BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. Howard Brett Berger Rosyln Heights, NY Great Neck, NY, Respondent.	DECISION Complaint No. C9B040069 Dated: July 28, 2006

Hearing Panel held that respondent failed to appear at two on-the-record interviews. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Jonathan M. Prytherch, Esq., Department of Enforcement, NASD

For Respondent: Andrew T. Solomon, Esq.

Decision

Pursuant to NASD Procedural Rule 9311(a), Howard Brett Berger ("Berger") appeals from a March 23, 2005 Hearing Panel decision. The Hearing Panel found that Berger failed to respond to two requests for Berger's appearance and testimony at on-the-record interviews, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. For this violation, the Hearing Panel barred Berger. After a complete review of the record, we affirm the Hearing Panel's findings and sanctions.

I. Background

Berger entered the securities industry in 1992. From 1992 to 1999, Berger worked in registered capacities with four different member firms and, for at least two of those firms, held compliance-related positions. Between late 1999 and April 19, 2001, Berger was registered with IPOMarket.com as a general securities representative, a general securities principal, and a financial and operations principal. On May 2, 2001, IPOMarket.com filed a Uniform Termination Notice for Securities Industry Registration ("Form U5"), notifying NASD that

Berger's registration was terminated. Subsequently, Berger was not registered or associated with any member firm for nearly two years. During that time, Berger worked as a hedge fund manager for Professional Traders Fund, LLC ("PTF"), and as the chief financial officer of Financial Systems Group ("FSG"), a software company.

On April 15, 2003, a Uniform Application for Securities Industry Registration ("Form U4") was filed on behalf of Berger to register with Millennium Brokerage, LLC ("Millennium"). As explained below, the key issue in this proceeding is whether Berger was associated with Millennium from April 15, 2003, to August 13, 2003. Berger is not currently registered with any member firms.

II. Facts

A. Berger's Association with Millennium

Berger first learned of Millennium in 2002. At some point thereafter, Berger negotiated on behalf of FSG a licensing agreement with Millennium for the use of a software program. In addition, PTF, Berger's hedge fund, became a customer of Millennium. In April 2003, Berger contemplated becoming registered with Millennium. Berger's motives were: (1) to earn some of the commissions that PTF was paying to Millennium; and (2) to avoid the lapse of his securities licenses, which were about to expire. Berger raised his idea of registering with Millennium with Lisa Esposito ("Esposito"), a Millennium registered representative who was servicing the PTF account. Berger explained to Esposito that his licenses would expire shortly. Esposito said she would "speak to the powers that be" about Berger's idea.

Christopher Ranni ("Ranni"), Millennium's compliance officer, testified that Steve Fox ("Fox"), Millennium's chief executive officer, instructed Ranni to initiate a Form U4 for Berger. While Ranni did not know the details concerning this application, he was aware that Berger wanted to register to share the commissions earned from the customers whom Berger introduced to Millennium.

Ranni testified that it was his responsibility to file Forms U4 with NASD, and he explained what his "usual business practice[s]" were in doing so. First, Ranni would obtain an applicant's Social Security number, date of birth, and name, and Ranni would enter such information in the Central Registration Depository ("CRD"®) to pull up whatever historical information about the applicant was already in the system. Ranni then would create the Form U4 application, and he or his assistant would e-mail to the applicant a hyperlink to the draft Form U4. The applicant would make any needed edits directly within the Form U4 and click on a link to release the Form U4 back to Ranni. Once the link was e-mailed to the applicant, Ranni could not do anything with the application until the applicant released it back to the firm. Once Ranni received the application back, he would check to make sure that all sections on the form were completed. If the form was not complete, Ranni would send the form back to the applicant to complete it. Once the Form U4 was complete, Ranni would submit it to NASD for registration on behalf of the applicant.

Esposito e-mailed to Berger a template with various fields for Berger to complete with preliminary information needed to process the Form U4. Berger edited the template to provide

his name, Social Security number, residential history, and employment history, and he e-mailed the completed template back to Esposito.

