BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of District Business Conduct Committee For District No. 7 Complainant, vs. Joseph G. Chiulli Lynbrook, New York, Respondent.	DECISION Complaint No. C07970006 Dated: October 15, 1998

Pursuant to Procedural Rule 9310, Joseph G. Chiulli ("Chiulli") has appealed the November 21, 1997 decision of the District Business Conduct Committee for District No. 10 ("DBCC"). After a review of the entire record in this matter, we find that Chiulli violated NASD Conduct Rules 2110 and 3110 by failing to preserve the books and records of a member firm and violated Procedural Rule 8210 by failing to respond to an NASD Regulation, Inc. ("NASD Regulation") request for information. We impose on Chiulli a censure and a one-year suspension in all capacities, and we require that he requalify by examination.[1]

Our review of this case focuses on the intersection between the record-keeping requirements imposed by the federal securities laws on broker/dealers who have ceased doing business and the "fresh start" afforded to debtors under the Bankruptcy Code. We begin our discussion by reviewing the facts and the law regarding the allegation that Chiulli failed to preserve the records of Meridian Dunhill & Co., Inc. ("Meridian Dunhill" or "the Firm"). We then will recite the facts regarding the allegation that Chiulli failed to produce documents and discuss our findings on this second cause.

Background

Chiulli entered the securities industry in 1983 as a general securities representative. From October 1994 to July 1995, he was registered with former member Meridian Dunhill as a general

[1] Although the complaint and amended complaint in this matter were issued by the DBCC for District No. 7, after filing his answer, respondent requested and was granted a change of venue to the DBCC for District No. 10.

securities representative, general securities principal, municipal securities principal, and financial and operations principal. He is not currently associated with any member of this Association.

Facts

In September 1994, Dunhill Equities, Inc. ("Dunhill Equities"), an NASD member owned by Chiulli, merged with Meridian Associates, Inc. ("Meridian Associates"), a Florida-based NASD member, and formed Meridian Dunhill. Although Meridian Dunhill's headquarters were in Sarasota, Florida, Chiulli worked in an office in Garden City, New York. Chiulli became the Chief Executive Officer and Chairman of the Board of Meridian Dunhill. Chiulli's tenure in his new position lasted for only three and one-half months, however. On January 17, 1995, Meridian Dunhill ceased conducting a securities business because of capital problems.

Chiulli testified that on January 13, 1995, he was informed by the Firm's President and the Firm's financial and operations principal that Meridian Dunhill might have a net capital deficiency. He stated that based on his review of Meridian Associates' financial statements before the merger, and based on his knowledge of Dunhill Equities' financial position before the merger, he was surprised to learn that Meridian Dunhill was facing a net capital deficiency. Chiulli testified that after the Firm ceased operations he held discussions with investors in New York in an attempt to raise additional capital for Meridian Dunhill. Chiulli learned in the first week of February 1995 that a group of petitioning creditors had filed an involuntary Chapter 7 bankruptcy petition against the Firm a few days earlier. He later learned that the President of Meridian Dunhill had filed a voluntary Chapter 7 bankruptcy petition, purportedly on behalf of the Firm. Chiulli, who had approximately 52 percent of the voting control over Meridian Dunhill, had not authorized the bankruptcy petitions.

On February 2, 1995, Chiulli flew to Florida to meet with an attorney regarding challenging the Meridian Dunhill involuntary bankruptcy petition. On February 3, 1995, Chiulli attempted to gain access to the Meridian Dunhill main office in Sarasota, however, Meridian Dunhill's President and other employees Chiulli tried to contact were not available to open the office. With the assistance of the building management company, Chiulli entered Meridian Dunhill's office and gathered three or four boxes of documents, principally bank statements. Taking the documents with him, he then flew back to New York. In the several weeks that followed, Chiulli's attorney succeeded in having both Meridian Dunhill bankruptcy petitions dismissed.

On May 10, 1995, Chiulli and his wife filed a joint, voluntary Chapter 7 petition in the United States Bankruptcy Court for the Eastern District of New York. Chiulli served the NASD Regulation office for District No. 7 ("District No. 7") with a Notice of Commencement of the case in this personal bankruptcy.

In a letter dated May 25, 1995, the property management company for Meridian Dunhill's Sarasota office informed Chiulli that the Firm's office space would be cleaned out and all remaining items would be discarded or sold on June 7, 1995. Before June 7, 1995, Chiulli again flew to Florida and traveled to Sarasota. He testified about Meridian Dunhill's documents as follows. He and two people assisting him sorted and boxed more than 300 boxes of Meridian Dunhill documents. Chiulli testified that he separated the documents into two categories: those that were available from other sources, for example, Meridian Dunhill's former clearing agent or accountants; and the Firm's original documents. Chiulli contacted a storage facility in Tampa, Florida called The Records Center, Inc. ("The Records Center") and arranged to have what he called the "non-original documents" stored in Tampa.

