

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Enforcement,

Complainant,

vs.

Charles C. Fawcett IV
Venetia, PA,

Respondent.

DECISION

Complaint No. C9A040024

Dated: January 8, 2007

Registered representative failed to provide information and on-the-record testimony requested by NASD staff. Held, Hearing Panel's findings and sanction affirmed.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Rory C. Flynn, Esq., Department of Enforcement, NASD

For the Respondent: Thomas P. Puccio, Esq.

Decision

Charles C. Fawcett IV ("Fawcett") appeals a May 24, 2005 Hearing Panel decision pursuant to NASD Procedural Rule 9311. After a thorough review of the record, we affirm the Hearing Panel's findings that Fawcett failed to provide NASD staff with information and testimony, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. We also affirm the bar imposed by the Hearing Panel as a sanction for the foregoing misconduct.

I. Background

A. Employment History

Fawcett entered the securities industry in 1986. He was registered as an investment company and variable contracts products limited representative of Federated

Securities Corp. (“Federated Securities” or “the Firm”) from October 1986 to January 15, 2004, and as an investment company and variable contracts products limited principal of Federated Securities from December 1999 to January 15, 2004. Fawcett is not presently associated with any NASD member.

B. Procedural Background

In a two-cause complaint dated June 22, 2004, the Department of Enforcement (“Enforcement”) charged Fawcett with misconduct in violation of NASD rules. The first cause of the complaint alleged that Fawcett deleted or attempted to delete e-mails that he knew or believed were subject, or potentially subject, to production pursuant to a subpoena issued by the Office of the Attorney General for the State of New York, in violation of NASD Conduct Rule 2110. The information and documents that were the subject of the subpoena related to potential late trading and market timing activities of Federated Investment Management and certain affiliates, including Federated Securities. The second cause of the complaint alleged that Fawcett failed on several occasions to provide information and on-the-record testimony requested by NASD staff, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110.

Fawcett, on July 20, 2004, filed an answer in which he denied having engaged in any misconduct in violation of NASD rules and requested a hearing. Fawcett, however, admitted certain factual allegations contained within Enforcement’s complaint. In particular, Fawcett admitted that he had been requested on three separate occasions to provide NASD staff with information or on-the-record testimony pursuant to Procedural Rule 8210. Fawcett further admitted that he had failed to comply with each of these requests.

On September 20, 2004, Enforcement filed a motion seeking, pursuant to NASD Procedural Rule 9264, summary disposition as to liability and sanctions with respect to each of the two causes set forth in Enforcement’s complaint. Consistent with the requirements of Procedural Rule 9264(d), Enforcement’s motion was accompanied by a statement of undisputed facts, a supporting memorandum of points and authorities, and the declarations of two individuals.

Fawcett filed a response in opposition to Enforcement’s summary disposition motion on November 9, 2004. Fawcett’s response, however, did not include a counter-statement of facts in dispute or any declarations or other evidence seeking to establish any genuine issue of material fact. Fawcett admitted deleting certain e-mails but stated that Enforcement’s evidence with respect to the first cause of the complaint raised critical factual issues that did not permit the Hearing Panel to issue summary disposition as a matter of law. Fawcett also asserted that his failures to comply with NASD staff’s Procedural Rule 8210 requests were excused. He stated that he was the subject of a concurrent criminal investigation by the New York Attorney General and thus should not have to cooperate with staff’s requests and waive his Fifth Amendment right to remain silent.

The Hearing Panel issued an order on November 12, 2004, granting, in part, and denying, in part, Enforcement's motion. The Hearing Panel, finding that there existed genuine and material factual issues worthy of a hearing, denied Enforcement's motion for summary disposition concerning the first cause of Enforcement's complaint. The Hearing Panel, however, finding that the allegations of Fawcett's failures to provide information and testimony were not in dispute, summarily disposed of the second cause of Enforcement's complaint. The Hearing Panel concluded that Fawcett violated Procedural Rule 8210 and Conduct Rule 2110 and stated that it intended to issue a decision barring Fawcett for this misconduct. In reaching this conclusion, the Hearing Panel rejected Fawcett's argument that the existence of a concurrent criminal investigation is an acceptable mitigative factor for failing to comply with a request issued pursuant to Procedural Rule 8210.¹

The Hearing Panel conducted a one-day hearing on February 23, 2005, concerning the violations alleged in the first cause of Enforcement's complaint.² The Hearing Panel issued a decision on May 24, 2005. The Hearing Panel found that Enforcement failed to establish by a preponderance of the evidence that Fawcett violated NASD Conduct Rule 2110 and dismissed the first cause of the complaint. Specifically, the Hearing Panel concluded that Enforcement failed to present evidence establishing that Fawcett either knew or believed that the e-mails he deleted were the subject of the New York Attorney General's subpoena or had any reason to attempt to conceal the information contained within the e-mails.

