

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

Department of Market Regulation,

Complainant,

vs.

Ryan & Company, LP
West Conshohocken, PA,

and

Scott W. Ryan
Bryn Mawr, PA,

Respondents.

DECISION

Failure to Provide Information
Proceeding No. FPI040002

Dated: October 3, 2005

Firm expelled and individual barred for refusing to produce information pursuant to requests issued under NASD Procedural Rule 8210. Held, findings and sanctions affirmed.

Appearances

For the Complainant: James J. Nixon, Esq., Jeffrey K. Stith, Esq.,
Department of Market Regulation, NASD

For the Respondents: Pro Se

Decision

Scott W. Ryan (“Ryan”) and Ryan & Company, LP (“Ryan & Co.” or “the Firm”) (together, “respondents”) appealed a June 17, 2004 Hearing Panel decision under former NASD Procedural Rule 9543(a).¹ The Department of Market Regulation (“Market

¹ NASD Procedural Rule 9552, which became effective on June 28, 2004, supersedes the NASD Procedural Rule 9540 Series. The instant proceedings were conducted under the NASD Procedural Rule 9540 Series, however, because Market
[Footnote continued on next page]

Regulation”) initiated this expedited proceeding under the Procedural Rule 9540 Series to suspend respondents for failing to produce all information requested under Procedural Rule 8210. We affirm the Hearing Panel’s findings of liability. We also affirm the Hearing Panel’s decision to expel the Firm and bar Ryan in all capacities. We conclude that these sanctions are necessary based on our determination that respondents’ consistent failure to provide all of the requested information was egregious.

I. Ryan’s Employment History

Ryan first registered with NASD in August 1983 as a general securities representative and registered options principal with Firm One, prior to forming S.W. Ryan & Company (“S.W. Ryan & Co.”), which became an NASD member in May 1988. Ryan associated with S.W. Ryan & Co. in May 1988 in the following capacities: general securities principal, general securities representative, registered options principal, financial and operations principal, and general securities sales supervisor. In January 2001, Ryan & Co. assumed all of the assets and liabilities of S.W. Ryan & Co. Ryan remained associated with Ryan & Co. until April 2004, when NASD terminated the Firm’s registration following Ryan’s filing of a Uniform Request for Broker-Dealer Withdrawal (“Form BDW”).

II. Factual and Procedural Background

Market Regulation began an investigation in December 2002 into the Firm’s possible violations of federal securities laws and NASD rules related to certain short-selling and options transactions between Ryan & Co. and three of its hedge fund clients. On January 27, 2004,² Market Regulation staff sent Ryan a letter requesting information and documents pursuant to Rule 8210. The letter requested, among other things, copies of certain Firm order tickets, blotters, options contracts, and exercise of options reports (totaling approximately 270 documents). The request also asked for information on the amount of net profits derived from the Firm’s options activity from its three hedge fund clients (Question 3). Staff requested a response by February 10, 2004.

On January 28, 2004, staff sent a letter to Ryan revising Question 3 of its January 27, 2004 letter to request information about the “gross revenues,” instead of the “net profits,” attributable to the Firm’s options trading with its three hedge fund clients. Staff advised Ryan that it expected to receive his response no later than February 6, 2004.

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Regulation staff initiated the suspension proceedings on March 31, 2004, approximately three months prior to the effective date of NASD Procedural Rule 9552.

² Although this letter bears the date “January 27, 2003,” Market Regulation clarified at the hearing below that the letter was actually sent on January 27, 2004, and that the year “2003” reflected on the letter was a typographical error.

Respondents provided information in response to Question 3 in a letter to NASD dated February 6, 2004.

On February 10, 2004, respondents' attorney sent a letter to NASD staff that further responded to the January 27, 2004 request. Respondents provided some of the requested information, including Ryan's handwritten computations of the Firm's revenues and profits for fiscal years 1999 through 2003, and objected to providing NASD with copies of Firm order tickets, trade blotters, options contracts, and exercise of options reports for certain listed transactions. Respondents claimed that staff's request for these documents were "unduly burdensome" and that the requested documents had already been provided to, and copied by, staff during its previous onsite examination of the Firm. Respondents asked whether, instead of requiring the Firm to provide staff with the requested documents, NASD would be willing to visit the Firm's offices in West Conshohocken, Pennsylvania and make copies of the documents it required.