Chiulli, on behalf of Meridian Dunhill, signed a standard storage agreement with The Records Center. Based on a quantity of 354 boxes of documents, the charge for storage was approximately $194 per month. As to the Meridian Dunhill documents that Chiulli determined were not available from another source, he had these documents shipped to his house in Lynbrook, New York. Chiulli testified that he eventually stored these documents in his home and the homes of his friends and relatives who lived nearby.

On July 3, 1995, Chiulli completed a Uniform Request For Withdrawal From Broker-Dealer Registration, a Form BDW, for Meridian Dunhill. Immediately above the signature portion of this document, the Form BDW stated:

> I swear or affirm that all the information I am filing is correct, that I am authorized to execute this form for the broker-dealer, and that the broker-dealer's books and records will be preserved and available for inspection as required by law.

Chiulli signed the form and also listed himself as the person who would have custody of the books and records of Meridian Dunhill.

In November 1995, District No. 7 filed a motion for relief from the automatic stay imposed pursuant to Chiulli's personal bankruptcy filing. See 11 U.S.C. § 362(d). Although District No. 7 had not filed a complaint against Chiulli, the motion sought leave from the Bankruptcy Court to complete an investigation of Chiulli and, if warranted, to issue and litigate a disciplinary complaint against him. District No. 7 represented to the Bankruptcy Court that if it issued a formal complaint against Chiulli, NASD Regulation would not seek to impose any monetary sanctions on him. On December 14, 1995, the Bankruptcy Judge granted District No. 7's motion to lift the automatic stay and signed an order which stated that "in the event a formal disciplinary complaint is brought against Chiulli and findings are made against him, the only sanctions, if any, that may [be] imposed must be non-monetary in nature."

On March 5, 1996, the Bankruptcy Court issued a "Discharge of Debtor" for Chiulli that: 1) released Chiulli from all dischargeable debts, and 2) permanently enjoined all creditors whose debts were discharged from engaging in any acts to collect discharged debts as Chiulli's personal liabilities. Thereafter, Chiulli's personal bankruptcy case was closed.

On March 25, 1996, District No. 7 filed a complaint against Meridian Dunhill and Chiulli alleging net capital and record-keeping violations from May 1994 to January 1995. District No. 7 did not set this complaint for a hearing, and in January 1998, the complaint was withdrawn.

Meridian Dunhill's Bankruptcy. In January 1996, eight months after Chiulli had filed his personal bankruptcy, he filed a voluntary Chapter 7 petition for Meridian Dunhill in the U.S. Bankruptcy Court for the Eastern District of New York. In July 1996, the Meridian Dunhill trustee filed a motion to abandon the books and records of the Firm due to lack of financial resources to preserve them. In response to this motion, District No. 7 filed an objection to the abandonment. On September 24, 1996, counsel for District No. 7 participated in oral argument on the trustee's abandonment motion. In its written opposition to the motion, District No. 7 had argued that the Bankruptcy Judge should order Chiulli to take responsibility for the documents. The Bankruptcy Judge explained that she did not have jurisdiction over Chiulli in the Meridian Dunhill case because Chiulli was not a party to the Firm's

bankruptcy case. After the September 24, 1996 oral argument, the Bankruptcy Judge granted the trustee's motion to abandon Meridian Dunhill's records.

On September 30, 1996, counsel for District No. 7 advised Chiulli by letter that he had until October 4, 1996 to acknowledge that he would assume responsibility for the Meridian Dunhill records. Chiulli's attorney requested and was given an extension until October 8 to reply. No reply came. In an October 10, 1996 letter to Chiulli's counsel, counsel for District No. 7 stated that he would be presenting Chiulli's failure to preserve the records to the DBCC for the issuance of a formal complaint. In an October 11, 1996 letter, Chiulli's counsel responded that the NASD had no legal authority to require Chiulli to maintain Meridian Dunhill's records because of Chiulli's bankruptcy discharge.

In January and February 1997, District No. 7 staff contacted The Records Center and learned that the Meridian Dunhill records were going to be destroyed if past storage fees were not paid. Thereafter, staff learned that the records had been destroyed, and they visited the storage facility to verify this fact.

Discussion

Conduct Rule 3110 requires that all members keep and preserve books and records in conformity with all applicable laws. The Securities and Exchange Commission ("SEC") has two record-keeping rules that are relevant to this case, Securities Exchange Act of 1934 Rules 17a-3 and 17a-4 ("Rules 17a-3 and 17a-4"). Rule 17a-3 describes several categories of records that a broker/dealer must maintain, and Rule 17a-4, among other things, establishes which categories of records must be preserved for six years and which must be preserved for three years. See Rule 17a-4(a) & (b).

