar is wholly justified. Hoeper's failure to respond prevented NASD Regulation staff from proceeding with its investigation, thereby undermining the Association's ability to carry out its self-regulatory functions. See, e.g., Barry C. Wilson, 52 S.E.C. 1070 (1996). Moreover, the applicable NASD Sanction Guideline states that a bar should be standard if the individual did not respond and no mitigation exists.² In sum, there is nothing in the record that excuses Hoeper's failure to respond during the nine months that passed between the requests for information and Hoeper's untimely response. We affirm the Hearing Panel's finding that Hoeper's belated response to the requests does not mitigate his earlier failure to respond and is an insufficient basis for any reduction of the sanction imposed herein.

Accordingly, we affirm the Hearing Panel's findings that Hoeper violated NASD Rules 8210 and 2110 by failing to respond in a timely manner to requests for information issued and

² See NASD Sanction Guidelines (1998 ed.) at 31 (Failure to Respond).

served in accordance with Rule 8210. Hoeper is barred from association with any NASD member firm in any capacity. The bar shall become effective as of the date of this decision.³

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney
Senior Vice President and Corporate Secretary

³ We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.