On February 23, 2004, NASD staff responded to the Firm's February 10, 2004 letter by sending a second request for information. The letter reiterated NASD's earlier request for copies of the trade documents. In response to the Firm's assertion that NASD had copied the requested documents during the course of its previous onsite examination, staff's February 23, 2004 letter stated that, "staff was not provided, and consequently did not copy, the requested documents during its on-site examination."

Urvashi Khurana ("Khurana"), the Market Regulation analyst for this investigation, testified that NASD staff rejected the Firm's invitation to conduct a search for the requested documents at the Firm's office. Khurana explained that it was staff's opinion, based upon the limited scope of the request for documents and the fact that it related to specific transactions, that Ryan could produce the requested trade documents.³ Khurana's February 23, 2004 letter stated that NASD did not believe that its request for documents imposed an undue burden given that the request was limited in scope and "confined to specific transactions that occurred on specified trade dates." The letter further advised that staff would give the Firm and Ryan three additional weeks from the date of its letter, until March 15, 2004, to produce the requested trade records. In addition, staff advised that it had reorganized the list of requested documents by trade date based upon its understanding that the Firm maintained its records in that manner.

NASD's February 23, 2004 letter also requested copies of Ryan's and the Firm's state and federal income tax returns for fiscal years 1999 through 2003. Khurana testified that staff needed to review the requested tax returns to obtain accurate information about the Firm's revenues from its transactions with the Firm's hedge fund clients. Staff also requested copies of the Firm's certified financial statements and copies of all documents

³ Ryan testified that he was the Firm's only employee at the time staff issued the Rule 8210 requests. Khurana testified, however, that the Firm's FOCUS reports showed that the Firm had over \$6 million in assets. Staff therefore concluded that the Firm had adequate resources to hire additional help, if needed, to produce the requested records.

relating to the Firm's annual compliance reviews conducted by Ryan for the period of January 1999 through December 2003. Staff asked for copies of the requested tax returns, financial statements, and compliance reviews by March 1, 2004.

In a March 1, 2004 response, respondents provided information relating to NASD's request for copies of the Firm's certified financial statements and compliance reviews, but they argued that staff's request for copies of the order tickets, blotters, options contracts, and exercise of options reports was unduly burdensome. Respondents again asked whether the Firm could satisfy NASD's request for the specified trading documents "by permitting staff to revisit the Firm and make copies of the required documents."

Respondents objected to staff's request for copies of their state and federal tax returns on the ground that the request was "overbroad and not tailored to financial information pertinent to the subject matter" of the investigation. The letter also represented, however, that the Firm and Ryan were willing "to engage the [s]taff in a good faith negotiation to narrow the scope of the request to that information which is relevant to the subject matter of this case."⁴

In a third Rule 8210 letter, dated March 5, 2004, Market Regulation attorney James J. Nixon ("Nixon") advised respondents' that their objections to providing the requested trade documents were without merit. Nixon also informed respondents' attorney that NASD staff viewed respondents' March 1, 2004 response as a "complete failure to comply with the staff's Rule 8210 requests for [respondents'] state and federal tax returns."⁵ Nixon repeated the request for copies of the Firm's and Ryan's tax returns as set forth in staff's February 23, 2004 letter. Nixon also stated that the documents relevant to the trades listed in Exhibit 1 were still due by March 15, 2004. Finally, Nixon informed respondents' attorney that his clients' continuing failure to produce the requested tax returns and/or their failure to provide the requested trade documents might result in disciplinary action. Respondents provided no documents to Market Regulation on March 15, 2004.

On March 31, 2004, Market Regulation sent separate written notices to Ryan and the Firm advising that NASD was initiating, under the Procedural Rule 9540 Series, expedited proceedings against the Firm and Ryan to suspend their registrations because they failed to provide certain documents in response to Rule 8210 requests. The

⁴ Respondents provided the requested Firm compliance reviews. In response to staff's request for copies of the Firm's certified financial statements for fiscal years 1999 through 2003, respondents advised staff that the requested financial statements were included in the Firm's FOCUS reports on file with NASD.