In reviewing the DBCC's finding that Chiulli failed to preserve the books and records of Meridian Dunhill, we first analyze the issue of whether Chiulli's obligation to maintain those books and records was a "debt" within the meaning of the Bankruptcy Code. See 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code"). In his brief to us, Chiulli argues that any financial responsibility he might have had to pay the storage fees for the Meridian Dunhill records was a debt that was discharged pursuant to the Bankruptcy Court's order. Conversely, District No. 7's brief argues that Chiulli's obligation under the federal securities law to preserve records was not a debt. We find -- as to the financial obligation of Chiulli to pay the storage fees for the records -- that this obligation was a "debt" as defined by the Bankruptcy Code. Our analysis does not, however, end at this point. As we discuss below, we also find that this debt was not discharged in Chiulli's personal bankruptcy.

Definition of a "Debt" Under the Bankruptcy Code. Under the Bankruptcy Code, debtors who file under Chapter 7 and receive an order from the Bankruptcy Court have all their "debts" discharged. See 11 U.S.C. § 727(b). The word "debt" is defined in the Bankruptcy Code as "liability on a claim." 11 U.S.C. § 101(12). The word "claim" is defined to mean:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5) (all further references to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, will be to "section ___")

Several courts have explained that Congress intended to invest the term "claim" with an extraordinarily broad reach. See, e.g., In re Chateaugay Corp., 944 F.2d 997, 1003 (2d Cir. 1991) ("Congress unquestionably expected this definition to have wide scope. 'By this broadest possible definition ... the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.'") (citing H.R. Rep. No. 595, 95th Cong., 2d Sess. 309 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6266); Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552, 558-59 (1990) (holding that an obligation to pay restitution imposed as part of a state criminal sentence is a "debt" within the meaning of the Bankruptcy Code) (although Congress later reversed the result, making criminal restitution nondischargeable, see Criminal Victim's Protection Act of 1990 and the Crime Control Act of 1990, Pub. Laws Nos. 101-581 and 101-647); Baldwin-United Corp. v. Named Defendants (In re Baldwin-United Corp.), 48 B.R. 901, 903 (Bankr. S.D. Ohio 1985) (characterizing the definition of "debt" as "all-encompassing").

With this background in mind, we turn to the facts of this case. Unfortunately, we have found no directly applicable bankruptcy law precedents that determine whether Chiulli's obligation to preserve records was a "claim." Instead, we take our guidance from roughly applicable decisions involving different circumstances.

The Supreme Court has held that a debtor's discharge under section 727 includes a debtor's obligation under a state court injunction to clean up a hazardous waste site. Ohio v. Kovacs, 469 U.S. 274, 283 (1985). There, the Supreme Court found that the cleanup injunction created a duty to pay money and was therefore a "debt" under section 101 that was dischargeable under section 727. Id. at 284. In Kovacs, the obligation imposed by the state of Ohio was not to pay money directly; instead the debtor, who was the Chief Executive Officer of a waste disposal company, was bound by an injunction in which he agreed -- both in his individual capacity and on behalf of his company -- to remove hazardous wastes from a waste site. Id. at 277. The Supreme Court noted that the debtor could not personally clean up the environmental damage he might have caused and that Ohio had appointed a receiver who intended to take possession of all of the debtor's assets in order to clean up the waste site. See id. at 283-84. The Supreme Court concluded that Ohio's cleanup order had been converted into an obligation to pay money. Id. at 284; see also United States v. Whizco, Inc., 841 F.2d 147, 150-51 (6th Cir. 1988) (holding that an injunction requiring a person to reclaim a mining site was a debt dischargeable in bankruptcy to the extent that the party would have to expend money).

Applying the principles of Kovacs to Chiulli's case, we first focus on the fact that the allegation against Chiulli that he failed to preserve the records of Meridian Dunhill involves only the records that were destroyed by The Records Center. As to those records, Chiulli's obligation to preserve them essentially had been converted into an obligation to pay monthly storage fees. The record contains no evidence, however, that the Meridian Dunhill records that Chiulli personally stored in and near his house caused Chiulli any financial obligation. Therefore, we do not conclude that Chiulli's responsibility to preserve the records that he stored in private homes in Lynbrook was a "debt" under the Bankruptcy Code. Under the narrow circumstances of this case, we find that Chiulli's duty to comply with the

records preservation requirement of Rule 17a-4 was converted into an obligation to pay money and was therefore within the definition of a "claim" and hence is a "debt" under the Bankruptcy Code.[2]

We recognize that the Bankruptcy Code's philosophy of granting discharged debtors a "fresh start" is potentially in conflict with the books and records retention requirements of the federal securities laws, which are designed to protect the investing public by ensuring that the records of broker/dealers are available for review for several years. We acknowledge, however, that the Bankruptcy Code dramatically alters the rights of creditors in countless different contexts. We are obligated to follow the Bankruptcy Code and judicial interpretations thereof regardless of whether they help or hinder our goal of protecting the investing public. Cf. Texaco Inc. v. Sanders (In re Texaco Inc.), 182 B.R. 937, 950 (Bankr. S.D.N.Y. 1995) (finding that land owners who were suing a discharged debtor for land and water contamination had their claims barred by the debtor's discharge and noting that "[there is a tension between the need to protect the property and constitutional rights of claimants, on the one hand, and the philosophy of granting discharged debtors a 'fresh start' which underlies the bankruptcy laws in the United States").

