

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Timothy J. Duma
Downers Grove, IL,

Respondent.

DECISION

Complaint No. C8A030099

Dated: October 27, 2005

Respondent engaged in outside business activity without providing his employer with prompt written notice; misrepresented his employment status on a new account application; failed to notify his employer in writing that he had opened a securities account at another firm and failed to notify the firm at which he opened the account that he was associated with an NASD member; testified untruthfully at an on-the-record interview; and used unapproved advertising. Held, findings affirmed in part, modified in part; sanctions affirmed.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Dale A. Glanzman, Esq., Department of Enforcement, NASD

For the Respondent: Pro Se

DECISION

Pursuant to NASD Procedural Rule 9311(a), Timothy J. Duma (“Duma”) appeals a September 28, 2004 Hearing Panel decision barring him from associating with any member firm in any capacity for various violations of NASD rules. We affirm the Hearing Panel’s findings that Duma engaged in outside business activity without providing his employer with prompt written notice; misrepresented his employment status on a new account application; failed to notify his employer in writing that he opened a securities account at another member firm and failed to notify the firm at which he opened the account that he was associated with an NASD member; testified untruthfully at an on-the-record interview; and used unapproved advertising.

We reverse the Hearing Panel's finding that the failure to file an advertisement and sales literature with NASD violated NASD Conduct Rule 2210. We affirm the Hearing Panel's imposition of a bar.

I. Procedural History

NASD's Department of Enforcement ("Enforcement") began an investigation of Duma following the filing of a March 2001 amended Uniform Termination Notice for Securities Industry Registration ("Form U5") for Susan Rogers ("Rogers") that disclosed that WMA Securities, Inc. ("WMA") was investigating whether Rogers had disseminated unapproved advertising while she was associated with WMA. The advertisement in question was for estate planning services offered by Rogers and Duma under the name "Rogers, Duma & Associates."

On December 19, 2003, Enforcement filed a five-cause complaint against Duma that alleged the following violations of NASD rules: (1) between 1997 and 2000, Duma utilized a "yellow page" advertisement, and between either 1998 or 1999 and 2000 used a personal brochure, and failed to obtain prior approval for these advertisements or to file the advertisements with NASD's Advertising Regulation Department in violation of NASD Conduct Rules 2210 and 2110;¹ (2) Duma failed on three separate occasions to give prompt written notice of outside business activities to his firm in violation of NASD Conduct Rules 3030 and 2110; (3) in May 2000, Duma, with his brother, opened a securities account (the "H&R Block Account") with H&R Block Financial Advisors, Inc. ("H&R Block"), another NASD member, without providing notice to his firm and without notifying H&R Block that he was associated with another NASD member in violation of NASD Conduct Rules 3050(c) and 2110; (4) in May 2000, when filling out the account application with H&R Block, Duma misrepresented his status as an associated person in violation of NASD Conduct Rule 2110; and (5) during his on-the-record interviews on October 22, 2002 and January 16, 2003, Duma responded untruthfully or in a misleading manner when he discussed the extent of his involvement and role in the H&R Block Account in violation of NASD Procedural Rule 8210 and Conduct Rule 2110.

With one exception, the Hearing Panel found that Duma committed the violations as alleged in the complaint.² Enforcement claimed that Duma's on-the-record testimony was untruthful or misleading regarding both the purpose of the H&R Block Account and Duma's use of the H&R Block Account. The Hearing Panel found that Enforcement failed to prove by a preponderance of the evidence that Duma lied about the purpose of the H&R Block Account; however, the Hearing Panel found that Duma testified falsely that he never engaged in personal transactions in the H&R Block Account. The Hearing Panel barred Duma from associating with

¹ Violations of any NASD Conduct Rule also constitute a violation of NASD Conduct Rule 2110. See *Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999). NASD Rule 115(a) provides that NASD rules apply to all members "and persons associated with a member" and that such persons have the same duties and obligations as a member under the rules.