⁵ There is no evidence in the record showing that respondents entered into any negotiations to narrow the scope of the request for respondents' tax records during the period between respondents' March 1, 2004 response and Nixon's March 5 2004 letter.

suspension notices advised that respondents failed to produce the requested Firm order tickets, trade blotters, options contracts, and exercise of options reports for certain specified transactions and the requested state and federal tax returns. The notices also explained that respondents' respective registrations would be suspended unless they either took corrective action within 20 days after service of the notices or requested a hearing within five days after the date of service of the notices.⁶

By letter dated April 6, 2004 to the Office of Hearing Officers, respondents filed a request for a hearing and asked that the suspension notices be set aside, arguing that the underlying information requests were overbroad and unduly burdensome. The letter also stated that respondents would deliver to NASD all of the Firm's trading records for the years 2002 and 2003 and that the records would contain the requested order tickets, blotters, options contracts, and exercise of options reports for the identified trades.

On April 14, 2004, Nixon sent a letter to respondents' attorney acknowledging the attorney's notice to staff that respondents intended to deliver all of the Firm's trading records for the years 2002 and 2003 to NASD. Nixon's letter also stated that staff had been informed that Ryan intended to deliver these trading records to NASD's Philadelphia District Office even though that office was not involved in the investigation of this matter. Nixon's letter advised that respondents' proposal to deliver the Firm's records to an NASD District Office that was not involved in the investigation did not comply with staff's request. The letter further advised that staff's request for trading records "identified specific documents" and that, consequently, staff expected to receive those documents that it identified. The letter also stated that to the extent any requested document was not produced, respondents should state in writing the reason for failing to produce it.

On April 22, 2004, staff received a letter signed by Ryan stating that since January 31, 2004, he had been the only employee of the Firm. He also stated that he was disabled due to a chronic knee condition for which he had recently undergone knee replacement surgery. Ryan advised that he would forward to staff a box with the requested documents prior to the hearing in this matter. As of the date of the May 13, 2004 hearing, staff had not received the requested trade documents or respondents' tax returns.

III. Hearing Panel Findings

The Hearing Panel found that respondents failed to produce copies of the following documents in response to NASD's Rule 8210 requests for information: (1) Firm order tickets, blotters, options contracts, and exercise of options reports for the

⁶ Former Rule 9542(a) permitted members or persons served with notice of possible suspension for failing to provide requested information to file within five days after the date of service of the notice a request for a hearing, which had the effect of staying the effective date of notice.

identified transactions; and (2) the Firm's and Ryan's state and federal tax returns for years 1999 through 2003. Accordingly, the Hearing Panel found that respondents failed to provide all of the documents and information that staff requested, in violation of NASD Conduct Rule 2110 and Rule 8210.

The Hearing Panel noted that, although respondents claimed to have sent a box containing the requested documents to staff, Market Regulation had not received the documents at the time of the hearing. The Hearing Panel concluded that respondents' claim about having sent the box of documents did not constitute evidence of a good-faith effort to comply with staff's request for certain specified order tickets, trade blotters, options contracts, and exercise of options reports.

IV. Discussion

Rule 8210 authorizes NASD to require members to provide information orally, in writing, or electronically "with respect to any matter involved in [an] investigation."⁷ Rule 8210 serves as a "key element" in NASD's regulatory function and allows NASD to carry out its investigations of firms and associated persons. *See Richard J. Rouse*, 51 S.E.C. 581, 584 (1993).

We affirm the Hearing Panel's finding that respondents failed to comply with Conduct Rule 2110 and Rule 8210.⁸ The following discussion examines separately respondents' failures to provide staff with copies of: (1) the requested trade records; and (2) the requested tax returns.