On April 15, 2003, Millennium filed with NASD a Form U4 on Berger's behalf to register Berger as a general securities representative, a general securities principal, and an equity trader. Under the "Signature of Applicant" and "Signature of Appropriate [Firm] Signatory" sections, respectively, Berger's and Ranni's typewritten names appear. Christopher Horihan ("Horihan"), Millennium's president, represented that all signatures on Berger's Form U4 were electronic signatures. Although Ranni could not specifically recall submitting Berger's Form U4, Ranni testified that, based on the normal procedures he followed, he sent the draft Form U4 to Berger for his review, Berger released the Form U4 back to Millennium, and Ranni filed the Form U4 with NASD. Ranni testified that he also notified Berger that he needed to submit his fingerprints.[1]

On April 17, 2003, CRD staff informed Ranni that the Disclosure Reporting Pages ("DRPs") in Berger's Form U4 had deficiencies.[2] Ranni explained that, when deficiencies existed, the procedure he followed was to send an additional e-mail to the applicant instructing him to correct the deficiencies. On April 23, 2003, an amendment to Berger's Form U4 was filed that made various changes, mostly to the DRPs. Both Berger's and Ranni's electronic signatures appear on the April 23, 2003 amendment. On April 25, 2003, CRD staff again informed Millennium that Berger's Form U4 contained deficiencies. On May 12, 2003, a second amendment to Berger's Form U4 was filed making additional changes, again mostly to the DRPs. Berger's electronic signature appears on the May 12, 2003 amendment. On May 13, 2003, CRD staff again informed Millennium of deficiencies in the Form U4. Such deficiencies were never resolved.

Berger's association with Millenium commenced with the filing of a Form U4. Berger's application for registration with Millennium was never approved. On August 13, 2003, Millennium submitted a Form U5, terminating Berger's association. The Form U5 states that the termination was voluntary. Ranni explained that a Form U5 was filed because it was "the only way to get [Berger] off the books."

B. Berger Fails to Attend Two On-the-Record Interviews

On January 14, 2004, in connection with a routine examination of Millennium during which NASD staff detected potential circumvention of the day trading rules, NASD staff sent to Berger, pursuant to NASD Procedural Rule 8210, a request to appear for an on-the-record

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[1] NASD Membership and Registration Rule 1140(c)(2) provides that, "[u]pon filing an electronic Form U4 on behalf of a person applying for registration, a member shall promptly submit a fingerprint card for that person."

[2] The DRPs provide details concerning any affirmative responses to the disclosure questions in Section 14 of Form U4.

interview on January 27, 2004. Berger conceded that he received the request and failed to appear at the interview. In a letter dated January 27, 2004, Andrew Solomon, Esq. ("Solomon"), of Sullivan & Worcester LLP, informed NASD staff that his firm represented Berger and "inadvertent[ly]" failed to inform NASD staff that Berger would be "unavailable" to appear. Solomon informed NASD staff to contact him if they wanted to reschedule the interview.

Subsequently, Berger retained different counsel, Carter Ledyard & Milburn, LLP ("Carter Ledyard"). On January 30, 2004, NASD staff spoke with Susan Kalib, Esq. ("Kalib"), of Carter Ledyard. They agreed to reschedule Berger's appearance at an on-the-record interview for February 12, 2004, but Kalib indicated that Berger might challenge NASD's jurisdiction over him. On February 2, 2004, NASD staff sent to Berger a request to appear at an on-the-record interview on February 12, 2004. On February 11, 2004, NASD staff contacted Ira Lee Sorkin, Esq. ("Sorkin"), also of Carter Ledyard, to confirm Berger's appearance at the interview scheduled for the following day. Sorkin informed NASD staff that Berger did not intend to appear and would be contesting NASD's jurisdiction.[3] Berger concedes that he received the request to appear and that he failed to appear for the February 12, 2004 interview.

III. Procedural History

On July 15, 2004, NASD's Department of Enforcement ("Enforcement") filed a one-cause complaint against Berger, alleging that Berger failed to appear at two on-the-record interviews. Berger filed an answer that admitted he did not appear at either on-the-record interview but that raised the affirmative defense that NASD lacked jurisdiction over him.

The Hearing Panel held a one-day hearing. In a decision dated March 23, 2005, the Hearing Panel found that Berger failed to appear and testify at two on-the-record interviews as requested, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. For this violation, the Hearing Panel barred Berger. On April 19, 2005, Berger appealed the Hearing Panel's decision.[4]

IV. Discussion

A. Rule 8210

NASD Procedural Rule 8210(a) provides that, for the purpose of an investigation, NASD staff has the right to "require a . . . person associated with a member, or person subject to . . . [NASD's] jurisdiction" to provide information at an on-the-record interview. It is undisputed

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[3] In an affidavit, Berger stated that he "chose to assert [his] jurisdictional defense . . . to preserve my privacy and the privacy rights of the investors in [PTF]."

[4] On appeal, Berger is represented by Solomon. Berger moved to introduce an affidavit, in which he asserts that Sorkin advised him not to appear at the second on-the-record interview. The subcommittee of the National Adjudicatory Council ("Subcommittee") empanelled for this proceeding admitted Berger's affidavit into evidence. We adopt this evidentiary ruling.

that Berger had notice of NASD's two requests that he appear and testify at on-the-record interviews, that such notices were issued within two years after Millennium filed a Form U5 terminating Berger's association,[5] and that Berger failed to attend both interviews. The only dispute is whether Berger was, in fact, an "associated person" of Millennium.

