FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. [redacted] (CRD No. [redacted]), Respondent.	Expedited Proceeding No. FPI210005 STAR No. 2020066797301 Hearing Officer–LOM

AMENDED ORDER SETTING HEARING AND OTHER DEADLINES[1]

I. Introduction

This is an expedited proceeding brought by FINRA's Department of Enforcement concerning the alleged failure of Respondent Darryl Matthew Cohen to respond timely and completely to multiple requests for information and documents pursuant to FINRA Rule 8210 ("Rule 8210"). Cohen has been represented by counsel in connection with the Rule 8210 requests and throughout this proceeding.

I originally set a one-day hearing for August 9, 2021, but prior to that date the parties sought a delay. Respondent now seeks an indefinite postponement of the hearing based on a medical condition.

For the reasons discussed below, I reject the request for an indefinite postponement and ORDER that the hearing be held by videoconference, for two days if necessary, starting on October 25, 2021. We will employ certain accommodations as set forth below to enable Respondent to participate. I further order Respondent to file status updates on September 13 and October 13, 2021. This Order does not foreclose the parties from requesting any other accommodation.

[1] This Order amends certain footnote citations to Respondent's exhibits to his brief and makes no substantive changes.

II. History of Proceeding

Pursuant to FINRA Rule 9552, Enforcement issued a Notice of Suspension to Respondent on June 16, 2021, informing him that he would be suspended in 21 days if he did not take corrective action before the end of that period.

FINRA Rule 9552(e) permits a person served with a Notice of Suspension pursuant to Rule 9552 to file a written request for a hearing conducted pursuant to FINRA Rule 9559. Through counsel, on July 9, 2021, Respondent timely filed a request for a hearing which, under FINRA Rule 9559(c), stayed the suspension.

FINRA Rule 9559(f)(4) provides that a hearing regarding a Notice of Suspension pursuant to Rule 9552 "shall be held within 30 days" after the respondent files a written request for a hearing. In accord with that provision, I set the hearing in this matter for August 9, 2021.

On July 27, 2021, Enforcement filed an unopposed motion to extend the hearing date and other deadlines to the end of August or beginning of September. In that filing, Enforcement said that Respondent had asserted to Enforcement that he is currently unable to participate in the hearing due to a medical condition. Enforcement said it needed additional time to consider a new document Respondent had provided about his medical condition and an additional document with updated information that he promised to provide at an unspecified date. Enforcement did not supply any further information to support the proposed change in hearing date and other deadlines.

A Hearing Officer has discretion under Rule 9559(d)(6) to shorten or extend dates in the schedule, including the hearing date, with the consent of the parties or for good cause shown. But that discretion is exercised in conjunction with a Hearing Officer's responsibility pursuant to FINRA Rules 9559(d)(4) and 9235 "to do all things necessary and appropriate" in the discharge of the Hearing Officer's duties. Those duties include regulating the course of the hearing in an efficient manner consistent with the expedited nature of the proceeding. FINRA is expressly permitted to bring expedited proceedings for alleged Rule 8210 violations for the purpose of providing "a procedural mechanism for FINRA to address certain types of misconduct in an accelerated timeframe."[2] Alternatively, a disciplinary proceeding that does not follow an accelerated schedule can also be brought for an alleged violation of Rule 8210.[3]

The motion to extend the hearing date in this expedited proceeding was denied for lack of good cause shown. The Securities and Exchange Commission ("SEC") has approved the use of that standard when considering whether to postpone the hearing in a Rule 8210 expedited

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[2] *See* FINRA Regulatory Notice 10-13 (Feb. 2010) 1, 2, https://www.finra.org/rules-guidance/notices/10-13.

