

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

DONALD SHELBY TOOMER
(CRD No. 2842723),

Respondent.

Expedited Proceeding
No. FPI160009

STAR No. 2016048445101

Hearing Officer—MJD

**EXPEDITED HEARING PANEL
DECISION**

October 5, 2016

Respondent is barred from associating with any FINRA member firm in any capacity for refusing to provide documents and information requested pursuant to FINRA Rule 8210. Respondent is also ordered to pay hearing costs.

Appearances

For the Complainant: Samir K. Ranade, Esq., Jasmine K. Shergill, Esq., and Michael J. Watling, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Amy Luria, Esq., Critchley, Kinum & DeNoia, LLC.

DECISION

I. Introduction

The Department of Enforcement sought documents and information from Respondent Donald Shelby Toomer after FINRA learned he was indicted for allegedly participating in a fraudulent scheme to manipulate the stocks of three low-priced, speculative securities. Toomer responded and produced a copy of the indictment, but he refused to provide any of the other requested documents because of the pending criminal charges, asserting his right against self-incrimination under the Fifth Amendment of the United States Constitution.

Because FINRA is not a government entity, an associated person may not refuse to produce information by claiming the constitutional protection against self-incrimination. Enforcement accordingly disputed Toomer's right to seek the protections afforded by the Fifth Amendment and sent him a Notice of Suspension from associating with any FINRA member firm based on his refusal to produce all the documents and information. Toomer timely requested

a hearing, which stayed the suspension. Toomer repeated his Fifth Amendment defense in his request for a hearing.

The Hearing Panel¹ determines that Toomer did not establish his Fifth Amendment defense and accordingly that he violated FINRA Rule 8210 by refusing to produce all the documents and information sought by Enforcement. The Hearing Panel therefore bars Toomer from associating with any FINRA member in any capacity.

II. Findings of Fact

A. Respondent's Background

Toomer was first employed in the securities industry in 1996. He was associated thereafter with four FINRA member firms before he joined Wells Fargo Advisors Financial Network, LLC, in 2005, as a General Securities Representative and Registered Investment Advisor.² Toomer was registered with Wells Fargo until December 23, 2015, when the firm filed a Uniform Termination Notice for Securities Industry Registration Form ("Form U5") terminating his registration. He has not been registered since then.

B. Toomer Is Indicted for Securities Fraud

Enforcement is investigating allegations that Toomer participated in a manipulation of the prices of securities and defrauded his customers. Toomer was indicted on December 21, 2015, in the U.S. District Court for the District of New Jersey on charges of securities fraud, in violation of Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and Section 206 of the Investment Advisers Act of 1940. He was also charged with conspiracy to commit securities fraud and investment adviser fraud.³ The U.S. Securities and Exchange Commission ("SEC") filed a parallel civil action against Toomer the same day he was indicted.⁴

The indictment alleges that, from 2008 to 2011, Toomer conspired with three other persons (whom the indictment does not identify) to manipulate the securities of NXT Nutritionals Holdings, Inc. (NXTH), Clear-Lite Holdings, Inc. (CLRH), and Mesa Energy

¹ A telephonic hearing was held July 20, 2016, during which the parties introduced into evidence seven joint exhibits (referred to as "JX-") and Enforcement introduced one exhibit (referred to as "CX-1"). The parties filed simultaneous pre-hearing briefs and simultaneous reply briefs.

² CX-1, at 3-10.

³ JX-1.

⁴ The record does not include a copy of the SEC's action against Toomer. According to the description contained in Toomer's Central Registration Depository ("CRD") records, the SEC amended an existing Complaint against other defendants to add charges against Toomer alleging that he violated Sections 17(a)(1) and (3) of the Securities Act of 1933, Section 10(b) of the Exchange Act, and Exchange Act Rules 10b-5(a) and (c). JX-3, at 14; CX-1, at 17.