² In the complaint, Enforcement also alleged that Duma failed to notify WMA of his outside business activities with LA Worldwide Mortgage. During the hearing below, however, Enforcement withdrew these allegations.

any member firm in any capacity, both for Duma's violation of NASD Procedural Rule 8210 for his failure to testify truthfully (Cause Five) and for the two violations concerning the H&R Block Account (Causes Three and Four). In light of the bars, the Hearing Panel did not impose additional sanctions for the advertising violations and the violation of NASD Conduct Rule 3030 for failure to report outside business activity (Causes One and Two).

II. Factual Findings

A. Duma

Duma began his career in the securities industry in 1988 and first registered with NASD as an investment company products/variable contracts limited representative in 1992. In 1994, Duma registered as an investment company products/variable contracts limited principal. In April 1996, Duma joined WMA and maintained his registrations as an investment company products/variable contracts limited representative and as an investment company products/variable contracts limited principal. Duma was a supervisory principal at WMA in 1997 and became a branch office manager in 1998. In or around May 2000, Duma ceased having supervisory responsibilities.³ In October 2000, Duma left WMA and joined another member firm, where he stayed until August 2003.⁴ Duma currently is registered with another member firm as an investment company products/variable contracts limited principal and as a general securities representative.

B. Duma's Communications with the Public

The parties stipulated that between 1997 and 2000, Duma used a "yellow page" advertisement, and between either 1998 or 1999 and 2000, Duma used sales literature in the form of a personal brochure. The "yellow page" advertisement was a one-half page print advertisement that appeared in a local telephone directory each year from 1997 through 2000. The advertisement, which was listed under "Estate Planning" services, was for Rogers, Duma & Associates. The advertisement referred to Duma as a "Registered Investment Advisor" and noted that the securities were "Offered Through WMA Securities, Member NASD/SIPC." The personal brochure, which Duma refers to as a "credibility piece," mentioned only Duma and did not refer to Rogers, Duma & Associates. The brochure included client testimonials, a biographical sketch of Duma, and Duma's contact information. The brochure made no mention that Duma was associated with an NASD member.

Duma testified that, in or around 1997, he sent both the "yellow page" advertisement and the brochure to the WMA home office for approval as required by WMA's procedures. After submitting them, however, he never received WMA's approval to distribute them. Rather, he "just assumed" they had been approved. When Duma was asked during his first on-the-record

³ Duma's supervisor testified that, in May 2000, he requested that Duma be removed from being a branch office manager because of Duma's "general disregard for a number of compliance requirements that were being put on us at the time." Duma asserts that he requested to be removed from being a branch office manager.

⁴ In May 2003, Duma registered as a general securities representative.

interview if he ever checked to confirm whether WMA had approved the advertisement and brochure, Duma answered that he had not because “[c]alling WMA was like calling a black hole.” Duma testified that, prior to 1999, WMA had “very little supervision or requirements for advertising.”⁵ In or around 1999, Duma submitted the “yellow page” advertisement to WMA in connection with an internal audit, and WMA did not approve the advertisement because it did not include WMA’s home office address. Duma testified that he corrected the error, submitted the revised advertisement, and WMA approved it for use going forward. Duma also submitted the brochure to WMA in connection with the same audit. Similarly, WMA did not approve the brochure; however, rather than correct the deficiencies, Duma testified that he stopped using it. Duma admits that he never submitted either communication to NASD’s Advertising Regulation Department.

C. Duma’s Outside Business Activities

WMA marketed both securities and non-securities products, and the WMA sales force included both captive and non-captive agents.⁶ When Duma joined WMA in 1996, he served as a non-captive agent, which allowed him to sell non-WMA products and engage in outside business activities. Duma testified that, in 1999, WMA began to be “more serious” about compliance, and he was required to disclose his outside business activities to the firm. Duma filled out numerous WMA outside business activity forms in April 1999; however, Duma failed to submit an outside business activity form for his work with Southwestern Life Insurance Company (“Southwestern”). Duma stipulated that, in 2000, he received \$2,015.30 in compensation from Southwestern. Duma testified that the compensation—which accounted for approximately one percent of his income—resulted from his sale of long-term care insurance, which is not a securities product, and that he “probably overlooked” the business because he was working with approximately 30 companies at the time. While Duma’s supervisor testified that he was generally aware that Duma was involved in outside business activities—including selling insurance products—he did not recall ever learning of Duma’s involvement with Southwestern.