[3] *Christine D. Memet*, Exchange Act Release No. 83711, 2018 SEC LEXIS 1876, at *4 (July 25, 2018) ("[E]xpedited proceedings and disciplinary proceedings are two separate avenues for addressing Rule 8210 violations.") (quotations and punctuation omitted); *Destina Mantar*, Exchange Act Release No. 79851, 2017 SEC LEXIS 194, at *11 (Jan. 19, 2017) (same).

proceeding, noting the "general fairness" of the good cause standard.[4] Indeed, the SEC has considered hearing postponement requests in its own administrative proceedings based on a good cause standard.[5]

Subsequently, I held a status conference on July 30, 2021. The parties discussed the reason for the motion to extend the time. Respondent's counsel asserted that Respondent suffers from a condition that renders him currently unable to participate in a hearing and referred to a May 14 letter from the medical professional who is treating Respondent. Neither party filed the May 14 letter with the Office of Hearing Officers,[6] and the nature of Respondent's condition was not described at the status conference [redacted]. I removed the hearing from my docket and set a schedule for Respondent's counsel to submit briefing and documentary support regarding Respondent's current medical condition and how it might affect his ability to participate in the hearing. I gave Enforcement time to respond.[7]

After the parties filed their papers concerning Respondent's current medical condition and the scheduling of the hearing, along with their pre-hearing submissions, I held another status conference on August 17, 2021.

III. The Parties' Positions on Setting the Hearing

A. Respondent

Through counsel, Respondent took the position in his pre-hearing brief and at the August 17 status conference that he cannot currently participate in a hearing because [redacted] for him. [redacted] and "is entitled to an accommodation." The accommodation he seeks is that the hearing should be postponed [redacted][8] This is in effect a request for an indefinite delay, because there is no indication when, if ever, or under what circumstances, the doctors might consider him able to testify.[9]

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[4] *Michael Nicholas Romano*, Exchange Act Release No. 76011, 2015 SEC LEXIS 3980, at *17–18 (Sept. 29, 2015).

[5] *Id.* at *17 n.18 (citing *John Roger Faherty*, Exchange Act Release No. 41454, 1999 SEC LEXIS 1067, at *2 (May 26, 1999)).

[6] Respondent's request for a hearing filed with the Office of Hearing Officers stated that it enclosed a May 14, 2021 letter [redacted] The filing did not include either document.

[7] Order Memorializing Rulings at Status Conference dated July 30, 2021 ("July 30 Order").

[8] Respondent Darryl Cohen's Pre-Hearing Brief ("Resp. Pre-Hr'g Br.") 2.

[9] At the status conference on August 17, 2021, Respondent's counsel denied that Respondent had requested an indefinite postponement. But in effect, without any end point or limiting factor, it is a request for an indefinite postponement.

In support, Respondent submitted four letters [redacted].[10] The first letter was dated December 9, 2020, and the most recent letter is dated July 22, 2021. [redacted][11] In a May 14, 2021 letter, [redacted] suggested that Respondent "may possibly" return to work January 1, 2022, "if improvements occur [redacted]."[12] And in her most recent letter, dated July 22, 2021, [redacted] concluded that the January 2022 date for returning to work would have to be "reassessed on a periodic basis."[13]

B. Enforcement

Enforcement opposed the indefinite extension of time for the hearing but did not suggest a new hearing date.[14] At the August 17, 2021 status conference, Enforcement expressed concern that an extension of time might lead to another extension and another, in serial fashion. In practical terms, repeated extensions would become the equivalent of an indefinite continuance of the proceeding.

IV. Discussion

A. Respondent's Request for an Indefinite Postponement of the Hearing Is Denied

As a threshold matter, I note that Respondent is the party who sought a hearing. In an expedited proceeding under FINRA Rule 9552, a hearing is an opportunity for a respondent to defend his actions in response to Enforcement's Rule 8210 requests and have an adjudicatory panel independent of Enforcement determine whether he violated Rule 8210.

Here, however, Respondent seeks to turn the opportunity he is afforded under FINRA Rule 9552 to defend his actions into something different. He seeks to turn it into a shield from regulatory oversight. Although he requested a hearing, Respondent argues that the hearing must be indefinitely delayed because of his [redacted]. If the stay that results from Respondent's hearing request were to remain in place indefinitely, he would avoid accountability indefinitely. That is a result contrary to FINRA's regulatory mission and its

[10] On August 9, 2021, pursuant to my July 30 Order, Respondent filed a brief addressing his ability to participate in the hearing with copies of these four letters attached as Exhibits A–D.