A. Respondents Failed to Provide Requested Trade Records in Violation of NASD Conduct Rule 2110 and Rule 8210.

The parties do not dispute that at the time of the hearing in this matter staff had not received the requested copies of Firm order tickets, blotters, options contracts, and exercise of options reports for the identified transactions. Instead of complying with staff's requests for these documents, respondents attempted to place on NASD the burden to locate and identify the requested trading records. The Commission has previously rejected this tactic, finding that actions designed to place the burden of production on NASD do not satisfy Rule 8210. *See Robert Fitzpatrick*, Exchange Act Rel. No. 44956, 2001 SEC LEXIS 2185, at *12 n.8 (Oct. 19, 2001) (finding that respondent's attempt "to put the burden of finding and identifying the requested records on the NASD" did not

⁷ A violation of Rule 8210 is also a violation of Conduct Rule 2110. *See Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999). Additionally, NASD Rule 115 provides that NASD's Rules apply to all members "and persons associated with a member" and that such persons have the same duties and obligations as a member under the Rules.

⁸ We also affirm the decision by the NAC's Review Subcommittee to deny Market Regulation's motion to dismiss respondents' request for an appeal. *See* Rule 9146(j)(2).

satisfy Rule 8210). We similarly conclude here that it was reasonable of staff to place the burden for producing the trade records on Ryan and the Firm because they were appropriately asked to produce records that they are required to keep and were capable of identifying and producing.

Respondents assert in their supplemental appeal statement that, prior to the release of the Hearing Panel's decision in this matter, they provided staff with "all of the non-tax related documents" that staff requested pursuant to Rule 8210. In response to this assertion, Market Regulation staff filed a motion for leave to introduce additional evidence, stating that respondents' characterization of their post-hearing production was "grossly inaccurate and not substantiated by the record." The additional evidence that staff sought to introduce consisted of a declaration by Market Regulation analyst Khurana, which set forth relevant facts regarding respondents' post-hearing production of documents. Respondents filed a response to staff's motion requesting that an attached declaration by Ryan also be admitted as evidence. The NAC Subcommittee that considered this matter on appeal granted staff's motion, finding that the proffered additional evidence was material and that it otherwise complied with NASD procedural requirements that authorize the introduction of additional evidence. *See* NASD Procedural Rule 9346. Although Ryan's request to introduce his declaration as additional evidence did not comply with the requirements of Procedural Rules 9346(b) or 9346(c),⁹ the Subcommittee permitted the introduction of certain material statements in Ryan's declaration as additional evidence under its discretionary authority. *See* Procedural Rule 9346(d). We agree with the Subcommittee's analysis and therefore affirm its rulings.

Khurana's declaration included the following information regarding respondents' post-hearing production of documents. Staff did not receive the referenced box of documents until May 21, 2004 (eight days after the date of the hearing).¹⁰ The box

⁹ Ryan's request did not comply with Procedural Rule 9346(b) because it was untimely and respondents failed to demonstrate that there was good cause for failing to introduce the evidence below.

¹⁰ Respondents advised staff in their April 6, 2004 letter requesting a hearing that while they considered staff's request "unduly burdensome," they would provide staff with the requested records by April 29, 2004. By letter to staff dated April 22, 2004, however, Ryan claimed that he had been disabled with a chronic knee condition for "the past couple of months" and that he could not provide staff with the requested documents until two weeks from the date of his letter because he recently had undergone knee replacement surgery. Although the record includes a letter dated May 5, 2004, stating that Ryan sent a box of documents to staff on that date, staff did not receive the documents until May 21, 2004. Neither Ryan nor his attorneys asserted prior to April 22, 2004 that Ryan could not comply with the requests for trading records because of an alleged disabling knee condition. Thus, respondents cannot change the reason for their initial failure to comply with staff's requests from a claim that the requests were too burdensome to Ryan's purported poor medical condition. Moreover, personal problems do not excuse a failure to furnish requested information. *See Ashton Noshir Gowadia*, 53

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contained approximately 800 to 900 trade records, most of which were not relevant to staff's Rule 8210 request. Staff determined that the box did not contain most of the requested trade documents. Furthermore, although staff had requested that respondents provide a written explanation for the non-production of any documents, respondents failed to explain to staff why they failed to provide more than half of the requested records.