The Hearing Panel's May 24, 2005 decision also set forth the bases for granting Enforcement's request for summary disposition as to the second cause of the complaint. Consistent with its earlier stated intention, the Hearing Panel barred Fawcett from associating with any NASD member in any capacity for violating NASD Procedural Rule 8210 and Conduct Rule 2110.

Fawcett timely appealed the Hearing Panel's decision that he violated NASD rules by failing to provide staff with requested information and testimony.³

¹ The Hearing Officer later issued a January 5, 2005 order deeming the respondent in default with respect to the first cause of Enforcement's complaint, after neither Fawcett nor his counsel appeared for a pre-hearing conference scheduled for January 4, 2005. The Hearing Officer vacated the default order on February 10, 2005.

² Although called to testify by Enforcement at the hearing, Fawcett refused to do so, again invoking his Fifth Amendment privilege against self-incrimination.

³ Enforcement did not cross-appeal the Hearing Panel's decision. We thus decline to consider the appropriateness of the Hearing Panel's decision with respect to the first cause of Enforcement's complaint.

II. Facts

On December 9, 2003, Federated Securities reported to NASD, pursuant to Conduct Rule 3070, that the Firm had terminated Fawcett on November 24, 2003, “for intentionally deleting e-mail correspondence relevant to a regulatory investigation.”⁴ On December 19, 2003, NASD staff issued, pursuant to Procedural Rule 8210, a written request that Fawcett provide, by January 2, 2004, information relating to the allegations made by Federated Securities that Fawcett had deleted e-mails related to a regulatory investigation.⁵

Fawcett failed to provide NASD with any of the information requested by the staff in its December 19, 2003 letter. Staff received, however, a January 7, 2004 letter from Fawcett’s attorney requesting an additional 90 days to comply with staff’s December 19, 2003 request. The attorney asserted that the extension was necessary because Fawcett was the subject of a separate investigation being conducted by the New York Attorney General relating to the alleged e-mail deletions.

Staff did not grant the requested extension. On February 10, 2004, NASD staff issued a second written request that Fawcett provide information concerning the allegations of e-mail deletions. Fawcett again failed to provide any of the requested information. Staff instead received from Fawcett’s attorney, on February 26, 2004, a letter stating that Fawcett was unable to respond to staff’s requests because he was the subject of a concurrent criminal investigation.

NASD staff advised Fawcett’s counsel in writing that, despite the existence of the criminal investigation, Fawcett was not excused from complying with requests for information issued by staff pursuant to Procedural Rule 8210. Staff thereafter issued, on March 4, 2004, a written request that Fawcett appear and provide on-the-record testimony at NASD’s Philadelphia, Pennsylvania offices on March 17, 2004.⁶ Staff’s request warned Fawcett that his failure to comply could subject him to disciplinary action and sanctions, including a bar. Fawcett failed to appear to testify on March 17, 2004.

⁴ Conduct Rule 3070 requires members to promptly report to NASD when, among other things, a person associated with the member is the subject of any disciplinary action taken by the member that involves a suspension, termination, or the withholding of commissions or imposition of fines in excess of \$2,500, or that otherwise would significantly limit the individual’s activities on a temporary or permanent basis. NASD Conduct Rule 3070(a)(10).

⁵ All requests for information or testimony at issue in this case were served by staff in accordance with NASD Procedural Rule 8210(d).

⁶ Staff also requested that Fawcett produce certain documents upon appearing to provide testimony.