[11] Resp. Pre-Hr'g Br. Exhibit B.

[12] Resp. Pre-Hr'g Br. Exhibit C.

[13] Resp. Pre-Hr'g Br. Exhibit D.

[14] Enforcement's Response to Cohen's Prehearing Brief ("Enf. Response").

responsibility as an SRO (self-regulatory organization) for overseeing the conduct of member firms and their associated persons.[15]

An indefinite stay of this proceeding would be a perversion of the expedited process for enforcing Rule 8210. The SEC has endorsed the use of an expedited proceeding like this for violations of Rule 8210 because an expedited proceeding promotes an "efficient disciplinary process."[16] According to the SEC, "[A]n open-ended stay runs counter to the overall purpose of an expedited proceeding." In affirming FINRA's refusal to grant an indefinite stay of a Rule 8210 expedited proceeding, the SEC has said that an indefinite stay would delay and thwart FINRA's investigation and threaten "the public interest in prompt and effective regulatory enforcement."[17] As is widely recognized, Rule 8210 "is the principal means by which FINRA obtains information from member firms and associated persons in order to detect and address industry misconduct."[18] The SEC considers the Rule "essential to FINRA's ability to investigate possible misconduct by its members and associated persons,"[19] because FINRA lacks subpoena power.[20]

Respondent cites no FINRA precedent for an indefinite stay of an expedited hearing. He contends instead that if FINRA does not accommodate his disability by postponing the hearing it would be engaged in disability-based discrimination in violation of six federal and state statutes.[21] That contention lacks merit. The cited statutes apply in circumstances far different from the circumstances here and to entities different from FINRA:

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[15] *See, e.g., Stratton Oakmont, Inc.*, Exchange Act Release No. 38390, 1997 SEC LEXIS 562, at *9 (Mar. 12, 1997) (ability to police members' compliance with federal securities laws and SRO rules is "core component" of SRO's regulatory function); *William Edward Daniel*, Exchange Act Release No. 28408, 1990 SEC LEXIS 3063, at *9 (Sept. 6,1990) (responsibility of an SRO to investigate allegations of misconduct and impose sanctions where appropriate is an "integral aspect" of statutory scheme to regulate securities brokers and protect investors).

[16] *Romano*, 2015 SEC LEXIS 3980, at *15 (quotations omitted).

[17] *Id.* at *10, 19.

[18] *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *54 n.46 (Sept. 24, 2015).

[19] *Id.* at *54.

[20] *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *23 (Nov. 8, 2007). Respondent argues that the hearing in this matter can be put off indefinitely without harm because Respondent is not currently working in the industry. Transcript of Pre-Hearing Conference (July 30, 2021) 9–10, 25. Respondent is mistaken. Although there is added urgency when a person being investigated for potential misconduct is still working in the industry and has the potential for committing more misconduct, it is still important to gather evidence of potential past wrongdoing promptly, so that it is not lost. When evidence is gathered closer in time to the activity under investigation, it may provide fresh leads to other evidence and additional wrongdoing. It is also important to gather evidence while FINRA has jurisdiction over the alleged wrongdoers, and, moreover, while it may be possible for any injured victims to receive recompense. *See*, *e.g.*, *Dep't of Enforcement v. Gruenberg*, No. FPI190005, 2019 FINRA Discip. LEXIS 33, at *25–26 (OHO Aug. 15, 2019) (delay could thwart FINRA's ability to fulfill its regulatory responsibilities, especially where FINRA might lose jurisdiction over the respondent, who was no longer working in the industry, in less than a year).