Khurana's declaration also stated that staff had received a letter from Ryan on August 4, 2004, in which he inquired as to whether staff had received the box of documents that he sent on May 5, 2004. By letter dated August 9, 2004, staff sent Ryan a letter advising him that staff had received the box of documents, but that many of the requested documents were not included. For example, although staff requested copies of 25 specific trade blotters, not one trade blotter was included in the box of documents. As to the remaining requests, only the following documents were produced: (1) 33 of the 119 requested order tickets; (2) 67 of the 99 requested options contracts; and (3) 20 of the 27 requested exercise of options reports. Khurana stated that, in total, the respondents provided only 120 of the 270 records requested.

We find that respondents' post-hearing production of fewer than half of the requested documents did not satisfy the requirements of Rule 8210. It is well settled that NASD should not have to bring disciplinary proceedings in order to obtain compliance with its Rule 8210 requests. *See, e.g., Toni Valentino*, Exchange Act Rel. No. 49255, 2004 SEC LEXIS 330, at *15 (Feb. 13, 2004). Moreover, even though staff notified respondents that the post-hearing production was incomplete, respondents still have not produced the 25 blotters that they acknowledge were not in the post-hearing production and the 86 order tickets that also were not included in that production.¹¹ Respondents

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S.E.C. 786, 789-90 (1998). Finally, even assuming that Ryan could not compile the records himself, we find no reason why he could not have hired additional personnel to assist him in responding to the Rule 8210 requests. *See, e.g., Wedbush Sec., Inc.*, 48 S.E.C. 963, 972 (1988) (suggesting that respondent could have hired additional personnel to assist in responding to NASD requests for information). Ryan's alleged medical condition is not a valid excuse for not complying earlier with the requests for documents.

¹¹ Respondents complain that Market Regulation staff never acknowledged having received the box of documents until after respondents filed their appeal in this case. We are mindful that before staff could conclude that respondents had not produced all of the requested documents, it first had to review 800 to 900 documents. Nonetheless, it would have been appropriate for Market Regulation to acknowledge that it had received the box of documents and was conducting a review of the documents to determine if respondents had complied with its Rule 8210 requests. We find, however, that respondents are responsible for ensuring that the documents that they provided responded to all parts of Market Regulation's request. We hold respondents fully accountable for their failure to do so.

state in their brief that Ryan “was not aware that the firm’s trading blotters and tickets had been placed in another box entirely.” They characterize the omission of the documents as an “inadvertent error by Mr. Ryan.” This argument is unconvincing considering that, at the time of the appeal hearing, Ryan still had not produced the remaining documents. We find no valid reason in the record for respondents’ failure to produce customary business records that were maintained at the Firm.

We find that respondents violated Conduct Rule 2110 and Rule 8210 by failing to produce the documents.

B. Respondents Failed to Produce Requested Tax Returns in Violation of NASD Conduct Rule 2110 and Rule 8210.

Respondents refused to produce the requested copies of their state and federal tax returns, arguing that the requests for these documents were overbroad and not tailored to the needs of staff’s investigation. This argument has no merit. As the Commission has held, “an NASD member may not ‘second guess’ or ‘impose conditions on’ the NASD’s request for information.” *Joseph Patrick Hannan*, 53 S.E.C. 854, 859 (1998) (citations omitted). As an individual registered with NASD, Ryan was obligated to “abide by its [rules], which are unequivocal with respect to the obligation to cooperate with . . . NASD.” *Brian L. Gibbons*, 52 S.E.C. 791, 794 n.12 (1996) (citation omitted). “Any problems or concerns that a member firm or its associated persons might have in responding to an information request in a timely or complete manner should be raised, discussed and resolved with . . . NASD in the cooperative spirit and prompt manner contemplated by the Rules.” *Richard J. Rouse*, 51 S.E.C. at 584.

There is no evidence that respondents followed the principles set forth in *Richard J. Rouse* to work cooperatively and promptly with staff in an effort to comply with its request for tax returns.¹² *Id.* To the contrary, the evidence shows that respondents repeatedly determined unilaterally that the requests for their tax returns for the years 1999 through 2003 were “overbroad,” and that the requests needed to be more narrowly tailored.