⁵ The record includes a copy of a WMA compliance form dated November 18, 1998. One of the approximately 65 items each WMA registered representative was required to initial states: “I understand that I must obtain written approval from my Branch Office Manager and the [WMA] Compliance Department prior to publishing any advertisement in a newspaper, magazine or publication.” Duma initialed this item and signed the form on April 15, 1999. On February 20, 2000, Duma again initialed an entry in another WMA compliance form that required him to certify that he understood “that [he] must obtain written approval from [his] Branch Office Manager and the [WMA] Compliance Department prior to publishing any advertisements in a newspaper, magazine or publication.”

⁶ A “captive” agent is one that is limited to selling only products of the firm with which he or she is employed. *See Dep’t of Enforcement v. Hartley*, Complaint No. C01010009, 2003 NASD Discip. LEXIS 49, at *3 n.3 (NAC Dec. 3, 2003), *aff’d*, *Christopher Dinh Hartley*, Exchange Act Rel. No. 50031, 2004 SEC LEXIS 1507 (July 16, 2004).

D. The H&R Block Account

In May 2000, Duma opened the H&R Block Account jointly with his brother.⁷ Duma testified that he filled out the information on the account application and that he was listed as the second party on the account for “estate planning purposes” because his brother was single and had no children. The application contained separate columns for information on Duma (as the “Second Party”) and his brother (as the “Applicant”). In the blank for Duma’s “Occupation/Position,” Duma wrote that he was a “Marketing Director,” and in the blank for “Employer/Nature of Business,” Duma wrote “Estate Plan Services.” When asked during his second on-the-record interview why he wrote this on the application, Duma responded that “[g]enerally, when I mention where I work, I try to avoid the insurance and security ‘stigma’ because no one wants to talk to an insurance or security guy. So I always use Estate Plan Services and marketing director as more of an easier way to market myself.”

Question 10 on the account application asked whether “you are associated with a Stock Exchange or NASD member firm.” Duma checked the “no” box. When asked why he answered “no,” Duma responded that he was filling out the application on behalf of his brother, and because his brother was not associated with a stock exchange or NASD member firm, he answered the question “no.” Duma stipulated that he failed to notify WMA in writing that he opened the H&R Block Account and that he failed to notify H&R Block in writing of his association with an NASD member firm before opening the H&R Block Account.

The record includes account statements for the H&R Block Account from May 2000, when the account was opened, through October 25, 2002. These statements reflect that there was very little trading activity in the account. Duma testified that, at his request, the representative on the account would contact Duma, rather than Duma’s brother, before making trades in the account. The H&R Block representative testified that he had never spoken to Duma’s brother.

E. Duma’s On-the-Record Interviews

In connection with the investigation of this case, Duma provided on-the-record testimony on two occasions: October 22, 2002 (the “October Interview”) and January 16, 2003 (the “January Interview”). The October Interview focused largely on Duma’s advertisements and outside business activities. The January Interview focused almost exclusively on the H&R Block Account.

The issue before us is whether, during the January Interview, Duma testified untruthfully or in a misleading manner in the following exchange:

Q: Now, we talked about your brother doing transactions [in the H&R Block Account]. Did you ever do any transactions in this account for yourself?

⁷ The account application indicates that the account was opened at OLDE Discount Corporation, which was acquired by H&R Block at the end of 1999.

A: No. It is my brother's account. No.

Q: Did you ever do anything in this account for yourself?

A: My brother, I think, may have given me some money out of the account here or there. My brother is a very generous kind of guy, and we may have some things on the side. So, I mean, my brother may have given me some money out of the account.⁸

Following this exchange, Enforcement showed Duma copies of numerous checks that he deposited into the H&R Block Account as well as checks that Duma wrote to disburse funds from the H&R Block Account. In total, the record includes 37 checks deposited into the H&R Block Account by Duma for a total of almost \$170,000 and 16 checks written out of the H&R Block Account by Duma for a total of over \$150,000.⁹ After Duma was confronted with the copies of the checks, he explained the purpose behind his use of the H&R Block Account.