Chiulli's Obligation To Preserve Meridian Dunhill's Records Arose After He Filed His Bankruptcy Petition. In a voluntary Chapter 7 case, the Bankruptcy Code sets the date that the debtor files a petition as the controlling date for determining which debts are discharged. Under section 727(b), a debtor is discharged from all debts that arose before the date of the debtor's petition. See 6 Collier on Bankruptcy, ¶727.13 at 727-54 (15th ed. 1998). Debts that are incurred by the debtor post-petition, on the other hand, are not discharged. See In re Haught, 120 B.R. 233, 236 (Bankr. M.D. Fla. 1990).

To reiterate the relevant dates regarding Chiulli's bankruptcy, Chiulli filed his petition on May 10, 1995. He signed the Form BDW almost two months later, on July 3, 1995. In September 1996, the Bankruptcy Court granted the bankruptcy trustee's motion to abandon the Meridian Dunhill records.

We now address the issue of timing. Specifically, on what date did Chiulli's obligation to preserve Meridian Dunhill's books and records become a financial obligation? We start by returning to the definition of "claim," the relevant portion of which is a "right to payment." Section 101(5)(A). The United States Court of Appeals for the Second Circuit has explained that "[a] claim exists only if before the filing of the bankruptcy petition, the relationship between the debtor and the creditor contained all of the elements necessary to give rise to a legal obligation -- 'a right to payment' -- under the relevant non-bankruptcy law." LTV Steel Co. v. Shalala (In re Chateaugay Corp.), 53 F.3d 478, 497 (2d Cir.) (citing In re National Gypsum Co., 139 B.R. 397, 405 (N.D. Tex. 1992)), cert. denied, 516 U.S. 913 (1995); see California Dep't of Health Servs. v. Jensen (In re Jensen), 995 F.2d 925, 930-31 (9th Cir. 1993).

Here, the relevant non-bankruptcy law that we consult is the NASD's Conduct Rule 3110, which incorporates SEC Rules 17a-3 and 17a-4. These rules are violated when a registered representative fails

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[2] In light of the bankruptcy law analysis we have undertaken, we do not rely on the SEC proceeding entitled In re Walter Alfred Heyman, Exchange Act Rel. No. 30775 (June 4, 1992). Most importantly, the Heyman settlement did not involve a personal bankruptcy. Although the settlement involved a former principal of a broker/dealer who failed to preserve the records of his firm and included the principal's claim that he could not afford to pay rental fees due to a storage company, the settlement did not involve and the SEC did not analyze the effect of a personal bankruptcy. Because Chiulli's personal bankruptcy is the central issue in this matter, we find the Heyman settlement unhelpful.

to preserve a firm's records. Therefore, we find that Chiulli violated Conduct Rule 3110 when he allowed Meridian Dunhill's records to be abandoned by the bankruptcy trustee in September 1996. At that time, Chiulli lost control of the documents and could not preserve them. Because that date was more than a year after Chiulli filed for bankruptcy, District No. 7's complaint against Chiulli was based on post-petition conduct and was not discharged in Chiulli's bankruptcy.

Our conclusion is bolstered by referring to analogous bankruptcy law decisions. In cases involving debtors who had violated federal statutes, two Circuit Courts of Appeal have held that prior to a particular statute being enacted, no bankruptcy claims based on the statute existed and, therefore, monetary obligations resulting from the statute were not discharged if the debtors filed for bankruptcy before the statute was enacted. See Chateaugay at 497 (corporate debtor who filed for bankruptcy before 1992 was not discharged from the monetary obligations imposed by the Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486); Matter of Penn Central Transp. Co., 944 F.2d 164, 167-68 (3d Cir. 1991), cert. denied, 503 U.S. 906 (1992) (a cleanup claim under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) did not arise prior to enactment of the statute, even though the claim was based on pre-petition activities). Similarly, we conclude that Chiulli's violation of an NASD Conduct Rule arose when Chiulli violated the rule, not sometime before.[3]

There is no dispute that the Meridian Dunhill records that had been stored at The Records Center have been destroyed. We reject Chiulli's argument that his obligation to preserve the Firm's records was discharged in his bankruptcy. Accordingly, we find that he failed to preserve Meridian Dunhill's records.