Respondents’ claim that Ryan & Co. was only formed in January 2003 and therefore had not filed any tax returns prior to 2003 is further evidence of respondents’ lack of cooperation. As stated above, Ryan & Co. was the successor company to S.W. Ryan & Co. The record also shows that Ryan & Co. and S.W. Ryan & Co. were registered with NASD under the same NASD Central Registration Depository (“CRD”®) number. Even if Ryan construed the request for the Firm’s tax returns for years 1999 through 2003 as not technically covering the tax returns filed for S.W. Ryan & Co., he should have notified staff that Ryan & Co. was the successor of S.W. Ryan & Co. and

¹² We therefore reject respondents’ argument on appeal that the evidence shows that they negotiated with staff regarding the scope of staff’s request for production of pertinent tax returns.

sought clarification about whether staff was seeking the tax returns from both firms. Finally, the record demonstrates that respondents did not respond to the letter dated March 5, 2004, in which staff reiterated its request for the tax returns in furtherance of its investigation. Contrary to respondents' contention that they acted in good faith in responding to NASD's requests for their tax returns, we find that a preponderance of the evidence establishes that respondents engaged in a pattern of delaying tactics and outright refusals to provide the requested information.

The record is unequivocal that respondents did not provide the requested tax returns. Respondents' failure to produce their state and federal tax returns constitutes a violation of Conduct Rule 2110 and Rule 8210.

* * *

Having concluded that respondents failed to comply with staff's Rule 8210 requests for specific trade documents and tax returns, we find that they violated Conduct Rule 2110 and Rule 8210.¹³

V. Procedural Issues

Respondents raise two procedural issues on appeal: (1) that they were denied due process under the U.S. Constitution; and (2) that the Hearing Panel "abdicated its responsibility to assure a reasonable, fair and just outcome." We discuss each issue in turn.

First, respondents argue that the Hearing Panel erred by not balancing their purported due process rights against staff's need for their tax returns. We presume that respondents are arguing that staff's request for their tax returns violated their constitutional right to privacy. *See, e.g., Whalen v. Roe*, 429 U.S. 589, 598 n.23 (1977) (stating that the concept of liberty in the due process clause includes a "right of privacy") (citation omitted). In order to make a constitutional claim, however, there must be a showing that NASD is a state actor. *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999). Courts have held that NASD is not a state actor. *Id.*; *First Jersey Sec. Inc. v. Bergen*, 605 F.2d 690, 698, 699 n.5 (3d Cir. 1979); *United States v. Shvarts*, 90 F. Supp. 2d 219, 222 (E.D.N.Y. 2000) *see generally Dep't of Enforcement v. Quattrone*, Complaint No. CAF030008, 2004 NASD Discip. LEXIS 17, at *23-37 (NAC Nov. 22,

¹³ Although respondents provided some of the trade documents requested subsequent to the hearing in this matter, the Hearing Panel based its finding that respondents had violated Conduct Rule 2110 and Procedural Rule 8210 on the fact that at the time of the hearing respondents had not produced any of the requested trade documents or tax returns. We affirm the Hearing Panel's finding that respondents had failed to produce all of the requested documents at the time of the hearing. The fact that respondents produced some of the documents after the hearing does not diminish or mitigate their violation.

2004) (analyzing each of the U.S. Supreme Court's tests for state action and concluding that NASD was not functioning as a state actor in its investigation), *appeal pending*, Administrative Proceeding No. 3-11786 (SEC Dec. 28, 2004). Thus, respondents' constitutional argument fails.

Second, respondents challenge the fairness of the hearing proceedings below by asserting that the Hearing Panel erred by not "assuring" a fair outcome. In support, respondents claim that they objected in "good faith" to staff's document request for their tax returns and that "the Hearing Panel [therefore] erred in imposing any sanction against Respondents." These arguments are meritless. As a preliminary matter, the evidence belies respondents' claim that they acted in "good faith." The Hearing Panel rejected respondents' argument that they made a good faith effort to comply with staff's information requests. We find no facts that would cause us to make a different determination. Moreover, we have thoroughly reviewed the record in this matter and conclude that the proceedings below were conducted in compliance with federal and NASD requirements and thus were fair.