Holdings, Inc. (MSEH), whose securities were quoted on the OTC Bulletin Board.⁵ The government estimates that the conspiracy generated over \$30 million in illicit trading profits.⁶

The indictment alleges that the conspirators increased the price of the three companies' stock by engaging in coordinated trading that coincided with the dissemination of promotional materials touting the stocks, thereby encouraging investors to buy the securities. After artificially causing the stock prices to rise, the conspirators then dumped large volumes of the shares they owned or controlled. Toomer's alleged role in the conspiracy was to facilitate the manipulative scheme by recommending the stocks to his customers. In exchange, Toomer's co-conspirators allegedly paid him hundreds of thousands of dollars in cash kickbacks and other compensation that he did not disclose to customers or to the firm.⁷ In one instance described in the indictment, Toomer deposited a \$2,000 cash kickback from a co-conspirator in a bank account he controlled.

The indictment further alleges that Toomer timed his customers' purchases of the stocks with corresponding sell orders arranged by the conspirators. Toomer's customers purchased hundreds of thousands of shares of the three companies' securities based on his recommendations. To avoid scrutiny, Toomer falsely told Wells Fargo that his customers' purchases were unsolicited. The clients' stock purchases were designed to create the false appearance of market interest and demand for the companies' stock, increase trading volume, and generate income so the conspirators could perpetuate the promotional campaign.⁸ Instead of giving his customers investment recommendations based on their best interests, the indictment alleges, Toomer made recommendations that favored his own personal interests.⁹ In one instance, Toomer refused to sell all of a customer's shares of MSEH because it would likely have hurt the value of MSEH shares held by his co-conspirators. The indictment also alleges that the co-conspirators gave Toomer tens of thousands of dollars in cash to repay some of the customers who lost money from buying CLRH shares. Using money his co-conspirators gave him, Toomer paid one customer \$42,000 to cover the client's losses from investing in CLRH.

C. Enforcement Begins Investigation of Toomer's Activities

On December 23, 2015, two days after his indictment, Wells Fargo terminated Toomer's registration by filing a Form U5.¹⁰ On January 4, 2016, Wells Fargo filed an amended Form U5 disclosing that Toomer had been indicted and that the SEC had filed a civil action against him.¹¹

⁵ JX-1, at 2.

⁶ JX-1, at 2.

⁷ JX-1, at 3-4.

⁸ JX-1, at 3.

⁹ JX-1, at 4.

¹⁰ JX-2. The Form U5 disclosed that Toomer voluntarily resigned from his firm on December 21, 2015, the same day he was indicted. JX-2, at 2.

¹¹ JX-3. The amended Form U5 also disclosed that the firm was not able to question Toomer about the allegations contained in the indictment because he resigned before the interview. JX-3, at 9.

Immediately after Wells Fargo filed the amended Form U5, Enforcement began investigating Toomer. It sent him a letter, dated January 20, 2016, seeking the production of documents and information relating to the allegations of the indictment. The letter informed Toomer that FINRA was seeking the information pursuant to FINRA Rule 8210 and he was “obligated to respond to this request fully, promptly, and without qualification.” The letter further cautioned Toomer that “[a]ny failure on your part to satisfy these obligations could expose you to sanctions, including a permanent bar from the securities industry.”¹²

The Rule 8210 letter sought the following eight categories of documents and information from Toomer:

1. Signed statement addressed to FINRA in response to the allegations [in the indictment].
2. Copies of all relevant documents referring or relating to [the indictment].
3. List each client account, if any, for whom you purchased shares of the following stocks, BioNeutral Group, Inc. (BONU) [and NXTH, MSEH, and CLRH].
4. For each customer above, list each transaction that was executed in his/her account. Please include the stock name, dollar amount, date and your compensation for each. Also describe any conversations you had prior to each transaction.
5. Current status of the criminal case. Provide copies of court documents.
6. Copies of your bank account(s) statements from January 2008 through December 2010.
7. Copies of your brokerage account(s) statements from January 2008 through December 2010.
8. Are there any other complaints regarding your employment at [Wells Fargo], which are open or were resolved within the preceding three years of the date of the current reportable event? If so, please provide additional documentation.¹³

¹² JX-4. Toomer does not dispute that FINRA properly served him with the Rule 8210 request. Enforcement sent its Rule 8210 letter to Toomer via certified and first-class mail to two addresses, one of which is the residential address reflected in his CRD records, as required by Rule 8210(d). JX-2, at 1; JX-3, at 1; JX-4, at 1, 3, 6.