III. Discussion

A. The Hearing Panel Correctly Granted Enforcement Summary Disposition, Finding that Fawcett Violated NASD Rules 8210 and 2110

NASD Procedural Rule 9264(a) provides that a party to a disciplinary proceeding may make a motion for summary disposition of any or all of the causes of action filed against a respondent. Pursuant to Procedural Rule 9264(e), a hearing panel may grant a motion for summary disposition “if there is no genuine issue with regard to any material fact and the party that files the motion is entitled to summary disposition as a matter of law.” By granting Enforcement summary disposition as to the second cause of the complaint, the Hearing Panel concluded that there existed no genuine issues with regard to any material fact and that Fawcett violated NASD Procedural Rule 8210 and Conduct Rule 2110 by refusing to comply with staff requests for information and testimony. We agree with the Hearing Panel’s conclusions.

As the party requesting summary disposition, Enforcement bore the initial burden of informing the Hearing Panel “of the basis for its motion, and identifying those portions of ‘the pleadings, . . . and admissions on file, together with the affidavits, if any,’ which it believe[d] demonstrate[d] the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).⁷ Enforcement successfully carried its burden with respect to the second cause of complaint. Through its statement of undisputed facts and memorandum of points and authorities, which referenced Enforcement’s complaint and Fawcett’s admissions, Enforcement established that there existed no controversy over the fact that NASD staff requested that Fawcett provide information or on-the-record testimony on three separate occasions, that Fawcett received each of these requests, and that Fawcett refused to comply with each of these requests.

As the party opposing summary disposition, Fawcett was required to come forward with “specific facts” showing that there existed a genuine issue for hearing. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (referring to Fed. R. Civ. P. 56(e)). Fawcett, however, did not contest the factual bases upon which the second cause of Enforcement’s complaint was premised.

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 Rules 8210(a), (c). As an individual associated with a member firm, Fawcett had a duty to cooperate fully and promptly with NASD staff’s requests for information and testimony. *Michael David Borth*, 51 S.E.C. 178, 180 (1992). The purpose of Procedural Rule 8210 is to provide a

⁷ In cases involving motions for summary disposition, we look to the Federal Rules of Civil Procedure concerning motions for summary judgment for guidance. *See, e.g., Dep’t of Enforcement v. U.S. Rica Fin., Inc.*, Complaint No. C01000003, 2003 NASD Discip. LEXIS 24, at *12 & n.3 (NAC Sept. 9, 2003).

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 Fawcett 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.”⁸ *Joseph G. Chiulli*, 54 S.E.C. 515, 524 (2000).

With no genuine issues of material fact present, we find that Fawcett violated Procedural Rule 8210 and Conduct Rule 2110.⁹

B. NASD Is a Private Actor

Fawcett contends that he was entitled, in responding to NASD staff’s investigative requests for information and testimony, to invoke his privilege against self-incrimination, without fear of reprisal, under the Fifth Amendment to the United States Constitution. We conclude that this case does not raise any issues concerning NASD’s status as a private actor and thus dismiss any assertions that the Hearing Panel erred in granting Enforcement summary disposition as to the second cause of complaint.

The Fifth Amendment states that “[n]o person shall . . . be compelled in any criminal case to be a witness against himself.” The privilege against self-incrimination, however, applies only to governmental conduct. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982). Both the courts and the Commission have considered, on numerous occasions, constitutional challenges to NASD’s ability to discipline its members. In each instance, they have determined that the constitutional limitations on government action do not apply to NASD. *E.g.*, *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) (“It has been found, repeatedly, that the NASD itself is not a

⁸ On appeal, Fawcett asserts that the information requested by NASD staff was irrelevant to the investigation that the staff was conducting concerning Fawcett’s alleged deletion of e-mails. This argument is of no moment. NASD is free to determine the information it needs and the manner in which it will be produced. *See Dep’t of Enforcement v. Benz*, Complaint No. C01020014, 2004 NASD Discip. LEXIS 7, at *20 (NAC May 11, 2004) (dismissing assertion that certain requested documents were not relevant to Enforcement’s investigation of his misconduct), *aff’d*, Exchange Act Rel. No. 51046, 2005 SEC LEXIS 116 (Jan. 14, 2005); *Robert Fitzpatrick*, 55 S.E.C. 419, 425 & n.16 (2001) (finding that respondent’s argument that NASD sought unnecessary information had no merit).