III. Discussion

A. Outside Business Activities

NASD Conduct Rule 3030 prohibits a registered representative from being employed by, or accepting compensation from, any other person as a result of any business activity (other than a passive investment) outside the scope of his relationship with his employer firm unless he has provided his employer firm with prompt written notice in the form required by the firm. As the language of the rule makes clear, Rule 3030 applies to all outside business activity, not just securities-related business activity. *See Dist. Bus. Conduct Comm. v. Cruz*, Complaint No. C8A930048, 1997 NASD Discip. LEXIS 62, at *96 (NBCC Oct. 31, 1997). Duma stipulated that, in 2000, he received over \$2,000 in compensation from Southwestern for the sale of insurance products. Duma testified that he "probably overlooked" Southwestern, and the compensation he received was a very small percentage of his income. Moreover, Duma's

⁸ Enforcement's allegation in the complaint regarding Duma's testimony alleges that "Duma responded untruthfully and/or in a misleading manner [during both the October Interview and the January Interview] when he discussed the extent of his involvement and role in the H&R Block [A]ccount" and that this conduct violated NASD Procedural Rule 8210 and Conduct Rule 2110. While the complaint does not identify the specific statements Enforcement alleged were untruthful or misleading, the Hearing Panel noted in its decision that, at the hearing, Enforcement identified Duma's testimony regarding the purpose and use of the account. At oral argument on appeal, Enforcement pointed to this same exchange as evidence that Duma provided misleading or untruthful testimony.

⁹ At oral argument on appeal, Enforcement alleged that Duma deposited \$190,000 of his own money into the H&R Block Account. Apparently, Enforcement is including in this figure a check for \$21,000 made out to H&R Block from Duma's mother. However, when asked about the check, Duma was unsure of its purpose. The record does not support Enforcement's characterization that this check represented Duma's money.

supervisor testified that, while he was aware Duma was selling fixed insurance products away from WMA, he had no knowledge of Duma's association with Southwestern, and the record contains no outside business activity form submitted by Duma for his work with Southwestern. Consequently, we affirm the Hearing Panel's finding that Duma failed to disclose to WMA his outside business activity with Southwestern. We conclude that this failure violated NASD Conduct Rules 3030 and 2110.

B. The H&R Block Account

Enforcement alleged, and the Hearing Panel found, two distinct violations in connection with Duma's conduct involving the H&R Block Account. First, Enforcement alleged that Duma violated NASD Conduct Rules 3050(c) and 2110 by failing to notify H&R Block that he was associated with another NASD member, failing to notify WMA that he had opened an account with another NASD member (H&R Block), and failing to give prior written notice of his intention to execute orders for the purchase and sale of securities with H&R Block. Second, Enforcement alleged that Duma separately violated NASD Conduct Rule 2110 by misrepresenting his employment status on the H&R Block Account application.

NASD Conduct Rule 3050(c) provides, in relevant part, that "[a] person associated with a member, prior to opening an account or placing an initial order for the purchase or sale of securities with another member, shall notify both the employer member and the executing member, in writing, of his or her association with the other member." Paragraph (e) of Rule 3050 specifies that the requirements of paragraph (c) apply to accounts in which the associated person has either a financial interest or discretionary trading authority. The record makes clear that Duma had both.¹⁰ Despite being a joint owner of the account, and therefore having a financial interest in it, and having authority over the transactions in the account, Duma failed to notify WMA in writing about the account and failed to notify H&R Block that he was associated with another NASD member. We affirm the Hearing Panel's conclusion that this conduct violated NASD Conduct Rules 3050(c) and 2110.

Enforcement also alleged, and the Hearing Panel found, that Duma intentionally failed to disclose his status as an associated person on the H&R Block Account application by misrepresenting his employer and the nature of its business and by checking "no" to the specific question on the application asking whether an account-holder was associated with an NASD member. The Hearing Panel found that this conduct constituted a separate violation of NASD Conduct Rule 2110. We agree. When Duma filled out the H&R Block Account application, he was registered as a representative and as a principal. He had previously served as a branch office manager and supervised approximately 25 representatives. In April 1999, and again in February 2000, Duma initialed items on WMA compliance forms indicating that he "will neither open nor

