BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. Robert M. Ryerson Freehold, NJ, Respondent.	DECISION Complaint No. C9B040033 Dated: August 3, 2006

Registered representative engaged in private securities transactions, for compensation, without giving prior written notice to, and receiving prior written approval from, his firm; shared commissions with a non-NASD member firm; and failed to appear and provide on-the-record testimony. Held, Hearing Panel's findings affirmed. Sanctions modified, in part.

Appearances

For the Complainant: Jonathan M. Prytherch, Esq., Leo F. Orenstein, Esq., Department of Enforcement, NASD

For the Respondent: Pro Se

Decision

Robert M. Ryerson ("Ryerson") appeals a January 24, 2005 Hearing Panel decision pursuant to NASD Procedural Rule 9311. After a thorough review of the record in this case, we affirm the Hearing Panel's findings that Ryerson: engaged in private securities transactions, for compensation, without providing written notice to, and obtaining written approval from, his employer, in violation of NASD Conduct Rules 3040 and 2110; shared commissions with a non-NASD member, in violation of Conduct Rule 2110; and failed to provide fully and promptly on-the-record testimony in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. We modify, in part, the sanctions imposed by the Hearing Panel for the foregoing misconduct.

I. Background

A. Employment History

Ryerson entered the securities industry in 1984. He became registered as a general securities representative of Prime Capital Services, Inc. ("Prime Capital" or "the Firm") in 1993 and as a general securities principal of the Firm in 1998. Ryerson conducted business on behalf of Prime Capital from an office of supervisory jurisdiction in Matawan, N.J.

During all times relevant to the conduct at issue in this case, Ryerson was also the president and owner of New Century Planning Associates, Inc. ("New Century"), a registered investment adviser and financial planning firm that conducted business at the same Matawan, N.J. address. From this office, Ryerson offered a variety of financial services, including brokerage services in stocks, mutual funds, and variable annuities, as well as insurance products and fixed annuities.

Ryerson voluntarily resigned his position with Prime Capital on April 23, 2002. Prime Capital filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") reporting Ryerson's termination on June 5, 2002. Ryerson is not presently associated with any NASD member.

B. Procedural Background

In a three-cause complaint dated April 21, 2004, the Department of Enforcement ("Enforcement") charged Ryerson with misconduct in violation of NASD rules. The first cause of the complaint alleged that Ryerson violated NASD Conduct Rules 3040 and 2110 by engaging in private securities transactions, for compensation, without providing prior written notice to, and receiving prior written approval from, the Firm. The second cause alleged that Ryerson paid commissions to a non-NASD member entity in violation of Conduct Rule 2110. The final cause of Enforcement's complaint alleged that Ryerson failed to appear to provide requested on-the-record testimony to NASD staff in violation of NASD Procedural Rule 8210 and Conduct Rule 2110.

Ryerson filed an answer generally denying Enforcement's allegations of misconduct and requesting a hearing. A Hearing Panel conducted a two-day hearing on October 13 and 14, 2004. On January 24, 2005, the Hearing Panel issued a decision in which it found that Ryerson had engaged in private securities transactions in violation of NASD rules, misconduct for which the Hearing Panel suspended Ryerson for two years in all capacities, ordered that he requalify in all capacities, and fined him $230,000. The Hearing Panel also found Ryerson improperly shared commissions with a non-NASD member, which resulted in sanctions of a 15-business-day suspension and a fine of $5,000. Finally, the Hearing Panel suspended Ryerson for one year and fined him $10,000 for failing to provide timely on-the-record testimony to NASD staff.

Ryerson's timely appeal followed.

II. Facts

A. Commission Sharing

In October 2000, Ryerson was introduced to Xu Wang ("Wang"), an investment company products and variable contracts limited representative with Metropolitan Life Insurance Company and MetLife Securities, Inc. (collectively "MetLife"). Wang was registered in Connecticut, but not New Jersey, and discussed with Ryerson the possibility of Ryerson providing brokerage services through Prime Capital to Wang's New Jersey clients.

On October 31, 2000, Ryerson proposed to Wang a commission-sharing agreement whereby Wang and Ryerson would split evenly commissions on investments referred by Wang up to $250,000, with Wang receiving a higher percentage of commissions on larger investments in specified increments. Ryerson instructed Wang that it would be best for Ryerson to pay Wang for "consulting" or "finders" fees with checks made payable from New Century.[1]

From October 2000 until December 2000, Ryerson and Wang discussed various annuity products that Ryerson could offer through Prime Capital to clients introduced by Wang.[2] In December 2000, Wang introduced Ryerson to Dr. Binhua Mao ("Mao"). Mao informed Ryerson that he was associated with a European investment bank called Zurich Capital Management ("Zurich"). Ryerson testified that Zurich had identified arbitrage opportunities available from investing in specific variable annuity contracts offered by Kemper Investors Life Insurance Company ("Kemper"). Ryerson informed Mao that the Kemper Destinations variable annuity contract was one that Ryerson could offer as a Prime Capital approved product. On December 9, 2000, Mao executed two Kemper Destinations variable annuity contract applications as "trustee" for trusts created on behalf of YL and JM.[3] These contracts were recorded through Prime Capital.

Ryerson executed two "split commission" agreements on December 20, 2000, whereby Ryerson agreed to share with Wang the commissions Ryerson earned from Prime Capital for each of the variable annuities executed by Mao.[4] Ryerson admits that he did not request, and did not obtain, Prime Capital's written approval of the commission-splitting agreements as was

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[1] Ryerson stated in his proposal to Wang that he had spoken with Prime Capital's compliance department and his accountant concerning "the best way" for Ryerson to pay Wang for his referred business.

[2] MetLife limited the selection of financial products that Wang could offer to his clients.

[3] A Kemper Destination variable annuity for customer JM in the amount of $1 million was issued on December 21, 2000. Shortly thereafter an additional $3 million was added to the contract. A Kemper Destinations annuity contract for customer YL was funded with $1,000 on December 21, 2000, with an additional $999,000 added to the contract shortly thereafter.