[21] Resp. Pre-Hr'g Br. 6–11.

i. Title I of the Americans with Disabilities Act ("ADA") applies to employers, employment agencies, and labor unions and prohibits discrimination on the basis of a disability in connection with job applications, hiring, firing, advancement, compensation, job training, and other job-related terms, conditions, and privileges.[22] The statute has no application to FINRA in the exercise of its regulatory responsibilities. Respondent is not FINRA's employee.

ii. Title II of the ADA applies to the provision of services by public entities, defined as state and local governments, their instrumentalities, and specified railway entities.[23] FINRA is not a governmental or railway entity.

iii. Title III of the ADA applies to places of public accommodation and commercial facilities. These are businesses that operate physical spaces open to the public, such as hotels, restaurants, movie theatres, schools, and recreation facilities.[24] A confidential FINRA regulatory proceeding is not a place of public accommodation.

iv. The Rehabilitation Act of 1973 applies only to federal agencies and contractors, and programs receiving federal financial assistance. It requires affirmative action and prohibits employment discrimination.[25] FINRA is not a federal agency or contractor and receives no federal funding.

v. California's Fair Employment and Housing Act applies to discrimination, retaliation, and harassment in employment and discrimination in connection with housing sales and rentals.[26] This proceeding is neither an employment nor a housing matter.

vi. California's Unruh Civil Rights Act prohibits any business in California from engaging in unlawful discrimination against a person within California's jurisdiction. It requires business establishments in California to provide equal accommodations, advantages, facilities, privileges, and services.[27] This statute

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[22] 42 U.S.C. § 12111(2) (covered entity defined as an employer, employment agency, labor organization, or joint labor-management committee); 42 U.S.C. § 12112 (a) and (b) (prohibits discrimination on the basis of a disability). *See, e.g., Silguero v. CSL Plasma, Inc*., 907 F.3d 323, 331 (5th Cir. 2018) (Title I protects only employees).

[23] 42 U.S.C. § 12131(1) (public entity defined as state or local government or instrumentality of such a governmental entity, and certain railway entities).

[24] 42 U.S.C. § 12181(7) (defining public accommodation to include hotels, restaurants, movie theatres, concert halls, grocery stores and other shopping establishments, schools, gyms, bowling alleys, golf courses, museums, libraries, and galleries and other places of public display).

[25] Sections 501, 503, and 504, of the Rehabilitation Act of 1973, codified as 29 U.S.C. §§ 701 et seq.

[26] California Government Code 12900–12996.

[27] California Civil Code Pt. 2, § 51.

> does not appear to apply here. Enforcement points out that Respondent resides in Nevada and has a Nevada driver's license.[28] In any event, in this proceeding FINRA is attempting to provide Respondent with the same kind of hearing that it would provide to any other respondent in similar circumstances. Respondent has failed to demonstrate how denying an indefinite postponement would be unlawful discrimination under the statute.

Although the statutes cited by Respondent have no application here, Respondent vaguely contends that they support an accommodation to Respondent's condition. And Respondent contends that the accommodation should be an indefinite postponement until his doctors declare him fit to participate in the hearing.[29]

Title I of the ADA, which concerns employment, contains the concept of "reasonable accommodation."[30] That may be a useful concept here. Whether an accommodation is reasonable requires consideration of the requesting party's disability and desires, but also consideration of the interests of the party from whom the accommodation is sought. In this case, that would include FINRA's ability to fulfill its statutory responsibilities and the public interest in effective regulation of the securities industry. Under the ADA and its regulations, both parties have a duty to assist in the search for a reasonable accommodation and to act in good faith in doing so.[31] In good faith, both parties here should cooperate in developing appropriate and reasonable accommodations to enable Respondent to participate in the hearing.

An indefinite postponement of the hearing in this expedited regulatory proceeding would not be a reasonable accommodation. Such a postponement would ignore the public interest in prompt resolution of an expedited proceeding and effective regulatory oversight of the securities markets and securities industry participants.

Furthermore, indefinite postponement is not the only alternative. I note that persons seeking [redacted] Respondent here asserts routinely testify in hearings on their claims, demonstrating that such

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[28] Enf. Response 9.

[29] Resp. Pre-Hr'g Br. 2, 6–12.

