

This Order has been published by NASD's Office of Hearing Officers and should be cited as OHO Order 05-07 (CAF040079).

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. CAF040079

Hearing Officer – DRP

**ORDER DENYING RESPONDENT'S MOTION TO QUASH
AND MOTION FOR A PROTECTIVE ORDER**

On November 8, 2004, the Department of Enforcement filed a four-count Complaint against Respondent alleging, among other charges, that the firm, through its registered representatives, violated Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 promulgated thereunder, and NASD Conduct Rules 2120 and 2110 by making material misrepresentations and omissions of fact in connection with the purchase or sale of securities, namely Enron bonds, sold to more than 800 customers in October and November 2001. On December 23, 2004, Respondent filed an Answer, denying the charges and requesting a hearing. The hearing is set to commence on October 17, 2005.

On February 25, 2005, Respondent filed the instant motion to quash (in part) the Department of Enforcement's request for information dated September 16, 2004. Respondent alleges that Enforcement's request seeks to compel Respondent to create documents that do not exist, for the sole purpose of supporting Enforcement's litigation strategy. Respondent also seeks a protective order prohibiting Enforcement from any future requests for information under Procedural Rule 8210 that "inappropriately attempt to shift the burdens of litigation" to

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Respondent. Enforcement filed its opposition on March 11, 2005.¹ For the reasons set forth below, Respondent's motion is denied in its entirety.

Respondent is aggrieved by the staff's September 16, 2004 request that Respondent "identify the amount of actual losses each [customer] sustained as a result of Enron bonds purchased during October and November 2001." Former counsel for Respondent told the staff that Respondent had not performed the requested calculations but would produce all documents necessary for Enforcement to do so and asked the staff to withdraw its request. By letter dated November 17, 2004, the staff refused to withdraw its request and warned that Respondent's failure to provide the information could result in the filing of disciplinary charges.

Respondent argues that Enforcement's request is beyond the scope of Rule 8210 and has no purpose other than to shift the burden of litigation onto Respondent. Respondent contends that "principles of fairness" dictate that Rule 8210 cannot be used in this fashion and moves to quash the request. Respondent fails, however, to address a preliminary issue: whether the Hearing Officer has authority to quash a pre-Complaint request for information.

In the absence of subpoena power, NASD must rely on Rule 8210² to obtain information from members in the course of its investigations. *Dep't of Enforcement v. Quattrone*, No. CAF030008, 2004 NASD Discip. LEXIS 17, at *46 (NAC Nov. 22, 2004). For this reason, the SEC has "repeatedly stressed the importance of cooperation in NASD investigations[,] . . . [and] emphasized that the failure to provide information undermines the NASD's ability to carry out its self-regulatory functions." *Joseph P. Hannan*, Exchange Act Rel. No. 40438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998) (internal citations omitted).

¹ The Hearing Officer did not permit Respondent to file a reply brief.

² Rule 8210 provides that NASD shall have the right to require a member to provide information ... "with respect to any matter involved in the investigation, complaint, examination or proceeding ...[.]"

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Accordingly, members and associated persons have a duty to cooperate fully and promptly with NASD requests for information. *Brian L. Gibbons*, Exchange Act Rel. No. 37170, 1996 SEC LEXIS 1291, at *7 (May 8, 1996), *aff'd*, 112 F.3d 516 (9th Cir. 1997). A member who fails to do so risks possible disciplinary action.

Respondent cites no legal authority to support its motion to quash a *pre*-Complaint request for information. Rule 9251(a)(2) requires the staff to “promptly inform the Hearing Officer and each other [p]arty” of *post*-Complaint requests for information issued pursuant to Rule 8210. As the commentary regarding Rules 8210 and 9251(a)(2) demonstrates and prior decisions have held, a Hearing Officer may limit Enforcement’s *post*-Complaint use of Rule 8210 in order to ensure a fundamentally fair proceeding.³ A Hearing Officer has no similar authority to limit requests for information under Rule 8210 issued *prior* to the issuance of a Complaint, however. That a disciplinary proceeding was commenced while a request was pending neither triggers the staff’s obligation to notify the Hearing Officer under Rule 9251, nor confers jurisdiction on the Hearing Officer to intercede regarding a previously-issued request. Respondent’s motion to quash is denied.

Respondent also fails to cite any authority to support its request for a protective order.⁴ Respondent asks the Hearing Officer to prohibit Enforcement from: (1) issuing future requests under Rule 8210 that “inappropriately attempt to shift the burdens of litigation” to Respondent, and (2) threatening additional charges for failure to comply with “improper” requests under Rule

³ See OHO Order 01-04 (CAF000045) at 8-9 (internal citations omitted) (motion to quash Enforcement’s requests for information regarding affirmative defenses granted to allow parties to complete discovery and propose case-management plan); OHO Order 00-21 (C3A990071) at 4-5 (internal citations omitted) (motion to quash Enforcement’s request for testimony regarding affirmative defenses denied).

⁴ A party may seek a protective order pursuant to Rule 9146(k) to limit or prohibit disclosure of a document containing confidential information to “other [parties], witnesses or other persons, except the Department of Enforcement and the Department of Market Regulation and other Association staff....” Respondent does not invoke this Rule, which is obviously inapplicable here.

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8210. In essence, Respondent seeks prospective relief regarding requests for information that have yet to (and may never) be issued. Respondent also asks the Hearing Officer to determine that certain requests are "improper" or "inappropriate" and to forbid Enforcement from "threatening" to file charges against Respondent for violating Rule 8210.

It would be improper to offer the advisory opinion Respondent seeks regarding the staff's future use of Rule 8210 or to limit Enforcement's discretion to file disciplinary charges. If and when those issues become justiciable, Respondent may seek appropriate relief. Respondent's motion for a protective order is denied.

SO ORDERED.

Dana R. Pisanelli
Hearing Officer

Dated: March 15, 2005
Washington, DC