[4] Wang signed these documents on December 28, 2000.

required by Prime Capital's written supervisory procedures.[5] On January 21, 2001, Ryerson, with a check drawn upon funds from a New Century account, paid to a consulting firm operated by Wang, XW Consulting, $100,000 for Wang's share of the commissions that Ryerson earned from Prime Capital on the variable annuity contracts executed by Mao. XW Consulting has never been an NASD member.[6]

B. Selling Away for Compensation

Mao informed Ryerson that he did not want to conduct all of his business through a single broker-dealer. In early January 2001, Ryerson introduced Mao to Pietro Passalacqua ("Passalacqua"), who was from 1998 until December 2001 a general securities representative and principal of NASD member The Investment Center ("TIC").[7] Passalacqua was also the owner and president of Frontier Financial Planning & Capital Management, Inc. ("Frontier"), a registered investment adviser and financial planning firm.

For Ryerson's referral of Mao's business, Ryerson requested that Passalacqua share with him the "lion's share" of the commissions that Passalacqua earned from TIC relating to the referrals. Ryerson thereafter presented Passalacqua with an "employment agreement" dated January 15, 2001, under which Passalacqua's firm, Frontier, would pay Ryerson's firm, New Century, for certain "research and analytical services." The agreement called for Frontier to pay New Century a "salary" of $200,000, plus "bonuses" to be paid "based upon the gross revenue generated as a direct result of the research information, analyses and marketing plan prepared by [New Century]." Passalacqua accepted Ryerson's terms and executed the employment agreement.[8]

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[5] Prime Capital personnel disclaimed knowledge of any proposed or actual commission sharing agreement between Ryerson and Wang.

[6] Mao subsequently executed a number of additional annuity contracts through Ryerson and Prime Capital. There is no evidence, however, that Ryerson shared any of the commissions he earned from these additional transactions with Wang.

[7] TIC permitted Passalacqua to resign after learning that he had entered into a commission-splitting arrangement with a registered representative at another NASD member firm. Passalacqua subsequently consented to the entry of a Letter of Acceptance, Waiver and Consent ("AWC") in which he accepted NASD findings that he paid, without the authorization of his member firm, $215,000 in commissions to "R.R." for the referral of variable annuity transactions, in violation of NASD Conduct Rule 2110. Passalacqua also consented to the imposition of a 10-day suspension and a $7,500 fine as sanctions for these activities.

[8] Ryerson declared in a January 15, 2001 compliance statement to Prime Capital that he had not conducted any activities with another broker-dealer and had not received any compensation, directly or indirectly, other than the commissions paid to him by Prime Capital. Although dated January 15, 2001, Ryerson testified that Passalacqua and Ryerson executed the employment agreement at a later date.

Ryerson confirmed with Passalacqua in January 2001 that TIC's product line included the Kemper Destinations variable annuity contracts that Mao desired. Between January 20 and January 27, 2001, Mao executed applications for four Kemper Destinations variable annuity contracts through Passalacqua and TIC for trusts created on behalf of DB, FM, JF and EG.[9] The net commissions that Passalacqua earned from TIC on these contracts totaled approximately $221,000.

Passalacqua paid to Ryerson his share of the commissions that Passalacqua earned from TIC for the Kemper Destinations variable annuity contracts purchased by Mao. On March 15, 2001, Passalacqua drafted a $200,000 check made payable by Frontier to New Century as "salary." On March 15, 2001, Passalacqua drafted a second Frontier check that was made payable to New Century as a $15,000 "bonus."[10] Ryerson did not deposit these checks into New Century's account until April 25, 2001. He did not notify Prime Capital of his receipt of these payments.

On March 14, 2001, Ryerson faxed to Carole Enisman ("Enisman"), an executive vice president of Prime Capital, a letter in which he requested that Enisman arrange for the split of commissions between Prime Capital and TIC. Ryerson's proposal called for Prime Capital to share in 90% of the commissions, and TIC to share in 10% of the commissions, earned by Passalacqua on various variable annuity contracts. Ryerson asked that Enisman expedite his request because "of a significant amount of business pending on that side." Though the following day, March 15, Ryerson, through New Century, received payments of at least $200,000 from Frontier, he did not re-contact Enisman to advise her of that fact.

On March 21, 2001, in response to Ryerson's letter to Enisman, Nancy Southard ("Southard"), Prime Capital's compliance officer, sent to Ryerson a copy of a proposed agreement whereby Prime Capital and TIC would share commissions for certain unnamed customers.[11] Southard signed the proposed agreement on behalf of Prime Capital but the facsimile cover sheet that Southard sent to Ryerson explicitly stated that TIC's approval of the agreement was required before it would become effective.

TIC did not approve the proposed agreement and verbally informed Southard and Passalacqua of this conclusion in March 2001. Southard thereafter verbally instructed Ryerson

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[9] Kemper Destinations contracts were issued for each of these customers between January 28, 2001 and February 9, 2001. In each case, the contract was funded with an initial investment of $1,000 and a subsequent investment of $999,000, for a total investment of $1 million.

[10] Passalacqua testified that he provided the check dated April 15, 2001 to Ryerson on March 15, 2001, at Ryerson's direction.

[11] Unlike Ryerson's and Passalacqua's employment agreement, the proposal from Prime Capital to TIC would involve commission sharing not directly between two registered persons but between the two NASD member firms.

that TIC had rejected the commission-sharing agreement proposed by Prime Capital. Upon being so informed, Ryerson did not advise Southard or Prime Capital that he had already received $215,000 in payments from Passalacqua.

C. Requests for Testimony

NASD staff began an investigation of this matter after receiving a December 19, 2001 Form U5 indicating that TIC had permitted Passalacqua to resign as a result of his unauthorized commission splitting with a registered representative at another NASD member firm.[12] After learning from TIC that the registered representative with whom Passalacqua had shared commissions was Ryerson, NASD staff issued a February 8, 2002 request for Ryerson to appear and provide testimony on February 21, 2002, pursuant to NASD Procedural Rule 8210.[13]

Ryerson retained legal counsel, Michael Shannon ("Shannon"), who requested that Ryerson's on-the-record interview be postponed to March 4, 2002. NASD staff granted the requested postponement.