The Securities Exchange Act of 1934 ("Exchange Act") requires that self-regulatory organization ("SRO") rules "provide a fair procedure for the disciplining of members and persons associated with members [.]". Section 15A(b)(8) of the Exchange Act (emphasis added). Section 15A(h)(1) of the Exchange Act requires that NASD proceedings be fair. The Commission's interpretations of the Exchange Act's fairness language have focused primarily upon whether the SRO followed its internal procedures and whether those procedures were fair.¹⁴ We find that the proceedings here were conducted in compliance with NASD's internal procedures and that those procedures were fair.

Market Regulation instituted proceedings against respondents under the Procedural Rule 9540 Series after making several written requests for documents and after warning respondents that their continued failure to comply with staff's Rule 8210 requests could result in disciplinary action. The record demonstrates that respondents requested a hearing and were given the opportunity to present evidence and legal arguments to support their position.

Furthermore, the Hearing Panel's imposition of an expulsion against the Firm and a bar against Ryan is authorized by Procedural Rule 9543(a) and within the sanctions recommended in NASD's Sanction Guidelines ("Guidelines") for failing to respond to

¹⁴ See *Scattered Corp.*, 53 S.E.C. 948, 958 (1998) (noting that past cases involving "fairness" analyses "have focussed on the fairness of the SRO's internal procedures, including organization structure as it affects the fairness and impartiality of the course of the proceeding"); *U.S. Assocs., Inc.*, 51 S.E.C. 805, 810-13 (1993) (performing a "fairness" analysis and finding that NASD had failed to follow its own procedural rules).

requests for information.¹⁵ Finally, the Hearing Panel issued a decision in which it stated grounds for the sanctions it imposed, in compliance with the requirements of Procedural Rule 9543(a). We thus find no support in the record for respondents' argument that the proceedings below were not fair.

We conclude that the proceedings in this matter complied with NASD's rules and the requirements of Exchange Act Sections 15A(b)(8) and 15A(h)(1) and were fair.¹⁶

VI. Sanctions

The Hearing Panel expelled the Firm and barred Ryan from associating with any member firm. We find the respondents' conduct to be egregious, and we do not find any facts in mitigation. We thus affirm the Hearing Panel's sanctions.

The applicable Guidelines recommend that a bar should be standard when an individual does not respond in any manner and that a firm should be expelled in egregious cases.¹⁷ In addition, we have held that a refusal to provide documents, even when other requested documents have been provided, is serious misconduct that can result in a bar. *See Manuel M. Bello*, Complaint No. CAF000030, 2002 NASD Discip. LEXIS 10, at *13-16 (NAC June 3, 2002) (imposing a bar on respondent who provided incomplete and untimely responses to Rule 8210 requests for information). The Guidelines list two principal considerations for cases involving failures to respond: (1) the nature of the information requested; and (2) whether the requested information has been provided and, if so, consider the number of requests made, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response. We find that these considerations support imposition of a bar and an expulsion.

With regard to the first principal consideration, the requested trade documents and tax returns were crucial to Market Regulation's investigation into the respondents' possible misconduct regarding short-selling and options transactions. In fact, respondents' refusal to provide order tickets, blotters, options contracts, and exercise of

¹⁵ See Guidelines (2001 ed.) at 39 (Failure To Respond Or Failure To Respond Truthfully, Completely, Or Timely To Requests Made Pursuant To NASD Procedural Rule 8210).

¹⁶ Respondents further suggest that a deliberative body other than an NASD Hearing Panel is required to review the investigative needs of NASD staff against the rights of members, particularly when staff requests "sensitive documents." We disagree. NASD's rules have no such requirement and fairness does not dictate that respondents be allowed to bypass a Hearing Panel.

¹⁷ See Guidelines (2001 ed.) at 39 (Failure To Respond Or Failure To Respond Truthfully, Completely, Or Timely To Requests Made Pursuant To NASD Procedural Rule 8210).

options reports essentially brought to a standstill Market Regulation's investigation. Khurana testified that, without such documents, Market Regulation could not complete its trading analysis relevant to the investigation. In addition, the tax returns were highly material to staff's understanding of the revenues that the Firm realized from the trading activity under investigation. Khurana testified that Market Regulation needed to review the requested tax returns because it became aware of discrepancies regarding the Firm's revenues and profits attributable to its transactions on behalf of its hedge fund clients.