Chiulli argues that his failure to preserve the records is this case is not a violation because one of his lawyers purportedly sought advice from the SEC regarding Chiulli's responsibility to preserve Meridian Dunhill's records. Chiulli's brief states that "[the SEC responds they are unaware of any legal precedent to force a discharged debtor to accept personal financial responsibility for the continued preservation of books and records." The testimony in the record was that in July 1996, one of Chiulli's previous attorneys spoke with an attorney in the Division of Market Regulation at the SEC. That attorney purportedly said that he did not believe there was any precedent to explain what Chiulli should do to preserve the Firm's records when both he and the Firm were in bankruptcy. We do not credit Chiulli's argument. Our interpretation of the applicable law in this case is based on our reading of the Bankruptcy Code, decisions of the United States Supreme Court, decisions of various federal courts, and decisions issued by the SEC. We do not accept as governing legal authority an SEC attorney's comment about his understanding of legal precedent on a question of bankruptcy law.

Chiulli also argues that he complied with the record retention requirements of Rule 17a-3 and Rule 17a-4 because all the required documents could have been obtained from Meridian Dunhill's clearing firm and other sources. The rule to which Chiulli is referring is Rule 17a-3(b)(1), which provides that: "This rule shall not be deemed to require a [registered broker or dealer] to make or keep such records of transactions cleared for such [registered broker or dealer] as are customarily made and kept by a clearing broker or dealer pursuant to the requirements of Rule 17a-3 and 17a-4." The DBCC,

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[3] We reject the notion that Chiulli's obligation to preserve the Meridian Dunhill records was based on a contract. Chiulli's obligation to preserve the Meridian Dunhill records was grounded in SEC Rule 17a-4 and Conduct Rule 3110.

however, took Rule 17a-3(b)(1) into account and found only that Chiulli failed to preserve the documents that Meridian Dunhill's clearing broker did not keep. Based on the evidence in the record, we uphold the DBCC's finding that Chiulli failed to preserve the following categories of documents:

> Cash, securities, and purchase and sale blotters for Meridian Associates dating back to March 27, 1991 (Rule 17a-3(a)(1));
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> General ledgers for Meridian Associates from March 1991 to June 1993 (Rule 17a-3(a)(2));
>
> Customer account cards or records which relate to the terms and conditions with respect to the opening and maintenance of customer accounts for Meridian Associates dating back to March 27, 1991 (Rule 17a-4(c));
>
> Order tickets for both principal and agency transactions for Meridian Associates dating back to March 27, 1994 (Rule 17a-3(a)(6) & (a)(7));
>
> Records in respect of each cash and margin account indicating the name and address of the beneficial owner of such account and, in the case of a margin account, the signature of such owner (Rule 17a-3(a)(9));
>
> Bank statements, canceled checks, and bank reconciliations from 3/94 to 6/94 for Meridian Associates (Rule 17a-4(b)(2));
>
> Bills receivable or payable (or copies thereof) for Meridian Associates dating back to March 27, 1994 (Rule 17a-4(b)(3));
>
> Originals of all communications received and copies of all communications sent (including inter-office memoranda and communications) for Meridian Associates and Meridian Dunhill dating back to March 27, 1994 (Rule 17a-4(b)(4));
>
> Trial balances, computations or aggregate indebtedness and net capital (and working papers in connection therewith), financial statements, branch office reconciliations, and internal audit working papers for Meridian Associates from 3/94 to 6/94.[4] (Rule 17a-4(b)(5));
>
> Guarantees of accounts, and all powers of attorney and other evidence of the granting of discretionary authority given in respect of any account, and copies of resolutions empowering an agent to act on behalf of a corporation for Meridian Dunhill and Meridian Associates dating back to March 27, 1994 (Rule 17a-4(a)(6));
>
> Lease agreements for Meridian Associates and Meridian Dunhill dating back to March 27, 1994 (Rule 17a-4(b)(7)); and
>
> Records that contain information in support of amounts included in the report prepared as of the audit date on Form X-17A-5 Part IIA and in annual audited financial statements required by Rule 17a-5 for Meridian Associates dating back to March 27, 1994 (Rule 17a-4(b)(8)(I)-(xv)).

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[4] Only profit and loss statements were found for this time period.

In summary, we uphold the DBCC's finding that Chiulli violated Conduct Rules 2110 and 3110.

Facts Regarding the Amended Complaint Against Chiulli. On February 13, 1997, District No. 7 issued the complaint in this matter. The complaint alleged that Chiulli had failed to maintain the records of Meridian Dunhill. On March 13, 1997, Chiulli filed an answer to the complaint. In the answer, Chiulli denied that the Meridian Dunhill records had been destroyed. This denial prompted counsel for District No. 7 to call Chiulli's counsel, who stated that Chiulli had records stored in Lynbrook, New York.