Subsequently, on February 28, 2002, Shannon requested a second postponement due to scheduling conflicts created by his representation of another client in a separate NASD proceeding. On March 5, 2002, NASD staff therefore sent to Ryerson a "final request" for Ryerson to appear for an on-the-record interview and rescheduled his testimony for March 19, 2002.[14]

On March 6, 2002, Shannon withdrew his representation of Ryerson.[15] On March 13, 2002, Ruthann Niosi ("Niosi") informed NASD staff that she had been approached to represent Ryerson. She informed staff that the on-the-record interview scheduled for March 19, 2002,

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[12] After learning of Mao's involvement in establishing the variable annuity contracts that Ryerson had introduced to Passalacqua, the unique trust format of those contracts, and the manner in which those contracts were initially funded, NASD began investigating whether there were any money laundering activities occurring concerning these and other variable annuity contracts.

[13] All requests for testimony or information at issue in this case were served by staff upon Ryerson in accordance with Procedural Rule 8210(d).

[14] NASD staff discussed with Shannon, on March 5, 2002, the possibility of Ryerson appearing to provide testimony on March 19, 2002. Staff thereafter issued the March 5, 2002 Rule 8210 notice despite the fact that Shannon had not yet had an opportunity to discuss the proposed date with Ryerson.

[15] In a letter to NASD staff, Shannon stated that he was withdrawing as counsel due to continued scheduling difficulties and the staff's insistence that Ryerson's interview proceed at a rapid pace.

would need to be postponed because she had been unable to obtain Ryerson's file from Shannon to run a conflicts check.

On April 4, 2002, NASD staff issued a request that Ryerson appear and provide testimony on April 16, 2002.[16] Staff's request stated that "[t]his date is firm and final. No extensions will be granted." Also on April 4, 2002, Niosi sent to NASD staff a letter indicating that she had received the documents to perform a conflicts check and would inform staff of the status of her representation of Ryerson at a later date.[17]

On April 10, 2002, Niosi sent NASD staff a notice stating that she would be out of the office until April 16, 2002, due to a family emergency. Her notice requested that NASD staff speak with an NASD attorney with whom Niosi had spoken concerning the emergency and informed staff that the April 16, 2002, interview of Ryerson would need to be rescheduled.[18]

NASD stamped Niosi's notice as having been received on April 15, 2002.[19] The staff preparing for Ryerson's interview, however, did not receive a copy of Niosi's notice until the morning of April 16, 2002. NASD staff opened the record to receive Ryerson's testimony on this date and noted that Ryerson had failed to appear as scheduled.

On April 17, 2002, NASD staff issued a request for Ryerson to appear and provide testimony on April 24, 2002. Staff noted that it was "incumbent upon you, Robert Ryerson, to appear on this date. If you fail to appear, you may be subject to disciplinary action and sanctions. You may choose to be represented by legal counsel, however, you must find an attorney who can represent you on this date."

On April 23, 2002, Niosi informed NASD staff by facsimile that she had discovered a conflict that would prevent her from representing Ryerson. Niosi stated that it was her understanding that Ryerson did not intend to appear to provide on-the-record testimony to NASD without representation.

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[16] In their letter requesting Ryerson's appearance, NASD staff stated that they had tried unsuccessfully to reach Niosi, after speaking with her on March 14, 2002. Niosi, however, a solo practitioner, informed staff on that date that she would be traveling for two weeks beginning on March 19, 2002.

[17] NASD staff's April 4, 2002 letter establishing a new date for Ryerson's on-the-record interview was sent to Ryerson, with a copy to Niosi, by regular mail.

[18] Staff never spoke with the NASD attorney referenced in Niosi's letter.

[19] Although Niosi's notice was written on a fax cover sheet containing her law office's letterhead, there is no record of it having ever been faxed to NASD. Niosi verbally informed Ryerson on or about April 10, 2002, that she had requested that NASD postpone the scheduled April 16, 2002 interview due to her family emergency.

After receiving Niosi's facsimile, NASD staff faxed a letter dated April 23, 2002, to Ryerson stating that, notwithstanding Niosi's statements, NASD staff expected Ryerson to appear for his scheduled on-the-record interview on April 24, 2002. Staff's letter stated "[a]s explained in our previous correspondence dated April 17, 2002 . . . this is a final date and time for your on-the-record interview. Failure to appear may result in disciplinary action against you."

Ryerson did not appear and provide testimony to NASD staff as scheduled on April 24, 2002. Therefore, on that date, NASD staff again opened the record to receive Ryerson's testimony and noted that Ryerson had failed to appear. That afternoon, NASD staff learned from Prime Capital that Ryerson had resigned from the Firm.

On May 2, 2002, Anthony Djinis ("Djinis") sent a letter to NASD staff stating that he would be providing legal representation to Ryerson concerning staff's inquiries. Djinis informed staff that Ryerson had retired from the securities industry and stated he was willing to assist the staff with their inquiry.

During telephone conversations with Djinis, NASD staff made several requests for information and documents. On May 21, 2002, Djinis provided requested information and materials. On June 11, 2002, Djinis responded to verbal requests for information from NASD staff, providing staff with information and documents. Djinis asked staff to contact him should they have any additional questions or need any additional information.

Djinis wrote to NASD staff on July 15, 2002, stating that he understood that NASD staff had additional questions of Ryerson and that the staff wished to know if Ryerson would be able to meet with staff for an on-the-record interview. Djinis informed staff that Ryerson was under a physician's care. Djinis suggested that an on-the-record interview may not be feasible and inquired whether Ryerson could respond to staff's questions in writing. Djinis further stated that, should staff desire an on-the-record interview after having reviewed Ryerson's written responses, Djinis would contact Ryerson's physician to determine whether and under what circumstances an interview could be conducted.

On July 16, 2002, in response to Djinis's July 15, 2002 letter, NASD staff requested, pursuant to NASD Procedural Rule 8210, that Ryerson provide details, including a written opinion from his physician, of his medical condition and an explanation of how his medical condition prevented him from providing staff with in-person testimony.