¹⁰ Duma testified that he instructed the representative handling the H&R Block Account to contact him for trades. In *NASD Notice to Members 83-17*, NASD specifically listed "an account for a relative of a registered representative of another member . . . if the registered representative places the orders for the account" as an example of the type of account subject to the provisions of Article III, section 28 of the NASD Rules of Fair Practice, which is now NASD Conduct Rule 3050. See *NASD Notice to Members 83-17*.

maintain an investment account with another broker/dealer, bank, or other financial institution, club or other organization without first notifying the [WMA] Compliance Department . . . and the other firm in writing.” Despite all of this, Duma listed his employer as “Estate Planning Services” and his position as “Marketing Director” because, in his own words, he wanted “to avoid the insurance and security ‘stigma’ because no one wants to talk to an insurance or security guy.” Even if we believe Duma’s testimony as to why he checked “no” to the question on the application regarding association with an NASD member firm, by filling out other portions of the application to purposefully avoid disclosing his status as an associated person, Duma’s conduct was inconsistent with the high standards of commercial honor required of registered persons.¹¹ We therefore affirm the Hearing Panel’s finding that Duma violated NASD Conduct Rule 2110 by failing to disclose his status as an associated person on the H&R Block Account application.

C. Untruthful or Misleading Testimony

NASD Procedural Rule 8210 requires persons associated with a member to provide information to NASD upon request. It is a violation of NASD Procedural Rule 8210 for an associated person to provide false or misleading information to NASD in response to a request for information or during testimony. *See, e.g., Dist. Bus. Conduct Comm. v. Doshi*, Complaint No. C10960047, 1999 NASD Discip. LEXIS 6, at *5-6 (NAC Jan. 20, 1999). Providing false or misleading information to NASD in connection with an investigation or examination is also conduct inconsistent with just and equitable principles of trade pursuant to NASD Conduct Rule 2110. *See Brian L. Gibbons*, 52 S.E.C. 791, 795 (1996), *aff’d*, *Gibbons v. SEC*, 112 F.3d 516 (9th Cir. 1997) (table).

Enforcement alleged that Duma violated NASD Procedural Rule 8210 and Conduct Rule 2110 because two portions of Duma’s testimony were false: his testimony regarding the purpose of the H&R Block Account and his use of the account. The Hearing Panel determined that Duma’s testimony regarding the purpose of the H&R Block Account was ambiguous and that Enforcement failed to prove that allegation by a preponderance of the evidence. Because Enforcement did not cross-appeal the Hearing Panel’s decision, we do not consider the allegation regarding that testimony on appeal. However, the Hearing Panel found that Duma’s testimony regarding his use of the H&R Block Account was false; thus, we do have before us the issue of whether Duma violated NASD Rules 8210 and 2110 by providing false or misleading testimony regarding his use of the H&R Block Account.

The record establishes that Duma used the H&R Block Account to transact personal business. Duma deposited approximately \$170,000 into the H&R Block Account and withdrew approximately \$150,000 during the time in question. However, when he was asked whether he ever did any transactions in the H&R Block Account for himself, he responded “no.” Following his answer, Enforcement asked again: “Did you ever do anything in this account for yourself?” He answered only that his brother “might have given [him] some money out of the account here

¹¹ While the Hearing Panel did not make a clear credibility determination as to Duma’s testimony, the Hearing Panel noted in its decision that it found Duma’s explanations during his testimony at the hearing and his prior statements “inconsistent and illogical.”

or there.” Given the evidence in the record, Duma’s negative response to the first question was not true. Moreover, his second answer failed to acknowledge his frequent use of the account. On appeal, Duma argues that he interpreted the question to relate back to an earlier question regarding the benefits of the H&R Block Account accruing to his brother. We do not find this argument credible. Enforcement prefaced the question—which is already clear on its face—with a transition from Duma’s brother to Duma personally: “Now, we talked about your brother doing transactions. Did you ever do any transactions in this account for yourself?” Even if Duma misinterpreted this question, when Enforcement asked the question again, Duma’s response, while closer to being accurate, continues to demonstrate his efforts to evade the fact that he personally used the H&R Block Account. Indeed, at oral argument on appeal Duma stated: “I am a private kind of guy. I didn’t want to bring that up until I was addressed. . . . If I wasn’t asked, I’m not going to bring it up.” It was only after Duma was confronted with the evidence of his transactions that he finally provided complete and truthful answers.