On March 14, 1997, counsel for District No. 7 wrote a letter to Chiulli's counsel and informed him that District No. 7 staff would travel to Lynbrook to review the documents and, if all the required records were there, District No. 7 would dismiss the complaint. On March 18, 1997, Chiulli's counsel responded that Chiulli would not permit District No.7 staff to review the documents he had stored in his home. On the same day, counsel for District No. 7 sent a request pursuant to Procedural Rule 8210 to Chiulli and his counsel requesting that Chiulli allow inspection of the Meridian Dunhill documents on March 27, 1998. In letters dated March 25 and March 26, 1997, Chiulli's counsel refused to produce any documents to District No. 7 on the grounds that District No. 7 did not have the authority to conduct discovery, pursuant to a Procedural Rule 8210 request, after District No. 7 had filed a complaint. During this exchange of correspondence, counsel for District No. 7 had offered to review the Meridian Dunhill documents at some other location and at some later time. Chiulli did not agree to any such production of the documents.

On April 21, 1997, the DBCC for District No. 7 issued an amended complaint against Chiulli, alleging in cause two that Chiulli had violated Procedural Rule 8210 by refusing to allow the inspection of documents that were in his possession.

Discussion Regarding Chiulli's Failure To Allow Timely Inspection of Documents. The complaint's second cause alleged that Chiulli failed to honor an NASD request for information in that Chiulli did not produce documents requested by District No. 7 staff in its March 18, 1997 letter. Procedural Rule 8210 authorizes the Association to require members to allow Association staff to inspect books, records, and accounts of members. Because the NASD lacks subpoena power over its members, a "failure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate." In re Michael David Borth, 51 S.E.C. 178, 180 (1992); see In re Brian L. Gibbons, Exchange Act Rel. No. 37170 (May 8, 1996), aff'd, Gibbons v. SEC, 112 F.3d 516 (9th Cir. 1997) (unpublished table decision).

There is no dispute that Chiulli refused to permit District No. 7 staff to inspect the Meridian Dunhill records that he was storing in Lynbrook, New York. After counsel for District No. 7 informally requested and was refused the opportunity to inspect these documents, he made a formal request to inspect the documents pursuant to Procedural Rule 8210. Chiulli's counsel also refused this request. The stated basis of Chiulli's refusal to allow inspection of the documents was a legal argument: His counsel asserted that a Procedural Rule 8210 request was invalid when issued after Chiulli had been served with a formal complaint.

We find Chiulli's argument to be invalid. Procedural Rule 8210 empowered authorized Association staff to investigate the books and records of a member "[for the purpose of any

investigation, or determination as to filing of a complaint or any hearing of any complaint."[5] The text of the rule contained no prohibition against issuing an 8210 request after a complaint had been filed. Indeed, creating such a restriction on NASD Regulation's power to investigate would frustrate the truth-seeking function of these requests for information. Moreover, Chiulli has offered no authority for his interpretation of this rule. Accordingly, Chiulli's refusal to allow inspection of the records was without justification.

In his appellate brief, Chiulli argues that he made the records available for inspection on August 19, 1997. This date was only six days before the hearing in this case and was five months after he was required to allowed inspection of the records. We find that Chiulli's refusal to allow District No. 7 timely to inspect the Meridian Dunhill records was not cured by this eleventh-hour offer. In fact, even at the DBCC hearing, Chiulli offered to allow inspection of the documents only if the DBCC ordered him to do so.

Chiulli asserts in his brief to us that he relied on advice of counsel in refusing timely to produce the requested documents. Advice of counsel, however, is not a valid defense because intent to violate the rule need not be established. See In re Michael Markowski, 51 S.E.C. 553, 557 (1993), aff'd, 34 F.3d 99 (2d Cir. 1994) (advice of counsel to refuse an NASD request for information is no defense because when respondent registered with the NASD, he agreed to abide by its rules, which are "unequivocal with respect to the obligation to cooperate with the NASD"); In re Darrell Jay Williams, 50 S.E.C. 1070, 1072 (1992).

Based on the facts in the record, we find that Chiulli violated Procedural Rule 8210 in that he failed to respond in a timely manner to a request to allow inspection of the records of Meridian Dunhill.

Procedural Issues

Chiulli's Request To Continue the August 25, 1997 Hearing. Chiulli contends that he was severely prejudiced by the DBCC panel's denial of his request to adjourn the August 25, 1997 hearing. We find that the DBCC's ruling was not an abuse of discretion.