Ryerson, on July 26, 2002, directly provided information that NASD staff had requested in their July 16, 2002 letter. Ryerson stated that he was taking a strong medication that caused drowsiness, confusion, and difficulty with memory. Ryerson did not, however, provide staff with a physician's opinion.

On September 24, 2003, NASD staff informed Ryerson of their intention to institute formal disciplinary proceedings for alleged violations of NASD Conduct Rules 2110 and 3040, and Procedural Rule 8210. In response, Djinis denied the staff's allegations of misconduct and

stated that Ryerson was willing and able to make himself available for on-the-record testimony on any convenient date.

On December 19, 2003, NASD staff requested that Ryerson appear on January 8, 2004, to provide testimony.[20] Ryerson appeared and provided testimony to NASD staff as scheduled.

III. Discussion

A. Ryerson Participated in Private Securities Transactions in Violation of NASD Conduct Rules 3040 and 2110

The Hearing Panel found that Ryerson violated NASD Conduct Rules 3040 and 2110 by participating in the sale of variable annuity contracts through TIC, and thus away from Prime Capital, for compensation, without providing prior written notice to, and obtaining prior written approval from, the Firm. We affirm the Hearing Panel's findings.

NASD Conduct Rule 3040 prohibits an associated person from participating in private securities transactions for selling compensation without first providing written notice to, and receiving written permission from, his member firm.[21] "Rule 3040 serves not only to protect investors, but also to permit securities firms, which may be subject to liability in connection with transactions in which their representatives become involved, to supervise such transactions." *Mark H. Love*, Exchange Act Rel. No. 49248, 2004 SEC LEXIS 318, at *9 (Feb. 13, 2004).

There is no dispute that the variable annuity contracts that were executed by Mao through TIC were securities as defined in Section 3(a)(10) of the Exchange Act and that Ryerson "participated" in these transactions. Conduct Rule 3040 prohibits an associated person from participating "in any manner" in private securities transactions, unless they are conducted in accordance with the requirements of the rule. NASD Conduct Rule 3040(a). The Commission has interpreted the phrase "in any manner" broadly. *Love*, 2004 SEC LEXIS 318, at *7. While an associated or registered person who does nothing more than refer a customer to another investment opportunity does not ordinarily violate Conduct Rule 3040, where, as is the case here, an associated or registered person becomes involved "by facilitating the mechanics of transactions," such participation fits within the broad range of behavior prohibited by the rule.[22] *Id.* at *10.

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[20] Ryerson testified at the hearing below that he contacted NASD staff in September 2002 and offered to appear and provide testimony. NASD staff, however, has no record of this offer.

[21] Conduct Rule 3040(e)(2) defines the term "selling compensation" to mean "any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security."

[22] Ryerson was Mao's primary contact with respect to the business Ryerson referred to Passalacqua, would assist Mao with completing the annuity contract applications, and would then forward the completed applications and customer checks to Passalacqua for processing by

[Footnote continued on next page]

Ryerson asserts that the variable annuity contracts were not "private securities transactions" under Rule 3040 because these were securities that Prime Capital authorized him to offer to customers. Conduct Rule 3040(e)(1) defines the term "private securities transaction" as "any securities transaction outside the regular course or scope of an associated person's employment with a member." Even if Ryerson were "ordinarily involved" in such transactions while associated with Prime Capital, he was not exempt from the notice requirements under Conduct Rule 3040 with respect to the variable annuity contracts purchased by Mao through TIC. *Charles A. Roth*, 50 S.E.C. 1147, 1151 (1992). Absent effecting these transactions through Prime Capital, Ryerson's facilitation of the execution of the variable annuity contracts through TIC was "outside the regular course or scope" of his employment. *See id.* ("Unless the transactions in question were effected through, or with proper notice to [his firm], Roth's argument simply means that he was violating the NASD's notice requirement on a regular basis.").

Ryerson also contends that his March 14, 2001 letter to Enisman, requesting that Prime Capital arrange for a split of variable annuity commissions with TIC, constituted the written notice required by Conduct Rule 3040. We disagree. The notice required by the rule "must be furnished before the transactions take place." *Dep't of Enforcement v. Newcomb*, Complaint No. C3A990050, 2000 NASD Discip. LEXIS 15, at *16 (NAC Nov. 16, 2000), *aff'd*, 2001 SEC LEXIS 2172 (Oct. 18, 2001). Ryerson's letter to Enisman came nearly three months after Mao, upon Ryerson's referral, purchased four $1 million Kemper Destinations variable annuity contracts through TIC.[23]

Furthermore, the notice provided to a member firm must describe "in detail" the proposed transaction and the person's proposed role therein and state whether the associated person has received or may receive selling compensation in connection with the transaction. NASD Conduct Rule 3040(b). The Commission has interpreted the phrase "in detail" to require, at a minimum, "the identification of the investor and the amount of money invested." *Newcomb*, 2000 NASD Discip. LEXIS 15, at *16 (*citing William Louis Morgan*, 51 S.E.C. 622, 627 n.19 (1993)). Ryerson's letter to Enisman made no mention and provided no details of the variable annuity contracts that Passalacqua had already written on behalf of Mao through TIC. Nor for

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TIC. Ryerson also conducted research on behalf of Mao concerning variable annuity contracts that offered the arbitrage opportunities that Mao was seeking and instructed Passalacqua to ensure that TIC authorized him to offer these contracts.

[23] Ryerson's letter to Enisman suggests that he had previously discussed with her the issue of sharing commissions with Passalacqua. Enisman testified that she had only general discussions with Ryerson concerning commission-splitting arrangements and informed him of the Firm's strict requirements in this regard. Enisman denied being aware of or approving an agreement whereby Ryerson and Passalacqua would share directly the commissions earned on the referral of any specific customer's business.

that matter did Ryerson's letter disclose to Prime Capital the terms of his employment agreement with Passalacqua, an agreement that would result in Ryerson being paid $215,000 for his share of the commissions that Passalacqua earned from TIC for the variable annuity contracts executed by Mao.[24] Ryerson's purported written notice to Prime Capital concerning his private securities transactions was insufficient to satisfy his obligations under Conduct Rule 3040.