In light of the foregoing, we affirm the Hearing Panel’s finding that Duma’s testimony regarding his transactions in the H&R Block Account was untruthful in violation of NASD Rules 8210 and 2110.

D. Advertising Violations

NASD Conduct Rule 2210(b)(1) requires that “[a] registered principal of the member must approve by signature or initial and date each advertisement, item of sales literature and independently prepared reprint before the earlier of its use or filing with NASD’s Advertising Regulation Department.” While Duma asserts that he submitted both the “yellow page” advertisement and the brochure to WMA for approval in or around 1997, he admits that he never received approval. Thus, over the course of several years, Duma used written communications that he knew had not been approved by WMA. Moreover, when Duma provided the advertisement and brochure to WMA in 1999 in connection with an audit, both the advertisement and the brochure were denied approval. We affirm the Hearing Panel’s finding that this conduct violated NASD Conduct Rules 2210 and 2110.

Neither the “yellow page” advertisement nor the brochure was submitted to NASD for review. The complaint alleges, and the Hearing Panel found, that the failure to file the communications with NASD’s Advertising Regulation Department violated NASD Conduct Rules 2210 and 2110. However, neither the complaint nor the Hearing Panel decision explains why the communications were required to be filed. While NASD Conduct Rule 2210 requires that certain advertisements and sales literature be filed with NASD, it does not require that all advertisements and sales literature be filed.¹² Based on our review of the advertisement and the brochure, we fail to see why these communications were required to be filed with NASD’s Advertising Regulation Department. Consequently, we find that the evidence before us does not prove that the failure to file the advertisement and brochure with NASD violated any applicable NASD rule.

¹² Among other things, NASD Conduct Rule 2210 generally requires that advertisements and sales literature concerning registered investment companies, public direct participation programs, and government securities be filed with NASD within 10 business days of first use or publication. *See* NASD Conduct Rule 2210(c)(2).

IV. Sanctions

Before discussing the specific violations, we note that Duma's overall conduct demonstrates a profound lack of understanding and appreciation regarding compliance with NASD rules. Duma's actions, testimony, and arguments convey a view that, if no customers are harmed, violations of regulatory requirements are unimportant. While Duma argues that he had no impure motives, he fails to appreciate that the notification and approval rules for such things as advertising, outside business activities, and accounts held away from an associated person's employing firm are designed to protect investors and to ensure that firms can monitor associated persons engaged in such activities. *See, e.g., Dep't of Enforcement v. Lu*, Complaint No. C9A020052, 2004 NASD Discip. LEXIS 8, at *39-41 (NAC May 13, 2004), *aff'd in relevant part, Guang Lu*, Exchange Act Rel. No. 51047, 2005 SEC LEXIS 117 (Jan. 14, 2005), *appeal docketed*, No. 05-8006 (D.C. Cir. Mar. 14, 2005). Duma's disregard for regulatory requirements is particularly disturbing given that he is registered as a principal. With this overarching consideration in mind, we now turn to a discussion of sanctions for each of the violations.

A. Outside Business Activities

The NASD Sanction Guidelines (the "Guidelines") for outside business activities recommend a fine of \$2,500 to \$50,000 and consideration of a suspension for up to 30 business days where no aggravating conduct is present.¹³ The Hearing Panel found that Duma's violation was inadvertent and found no aggravating circumstances present. The Hearing Panel concluded that the minimum sanction would be appropriate. Because of the bars, however, the Hearing Panel did not impose a sanction for the violation. The record supports the Hearing Panel's finding that Duma's failure to report the Southwestern activity was inadvertent. It was a small portion of Duma's income, and, while WMA was not aware specifically of Duma's business with Southwestern, Duma's supervisor was aware that Duma was engaged in outside business activity. There is also no indication in the record that any customer was harmed by the failure to disclose this limited activity. After considering the relevant principal considerations and general principles, we agree with the Hearing Panel's assessment that nothing more than the minimum sanction would be appropriate under these circumstances. Consequently, we find that an appropriate sanction for the violation of NASD Conduct Rules 3030 and 2110 would be a fine of \$2,500. Because of the bars imposed below, however, we do not impose the fine.