On July 18, 1997, the District Director for District No. 7 notified Chiulli that the hearing in his case was scheduled for August 25, 1997, in New York City. At the time, Chiulli's previous attorney of record had withdrawn from the case. On August 18, 1997, Joseph Kennan, Esq. ("Kennan") wrote a letter to counsel for District No. 7, identified himself as Chiulli's new attorney, and requested an adjournment of the August 25, 1997 hearing. Kennan requested the adjournment in order to have sufficient time to prepare for the hearing. On August 20, 1997, the hearing panel denied the request. The hearing took place as scheduled on August 25, 1997.

In NASD Regulation disciplinary proceedings, the DBCC has broad discretion in determining whether to grant a request for continuance, based upon the particular facts and circumstances presented. See In re Falcon Trading Group, Ltd., Exchange Act Rel. No. 36619 (Dec. 21, 1995), aff'd, 102 F.3d 579, 581 (D.C. Cir. 1996). In reviewing the denial of a motion for continuance, we ask whether the denial constituted "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." In re Richard W. Suter, 47 S.E.C. 951, 963 (1983) (quoting Morris v. Slappy, 461 U.S. 1, 11 (1983)).

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[5] We quote here and consider the version of Procedural Rule 8210 that was in effect during March 1997.

We uphold the DBCC's ruling. Chiulli was given more than one month's advance notice of the hearing date. The fact that he did not retain a replacement attorney until shortly before the hearing is not sufficient justification to delay the hearing. See L.B. Securities Corp., 42 S.E.C. 885, 890 (1966). Moreover, in raising the issue before us, Chiulli does not substantiate any alleged prejudice that he claims to have suffered. At the DBCC hearing, he was represented by counsel who: called as witnesses Chiulli and one of his former attorneys, Bob Lehman; cross-examined District No. 7's witnesses; and otherwise fully participated in the hearing. Based both on Chiulli's failure to make a showing of any prejudice and on the amount of notice Chiulli was given, we deny Chiulli's request for a new hearing based on the DBCC hearing panel's denial of his request for an adjournment.

Complaints About the Investigation of this Case. Chiulli argues that the staff of District No. 7 conducted "no investigation" before the DBCC filed the initial complaint in this matter, which alleged that Chiulli allowed the records of Meridian Dunhill to be destroyed. We find no merit in Chiulli's argument because it is not supported by the facts. Before the DBCC filed the initial complaint against Chiulli, counsel for District No. 7 corresponded with Chiulli's counsel regarding the possibility of the DBCC filing a complaint. In an October 10, 1996 letter, counsel for District No. 7 stated that he would be presenting Chiulli's failure to preserve the records of Meridian Dunhill to the DBCC for the issuance of a formal complaint.[6] For reasons that Chiulli has not explained, he did not inform District No. 7 that he was maintaining some Meridian Dunhill records in Lynbrook, New York. Rather, Chiulli waited until he filed his answer to the complaint to disclose that he was maintaining some records. Based on all the relevant facts, we reject Chiulli's contention that District No. 7 conducted no investigation in this case.

Chiulli also argues that his constitutional right to due process was violated by the DBCC because a complaint alleging net capital and related violations that was filed against him on March 25, 1996 and eventually withdrawn was filed without, he asserts, any valid basis. We disagree. First, Chiulli introduced no evidence to substantiate his charge of a meritless complaint. Second, Chiulli has suffered no prejudice or other harm in this case as a result of the other complaint that was filed against him. In fact, the net capital and related allegations from that complaint are irrelevant to this case. The DBCC considered this case based on evidence of Chiulli's failure to preserve records and his failure timely to comply with an NASD Regulation request for information. Lastly, to the extent that Chiulli is contending that the staff of District No. 7 or the DBCC was biased against him, in addition to finding no factual support for this assertion, we find that our review of this matter dissipates any harm that purportedly occurred. See In re Frank J. Custable, Jr., 51 S.E.C. 855, 862 (1993).

In addition, Chiulli has asserted that various actions by the DBCC and the staff of District No. 7 were in retaliation for Chiulli's exercising his rights, were generally vindictive, or were otherwise improper. Because Chiulli had no "right" to refuse an NASD Regulation request to inspect documents and because Chiulli's many assertions are vague, we find that these assertions are immaterial to our decision. In summary, we conclude that the DBCC committed no procedural errors in this case.

Sanctions

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[6] Before writing this letter, District No. 7 staff had investigated whether the Meridian Dunhill documents that were stored by The Records Center had actually been destroyed.

The DBCC imposed sanctions of a censure, a $35,000 fine, a bar, and hearing costs of $1,381.25. For several reasons, we modify these sanctions.