Ryerson further claims that the Firm provided him with written approval for his receipt of selling compensation when it provided him with a copy of a commission sharing agreement that Prime Capital proposed to TIC on March 21, 2001. We disagree. First, "Rule 3040 states unequivocally that a representative who receives selling compensation from participation in private securities transactions must not only give written notice to the firm but also must receive written permission from the firm before engaging in the transactions." *Dep't of Enforcement v. Hartley*, Complaint No. C01010009, 2003 NASD Discip. LEXIS 49, at *25 (NAC Dec. 3, 2003), *aff'd*, 2004 SEC LEXIS 1507 (July 16, 2004). The Firm's proposed agreement with TIC concerning prospective business thus could not constitute the required approval of Ryerson's participation in and compensation for the sale of variable annuity contracts that already had occurred away from the Firm. Second, the Firm made clear that any such agreement was required to be approved and executed by TIC before it would become effective. Upon being verbally informed by Southard that TIC was rejecting Prime Capital's proposal, Ryerson was on clear notice that he could not rely upon that agreement as written approval for purposes of Conduct Rule 3040. Finally, it was not reasonable for Ryerson to assume that Prime Capital's proposal constituted the Firm's approval of Ryerson's receipt of selling compensation. Ryerson did not disclose the existence of his "employment agreement" with Passalacqua to the Firm, and thus the Firm's proposal to TIC could not constitute approval of any selling compensation that Ryerson was to receive under the terms of that agreement.[25]

Ryerson referred Mao to Passalacqua in January 2001 for the purchase of variable annuity contracts through TIC. In return for these referrals, Ryerson requested and received a substantial portion of the commissions that Passalacqua earned from TIC on the variable annuity contracts that Mao purchased. The purchase transactions were facilitated by Ryerson, and he

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[24] Although Mao would go on to place additional variable annuity contracts through Passalacqua and TIC, there is no evidence that Ryerson received any compensation from Passalacqua for these additional contracts.

[25] Southard testified that she recalls having a general conversation with Ryerson about the possibility of Ryerson splitting commissions with a registered representative of another firm. Southard recalls informing Ryerson of the need to obtain Prime Capital's prior written approval for such activities. Southard also testified that Prime Capital would not in any event have approved of an arrangement whereby Ryerson and Passalacqua would share directly in any commissions. Any approved commission-sharing agreement would require payment of commissions from one broker-dealer to another broker-dealer. Southard testified she was not aware of the "employment agreement" executed by Ryerson and Passalacqua or of the payments made by Passalacqua under that agreement.

was compensated for doing so, thus triggering the proscriptions set forth in Conduct Rule 3040.[26] *See Roth*, 50 S.E.C. at 1150 (dismissing claims that Conduct Rule 3040 did not apply to respondent's conduct because he was merely acting as "intermediary").

At no time prior to the execution of the variable annuity contracts by Mao did Ryerson provide written notice of the details of his role in Mao's purchase of the variable annuity contracts through TIC. Similarly, at no time prior to entering into an "employment agreement" with Passalacqua, and receiving payment pursuant to the terms of that agreement, did Ryerson obtain written approval to participate in the sale of securities away from the Firm. On these facts, we conclude that Ryerson violated NASD Conduct Rules 3040 and 2110.[27]

B. Ryerson Violated NASD Conduct Rule 2110 by Sharing Commissions with Wang

Ryerson does not contest the Hearing Panel's findings with respect to the second cause of Enforcement's complaint. Ryerson admits that he caused New Century to make a $100,000 payment to XW Consulting, which represented Wang's share of commissions Ryerson earned on two variable annuity contracts executed by Mao through Prime Capital. XW Consulting was not at the time of the payment an NASD member. We therefore affirm the Hearing Panel's findings that Ryerson violated NASD Conduct Rule 2110 when he caused commissions to be shared with a non-NASD member firm. *See Dist. Bus. Conduct Comm. v. Prince*, Complaint No. C05930027, 1994 NASD Discip. LEXIS 18, at *14 (NBCC July 28, 1994) (finding that the respondent failed to observe high standards of commercial honor when he caused off-book compensation to be made to a non-registrant); *cf. Donald R. Gates*, 54 S.E.C. 292, 300 (1999) (finding that respondent violated NASD registration requirements when he accepted a share of the commissions earned by a registrant).

C. Ryerson Failed to Fully and Promptly Provide Requested Testimony in Violation of NASD Procedural Rule 8210 and Conduct Rule 2110

The third cause of Enforcement's complaint alleged that Ryerson failed to provide testimony requested by NASD staff pursuant to NASD Procedural Rule 8210. The Hearing

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[26] Ryerson contends that a finding of liability under Conduct Rule 3040 in this case represents retroactive rulemaking. The Commission has already concluded that NASD Conduct Rule 3040 "gives fair guidance to firms, their associated persons, and NASD decision makers with respect to the type of activities that are subject to its restrictions." *Love*, 2004 SEC LEXIS 318, at *12.

[27] Conduct Rule 2110 provides that all members "shall observe high standards of commercial honor and just and equitable principles of trade." A violation of NASD Conduct Rule 3040 is also a violation of Conduct Rule 2110. *Hartley*, 2003 NASD Discip. LEXIS 49, at *21 & n.15. Pursuant to NASD Rule 0115 all NASD rules apply to members and persons associated with a member.

Panel found that Ryerson violated Procedural Rule 8210 when he failed to appear for a scheduled on-the-record interview on April 24, 2002. We affirm the Hearing Panel's findings.