B. Failure to Disclose the H&R Block Account

The Guidelines for failure to comply with NASD Conduct Rule 3050 recommend a fine of \$1,000 to \$25,000, and, in egregious cases, considering suspending the associated person for up to two years or barring the associated person.¹⁴ For purposes of determining a sanction for

¹³ *See NASD Notice to Members 03-65* (Oct. 2003) (revising Guidelines for violations of NASD Conduct Rule 3030).

¹⁴ *See Guidelines* (2001 ed.) at 21 (Transactions For Or By Associated Persons—Failure To Comply With Rule Requirements).

Duma's violations regarding the H&R Block Account, we find that it is appropriate to aggregate the violation of NASD Conduct Rule 3050 with the separate violation of NASD Conduct Rule 2110 for Duma's misrepresentations on the H&R Block Account application.¹⁵

After reviewing the relevant principal considerations and general principles, we agree with the Hearing Panel's determination that Duma's conduct was egregious. We therefore affirm the Hearing Panel's imposition of a bar as the appropriate sanction in this case under the Guidelines. Duma's conduct surrounding the H&R Block Account involved intentional deceptions. Duma did not merely fail to disclose the account to WMA; he failed to disclose his status as an associated person to H&R Block and affirmatively misstated his status on the account application. Within the previous 13 months, Duma had twice initialed compliance documents attesting that he would not open an investment account away from WMA without first notifying both WMA and the other firm. Duma signed the most recent certification less than three months before he opened the H&R Block Account. Moreover, during the October Interview, Duma was questioned about the H&R Block Account. He stated that he was an owner on the account and he had "[found] out later [he] should have disclosed that." Despite knowing that he was required to disclose the account and being questioned directly about the account by NASD, when Duma changed firms in October 2000, he failed to disclose the H&R Block Account to his new employer firm—either in writing, as required by NASD Rule 3050(c), or verbally—until the firm approached him and questioned him about it. This blatant disregard of compliance responsibilities is inexcusable. Duma's conduct regarding the H&R Block Account—including his failure to appreciate the necessity of notification, his apparent indifference to complying with the rule, and, most importantly, his affirmative misstatements on the account application—is highly aggravating and constitutes egregious misconduct. Consequently, we affirm the Hearing Panel's imposition of a bar for Duma's violations of NASD Conduct Rules 3050(c) and 2110.

C. Untruthful or Misleading Testimony

The Guidelines for untruthful testimony in an on-the-record interview pursuant to NASD Procedural Rule 8210 recommend a fine of \$25,000 to \$50,000 and suggest that, absent mitigating factors, a bar should be imposed.¹⁶ The principal considerations relevant to this case

¹⁵ In determining a sanction for Duma's misrepresentations on the H&R Block Account application, the Hearing Panel relied on the Guidelines for Forgery And/Or Falsification of Records as the "most analogous" Guidelines. *See* Guidelines (2001 ed.) at 43 (Forgery And/Or Falsification Of Records). These Guidelines also recommend consideration of a bar for egregious conduct. *Id.* As described below, because we find that Duma's misconduct was egregious, the sanction of a bar is appropriate under either Guideline.

¹⁶ *See* Guidelines (2001 ed.) at 39 (Failure To Respond Or Failure To Respond Truthfully, Completely, Or Timely To Requests Made Pursuant To NASD Procedural Rule 8210); *see also Dep't of Enforcement v. Walker*, Complaint No. C10970141, 2000 NASD Discip. LEXIS 2, at *31 (NAC Apr. 20, 2000) (finding that respondent's untruthful testimony was "as harmful as a complete failure to respond and, as such, that a bar is the appropriate sanction"); *Doshi*, 1999 NASD Discip. LEXIS 6, at *13 ("The NASD Sanction Guideline for failure to respond truthfully suggests that in the absence of mitigation, a bar should be standard.").

are the nature of the information requested and the extent to which regulatory pressure was necessary to obtain a response.