⁹ 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). Conduct Rule 2110 provides that all members “shall observe high standards of commercial honor and just and equitable principles of trade.” Pursuant to NASD Rule 115 all NASD rules apply to members and persons associated with a member.

government functionary.” (citations omitted)); *Marchiano v. Nat’l Ass’n of Sec. Dealers Regulation, Inc.*, 134 F. Supp. 2d 90, 95 (D.D.C. 2001) (“The court is aware of no case . . . in which NASD Defendants were found to be state actors either because of their regulatory responsibilities or because of any alleged collusion with criminal prosecutors.”); *United States v. Shvarts*, 90 F. Supp. 2d 219, 222 (E.D.N.Y. 2000) (“It is beyond cavil that NASD is not a government agency.”), *rev’d on other grounds*, *United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001); *E. Magnus Oppenheim & Co.*, Exchange Act Rel. No. 51479, 2005 SEC LEXIS 764, at *10 n.15 (Apr. 6, 2005) (“Multiple courts and this Commission have held that the Constitutional protections asserted by Applicant are inapplicable to NASD proceedings.” (citations omitted)); *Frank W. Leonesio*, 48 S.E.C. 544, 549 (1986) (“Leonesio contends that the NASD’s rule impinges on his Fifth Amendment privilege . . . we have repeatedly rejected similar arguments.”).

Fawcett nevertheless asserts that NASD is intrinsically a state actor as a result of having been delegated the “public function” of enforcing member compliance with the federal securities laws. This argument is misguided. While it is true that a private organization may be a state actor when it is delegated a “public function,” *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974), a private organization is not deemed to be a state actor simply because the government could have performed the function of the private organization. Rather, courts have found state action only where the private organization exercises “powers *traditionally exclusively* reserved to the State.” *Id.* (emphasis added).

NASD is a “registered securities association” under Section 15A of the Securities Exchange Act of 1934 (“Exchange Act”) and thus is a “self-regulatory association.” 15 U.S.C. § 78c(a)(26). In fulfilling its self-regulatory role, NASD is not engaged in state action. Securities regulation is instead the domain of *both* the government and private entities, such as NASD, which cannot give rise to a finding that securities regulation is a *traditionally exclusive* public function. *See D.L. Cromwell*, 279 F.3d at 161-62 (rejecting a contention that NASD exercises powers that are “traditionally the exclusive prerogative of the State”); *see also Graman v. NASD*, Civ. A. 97-1556-JR, 1998 U.S. Dist. LEXIS 11624, at *8 (D.D.C. Apr. 27, 1998) (finding that although “NASD plays an important part in the highly regulated securities industry” NASD’s role does not amount to the performance of a traditional government function). Although its rules may, in many instances, overlap with government objectives, NASD retains the discretion to determine how best to regulate its members. *See Jones v. SEC*, 115 F.3d 1173, 1180 (4th Cir. 1997) (noting that NASD and the SEC have “distinct interests”); *Abercrombie*, 47 S.E.C. 176, 177 (1979) (concluding that NASD’s powers “extend beyond the requirements of the federal securities laws”).

Fawcett also contends that NASD engages in state action when it registers individuals who are associated with member broker-dealers conducting business in the securities industry. NASD does not, however, become a state actor simply by imposing requirements upon associated persons whose registration with NASD is mandatory under the Exchange Act and Commission rules. *See Desiderio v. NASD*, 191 F.3d 198, 207 (2d Cir. 1999) (concluding that NASD did not engage in state action even though

employment in the securities industry requires registration with NASD by executing an NASD registration form containing a mandatory arbitration provision concerning employment-related disputes); *see also Illyes v. John Nuveen & Co.*, 949 F. Supp. 580, 584 (N.D. Ill. 1996) (finding no state action where an employee of a broker-dealer signed an NASD registration form containing a pre-dispute arbitration clause). The fact that NASD is currently the only registered securities association does not alter this conclusion. *See Graman*, 1998 U.S. Dist. LEXIS 11624, at **8-9 (stating that “the existence of an effective private monopoly does not create governmental action”).

Finally, Fawcett argues that the Commission’s “entwinement” with the management and control of NASD causes NASD disciplinary action to constitute government action. In this respect, Fawcett asserts that the Commission “closely supervises” NASD by reviewing its rules and disciplinary decisions. These arguments, however, have been considered and rejected. *See Desiderio*, 191 F.3d at 206 (“[T]he fact that a business entity is subject to ‘extensive and detailed’ state regulation does not convert that organization’s actions into those of the state.”) (*quoting Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974)); *cf. People v. Barysh*, 408 N.Y.S.2d 190, 197 (N.Y. Sup. Ct. 1978) (“The court rejects the argument that the broad supervisory powers which the SEC has been given over exchanges’ self-regulation have, in effect, rendered the exchanges governmental agents. Supervision and regulation do not imply agency.”); *Vincent Musso*, 47 S.E.C. 606, 609 (1981) (same); *see also Daniel Turov*, 51 S.E.C. 235, 238 n.4 (1992) (explaining that the Commission’s oversight authority over exchanges and other self-regulatory bodies does not convert these organizations into a branch of government).

