

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JAMES G. MCKINNEY  
(CRD No. 2100850),

Respondent.

Disciplinary Proceeding  
No. 2018057829001

Hearing Officer–MJD

**DEFAULT DECISION**

February 27, 2020

**Respondent is barred from associating with any FINRA member firm in any capacity for failing to comply with requests for information and documents and failing to provide testimony during a FINRA investigation, in violation of FINRA Rules 8210 and 2010.**

*Appearances*

For the Complainant: Heather Hawker, Esq., and Douglas Ramsey, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: No appearance.

**DECISION**

FINRA opened an investigation into Respondent James G. McKinney's ("Respondent") potential involvement in undisclosed private securities transactions and his possible failure to disclose tax liens. Pursuant to FINRA Rule 8210, FINRA staff requested that Respondent provide information and documents and appear at an on-the-record interview ("OTR") to provide sworn testimony. Respondent did not produce the information and documents requested and did not appear for testimony. For violating FINRA Rules 8210 and 2010, Respondent is barred from associating with any FINRA member firm in any capacity.

The Department of Enforcement properly served Respondent with two Notices of Complaint and the Complaint. Respondent did not file an Answer to the Complaint. On January 21, 2020, Enforcement filed a Motion for Entry of Default Decision ("Default Motion") supported by the Declaration of Enforcement counsel Heather Hawker ("Hawker Decl.") and five exhibits (CX-1 through CX-5). Respondent did not respond to the Default Motion.

For the reasons set forth below, I find Respondent in default. I grant Enforcement's Default Motion and deem the facts alleged in the Complaint admitted pursuant to FINRA Rules 9215(f) and 9269(a).

## **I. Findings of Fact and Conclusions of Law**

### **A. Background**

Respondent entered the securities industry in 1990. He was registered with Cetera Advisors LLC ("Cetera") from September 2012 until August 2019 as an investment company and variable contracts products representative, a general securities representative, and a corporate securities representative. On August 1, 2019, Cetera filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") to terminate Respondent's registration.<sup>1</sup>

### **B. Jurisdiction**

Respondent was last registered with FINRA on August 1, 2019. Although he is not currently associated with a FINRA member firm, FINRA has jurisdiction over this disciplinary proceeding pursuant to Article V, Section 4(a) of FINRA's By-Laws because (i) the Complaint was filed within two years of the effective date of the Form U5 that terminated Respondent's association with a member firm, and (ii) the Complaint charges him with failing to comply with requests for information from FINRA staff while he was associated with a member firm and failing to attend an OTR within two years of the termination of his registration.<sup>2</sup>

### **C. Origin of the Investigation**

FINRA commenced an investigation in March 2018 into Respondent's possible participation in undisclosed private securities transactions, a potential violation of FINRA Rule 3280. The investigation later expanded to look into Respondent's possible failure to timely disclose two tax liens on his Uniform Application for Securities Industry Registration ("Form U4").<sup>3</sup> As part of the investigation, FINRA sought information and documents from Respondent before his OTR. The investigation led to the filing of the Complaint in this matter.

### **D. Respondent Defaulted by Failing to Answer the Complaint**

Enforcement served Respondent with the First and Second Notices of Complaint and the Complaint in accordance with FINRA Rules 9131 and 9134. Enforcement served the First Notice of Complaint and Complaint on November 5, 2019, and the Second Notice of Complaint and Complaint on December 4, 2019.<sup>4</sup> In each case, Enforcement served Respondent by certified

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<sup>1</sup> Hawker Decl. ¶ 3; CX-1, at 3, 5, 8.

<sup>2</sup> Hawker Decl. ¶¶ 3-4.

<sup>3</sup> Hawker Decl. ¶ 4. A failure to disclose material information on Form U4 violates FINRA Rules 1122 and 2010.

<sup>4</sup> Hawker Decl. ¶¶ 5, 8; CX-2; CX-3; CX-4; CX-5.

mail, return receipt requested, and by FedEx, to his last known residential address recorded in FINRA's Central Registration Depository ("CRD").<sup>5</sup> Respondent thus received valid constructive notice of this proceeding.<sup>6</sup>

Pursuant to FINRA Rule 9215, Respondent was required to file an Answer or otherwise respond to the Complaint by December 23, 2019. Respondent did not respond to the Complaint. I thus find that Respondent defaulted.

On December 30, 2019, I issued an Order instructing Enforcement to file a Default Motion. On January 21, 2020, Enforcement filed its Default Motion. Pursuant to FINRA Rules 9215(f) and 9269(a)(2), I grant the Default Motion,<sup>7</sup> and deem the allegations in the Complaint admitted.