¹³ JX-4, at 1. Enforcement’s Rule 8210 letter added, “You are also obligated to supplement or correct any response that you later learn to have been incomplete or inaccurate. If you withhold any responsive document or information, you must specifically identify what you are withholding and state the basis for your doing so.” JX-4, at 2.

D. Toomer Invokes the Fifth Amendment to the Constitution

In a letter dated February 17, 2016, Toomer responded to Enforcement's request for information. In the letter, Toomer, through counsel, "invoke[d] his Fifth Amendment right against self-incrimination, and refuse[d] to produce any of the information and documents requested for production," with the exception of providing a copy of the indictment, as requested in Item No. 5 of Enforcement's Rule 8210 letter. Toomer asked FINRA "to stay all proceedings against" him, including the request for documents and information, "pending resolution of the parallel criminal proceeding."¹⁴ Enforcement rejected the request.

Toomer also objected to Enforcement's Rule 8210 request on the grounds that it impermissibly called for him to "create documents for production, including but not limited to lists and written narratives."¹⁵ Item Nos. 1, 3, 4, 5, and 8 of Enforcement's Rule 8210 request required that Toomer provide written answers. In the letter to Enforcement, Toomer said his "understanding" is that the Rule does not authorize the creation of such documents.¹⁶ Toomer abandoned this particular defense at the hearing.

E. Enforcement Sends Toomer a Notice of Suspension

On May 12, 2016, Enforcement sent Toomer a Notice of Suspension informing him that, pursuant to provisions for expedited proceedings under FINRA Rule 9552 for failure to provide information, he would be suspended from associating with any FINRA member in any capacity, effective June 6, 2016, for his failure to fully respond to the Rule 8210 request.¹⁷ The Notice informed Toomer he could take corrective action to prevent the suspension, request a hearing in response to the Notice, or, if he was suspended, request termination of the suspension on the grounds of full compliance. The Notice also instructed Toomer that if he requested a hearing, he was required to state all defenses with specificity. Finally, it stated he would be barred automatically on August 15, 2016, if he failed to request termination of the suspension.¹⁸

On June 1, 2016, Toomer filed a written request for a hearing with the Office of Hearing Officers. He attached a copy of his February 17, 2016 letter to Enforcement, formally invoking

¹⁴ JX-5.

¹⁵ JX-5, at 1.

¹⁶ Toomer's objection to "creating" documents has no basis under FINRA's Rules. Rule 8210(a)(1) authorizes FINRA to require an associated person to provide information "in writing," in addition to providing information orally at an on-the-record interview.

¹⁷ JX-6. Under Rule 9552(a), if a member or associated person fails to provide information requested under Rule 8210, FINRA may provide written notice specifying the nature of the failure and stating that failure to take corrective action within 21 days of service of the notice will result in suspension of the member or associated person.

¹⁸ JX-6. Under Rule 9552(h), a person suspended under Rule 9552 who fails to request termination of the suspension within three months of issuance of the original notice of suspension will automatically be barred.

the Fifth Amendment as his defense to FINRA's action.¹⁹ The request for a hearing stayed the effective date of the suspension.²⁰

III. Conclusions of Law

A. The Applicable Law

Enforcement requested information and documents from Toomer in accordance with FINRA Rule 8210. Rule 8210(a) authorizes FINRA, for the purpose of an investigation, complaint, examination, or proceeding authorized by FINRA's By-Laws or rules, to (1) require persons subject to FINRA's jurisdiction to provide information orally, in writing, or electronically and to testify under oath, and (2) inspect and copy their books, records, and accounts that are in their possession, custody, or control. These requirements are "unequivocal" and "unqualified,"²¹ and compliance is mandatory. Rule 8210(c) states: "No member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule."²²

As the SEC has repeatedly held, Rule 8210 is "essential to FINRA's ability to investigate possible misconduct by its members and associated persons."²³ The scope of Rule 8210 is broad, giving FINRA a critical tool to protect investors and markets in the absence of subpoena power.²⁴ Failing to provide information "frustrates [FINRA's] ability to detect misconduct, and such inability in turn threatens investors and markets."²⁵

¹⁹ JX-7.