“The NASD is a private actor, not a state actor.” *Desiderio*, 191 F.3d at 206. It is a private corporation that was not created by the government or an act of Congress. *Id.* The Commission’s ability to approve or disapprove NASD rules is insufficient to make NASD a state actor. *See Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 (1982) (“Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives”); *cf. Desiderio*, 191 F.3d at 207 (finding that the Commission’s approval of a mandatory arbitration clause in an NASD registration form was not enough for NASD to be deemed a state actor). Similarly, the Commission’s role in providing appellate review of NASD disciplinary decisions does not create state action. *See Jones v. SEC*, 115 F.3d at 1182 (finding that the Commission’s “review power does not convert the NASD’s interest to the same interest as that of the regulating agency”); *People v. Cohen*, 773 N.Y.S. 2d 371, 383 (N.Y. App. Div. 2004) (“[T]he fact that the NASD is subject to extensive oversight by the SEC, and ultimately Federal court review, does not metamorphose the NASD into an organ of the Federal government.”).

To establish that the privilege against self-incrimination applied in these proceedings, Fawcett bore the difficult burden of establishing as a matter of fact that NASD engaged in state action. *See Lugar*, 457 U.S. at 939 (stating that tests for state actor status involve a “necessarily fact-bound inquiry”); *Brentwood*, 531 U.S. at 298 (same); *D.L. Cromwell*, 279 F.3d at 162 (stating that respondent must establish facts that distinguish its case from the general rule that NASD is not a government functionary);

see also *Frank P. Quattrone*, Exchange Act Rel. No. 53547, 2006 SEC LEXIS 703, at *22 (Mar. 24, 2006) (affirming that “the burden of demonstrating joint activities sufficient to render NASD a state actor [is] high”). Fawcett has not met his burden.¹⁰

The mere possibility that information and testimony provided during an NASD investigation may have exposed Fawcett to criminal sanctions does not convert NASD into a state actor. See *D.L. Cromwell*, 279 F.3d at 162 (concluding that “[t]estimony in an NASD proceeding may entail exposure to criminal liability, but that in itself is not enough to establish the requisite governmental nexus” that would convert NASD into a state actor); *United States v. Shvarts*, 90 F. Supp. 2d at 222 (holding that “questions put to the defendants by the NASD in carrying out its own legitimate investigative purposes do not activate the privilege against self-incrimination”); cf. *Dan Adlai Druz*, 52 S.E.C. 416, 428-429 (1995), *aff’d*, 103 F.3d 112 (3d Cir. 1996) (rejecting argument that New York Stock Exchange disciplinary proceeding should have been stayed until the completion of a concurrent criminal matter). Fawcett’s theory that NASD acts as an agent of the state any time that it investigates someone who simultaneously is the subject of a criminal investigation is directly contrary to well-settled law. We thus find that it was appropriate for the Hearing Panel to dispose of this argument on summary disposition.

IV. Sanctions

When an associated person fails to cooperate fully and promptly with NASD staff requests for information and testimony, he undermines NASD’s ability to carry out its regulatory responsibilities. *Toni Valentino*, Exchange Act Rel. No. 49255, 2004 SEC LEXIS 330, at *14 (Feb. 13, 2004); *Joseph G. Chiulli*, 54 S.E.C. at 523-24. The NASD Sanction Guidelines (“Guidelines”) for cases involving a failure to respond to requests made pursuant to Procedural Rule 8210 thus state that a bar should be imposed if an individual did not respond in any manner.¹¹

The Guidelines list two principal considerations for Procedural Rule 8210 violations: (1) the nature of the information requested; and (2) whether the requested

¹⁰ Fawcett does not allege, and there is no evidence to support an allegation, that the staff did not independently conduct NASD’s investigation of him. Fawcett’s appeal is therefore markedly different from the Commission’s recent decision in *Quattrone*, where the Commission found that the respondent, in opposing summary disposition, “did not rely on mere conclusory allegations or speculation but instead offered specific facts to support his contention that NASD engaged in state action.” 2006 SEC LEXIS 703, at *20.