[30] 42 U.S.C. § 12111(9) (reasonable accommodation in the context of employment may include job restructuring and part-time or modified work schedule); 42 U.S.C. § 12112(b)(5)(A) (reasonable accommodation must be made unless covered entity can demonstrate that accommodation would impose an undue hardship on operation of the business); 42 U.S.C. § 12113(a) (defense to charge of discrimination may be established if qualification standards, tests, or selection criteria that tend to deny a job of benefit to individual with disability are shown to be job-related and not able to be addressed by reasonable accommodation).

[31] *Taylor v. Phoenixville Sch. Dist*., 184 F.3d 296, at *311–12 (3d Cir. 1999).

[redacted] do not automatically preclude sufferers from testifying in a legal proceeding.[32] Reasonable accommodations in the conduct of the hearing can be made.

B. The Hearing Is Set

Having rejected an indefinite postponement, I focus now on setting the hearing in this matter at a time that is consistent with the expedited nature of the proceeding and FINRA's statutory responsibilities, but also consistent with fundamental fairness to the parties and with the concept of reasonable accommodation. Based on the parties' and panelists' availability and the discussion at the August 17 status conference, I set the hearing to begin on October 25, 2021, and run two days if necessary.

In between now and then, Respondent is required to file two status reports regarding his medical condition and steps that can be taken to accommodate it. [redacted] The status reports are due to be filed and served September 13 and October 13, 2021. If necessary, I will schedule another pre-hearing status conference. I also may schedule a practice session to familiarize the parties and counsel with the videoconference technology.

The October 25, 2021 hearing date is more than two months from now and should give the parties, counsel, and the witnesses—including Respondent—enough time to prepare. The October hearing date is almost three months after the original hearing date and four months after the Notice of Suspension. This is not an extraordinary delay, but it is a delay. It allows Respondent more than the usual time to consider his response to the charge that he has not complied with Rule 8210.

The original hearing was scheduled for one day. Setting two hearing days should provide ample time for Respondent to receive full consideration of his defense and arguments in mitigation.

Setting two days for the hearing also will permit more breaks and shorter hearing days, thereby decreasing the stress imposed on Respondent. If Respondent develops difficulties while testifying at the hearing, his counsel may request a short break. This flexibility should ameliorate Respondent's difficulties while still allowing him to testify.

Finally, I note that the hearing in this case will take place by videoconference. This method of taking Respondent's testimony may also relieve some of the stress that comes with testifying in this proceeding. Respondent does not have to travel, which will allow him to be in a comfortable and familiar surrounding when he testifies.

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[32] *See*, *e.g.*, *Springer v. Saul*, 2019 U.S. Dist. LEXIS 170023 (D.S.D. Oct. 1, 2019); *Debiase v. Saul*, 2019 U.S. Dist. LEXIS 184847 (D. Conn. Oct. 25, 2019).

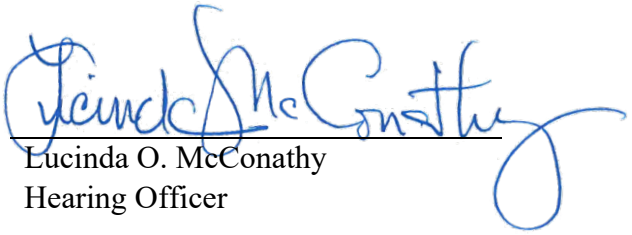
Respondent requested a hearing. He is entitled to a hearing. And a hearing will be provided with appropriate accommodations.

V. Order

Pursuant to FINRA Rule 9559, I ORDER the hearing to begin October 25, 2021, by videoconference, and run two days as necessary. The Office of Hearing Officers will issue a separate notice with the videoconference link and instructions for joining the hearing.

Any questions regarding this proceeding should be directed to Case Administrator Kate Shaffer at 202-728-8113 or kate.shaffer@finra.org.

SO ORDERED.



Lucinda O. McConathy
Hearing Officer

Date: August 24, 2021

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