

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C02980025
v.	:	
ROGER HARRY CHLOWITZ,	:	
(CRD #501445)	:	
Northridge, CA	:	
	:	
	:	Hearing Panel Decision
and	:	
	:	
Northridge, CA	:	
	:	
Respondent.	:	Date: November 17, 1998
	:	

**ORDER AND DECISION GRANTING DEPARTMENT OF ENFORCEMENT'S
MOTION FOR SUMMARY DISPOSITION**

On June 5, 1998, the Department of Enforcement ("Enforcement") filed a one-count Complaint in this disciplinary proceeding, alleging that Respondent Roger Harry Chlowitz ("Respondent") violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by failing to provide certain documents and information requested by NASD Regulation staff. Respondent filed an Answer on July 29, 1998, denying that he had any documents in his possession and indicating that he had previously advised NASD of that fact.

Enforcement filed a Motion for Summary Disposition on October 23, 1998 and supplemented it on November 3, 1998.¹ The Motion for Summary Disposition, as supplemented, is now pending before the Hearing Panel. Respondent filed a “Response to, Statement of and Against the Motion for Summary Disposition” on November 6, 1998 (“Motion in Opposition”). However, the Motion in Opposition did not dispute the facts set forth in Enforcement’s Motion for Summary Disposition, but rather provided Respondent’s reasoning for failing to respond.

The Hearing Officer held Pre-Hearing Conferences on August 11, August 25, and September 29, 1998.²

For the reasons set forth below, the Hearing Panel grants Enforcement’s Motion for Summary Disposition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Background

Respondent was associated with Capital Markets Growth Corporation (“CMG”), a former member of the NASD, as a General Securities Principal, from on or about May 20, 1996 through on or about June 13, 1997.³ (CX-2, 2). CMG filed a Form U-5 on June 13, 1997 regarding Respondent’s termination. (CX-2, 2). The NASD Regulation staff (the

¹ Enforcement’s Motion for Summary Disposition was accompanied by a Memorandum of Points and Authorities, a Statement of Undisputed Facts, and ten exhibits, including declarations of three NASD staff members. Hereinafter Enforcement’s exhibits will be designated as “CX- ” with the appropriate bates page number.

² References to the testimony set forth in the transcript of the August 25, 1998 Pre-Hearing Conference will be designated as “Tr.”

³ Respondent previously was a registered representative associated with Columbus Financial, Inc., a former member of the NASD (“Columbus Financial”), from on or about August 5, 1992 through on or about May 26, 1995. (CX-2, 3). Between May 1995 and May 1996, Respondent worked for Atlantic Pacific Financial, Inc., Global Strategies Group, and APS. (CX-2, 2).

“NASD”) began an investigation of CMG regarding potentially fraudulent offers and sales of securities by CMG, possible misuse of offering proceeds, and improper payments from the issuer to CMG registered representatives. (CX-3, 14; CX-10, 38).

Subsequently, on October 8, 1997, CMG filed an amended Form U-5, which listed in excess of 100 arbitration claims against Respondent. (CX-2, 2, 5-13). As a result of the amended termination notice, the NASD began a second investigation regarding the arbitration filings. (CX-3, 14-15).

II. Requests for Information

A. CMG Investigation

On October 24, 1997, NASD sent Respondent a letter requesting information, pursuant to Rule 8210, in connection with CMG’s investigation. (CX- 5, 18-19). The NASD sent the October 24, 1997 request for information to Respondent’s address of record as reflected in the Central Registration Depository (“CRD”).⁴ (CX-5, 18). The October 24 letter specifically requested that Respondent provide: (1) personal tax returns, including all schedules and tax forms (1099’s and W-2s) for tax years 1994, 1995, 1996 and all tax filings for 1997; (2) a listing of investors solicited by Respondent for the private placements listed in the letter; (3) a complete list of all sales meetings that Respondent attended relating to the private placements; and (4) a breakdown of all compensation Respondent earned for the private placements and the form of the compensation received. (CX-5, 18). The deadline for producing the information was November 3, 1997. (CX-5, 18). Respondent acknowledged receipt of the letter by signing the return receipt on or about October 27, 1997. (CX-5, 20).

⁴ Respondent’s CRD Address is _____, Northridge, California _____.

On November 11, 1997, the NASD sent Respondent a second letter, again pursuant to Rule 8210, via certified and regular mail to his CRD address. (CX-7). The November 11 letter repeated the original request for information but set November 18, 1997 as the new deadline for producing the requested information. (CX-7). The return receipt of the certified mailing was signed on November 13, 1997.⁵ (CX-7, 34).