Article I(dd)(1) of NASD's By-Laws defines "person associated with a member" to include "a natural person who is registered or has applied for registration." This definition means that "any person who signs and submits a Form U4 is an associated person." *NASD Notice to Members 99-95*. Although Millennium filed a Form U4 and two Form U4 amendments on behalf of Berger, Berger claims that he neither signed these forms nor authorized Millennium to file them with NASD. We believe that Berger's claims are unpersuasive.

The preponderance of the evidence demonstrates that Berger played an active role in completing the Form U4 and the two Form U4 amendments. Berger admitted that Esposito had sent him an e-mail containing a template "for me to fill out my preliminary personal instruction for a U-4." Berger admitted that he filled in the template with his full name, Social Security number, residential history, and employment history. Moreover, the Form U4 and two Form U4 amendments added information to Berger's CRD record that only could have been provided by Berger and made changes that were expressed in first person language, demonstrating that Berger supplied all such information and statements himself.[6] Indeed, Berger admitted that he supplied information that appeared in the Form U4 filed by Millennium. *Cf. Dale M. Russell*, 51 S.E.C. 561, 564 (1993) (rejecting respondent's argument that he did not intend to become an associated person and should, therefore, not be held liable for failing to provide firm with prior written notice of private securities sales, where respondent had submitted a Form U4 and

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[5] Article V, Section 4(a) of NASD's By-Laws provides for retained jurisdiction over a former associated person for two years following a firm's termination of that person's association.

[6] Gregory Marro, an NASD compliance specialist, testified about several examples. First, the April 15, 2003 Form U4 contains an initial DRP disclosing a November 1, 2001 default judgment against Berger in the amount of $30,000. Because the disclosed matter occurred after Berger's previous firm, IPOMarket.com, made its last CRD filing concerning Berger, no one at Millennium could have copied such information from the CRD system to draft Berger's April 15, 2003 Form U4. Second, the April 23, 2003 amendment to Berger's Form U4 contains another initial DRP disclosing an arbitration matter disposed of on October 4, 2001. Some of the information contained in that DRP occurred after IPOMarket.com made its last CRD filing for Berger and, therefore, also was not information that Millennium could have copied from Berger's pre-existing CRD record. That initial DRP also added the statement, "I was not employed at the firm at the time of the complaint." This first-person language points to Berger as the statement's author. The April 23, 2003 Form U4 amendment made two other changes to the DRPs that also were expressed in first person language, including the statements "I was named as the chief compliance officer for failure to supervise" and "[I] was withdrawn as a respondent. I am not familiar with exact date as I was no longer employed at the time."

supporting documents and knew that the firm's processing of the Form U4 would cause him to be an associated person). In addition, the Forms U4 all contain Berger's electronic signature, which the forms explain is effected by "typing a name in the designated signature field" and constitutes "in every way, use or aspect, [a] legally binding signature" on electronically filed Forms U4. Berger admitted that he never made any attempt to correct the Form U4 filings that he now contends were unauthorized.

Although Berger contends that he provided information to Esposito only because he was contemplating registration, Berger had two clear motives for registering with Millennium. First, Berger admittedly wanted to register to capture some of the commissions that his hedge fund was paying to Millennium. Second, Berger had until April 19, 2003 (two years after IPOMarket.com terminated Berger's association) to avoid a lapse of his registrations by registering with another member firm. *See* Membership and Registration Rules 1021(c), 1031(c). In fact, Berger admitted that he expected his supplying of information to Millennium would "hold any expiration date on my license." As a former compliance officer who had responsibilities for filing Forms U4, Berger should have been aware that only the filing of a Form U4 would allow him to avoid having to requalify. Berger's motives, combined with the fact that Berger's Form U4 was filed just four days before the lapse of his registrations, further demonstrate that Berger decided to sign and submit the Form U4. Conversely, Millenium had no incentive to file a Form U4 if Berger was only contemplating registration, given the costs it would have incurred and the risks it would have taken to do so.[7]

A letter from, and testimony by, Ranni further corroborates our conclusion that Berger signed and authorized the filing of the Form U4 and the two Form U4 amendments. Although Ranni could not specifically recall dealing with Berger's Form U4, Ranni testified that, in accordance with his normal practices, he sent Berger the link to the Form U4, Berger "released" the Form U4 back to Millennium, and Ranni filed the Form U4 with NASD. Moreover, Ranni himself electronically signed the Form U4, signifying that he had "provided [Berger] an opportunity to review the information contained herein and [that Berger] has approved the information and signed the Form U-4." As for the changes made to Berger's DRPs, Ranni testified that he would never complete the DRPs, further demonstrating that it was Berger who added such information. The Hearing Panel found that Ranni's testimony was credible based on his "demeanor, the consistency of his testimony, and the lack of any motive to testify less than fully and truthfully."