²⁰ Under Rule 9552(d), in an expedited proceeding for failure to provide information, a suspension takes effect 21 days after service of the notice unless stayed by a request for a hearing. Rules 9559(a) and (c)(1) allow associated persons in expedited proceedings initiated under Rule 9552 to request a hearing, which stays the effective date of the suspension.

²¹ *Dep't of Enforcement v. North Woodward Fin. Corp.*, No. 2010021303301, 2014 FINRA Discip. LEXIS 32, at *19 (NAC July 21, 2014) (citation omitted), *aff'd*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867 (May 8, 2015), *aff'd sub nom. Troszak v. SEC*, No. 15-3729 (6th Cir. June 29, 2016); *accord Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *54 (Sept. 24, 2015).

²² *See CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *15 (Jan. 20, 2009) (holding that firms and associated persons must cooperate fully in providing requested information).

²³ *Mielke*, 2015 SEC LEXIS 3927, at *54-55 n.46.

²⁴ *Charles C. Fawcett*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *23 (Nov. 8, 2007); *Richard J. Rouse*, 51 S.E.C. 581, 584 (1993).

²⁵ *North Woodward Fin. Corp.*, 2014 FINRA Discip. LEXIS 32, at *20 (citing *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008)); *see Dep't of Enforcement v. Jarkas*, No. 2009017899801, 2015 FINRA Discip. LEXIS 50, at *46-47 (NAC Oct. 5, 2015) (citation omitted) ("Delay and neglect on the part of members and their associated persons undermine the ability of [FINRA] to conduct investigations and thereby protect the public interest.").

IV. Toomer's Defenses Are Without Merit

Toomer does not dispute that FINRA had jurisdiction to issue the January 20, 2016 Rule 8210 request. Nor does he claim that the request is overly broad or burdensome, or that he does not have the requested documents and information. He also concedes he did not fully comply with the request.²⁶ Instead, he asserts various defenses and justifications for his failure to comply, some of which he did not raise in his hearing request. We first address the defenses raised in the hearing request.

A. The Defenses Toomer Raised in the Hearing Request

Toomer's primary defense is that he has a constitutional right to refuse to produce the requested information under the Fifth Amendment to the United States Constitution. We reject Toomer's constitutional defense. It is well established that the constitutional protections under the Fifth Amendment are inapplicable to FINRA proceedings because the Fifth Amendment restricts only government conduct, and FINRA is not a state actor.²⁷ FINRA can be subject to the Fifth Amendment only if it engages in state action by closely coordinating with a government investigation.²⁸

Here, however, Toomer concedes that there is no evidence that FINRA is a state actor.²⁹ Nevertheless, he argues that he can invoke the Fifth Amendment because, as Enforcement's Rule 8210 letter informed him, the information he provides to FINRA may in turn be produced to government law enforcement authorities and securities regulators.³⁰ The National Adjudicatory Council ("NAC") has rejected this argument. In *Department of Enforcement v. Levitov*,³¹ respondents, who were under indictment in a matter related to FINRA's investigation, argued that if they participated in an on-the-record interview before the resolution of their criminal

²⁶ Toomer Pre-Hearing Brief, at 4.