The NASD telephoned Respondent on November 25, 1997 to remind him of his obligation to respond to the requests for information set forth in the October 24 and November 11 letters. (CX-4, 16). Respondent acknowledged that he had received the letters, admitted that he had not responded, and indicated he had no intention of responding. (CX-4, 16). On December 30, 1997, the NASD sent Respondent a letter summarizing the November 25, 1997 conversation and providing him with a final opportunity to respond, setting a due date of January 6, 1998. (CX-4, 16; CX-8, 35).

B. Arbitration Claims Investigation

On November 11, 1997, the NASD telephoned Respondent to inquire about the more than 100 arbitration claims⁶ that had been filed against him. (CX-6, 21). Respondent admitted that the arbitration claims had been filed. (CX-6, 21; Tr. 8). The NASD informed Respondent that he would soon receive a request for information about the arbitration claims. (CX-6, 21). Respondent stated that he was no longer a member of the

⁵ The signature on the receipt appears to be "B. Chlowitz." (CX-7, 34).

⁶ According to the Motion in Opposition, there were 140 arbitration claims, of which 137 were exactly the same. A Florida attorney had purchased the client list of Columbus Financial and filed arbitration claims on behalf of the Columbus Financial clients against Respondent and approximately 20 other individuals. All of the arbitration claims were subsequently dismissed. Of the three remaining arbitration claims, Respondent was exonerated in one and the other two are still pending.

NASD, that he did not plan to register in the future and that he “could care less” about the NASD’s interest in the arbitration claims. (CX-6, 21).

On the same day, the NASD sent via certified and regular mail to Respondent’s CRD address, a letter, pursuant to Rule 8210, requesting information about the arbitration claims pending against him. (CX-6, 21, 23). The November 11 letter specifically requested that Respondent provide the NASD with (1) three examples of the arbitration statements, that he described as “cookie-cutter”; (2) any other arbitration statements naming him, that are not “cookie-cutter”; (3) documents showing the status of the arbitration claims against him; and, (4) a detailed written statement describing the circumstances leading up to the claims against him. (CX-6, 23). The letter selected November 25, 1997 as the deadline for producing the information. (CX-6, 24). The return receipt was signed on November 12, 1997.⁷ (CX-6, 25).

After receiving no response to the November 11 letter, the NASD sent a letter labeled “FINAL REQUEST” and dated December 4, 1997, repeating the request of the November 11 letter for information concerning the arbitrations. (CX-6, 21, 26). The December 4 letter set a deadline of December 19, 1997 and advised Respondent if he failed to respond the matter would be referred for possible disciplinary action. (CX-6, 26). The December 4 letter was sent by certified and regular mail. (CX-6, 21, 29). The U.S. Post Office did not return a receipt for the letter. (CX-6, 21).

Respondent failed to provide the written information or the documents requested by the staff pursuant to Procedural Rule 8210. Respondent stated he was losing his

⁷ The signature on the receipt appears to be “B. Chlowitz.” (CX-6, 25).

house; he had no money; and he just didn't want to be bothered, because he was not going to be in the industry any more. (Tr. 10-11).

III. Legal Discussion

A. Jurisdiction

Although not currently registered with the Association, Respondent is subject to the NASD's jurisdiction in this proceeding. Article V, Section 4(a) of the NASD's By-Laws provides that the NASD retains jurisdiction over formerly registered persons who are no longer associated with any member firm for two years after the effective date of termination of registration. Moreover, Article V, Section 4 specifically permits the NASD to file a complaint against a formerly associated person during this period of retained jurisdiction, based upon that person's failure to provide information, pursuant to NASD procedural Rule 8210, while subject to the NASD's jurisdiction.⁸ Because this Complaint was filed within two years of the date Respondent's registration was terminated,⁹ NASD Regulation has jurisdiction to bring this disciplinary proceeding.

B. Summary Disposition

Rule 9264(d) of the NASD Code of Procedure permits a Hearing Panel to grant summary disposition when "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." In this case there is no issue of material fact. It is not contested that Respondent failed to

⁸ See NASD Notice to Members 92-19. In his Answer, Respondent asserted that he was employed by CMG through February 1997. However, for purposes of Article V, Section 4, the date of termination is the later of the date a Form U-5 or an amended Form U-5 is filed with the NASD. In any event, even if February 1997 were treated as the termination date, the Complaint was filed within two years of February 1997.

⁹ Enforcement filed this Complaint on June 5, 1998.

provide the information and documents requested by NASD. In Respondent's Motion in Opposition, Respondent admits that he did not supply the documents or information requested of him by Enforcement.