**E. Respondent Violated FINRA Rules 8210 and 2010 by Failing to Produce Documents and Information and Failing to Appear to Provide Testimony**

The Complaint contains one cause of action. It alleges that Respondent violated FINRA Rules 8210 and 2010 by failing to comply with FINRA's requests to produce information and documents and by failing to provide sworn testimony at an OTR.<sup>8</sup>

Rule 8210 requires persons subject to its jurisdiction to provide information to FINRA upon request. Rule 8210(a)(1) authorizes FINRA, in the course of an investigation, to require persons subject to its jurisdiction to "provide information orally, in writing, or electronically ... and to testify at a location specified by FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in the investigation." Rule 8210(a)(2) authorizes FINRA to "inspect and copy the books, records, and accounts" of persons subject to its jurisdiction "with respect to any matter involved in the investigation ... that is in such ... person's possession, custody, or control." Rule 8210(c) provides that "[n]o 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."

Rule 8210 is among FINRA's most important tools for investigating potential wrongdoing.<sup>9</sup> "FINRA Rule 8210 is unequivocal and grants FINRA broad authority to obtain

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<sup>5</sup> Hawker Decl. ¶¶ 6, 9; CX-1, at 1; CX-2, at 1, 10-12; CX-3; CX-4, at 1, 11-14. Enforcement is not aware of any other address for Respondent besides the one recorded in CRD. Hawker Decl. ¶ 11.

<sup>6</sup> See, e.g., *Dep't of Enforcement v. Evansen*, No. 2010023724601, 2014 FINRA Discip. LEXIS 10, at \*20-21 & n.21 (NAC June 3, 2014), *aff'd*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080 (July 27, 2015).

<sup>7</sup> Respondent may move to set aside the default under FINRA Rule 9269(c) upon a showing of good cause.

<sup>8</sup> Complaint ("Compl.") at ¶¶ 10-11, 13, 15, 17.

<sup>9</sup> See *Dep't of Mkt. Regulation v. Sciascia*, No. CMS040069, 2006 NASD Discip. LEXIS 22, at \*11 (NAC Aug. 7, 2006) (analyzing NASD Rule 8210, the predecessor to FINRA Rule 8210).

information concerning an associated person's securities-related business ventures."<sup>10</sup> Associated persons must cooperate fully in providing FINRA with information.<sup>11</sup> It is therefore a violation of Rule 8210 for a person to fail to provide information sought by FINRA.<sup>12</sup>

## **1. Respondent Failed to Produce Information and Documents**

On July 12, 2019, FINRA sent Respondent a letter pursuant to FINRA Rule 8210 asking that he provide information and documents relevant to the staff's investigation.<sup>13</sup> Because Respondent did not respond, on August 15, 2019, FINRA staff sent Respondent another letter pursuant to Rule 8210 asking him to produce the information and documents sought in the prior letter. Respondent again failed to provide any of the information and documents FINRA sought.<sup>14</sup> FINRA staff sent both letters via first-class and certified mail to Respondent's last known address recorded in CRD. Respondent therefore had constructive notice of the requests.<sup>15</sup>

By failing to produce the information and documents requested by FINRA staff, Respondent violated FINRA Rules 8210 and 2010.<sup>16</sup>

## **2. Respondent Failed to Appear at an OTR**

On July 26, 2019, FINRA sent Respondent a letter pursuant to FINRA Rule 8210 requesting that he appear at FINRA's Denver office on August 29, 2019, to provide sworn testimony. Respondent did not appear for his OTR. On September 9, 2019, FINRA sent Respondent another letter pursuant to FINRA Rule 8210 asking that he provide testimony on

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<sup>10</sup> *Dep't of Enforcement v. Gallagher*, No. 2008011701203, 2012 FINRA Discip. LEXIS 61, at \*12 (NAC Dec. 12, 2012).

<sup>11</sup> *See CMG Inst'l Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at \*21 (Jan. 30, 2009) (member firms and their associated persons have an obligation to respond to FINRA's request for information "fully and promptly"). *See also Dep't of Enforcement v. Vedovino*, No. 2015048362402, 2019 FINRA Discip. LEXIS 20, at \*20 (NAC May 15, 2019) (FINRA Rule 8210 "requires associated persons to comply fully with FINRA's requests for information, testimony, and documents with respect to any matter involved in a FINRA investigation, complaint, examination, or proceeding.").

<sup>12</sup> *See Dep't of Enforcement v. Reifler*, No. 2016050924601, 2019 FINRA Discip. LEXIS 44, at \*10 (NAC Sept. 30, 2019) ("A violation of FINRA Rule 8210 occurs when an associated person fails to provide full and prompt cooperation to FINRA in response to a request for information."), *appeal docketed*, No. 3-19589 (SEC Oct. 10, 2019).