²⁷ See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982) (noting that the Fifth and Fourteenth Amendments to the U.S. Constitution protect individuals only against violation of constitutional rights by the government, not private actors); *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) (finding that NASD is not a state actor, and constitutional requirements generally do not apply to it); *Dep't of Enforcement v. Fawcett*, No. C9A040024, 2007 NASD Discip. LEXIS 2, at *14 (NAC Jan. 8, 2007), *aff'd*, 2007 SEC LEXIS 2598.

²⁸ Courts have held that the Fifth Amendment and other constitutional provisions limit only government conduct and will restrict a private entity such as FINRA only if its actions are found to be "fairly attributable" to the government. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Actions are "fairly attributable" to the government where "there is a sufficiently close nexus between the State and the challenged action." *D.L. Cromwell Invs., Inc. v. NASD Reg., Inc.*, 279 F.3d 155, 161 (2d Cir. 2002) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

²⁹ While conceding that FINRA is not a state actor, Toomer said in his pre-hearing brief that he "reserves the right to argue that FINRA has engaged in state action, subjecting it to the Fifth Amendment, if information comes to light that there has been cooperation and/or interaction between FINRA and the government that would justify a finding that FINRA has effectively engaged in state action." Toomer Pre-Hearing Brief, at 11 n.1. Toomer submitted no evidence in this proceeding that FINRA coordinated its investigation with a government agency.

³⁰ Toomer Pre-Hearing Brief, at 7 (citing *U.S. v. Balsys*, 524 U.S. 666, 692 (1998)).

³¹ *Dep't of Enforcement v. Levitov*, No. CAF980025, 1999 NASD Discip. LEXIS 30 (NAC Nov. 1, 1999).

cases, Enforcement would provide copies of the transcripts of their testimony to the government. They argued they would be denied their Fifth Amendment privilege against self-incrimination. The NAC held that “respondents in failure-to-respond cases cannot raise the purpose of the information requests as part of a substantive defense.”³² The fact that FINRA may share information with criminal authorities does not excuse associated persons from their obligation to cooperate with FINRA. Furthermore, FINRA is not required to postpone an investigation because of a related criminal action.³³

Toomer requested a stay of all proceedings against him, including the request for production of documents and information, pending resolution of the parallel criminal proceeding, *United States v. Toomer*, No. 15-cr-640 (JLL) (D.N.J.). FINRA and the SEC have repeatedly stated that reliance on the Fifth Amendment protection against self-incrimination is not a valid defense to avoid producing information in a FINRA investigation.³⁴ Thus, we deny his request for a stay.

B. Toomer’s Additional Defenses and Arguments

At the hearing and in his written submissions, Toomer asserted a number of defenses and arguments he did not raise in his hearing request. FINRA Rule 9552(c), however, precludes him from doing so. This Rule requires that a hearing request “set forth with specificity any and all defenses to the FINRA action.” In his hearing request, Toomer’s counsel stated that he had set forth Toomer’s defenses with particularity. Nevertheless, we considered each of his additional defenses, and we find them meritless with respect to the outstanding Rule 8210 request.

Toomer contends he should not be barred for his refusal to provide all of the requested documents and information. Rather, Toomer asks that the Hearing Panel suspend him “until resolution of the [criminal matter], at which time FINRA should be permitted to renew its Rule 8210 request.”³⁵ Toomer also offers to provide to Enforcement any documents he receives from the Office of the United States Attorney prosecuting his criminal case, so long as the government agrees. To obtain these documents, Toomer says, Enforcement “would have to work with counsel for Mr. Toomer to identify which documents it would like, then Mr. Toomer’s counsel would have to seek approval” from the government. As Toomer puts it, by making this offer, he is not “ignoring the Rule 8210 request, but rather is willing to work” with Enforcement.³⁶ The

³² *Id.* at *13-14.

³³ *Id.* at *15.