Procedural Rule 8210 requires persons associated with a member of NASD to provide testimony in connection with any investigation, complaint, examination, or proceeding authorized by NASD. NASD Procedural Rule 8210(a), (c). It is undisputed that Enforcement made numerous requests of Ryerson to appear and provide on-the-record testimony to NASD staff. It is also undisputed that Ryerson failed to appear and provide testimony as scheduled on April 24, 2002.[28]

As an individual associated with a member firm, Ryerson had a duty to cooperate fully and promptly with NASD's requests for on-the-record interviews under Procedural Rule 8210. *See Michael David Borth*, 51 S.E.C. 178, 180 (1992) (finding that because NASD lacks the power to issue subpoenas to its members and their associates, a "[f]ailure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate"). Even if NASD staff had acted rigidly in refusing to reschedule Ryerson's testimony, these actions cannot excuse Ryerson's failure to provide testimony. *Dep't of Enforcement v. Levitov*, Complaint No. CAF980025, 1999 NASD Discip. LEXIS 30, at *12 (NAC Nov. 1, 1999). It was Ryerson's responsibility to appear before NASD and provide testimony when requested. *See Borth*, 51 S.E.C. at 181 ("A registered representative is responsible for responding directly to the NASD's requests for information.").

The purpose of Procedural Rule 8210 is to provide a means for NASD, in the absence of subpoena power, to obtain information from its members in the course of its investigations. *Richard J. Rouse*, 51 S.E.C. 581, 584 (1993). When Ryerson registered with NASD, "he agreed to abide by its rules which are unequivocal with respect to an associated person's duty to cooperate with NASD investigations." *Joseph G. Chiulli*, 54 S.E.C. 515, 524 (2000). By failing to provide, fully and promptly, testimony on April 24, 2002, Ryerson violated Procedural Rule 8210 and Conduct Rule 2110.[29]

IV. Sanctions

The Hearing Panel suspended Ryerson for two years in all capacities, ordered that he requalify in all capacities, and fined him $230,000 for engaging in private securities transactions.

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[28] We agree with the Hearing Panel that respondent's failure to appear on April 16, 2002, was reasonable given Ryerson's belief that counsel had arranged a postponement of the interview until a later date. Indeed, Enforcement concedes that when Ryerson failed to appear on April 16, the staff granted Ryerson another opportunity to comply and rescheduled his on-the-record interview for April 24, 2002.

[29] A violation of Procedural Rule 8210 constitutes a violation of Conduct Rule 2110. *Paz Sec., Inc.*, Exchange Act Rel. No. 52693, 2005 SEC LEXIS 2802, at *1 n.1 (Oct. 28, 2005), *appeal docketed*, No. 05-1467 (D.C. Cir. Dec. 22, 2005).

The Hearing Panel also suspended Ryerson 15 business days and ordered that he pay a $5,000 fine for his payment of commissions to a non-NASD member firm. Finally, the Hearing Panel concluded that a one-year suspension in all capacities and a $10,000 fine were appropriate sanctions for Ryerson's failure to provide on-the-record testimony. We modify, in part, the sanctions imposed by the Hearing Panel for Ryerson's misconduct.

A. Private Securities Transactions

The NASD Sanction Guidelines ("Guidelines") for private securities transactions provide that our first step in determining sanctions is to assess the quantitative extent of the transactions.[30] The Guidelines provide for a fine of between $5,000 and $50,000, and the imposition of a suspension of one year to a bar, when the dollar amount of the sales exceeds $1 million.[31]

Ryerson participated in the sale of at least $4 million in variable annuity contracts through TIC. This quantitative factor alone warrants, at a minimum, a one-year suspension. The Guidelines also state, however, that "[t]he presence of one or more mitigating or aggravating factors may either raise or lower sanctions."[32] Thus, the Guidelines direct that we consider numerous principal considerations for violations of Conduct Rule 3040, as well as the principal considerations and general principles applicable to all sanction determinations.[33]

The Hearing Panel concluded that Ryerson's selling away activities constituted egregious misconduct but warranted a sanction of less than a bar. We agree with the Hearing Panel's conclusions.

While verbal disclosure is generally a mitigating factor for our consideration,[34] the record does not support a conclusion that Ryerson disclosed to Prime Capital the details of his proposed activities with Passalacqua. While Ryerson testified at the hearing below that he had discussed with various Prime Capital personnel the desire to share with Passalacqua various business prospects in an attempt to have Passalacqua join Ryerson at Prime Capital, there exists in the record no evidence that Ryerson disclosed to Prime Capital the explicit arrangements that

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30 *NASD Sanction Guidelines* 15 (2006), http:www.nasd.com/web/groups/enforcement/documents/enforcement/nasdw_011038.pdf [hereinafter *Guidelines*].

31 *Id.*

32 *Id.*

33 *Id.*

34 *See id.* at 16 (Principal Considerations in Determining Sanctions, No. 9).

Ryerson and Passalacqua agreed to for purposes of sharing in commissions related to Mao's referred business.[35]

Instead, the preponderance of the evidence leads us to conclude that Ryerson intentionally engaged in conduct designed to mislead his Firm and to conceal the true extent and nature of his selling away activities.[36] First, Ryerson entered into an "employment agreement" whereby Passalacqua ostensibly agreed to pay Ryerson a "salary" and "bonuses" for "investment advice" and "financial planning." In fact, the employment agreement was designed to provide a mechanism for Passalacqua to pay directly to Ryerson 90% of the commissions that Passalacqua earned on variable annuity contracts Mao executed through TIC.[37] Second, when Ryerson wrote to Enisman on March 14, 2002, requesting that Enisman assist in arranging a commission-sharing agreement between Prime Capital and TIC, Ryerson failed to disclose to the Firm several critical facts concerning his activities. Ryerson disclosed to the Firm neither his employment agreement with Passalacqua nor the variable annuity contracts that Mao, with Ryerson's facilitation, had already purchased through TIC. Ryerson's purported written approval request was therefore misleading. Finally, when the Firm provided Ryerson with a copy of a proposal whereby Prime Capital and TIC would share in commissions prospectively concerning transactions for certain variable annuity purchases, the Firm put Ryerson on clear notice that he would not be permitted to share directly the commissions earned by another registered representative at another firm. Upon being informed that TIC had rejected Prime Capital's proposal, Ryerson remained silent and instead proceeded to cash two checks written by Passalacqua for commissions he had earned from TIC from Mao's referred business. It is clear from the record that at no time did Prime Capital or TIC approve of the direct sharing of commissions between Ryerson and Passalacqua, or their respective investment adviser firms, for customer business referred to TIC. Prime Capital, as a result of Ryerson's actions, was unaware

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[35] Michael Ryan ("Ryan"), Prime Capital's president, recalls having general conversations with Ryerson during late 2000 and early 2001 concerning Ryerson's efforts to expand his business and to recruit new registered representatives to Prime Capital. Ryan, however, disclaimed any knowledge or approval of Ryerson's efforts to refer Mao to another broker-dealer, Ryerson's sharing in the commissions Passalacqua earned from Mao's business, or of the employment agreement into which Ryerson and Passalacqua entered. Ryan testified that under no circumstances would the Firm have approved the direct sharing of commissions between registered representatives without their respective broker-dealer's involvement. Ryan's testimony is consistent with written responses the Firm provided to NASD during NASD's investigation of Ryerson's activities and with the testimony of other Firm personnel at the hearing below.