<sup>13</sup> Respondent produced information and documents in response to two prior letters FINRA sent him pursuant to Rule 8210 in March and April 2019. Compl. ¶ 10.

<sup>14</sup> Compl. ¶¶ 11-14.

<sup>15</sup> Compl. ¶¶ 11, 13. *See* FINRA Rule 8210(d) (stating that a notice issued under FINRA Rule 8210 is "deemed received" by a currently or formerly registered person when it is mailed to the person's last known residential address as reflected in CRD).

<sup>16</sup> FINRA Rule 2010 requires a member to "observe high standards of commercial honor and just and equitable principles of trade." It is well established that a violation of Rule 8210 is also a violation of Rule 2010. *See CMG Inst'l Trading*, 2009 SEC LEXIS 215, at \*29-30; *Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999).

September 18, 2019. Respondent again did not appear. FINRA sent the two letters via first-class and certified mail to Respondent's CRD address.<sup>17</sup>

By failing to provide sworn testimony at an OTR, Respondent violated FINRA Rules 8210 and 2010.

## II. Sanctions

FINRA's Sanction Guidelines ("Guidelines") recommend that if an individual does not respond in any manner to a request for information made pursuant to FINRA Rule 8210, a bar should be standard.<sup>18</sup> Even though Respondent responded to FINRA's first request for information, I find that his failure to respond to the subsequent requests for documents and information and his later failure to appear for an OTR constitute a failure to respond in any manner.

The Guidelines also provide that when an individual fails to respond to requests for information the principal consideration in determining sanctions is the importance of the information sought as viewed from FINRA's perspective.<sup>19</sup> FINRA was investigating potentially serious misconduct by Respondent: he may have engaged in undisclosed private securities transactions<sup>20</sup> and may have failed to disclose two tax liens.<sup>21</sup> FINRA needed information and documents from Respondent to perform its regulatory function. Respondent's failure to produce the information and documents requested and failure to provide sworn testimony prevented FINRA from fulfilling its regulatory responsibilities.<sup>22</sup>

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<sup>17</sup> Compl. ¶¶ 15-18.

<sup>18</sup> FINRA Sanction Guidelines at 33 (2019), <http://www.finra.org/industry/sanction-guidelines>.

<sup>19</sup> *Id.*

<sup>20</sup> See *Chris Dinh Harley*, 57 S.E.C. 767, 775 n.17 (2004) (FINRA's rule against private securities transactions "protect[s] investors from unsupervised sales and securities firms from exposure to loss and litigation from transactions by associated persons outside the scope of their employment.").

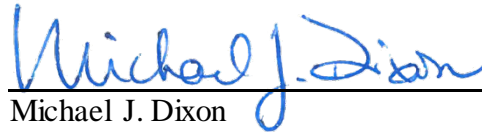
<sup>21</sup> The duty to provide accurate information and to amend the Form U4 to provide current information assures regulatory organizations, employers, and members of the public that they have all material, current information about the securities professional. See *Dep't of Enforcement v. Riemer*, No. 2013038986001, 2017 FINRA Discip. LEXIS 38, at \*8-9 (NAC Oct. 5, 2017), *aff'd*, Exchange Act Release No. 84513, 2018 SEC LEXIS 3022 (Oct. 31, 2018). In addition to being sanctioned for failing to disclose material information, such as tax liens, on Form U4, a respondent may also be statutorily disqualified pursuant to Section 3(a)(39)(F) of the Securities Exchange Act of 1934 if a factfinder determines that the failure was willful. *Id.* at \*15-16.

<sup>22</sup> *Dep't of Enforcement v. Sahai*, No. C9B020032, 2004 NASD Discip. LEXIS 14, at \*19-20 (NAC Aug. 12, 2004) (finding that a person who fails to respond to FINRA requests for information subverts FINRA's regulatory responsibilities), *remanded*, 58 S.E.C. 276 (2005), *aff'd on reh'g*, 2006 NASD Discip. LEXIS 2 (NAC Mar. 2, 2006), *modified*, Exchange Act Release No. 55046, 2007 SEC LEXIS 13 (Jan. 5, 2007).

The evidence reveals no justification or excuse for Respondent's failure to respond to FINRA's requests. I find no mitigating factors. Thus, the appropriate sanction is a bar in all capacities.

### III. Order

Respondent James G. McKinney is barred from associating with any FINRA member firm in any capacity for violating FINRA Rules 8210 and 2010. The bar shall become effective immediately if this Default Decision becomes FINRA's final disciplinary action.



Michael J. Dixon  
Michael J. Dixon  
Hearing Officer

Copies to:

James G. McKinney (via overnight courier and first-class mail)  
Heather Hawker, Esq. (via email and first-class mail)  
Douglas Ramsey, Esq. (via email)  
Jennifer L. Crawford, Esq. (via email)