³⁴ *Michael Nicholas Romano*, Exchange Act Release No. 76011, 2015 SEC LEXIS 3980, at *23 (Sept. 29, 2015); *Dep’t of Enforcement v. Legacy Trading Co., LLC*, No. 2005000879302, 2010 FINRA Discip. LEXIS 20, at *18-19 (NAC Oct. 8, 2010). *See also, e.g., Dep’t of Enforcement v. Carney*, No. C8A000024, 2001 NASD Discip. LEXIS 21, at *37-38 (OHO Feb. 2, 2001) (invoking Fifth Amendment privilege against self-incrimination when refusing to answer completely all questions at on-the-record interview does not mitigate sanctions); *Dep’t of Enforcement v. Milligan*, No. C10990058, 1999 NASD Discip. LEXIS 47 (OHO Nov. 22, 1999) (invoking Fifth Amendment during a pending federal criminal proceeding does not mitigate sanctions).

³⁵ Toomer Pre-Hearing Brief, at 6. Toomer also says a two-year suspension would be appropriate.

³⁶ Toomer Pre-Hearing Reply Brief, at 3-4.

Hearing Panel rejects Toomer's attempts to negotiate his responses to Enforcement's requests for documents and information. The SEC has made it clear that "associated persons may not decide which specific FINRA information requests they will fulfill."³⁷ Furthermore, Toomer's proposed sanction of a term of suspension is open-ended and indefinite and accordingly presents no guarantee that he will ultimately produce the requested information.

Toomer further argues that imposing a bar in this case would be punitive rather than remedial.³⁸ The SEC has held that barring an individual for violating Rule 8210 is remedial, and not punitive, reasoning that "[t]he possibility of receiving a bar for a failure to cooperate may have a very specific deterrent effect on all current and future [self-regulatory organization] members and associated persons.... [A]ssociated persons who ... are approached by NASD with requests for information as part of an investigation should be deprived of any incentive to fail to cooperate."³⁹ The SEC added that a failure to cooperate with a request for information "renders the violator presumptively unfit for employment in the securities industry because the self-regulatory system of securities regulation cannot function without compliance with Rule 8210 requests."⁴⁰

Toomer also claims that his reliance on the advice of counsel supports a sanction less than a bar.⁴¹ The Hearing Panel finds Toomer's reliance on his attorney's advice does not excuse his refusal to produce information and documents and is not mitigating in this case. FINRA and the SEC have repeatedly held that reliance on counsel does not excuse an associated person's obligation to supply information or testimony or otherwise cooperate with FINRA's investigations.⁴² Reliance on the advice of counsel can be considered mitigating if the respondent sought the advice "for the purpose of ensuring that one has not violated applicable securities laws and rules."⁴³ Advice that leads a respondent to fail to comply with securities laws and

³⁷ *Mielke*, 2015 SEC LEXIS 3927, at *55-56 (citing *CMG Inst. Trading, LLC*, 2009 SEC LEXIS 215, at *21 (associated persons "may not ignore NASD inquiries; nor take it upon themselves to determine whether information is material to an NASD investigation of their conduct"))).

³⁸ Toomer Pre-Hearing Brief, at 14; Toomer Pre-Hearing Reply Brief, at 1.

³⁹ *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *14-15 (Apr. 11, 2008), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009).

⁴⁰ *Id.* at *10.

⁴¹ FINRA's Sanction Guidelines ("Guidelines") at 6 (2015) (Principal Considerations in Determining Sanctions No. 6), <http://www.finra.org/industry/sanction-guidelines> (whether respondent demonstrated reasonable reliance on competent legal or accounting advice).

⁴² *Toni Valentino*, 57 S.E.C. 330, 338-39 (2004) (citing *Joseph G. Chiulli*, 54 S.E.C. 515, 524 (2000)); *see also Sundra Escott-Russell*, 54 S.E.C. 867, 873 (2000) (finding that respondent "was not relieved of her obligation to respond to NASD's requests by her lawyer's advice").