[36] *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13); *id.*, at 16 (Principal Consideration in Determining Sanctions, No. 13).

[37] $200,000 represented approximately 90% of the commissions that Passalacqua earned from Mao's business with TIC.

that Ryerson received commission-sharing payments from Passalacqua as a result of their "employment agreement" concerning Mao's business.

We also find several additional aggravating factors present in this case. First, we are extremely troubled by Ryerson's repeated failure to disclose his activities and material terms of his arrangements to his employer.[38] Consistent with his failure to disclose to the Firm his activities with Passalacqua, Ryerson never disclosed to Prime Capital his commission-splitting agreements with Wang and his payment of commissions to XW Consulting. Second, Ryerson did not voluntarily and reasonably attempt, prior to detection and investigation by NASD, to remedy his misconduct.[39] Instead, despite having several opportunities to disclose the true nature of his activities to the Firm, Ryerson remained silent and instead chose to pocket the $215,000 in compensation that he received from Passalacqua. Finally, we find that Ryerson fails to fully appreciate his responsibilities under NASD Conduct Rule 3040.[40] Indeed, Ryerson asserts on appeal that he relied upon Prime Capital to provide him with the requisite guidance concerning Conduct Rule 3040's requirements. Ryerson may not shift responsibility to Prime Capital, and he is not excused for his lack of knowledge or appreciation of the rule's requirements. *See Thomas C. Kocherhans*, 52 S.E.C. 528, 531 (1995) (dismissing as meritless respondent's assertion that he was never warned by his manager that his conduct was inappropriate and therefore he had no way to know that his conduct was wrong); *see also Carter v. SEC*, 726 F.2d 472, 474 (9th Cir. 1983) (finding that a registered person is "assumed as a matter of law to have read and have knowledge of [NASD's] rules and requirements").

We agree, however, with the Hearing Panel's conclusion that other potentially aggravating factors are not present in this case. For instance, the product sold away, variable annuity contracts, did not include products that have been found to involve a violation of federal or state securities laws, and were sold to one individual over a short period of time.[41] Moreover, Ryerson did not have a proprietary or beneficial interest in the variable annuity contracts purchased by Mao.[42] Furthermore, Ryerson participated in the sale not by selling directly to customers but, rather, by referring Mao to Passalacqua.[43] Finally, there is no evidence of customer harm or loss that resulted from Ryerson's activities.[44]

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38 *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 8).

39 *Id.* (Principal Considerations in Determining Sanctions, No. 3).

40 *Id.* (Principal Considerations in Determining Sanctions, No. 2).

41 *See Guidelines*, at 15 (Principal Considerations in Determining Sanctions, Nos. 2-4).

42 *Id.* (Principal Considerations in Determining Sanctions, No. 5).

43 *Id.* at 16 (Principal Considerations in Determining Sanctions, No. 11).

44 *Id.* (Principal Considerations in Determining Sanctions, No. 7).

As the Commission has stressed, "selling away is a serious violation, and Rule 3040 is designed not only to protect investors from unmonitored sales, but also to protect securities firms from exposure to loss and litigation in connection with sales made by persons associated with them." *Jim Newcomb*, Exchange Act Rel. No. 44945, 2001 SEC LEXIS 2172, at *19 (Oct. 18, 2001). Conduct Rule 3040 plays a crucial role in the regulatory scheme, and its abuse calls for significant sanctions. *Ronald W. Gibbs*, 52 S.E.C. 358, 365 (1995). We therefore affirm the sanctions imposed by the Hearing Panel because they are appropriately remedial**,** commensurate with Ryerson's misconduct, and will serve as a deterrent to others who may contemplate similar misconduct in the future. Accordingly, we suspend Ryerson for a period of two years in all capacities, order that he requalify in all capacities,[45] and order that he pay a fine of $230,000[46] for his violations of NASD Conduct Rules 3040 and 2110.[47]

B. Paying Commissions to an Unregistered Entity

The Hearing Panel suspended Ryerson for 15 days in all capacities and fined him $5,000 for his sharing of commissions with Xu Wang's firm, XW Consulting.[48] Ryerson does not contest these sanctions on appeal. We therefore find a suspension of 15 business days and a fine of $5,000 for Ryerson's violation of Conduct Rule 2110 to be an appropriate sanction.[49]

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[45] *See Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 7).

[46] The $230,000 fine consists of a $15,000 fine and disgorgement of the $215,000 in commissions that Ryerson was paid by Passalacqua. We find that this calculus is consistent with the Guidelines. *See Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 6).

[47] Ryerson also asserts on appeal that the sanctions imposed by the Hearing Panel are inconsistent with those imposed in other cases. The Commission, however, has firmly established "that the appropriate remedial action depends upon the facts and circumstances of each particular case, and cannot be precisely determined by comparison with action taken in other cases." *Pacific On-Line Trading & Sec., Inc.*, Exchange Act Rel. No. 48473, 2003 SEC LEXIS 2164, at *30 (Sept. 10, 2003).

[48] There is no specific sanction guideline for paying commissions to a non-NASD member. However, because such conduct perpetuates unregistered activities, we believe it appropriate to analogize Ryerson's conduct to a registration violation. The Guidelines for registration violations call for a fine of $2,500 to $50,000 and a suspension of an individual in any or all capacities for up to six months. *Guidelines*, at 48.