With no issue of material fact present, the only issue to be determined in this action is whether the Respondent raised a reasonable defense, as a matter of law, for his refusal to provide the requested information. Respondent raised as his sole defense that the requests for information involved information that the NASD already had and the requests therefore constituted harassment.

C. Failure to Provide Written Information and Documents

NASD Procedural Rule 8210(a)(1) authorizes the NASD to require an associated person "to provide information orally, in writing, or electronically . . . with respect to any matter involved in [an] investigation . . ." The Rule provides a means for the NASD to carry out its regulatory mandate in the absence of subpoena power. As such, the Rule is a "key element in the NASD's effort to police its members."¹⁰ A failure to respond "undermines the NASD's ability . . . to carry out its self-regulatory functions,"¹¹ and frustrates its ability "to conduct investigations and thereby protect the public interest."¹²

The Respondent does not deny that he did not provide information to the NASD. He explains in his Opposition to the Motion that it was ridiculous for the NASD to request information about the arbitrations when "all they had to do was go across the hall

¹⁰ In re Richard J. Rouse, 51 S.E.C. 581, 1993 SEC LEXIS 1831, at *7 (1993).

¹¹ In re John J. Fiero, Exchange Act Release No. 39544, 1998 SEC LEXIS 49, at *5 (Jan. 13, 1998).

¹² In re Barry C. Wilson, Exchange Act Release No. 37867, 1996 SEC LEXIS 3012, at *14 (Oct. 25, 1996) (quoting Rouse, 51 S.E.C. at 588, 1993 SEC LEXIS 1831, at *16).

to get them.”¹³ He viewed the NASD’s request to produce the documents that were already in its possession, though in a different department, as nothing more than harassment. In addition, he viewed the request for his tax returns, which he had provided earlier in a separate matter, as further evidence of the harassment being perpetuated by the staff.

The SEC has held that an NASD member may not “second guess” or “impose conditions” on the NASD’s request for information.¹⁴ Respondent could not force the NASD to gather the information from another source. Alleged staff harassment does not provide an adequate excuse for Respondent failing to abide by his obligations. If Respondent believed there was harassment, there were other avenues to address those concerns. Respondent could have contacted the NASD Office of Internal Review to report allegations of NASD staff misconduct or harassment.

Failure to provide testimony to NASD, absent a legally recognizable reason for such a failure, is a violation of Conduct Rule 2110 and Procedural Rule 8210. In this case, there is no doubt that Respondent refused to provide the requested information and Respondent’s purported reason for refusing to comply does not excuse his conduct, although it may be relevant in assessing sanctions.

The Respondent has not provided an adequate defense for his failure to provide requested information to the NASD.

D. Sanctions

¹³ According to his Motion in Opposition, in his conversations with the NASD, Respondent provided the names of the NASD personnel who had the arbitration documents.

¹⁴ In re Joseph Patrick Hannan, Exchange Act Release No. 40438, 1998 SEC LEXIS 1955, at *11 (September 14, 1998).

The applicable NASD Sanction Guideline recommends that, where an individual respondent does not respond in any manner, a bar should be standard and a fine ranging between \$25,000 and \$50,000 should be imposed.¹⁵ Enforcement has requested that Respondent be censured, barred and fined \$25,000.

Respondent was required to be familiar with the NASD's rules and regulations. Respondent's prior censure and fine in August 1996 for failure to respond to a request for information about Columbus Financial clearly informed Respondent of the importance of this regulation, and the consequences for failing to meet his obligations thereunder. The Hearing Panel sees no reason to impose a sanction below those recommended by the Guidelines.

The Hearing Panel, having considered all of the arguments, concluded that censuring Respondent, fining him \$25,000, and barring him from association with any NASD member in any capacity was an appropriate sanction.

CONCLUSION

The Hearing Panel determined that there are no disputes of material fact in this proceeding, and that Enforcement is entitled to judgment as a matter of law. Therefore, the Hearing Panel grants Enforcement's Motion for Summary Disposition, and censures Respondent, fines him \$25,000, and bars him from associating with any member in any

¹⁵ NASD Sanction Guideline at 31 (1998 ed.).

capacity. These sanctions shall become effective on a date set by the Association but not before the expiration of 45 days after the date of this decision.

SO ORDERED

Hearing Panel

by: _____
Sharon Witherspoon
Hearing Officer

Copies to:

Roger Harry Chlowitz (via federal express, certified and first class mail)
Karol L. K. Pollock, Esq. (via facsimile and first class mail)
Rory C. Flynn, Esq. (via facsimile and first class mail)