⁴³ *Dep't of Enforcement v. Quattrone*, No. CAF030008, 2004 NASD Discip. LEXIS 17, at *52-53 (NAC Nov. 22, 2004), *rev'd on other grounds*, *Frank P. Quattrone*, Exchange Act Release No. 53547, 2006 SEC LEXIS 703 (Mar. 24, 2006). *See also Dep't of Enforcement v. Walblay*, No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at *16 (NAC Feb. 25, 2014) ("While reasonable reliance on competent legal advice can be mitigating for purposes of assessing sanctions, a respondent's reliance on an attorney's legal advice 'is immaterial to an associated person's obligation to supply requested information' to FINRA.") (quoting *Michael Markowski*, 51 S.E.C. 553, 557 (1993), *aff'd*,

regulations is not mitigating. Toomer's attorney's advice was a strategy to avoid compliance with his obligations under Rule 8210 and accordingly his reliance on such advice is not mitigating.⁴⁴

Toomer also argues that his lack of a disciplinary history should mitigate in favor of a reduced sanction.⁴⁵ But lack of a disciplinary record is not a mitigating factor.⁴⁶

Finally, citing the Guidelines' Principal Considerations in Determining Sanctions, Toomer argues that the Hearing Panel should take into consideration that he (i) did not engage in numerous acts or a pattern of misconduct over an extended period of time; (ii) did not attempt to conceal his refusal to comply with the Rule 8210 requests; and (iii) did not directly or indirectly cause injury to third parties.⁴⁷ Whether or not these factors are present here, the Guidelines provide that the absence of these aggravating factors is not mitigating.⁴⁸ The Hearing Panel does not find Toomer's mitigation arguments persuasive, particularly in view of the gravity of the allegations against him. The Hearing Panel has also considered that it is unlikely that Toomer will ever produce any information. During the hearing, Toomer's attorney said she would advise Toomer not to attend an on-the-record interview if, during Enforcement's investigation, it served him with a Rule 8210 request to provide sworn testimony.⁴⁹ This statement further supports our determination that Toomer made a conscious decision not to comply with Enforcement's request even though he was told that a failure to comply could result in a disciplinary action that could lead to sanctions, including a bar. The Hearing Panel finds that if associated persons could invoke the Fifth Amendment for purposes of mitigating sanctions, it effectively would result in recognizing a privilege that does not exist in FINRA investigations and disciplinary and expedited proceedings.

⁴⁴ *Quattrone*, 2004 NASD Discip LEXIS 17, at *53 (Advice of counsel is not mitigating when it is "premised on a strategy for a respondent to avoid full compliance with applicable regulatory requirements for any reason, including the desire to avoid greater liability or jeopardy.").

⁴⁵ Toomer Pre-Hearing Brief, at 12 (citing Guidelines at 6, Principal Considerations in Determining Sanctions No. 1); Hearing Transcript ("Tr.") 47-48.

⁴⁶ *Quattrone*, 2004 NASD Discip. LEXIS 17, at *54 (citing *Dep't of Enforcement v. Balbirer*, No. C07980011, 1999 NASD Discip. LEXIS 29, at *10 (NAC Oct. 18, 1999) ("We are not compelled to reward a respondent because he has acted in the manner in which he agreed (and was required) to act when entering this industry as a registered person.")).

⁴⁷ Toomer Pre-Hearing Brief, at 13-14 (citing Guidelines at 6 (Principal Considerations in Determining Sanctions Nos. 7, 8, 9, 10, 11)); Tr. 47-49.

⁴⁸ The Guidelines state, "[T]he presence of certain factors may be aggravating but their absence does not draw an inference of mitigation." Guidelines at 6.

⁴⁹ Tr. 60-61.

In sum, we conclude that Toomer violated FINRA Rules 8210 and 2010 by not producing all of the documents and information FINRA staff sought in the January 20, 2016 Rule 8210 request.⁵⁰

V. Sanctions

FINRA Rule 9559(n)(1) governs sanctions in an expedited proceeding brought under Rule 9552. The Rule provides that the Hearing Panel “may approve, modify or withdraw any and all sanctions, requirements, restrictions or limitations imposed by the notice and ... may also impose any other fitting sanction.” The Hearing Panel therefore has broad discretion to impose an appropriate sanction. After carefully considering the facts and circumstances of this case, as well as the arguments the parties presented in their written briefs and during their oral arguments at the hearing, the Hearing Panel bars Toomer from associating with any member firm in any capacity as of the date of this decision.