Having determined that Duma intentionally testified untruthfully, we begin with the sanction of a bar, and we must find sufficient mitigating factors present to reduce that sanction. Here, there are no mitigating factors. Duma was asked a straightforward question, and he lied. Only after he was confronted with documentary proof did he admit that he personally used the H&R Block Account. Duma is entitled to no mitigation simply because he did not continue to lie. The obligation to cooperate with an NASD investigation is unqualified. *See Dist. Bus. Conduct Comm. v. Nevers*, Complaint No. C3A930009, 1994 NASD Discip. LEXIS 66, at *10-11 (NBCC May 13, 1994) (barring respondent for failure to provide truthful responses to NASD information requests). NASD's regulatory mandate is thwarted if respondents can selectively determine which facts to omit during investigative testimony and avoid issues because they may be personal or embarrassing. *See Richard J. Rouse*, 51 S.E.C. 581, 584 (1993) (noting that Rule 8210 is a "key element in the NASD's efforts to police its members"). We affirm the Hearing Panel's imposition of a bar for Duma's violations of NASD Procedural Rule 8210 and Conduct Rule 2110.

D. Advertising Violations

The Hearing Panel concluded that "a sanction at the upper end of the recommended range would be appropriate under the facts and circumstances of this case." The Hearing Panel, however, did not provide a specific sanction, noting that a separate sanction of a suspension or fine, in light of the bars imposed for other violations, would be redundant or serve no remedial purpose. In making this determination, the Hearing Panel used the Guidelines for failure to file an advertisement. In light of our conclusion that Duma's violations of NASD Conduct Rule 2210 relate to the failure to have principal approval rather than a failure to file, we consider the appropriate Guidelines to be for failure to comply with rule standards or use of misleading communications.¹⁷

The Guidelines for failing to comply with rule standards recommend a fine ranging from \$1,000 to \$20,000.¹⁸ In egregious cases, adjudicators may consider suspending the responsible person in any or all capacities for up to 60 days. After reviewing the principal considerations and general principles, what is most troubling is Duma's casual dismissal of the fact that he did not receive WMA's approval before using the advertisement and brochure. The Hearing Panel found that Duma's compliance certifications in 1999 that he had not used unapproved advertising were false and constituted an aggravating circumstance. We agree. Duma testified

¹⁷ There is no allegation that either the advertisement or the sales literature used by Duma was misleading. The Guidelines for violations of NASD Conduct Rule 2210 note that the considerations for failing to comply with rule standards or use of misleading communications "[are] appropriate for disciplinary actions that name as respondents . . . associated persons who have circumvented the firm's procedures or violated the NASD's rules." Guidelines (2001 ed.) at 87 n.2 (Communications With The Public).

¹⁸ *See* Guidelines (2001 ed.) at 88 (Communications With The Public).

that, in 1997, he was aware of the requirement that he submit and receive approval before using advertising. While Duma complied with the submission requirement, he used the advertisements despite having never received approval. He then continued to use these documents, without approval, and sign compliance certifications that he knew were not accurate. Duma's comments that he simply assumed it was approved—and that he “didn't spend a lot of time thinking about it or dwelling on it” because it was a small part of his business—demonstrate a careless attitude toward compliance. We find that an appropriate sanction for the violation of NASD Conduct Rules 2210 and 2110 would be a fine of \$10,000. Because of the bars imposed, however, we do not impose the fine.

V. Conclusion

We affirm the Hearing Panel's findings that Duma violated NASD Conduct Rules 2210, 3030, 3050(c), and 2110 and NASD Procedural Rule 8210. We reverse the Hearing Panel's finding that Duma violated NASD Rule 2210 because of the failure to file an advertisement and sales literature with NASD's Advertising Regulation Department.

Accordingly, we affirm the Hearing Panel's imposition of sanctions. Duma is barred from associating with any member firm in any capacity for his violations of NASD Conduct Rules 3050(c) and 2110 and his violations of NASD Procedural Rule 8210 and Conduct Rule 2110. The bars will be effective upon service of the decision. In light of the bars, no further sanctions are imposed for Duma's violations of NASD Conduct Rules 2210 and 3030. The Hearing Panel's imposition of costs in the amount of \$1,879.26 is affirmed, and we impose appeal costs of \$1,397.84 (consisting of \$1,000 in appeal costs and \$397.84 in appeal hearing transcript costs).¹⁹

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney
Senior Vice President and Corporate Secretary

¹⁹ We also have considered and reject without discussion all other arguments advanced by respondent.