As to Chiulli's failure to preserve records of Meridian Dunhill, there is no applicable guideline from the NASD Sanction Guidelines ("Guidelines") for this violation. We impose no sanction for this violation because we find two mitigating factors that weigh against imposing a sanction in addition to the suspension we impose for the second cause. First, we find that -- under all the circumstances of this case -- Chiulli made reasonable efforts to retain many of the documents he was required to maintain. As our discussion indicates, the majority of the records that were not preserved were from the firm that Dunhill Equities merged with, Meridian Associates. Chiulli maintained all but a few categories of the Meridian Dunhill records, which were generated after the merger, and were required to be preserved by the rule. Chiulli also preserved the records of the firm that he previously owned, Dunhill Equities. In sum, we have no indication that Chiulli disregarded his responsibility to preserve records other than his refusal to pay the expenses for the storage of the records.

Second, we find that Chiulli's personal financial situation is a mitigating factor. Once Chiulli had failed to secure the funds required to store the documents for the required period of time, we understand that during and after his personal bankruptcy, he lacked the financial resources to maintain all of the documents in question.

Based on the Bankruptcy Court's order authorizing NASD Regulation to impose nonmonetary sanctions on Chiulli, we eliminate the $35,000 fine and costs imposed by the DBCC. Although we have found that Chiulli's obligation to preserve Meridian Dunhill's records was not discharged in his personal bankruptcy, District No. 7 staff neither advised the Bankruptcy Court that they would seek monetary sanctions against Chiulli in any future complaints nor did it move the Bankruptcy Court to modify its order to allow NASD Regulation to impose monetary sanctions in this case. Consequently, we impose no fines and no costs on Chiulli.

As to Chiulli's failure timely to allow inspection of documents, we find that no mitigating factors support a lessening of his sanctions for this serious violation. First, Chiulli's personal bankruptcy is irrelevant to this violation. District No. 7 staff was only requesting the ability to inspect documents that were under Chiulli's control. Second, Chiulli has not offered any reasonable explanation for his failure to allow the inspection of the documents in question. Third, NASD Regulation was required to apply a high degree of regulatory pressure before Chiulli agreed to allow inspection of the documents. Fourth, we find no mitigation based on Chiulli's claim that he acted pursuant to advice of counsel because Chiulli had the sole responsibility to produce the documents when District No. 7 staff initially requested them.

The Guideline for failure to respond in a timely manner to a request for information advises us that in cases in which an individual has not responded timely, we should consider a suspension of "six months to two years." Here, we impose a one-year suspension on Chiulli because, without any legal basis, he delayed the review of documents for five months, forced District No. 7 to hold a disciplinary hearing, and required the DBCC to order him to permit the Meridian Dunhill records to be reviewed.[7]

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[7] The recommended sanctions are consistent with the applicable Guideline, except that we impose no fine. See Guidelines (1996 ed.) at 22 (failure to respond or respond truthfully or completely; failure to respond in a timely manner),

Accordingly, we order that Chiulli be censured, suspended for one year from associating with any member firm in any capacity, and required to requalify by examination in any capacity in which he wishes to be associated before again acting in any capacity requiring registration. The suspension will begin on a date to be set by the Chief Hearing Officer. Based on the unique circumstances of this case, we impose no fine and no costs. [8]

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Corporate Secretary

[8] We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Joan C. Conley
Direct: (202) 728-8381
Corporate Secretary
Fax: (202) 728-8894

October 15, 1998

VIA CERTIFIED MAIL: RETURN RECEIPT REQUESTED

Joseph F. Keenan, Esq.
Bochat & Keenan, P.C.
975 Franklin Avenue
Garden City, New York 11530

Re: Complaint No. CO7970006: Joseph G. Chiulli

Dear Mr. Keenan:

Enclosed herewith is the Decision of the National Business Conduct Committee in connection with the above-referenced matter. Any fine and costs assessed should be made payable and remitted to the National Association of Securities Dealers, Inc., Department #0651, Washington, D.C. 20073-0651.

You may appeal this decision to the U.S. Securities and Exchange Commission. To do so, you must file an application with the Commission within thirty (30) days of your receipt of this decision. A copy of this application must be sent to the NASD Regulation, Inc. Office of General Counsel as must copies of all documents filed with the SEC. Any documents provided to the SEC via fax or overnight mail should also be provided to the NASDR by similar means.

Your application must identify the NASDR case number, and set forth in summary form a brief statement of alleged errors in the determination and supporting reasons therefor. You must include an address where you may be served and phone number where you may be reached during business hours. If your address or phone number changes, you must advise the SEC and NASDR. If you are represented by an attorney, he or she must file a notice of appearance.

The address of the SEC is:
Office of the Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W., Stop 6-9
Washington, D.C. 20549

The address of the NASD is:
Office of General Counsel
National Association of Securities Dealers Regulation, Inc.
1735 K Street, N.W.
Washington, D.C. 20006

Questions regarding the appeal process may be directed to the Office of the Secretary at the SEC. The phone number of that office is 202-942-7070.

Very truly yours,

Joan C. Conley

Enclosure

cc: Gene E. Carasick, Esq.