In determining that an immediate bar is appropriate under the facts and circumstances of this case, we considered the Guidelines for failure to respond to Rule 8210 requests for information. The Guidelines recommend that, if an individual did not respond in any manner, a bar in all capacities should be standard.⁵¹ The Guidelines further provide that a bar is standard when an individual provided a partial response unless the person can demonstrate that the information provided substantially complied with all aspects of the request.⁵² Toomer partially responded to Enforcement’s request for information by providing a copy of his indictment, responding to Item No. 5 of Enforcement’s Rule 8210 request (which included a request for “copies of court documents”). Therefore, the Guidelines for a partial but incomplete response apply here.⁵³ Because Toomer produced a copy of just one publicly available document and failed to produce documents and information responsive to the other seven Items Enforcement sought, the Hearing Panel finds that he did not “substantially comply” with the Rule 8210 request.

The Guidelines contain Principal Considerations in determining sanctions for a partial but incomplete response to Rule 8210 requests for information: (1) the importance of the information requested but not provided (as viewed from FINRA’s perspective), and whether the information provided was relevant and responsive to the request; (2) the number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a

⁵⁰ A violation of Rule 8210 constitutes a violation of Rule 2010. *See Dep’t of Enforcement v. Reichman*, No. 200801201960, 2011 FINRA Discip. LEXIS 18, at *29 (NAC July 21, 2011).

⁵¹ Guidelines at 33.

⁵² Guidelines at 33.

⁵³ *See John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *55-57 (June 14, 2013) (remanding so that FINRA may analyze respondent’s violation of Rule 8210 using Sanction Guidelines for a partial response) (citing *Kent M. Houston*, Exchange Act Release No. 66014, 2011 SEC LEXIS 4491, at *27 (Dec. 20, 2011)).

response; and (3) whether the respondent thoroughly explained valid reason(s) for deficiencies in the response.⁵⁴

The misconduct under investigation was serious and the information Enforcement requested was important. “Fraud violations ... are especially serious and subject to the severest of sanctions under the securities laws.”⁵⁵ The information Toomer withheld is critical to Enforcement’s investigation into whether he participated in a scheme to fraudulently manipulate securities, as alleged by the government. Accordingly, the missing information was important from Enforcement’s perspective. Toomer’s refusal to produce documents and information also impairs FINRA’s ability to investigate possible wrongdoing by other FINRA registered persons who may have participated in the manipulative scheme.

We also we note that more than eight months have passed since Enforcement requested the information, and Toomer has yet to produce any information beyond the publicly available copy of the indictment. His obdurate refusal to produce responsive documents and information forced Enforcement to issue the May 12, 2016 Notice of Suspension under Rule 9552. Toomer continues to insist he will not produce the requested documents and information while his criminal proceeding remains pending despite the well-settled jurisprudence that respondents must fully and promptly cooperate with FINRA.

In conclusion, after carefully considering the facts and circumstances present in this case and the arguments of the parties, the Hearing Panel finds that the appropriate sanction is to bar Toomer from associating with any FINRA member firm in any capacity.

VI. Order

Respondent Donald Shelby Toomer is barred from associating with any FINRA member firm in any capacity for refusing to produce information and documents, in violation of FINRA Rules 8210 and 2010. Pursuant to Rule 9559(n)(4), Respondent is also ordered to pay hearing costs of \$1,280.24, which includes a \$750 administrative fee and the cost of the hearing transcript. The costs are due immediately upon issuance of this Decision. The bar shall be effective upon service of this Decision.⁵⁶

Michael J. Dixon
Hearing Officer
For the Hearing Panel

⁵⁴ *Id.*

⁵⁵ *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *36 (Mar. 31, 2016) (internal quotation marks omitted).

⁵⁶ The Hearing Panel considered and rejected without discussion all other arguments of the parties.