As to the second principal consideration, we view respondents' failure to provide the documents at issue as particularly egregious. Ryan, an experienced securities professional who was registered in multiple capacities (including in four different principal capacities), refused to comply with Market Regulation's numerous requests for information. He did so despite Market Regulation's various attempts to be accommodating¹⁸ and its repeated warnings that it needed the information and would initiate a disciplinary action if respondents continued to refuse to comply with the requests. Moreover, under the facts of this case, Ryan's conduct is imputed to the Firm. Ryan was the president and owner of the Firm.¹⁹ Indeed, at times, he also was the only person working at the Firm. For all intents and purposes, Ryan and the Firm were one and the same. This was not a case, for instance, where an employee refused to cooperate with an NASD investigation unbeknownst to the firm or its senior officers. The Firm, through Ryan, refused to comply with Market Regulation's requests for the information at issue. Respondents' conduct thwarted an investigation of potentially serious misconduct and was egregious.

We also find that no mitigation exists. Respondents contend that they should receive credit for complying with other Rule 8210 requests for information associated with staff's investigation at issue here. They are mistaken. While we acknowledge that respondents provided some of the information requested under Rule 8210, providing selective responses does not mitigate this misconduct. *See Barry C. Wilson, 52 S.E.C. 1070, 1075 (1996)* (rejecting argument that respondent's incomplete responses were

¹⁸ The evidence shows that Market Regulation staff accommodated respondents on a number of occasions in an effort to facilitate their compliance with staff's requests for trading records. For instance, staff revised the deadline for respondents' production of the requested trading records from February 10 to March 15, 2004, after respondents asserted that staff's request for the trading documents was "unduly burdensome." Additionally, in an effort to further assist respondents, staff reorganized its list of requested documents by trade date because that was the manner in which the Firm kept its trading records. Finally, by letter dated March 31, 2004, staff notified respondents that their registrations would be suspended unless they took corrective action within 20 days from the date they were served with notice of the possible suspension or they requested a hearing within five days after service of the notices.

¹⁹ Ryan's wife also held a minority share in the Firm.

mitigating for purposes of sanctions and finding that members and associated persons must cooperate “fully” in providing requested information).

Ryan also contended during his oral argument on appeal that during the proceedings below he relied on the advice of his counsel not to produce the requested tax returns. Ryan’s argument implies that his reliance on counsel should be considered in mitigation of sanctions. Ryan does not substantiate this claim. The Guidelines state that an adjudicator may consider whether “the respondent demonstrated reasonable reliance on competent legal or accounting advice.”²⁰ We find that respondents did not meet that standard. Ryan’s statement at oral argument on appeal that his attorney had advised him that turning over his tax records would “hurt” the negotiation process was not introduced as evidence. Nor did respondents establish that they received legal advice that applicable law did not require them to produce the requested documents. Indeed, such advice would not have been reasonable based on respondents’ obligation to cooperate fully with Rule 8210 requests for information.

In sum, respondents engaged in dilatory measures over an approximately four-month period by continuously failing to provide the requested trading records and tax returns. Their failure to produce the requested records delayed staff’s investigation into potentially serious misconduct. Their actions were egregious and a bar and expulsion are fully warranted.

VII. Conclusion

We order the Firm expelled from NASD membership and Ryan barred from associating with any member in any capacity. These sanctions are based upon our findings that respondents engaged in egregious misconduct by consistently failing to provide documents in response to repeated Rule 8210 requests, in violation of Conduct Rule 2110 and Rule 8210. These sanctions are necessary to protect the integrity of NASD’s investigative process and its role in serving the public interest. The Firm’s expulsion and Ryan’s bar will become effective upon issuance of this decision.²¹ We

²⁰ See Guidelines (2001 ed.), Principal Consideration No. 7, at 9.

²¹ We also have considered and reject without discussion all other arguments advanced by the parties.

uphold the Hearing Panel's imposition of \$1,453.78 in hearing costs against respondents. We further impose appeal costs of \$1,191.85, consisting of appeal costs of \$1,000 and transcript costs of \$191.85. We further order that respondents be jointly and severally liable for the hearing and appeal costs, which total \$2,645.63.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney
Senior Vice President and Corporate Secretary