¹¹ *NASD Sanction Guidelines* 35 (2006), http://www.nasd.com/web/groups/enforcement/documents/enforcement/nasdw_011038.pdf [hereinafter *Guidelines*].

information has been provided.¹² We find that these considerations support the imposition of a bar in this case.

The requests made by NASD staff for information and testimony were material to an investigation of the issues raised by the Firm's Conduct Rule 3070 report, that is, whether Fawcett knew or believed that the e-mails he deleted or attempted to delete were subject to production pursuant to the New York Attorney General's subpoena to the Firm. There is no question that such requests, concerning a possible obstruction of justice, are at the heart of NASD's regulatory role in preventing securities fraud and protecting investors. *See, e.g., United States v. O'Hagan*, 521 U.S. 642, 658 (1997) (stating that in passing the Exchange Act, one of Congress's animating objectives was "to insure honest securities markets and thereby promote investor confidence"); *see also Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 315 (1985) (stating that the "primary objective of the federal securities laws" is investor protection through promotion of a "high standard of business ethics" in "every facet of the securities industry"). Enforcement sought to verify questions raised by the Firm's dismissal of Fawcett by having him provide information and testify. Fawcett's compliance with staff's requests was crucial to NASD's investigation.

It is also beyond dispute that Fawcett refused to comply with staff's requests for information and testimony. As we have previously stated, "[a] refusal to comply with an NASD request for information is tantamount to a complete failure to respond" for purposes of determining sanctions. *Dep't of Enforcement v. Steinhart*, Complaint No. FPI020002, 2003 NASD Discip. LEXIS 23, at *13 (NAC Aug. 11, 2003).

On appeal, Fawcett asserts that barring him for asserting his Fifth Amendment privilege is unfair and that a lesser sanction should instead be imposed. Fawcett, however, is not entitled to a lesser sanction because he may have been willing to appear for NASD testimony upon the conclusion of the New York Attorney General's investigation. It has long been recognized that associated persons may not impose conditions under which they will respond to NASD requests for information and testimony. *E.g., Toni Valentino*, 2004 SEC LEXIS 330, at *11; *Market Surveillance Comm. v. Markowski*, Complaint No. CMS920091, 1998 NASD Discip. LEXIS 35, at *55 (NAC July 13, 1998). Associated persons also are not free to determine the appropriate time to respond to staff's requests for information and are not entitled "as a matter of right to adjourn the dates set for their Rule 8210 testimony." *Dep't of Enforcement v. Levitov*, Complaint No. CAF980025, 1999 NASD Discip. LEXIS 30, at *12-13 (NAC Nov. 1, 1999).

Fawcett made an informed choice to follow his counsel's advice to concentrate primarily on the criminal investigation of which he was a subject, even in the face of a potential NASD disciplinary action. We therefore agree with the Hearing Panel that it is

¹² *Id.* If the information was provided, the Guidelines further state that the adjudicator should consider the number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response. *Id.*

appropriate to bar Fawcett in all capacities for refusing to comply with three separate requests for information and testimony propounded by NASD staff pursuant to Procedural Rule 8210.¹³

V. Conclusion

We affirm the Hearing Panel's decision to grant Enforcement summary disposition as to the allegations contained within the second cause of Enforcement's complaint. We find that Fawcett failed to provide requested information and testimony, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. We also reject Fawcett's argument that NASD is a state actor and that he could invoke his Fifth Amendment privilege to avoid compliance with staff's requests for information and testimony.¹⁴

Accordingly, Fawcett is barred from associating with any NASD member in any capacity. The bar will be effective as of the date of this decision. We also order Fawcett to pay appeal costs of \$1,522.15.

On behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

¹³ The Sanction Guidelines permit us to consider suspending an individual in any and all capacities for up to two years where mitigation exists or the person did not respond in a timely manner. *Guidelines*, at 35. In deciding to bar Fawcett, we find that there are no mitigating factors present and that Fawcett's failure to respond to NASD requests for information and testimony was complete.

¹⁴ We also have considered and reject without discussion all other arguments of the parties.