[49] We order that the 15-business-day suspension run concurrently with the two-year suspension imposed for Ryerson's selling away.

C. Failure to Provide Testimony Fully and Promptly

The Hearing Panel concluded that a one-year suspension in all capacities and a fine of $10,000 represented an appropriate sanction for Ryerson's failure to provide an on-the-record interview in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. For failure to respond violations, the Guidelines suggest that, "if the individual did not respond in any manner, a bar should be standard. 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."[50] The Guidelines further suggest monetary sanctions of $25,000 to $50,000 for a complete failure to respond and $2,500 to $25,000 for a failure to respond in a timely manner.[51] We agree with the Hearing Panel that, for purposes of sanctions, it is appropriate to view Ryerson's misconduct as a failure to respond to a request for testimony in a timely manner. We decline, however, to impose any additional sanctions for this misconduct.

First, the preponderance of the evidence does not establish that either Ryerson or his succession of legal counsel willfully attempted to obstruct or delay NASD's investigation. *Compare Toni Valentino*, Exchange Act. Rel. No. 49255, 2004 SEC LEXIS 330, at *15 (Feb. 13, 2004) ("Valentino's attempts to delay and ultimately avoid her appearance are especially troubling given the importance of Rule 8210."), *and Dist. Bus. Conduct Comm. v. Rudi*, Complaint No. C9A970019, 1997 NASD Discip. LEXIS 59, at *11 (NBCC Dec. 22, 1997) ("[T]here is evidence of willful attempts by Rudi and his attorney to delay the investigation . . . ."), *with Dep't of Enforcement v. Benz*, Complaint No. C01020014, 2004 NASD Discip. LEXIS 7, at *25 (NAC May 11, 2004), *aff'd*, 2005 SEC LEXIS 116 (Jan. 14, 2005). Instead, through a series of events, Ryerson found it necessary on the eve of staff scheduled milestones in its investigation to seek new counsel. NASD has long recognized good faith efforts to secure legal representation. *See Answers to Frequently Asked Questions for Respondents in Disciplinary Proceedings*, http://www.nasd.com/web/groups/enforcement/documents/oho_disciplinary_decisions/nasdw_006746.pdf. Indeed, addenda to requests for testimony issued by staff beginning in 2003 state that on-the-record interviews would be adjourned to permit associated persons reasonable opportunities to obtain legal representation. For purposes of sanctions, therefore, we find it necessary to strike a balance in this case between the staff's need for testimony and Ryerson's desire for assistance of counsel.

Second, the principal considerations for violations of Procedural Rule 8210 instruct us to consider whether the requested information has been provided, and, if so, the time it took respondent to respond and the amount of regulatory pressure required to obtain a response.[52] We find after Niosi's abrupt withdrawal just prior to the April 24, 2002 scheduled interview, Ryerson promptly obtained new counsel and that Ryerson and counsel cooperated with staff's investigation by providing information requested by the staff. Although Ryerson did not

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[50] *Guidelines*, at 35.

[51] *Id.*

[52] *Guidelines*, at 35 (Principal Considerations in Determining Sanctions, No. 2)

volunteer to appear and provide testimony, NASD staff did not renew its request for an interview until December 2003.[53]

Under the unique circumstances presented here, particularly since the preponderance of the evidence does not establish that Ryerson instigated counsel's actions, and given the sanctions imposed for Ryerson's selling away and commission-sharing misconduct, we impose no further sanction on Ryerson for his failure to provide testimony.[54] We therefore set aside the sanctions imposed by the Hearing Panel for Ryerson's violation of NASD Procedural Rule 8210.

V. Conclusion

We affirm the Hearing Panel's finding that Ryerson engaged in private securities transactions, for compensation, in violation of NASD Conduct Rules 3040 and 2110. We also affirm the Hearing Panel's finding that Ryerson shared commissions with a non-NASD member firm in violation of Conduct Rule 2110. Finally, we affirm the Hearing Panel's findings that Ryerson violated NASD Procedural Rule 8210 and Conduct Rule 2110 by failing to provide fully and promptly testimony requested by NASD staff.

With respect to sanctions, Ryerson is suspended in all capacities for a period of two years, ordered to requalify in all capacities, and fined $230,000 for engaging in private securities transactions.[55] Ryerson is also suspended 15 business days and ordered to pay a $5,000 fine for

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[53] Enforcement contends that Djinis's July 15, 2002 letter to staff, in which he suggested alternative formats for staff to obtain requested information, sought to discourage staff from persisting in its efforts to take Ryerson's testimony. Indeed, it did. Djinis, however, at no time stated that Ryerson would not appear for testimony if directed by NASD staff pursuant to Procedural Rule 8210. Nothing prevented Enforcement from seeking the testimony that it desired.

[54] Because our conclusions are based upon the unique circumstances of this case, they should not be applied generally to cases involving a respondent's violation of Procedural Rule 8210. We reiterate that Procedural Rule 8210 is widely accepted as an important tool for NASD's investigation of potential wrongdoing. *Levitov*, 1999 NASD Discip. LEXIS 30, at *20. Ryerson, after finding himself without counsel, should have communicated more clearly with NASD staff about his intent to provide information once assistance of counsel had been secured. Ryerson might even have appeared at the appointed time to explain on the record that he desired to cooperate and was moving expeditiously to find counsel who was in a position to represent him. As the Commission has stated, "any problems or concerns that a member firm or its associated persons might have in responding to an information request in a timely or complete manner should be raised, discussed and resolved with the NASD in the cooperative spirit and prompt manner contemplated by [Rule 8210]." *Rouse*, 51 S.E.C. at 584 n.9.

[55] Pursuant to NASD Procedural Rule 8320, any member that 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

[Footnote continued on next page]

his payment of commissions to an unregistered entity. We decline to impose any additional sanctions for Ryerson's failure to comply with staff's requests for his testimony. Finally, we affirm the hearing costs imposed by the Hearing Panel of $4,178.26.[56]

On behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

[cont'd]

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.

[56] We also have considered and reject without discussion all other arguments of the parties.