Berger argues that the Hearing Panel erred in crediting Ranni's testimony. In support of his argument, Berger notes that Millennium failed to retain Berger's originally executed Form U4 and the amendments to it, as required by NASD Membership and Registration Rule 1140(c),

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[7] Berger argues that Ranni could not refute the possibility that Esposito may have completed Berger's Form U4 without authority. Berger also argues that an unauthorized filing of a Form U4 would have been consistent with a motive of Millennium to have Berger's association to generate additional brokerage commissions. Both of these arguments, however, are mere speculation and not persuasive.

and that none of the e-mails that Ranni purportedly sent to Berger was in evidence. It is well-settled, however, that "[c]redibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference." *Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *17-18 (Feb. 10, 2004). Moreover, a credibility determination "can be overcome only where the record contains substantial evidence for doing so." *John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *21 (Jan. 22, 2003). The evidence to which Berger points does not amount to the substantial evidence needed to overturn the Hearing Panel's credibility determination.

Berger argues that the preponderance of the evidence precludes a finding that Berger signed and submitted the Form U4. For example, Berger notes that no one testified that he typed his name on the Form U4 or directed anyone to do so. Considering, however, that Ranni credibly testified that he e-mailed the Form U4 to Berger to complete and that Ranni could not file the Form U4 without Berger returning it to him, it is not material that there is only circumstantial evidence that Berger typed his own name on the Form U4. Berger also argues that minor errors in Berger's residential history in the Form U4 demonstrate that he never saw the Form U4. Such minor errors, however, are also consistent with a conclusion that Berger simply failed to correct these errors when he reviewed the Form U4.

As noted above, Berger deems it significant that Millennium did not, as it was required to do, have copies of Berger's originally signed Form U4 and the Form U4 amendments.[8] While the absence of an original Form U4 does bolster Berger's argument that he never manually signed the Form U4, it does not outweigh the preponderance of the evidence described above showing that Berger did, nevertheless, electronically sign and submit a Form U4.

Finally, Berger contends that, even if he authorized the filing of his Form U4, NASD still lacked jurisdiction over him because Millennium never filed a complete Form U4. Specifically, Berger notes that he never submitted a fingerprint card and that there were "unresolved deficiencies" with the Form U4. We reject Berger's argument.[9] The SEC has held that NASD's jurisdictional provisions "should be construed, not strictly and technically, but flexibly to achieve

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[8] Membership and Registration Rule 1140(c) provides that "[e]very initial . . . electronic Form U4 filing shall be based on a signed Form U4 provided to the member . . . by the person on whose behalf the Form U4 is being filed. As part of the member's recordkeeping requirements, it shall retain the person's signed Form U4 . . . ." Electronically filed Forms U4 must be based, therefore, on a "signed, paper Form U4" that is provided to the member by the applicant. *NASD Notice to Members 03-56*. Horihan explained in a letter that Berger's Form U4 was based on Berger's electronic signature.

[9] As a preliminary matter, the absence of a fingerprint card does not render a Form U4 incomplete. A fingerprint card is not part of the Form U4, but is a separate document filed only *after* a Form U4 has been submitted. In fact, Membership and Registration Rule 1140(c)(2) allows a registration to be effective for 30 days pending receipt of a fingerprint card.

their remedial purpose." *See Donald M. Bickerstaff*, 52 S.E.C. 232, 234 (1995). NASD has explained that all that is required to be an associated person within NASD's By-Laws is to "sign and submit" a Form U4. *NASD Notice to Members 99-95*. Nothing in *Notice to Members 99-95* or our prior cases suggests that a person who signs and submits an incomplete Form U4 thereby prevents himself from becoming subject to NASD's jurisdiction. By analogy, we have found persons who have applied for membership but who have not been approved to be within NASD's jurisdiction. *See, e.g.*, *Dep't of Enforcement v. Respondent*, Complaint No. C10010146, 2003 NASD Discip. LEXIS 1, at *9 n.4 (NAC Jan. 3, 2003) (holding that respondent who signed and submitted Form U4, but whose registration was never accepted, to be within NASD's jurisdiction); *Dist. Bus. Conduct Comm. v. Maliagros*, Complaint No. C10920110, 1994 NASD Discip. LEXIS 47, at *1-2 (NBCC Jan. 10, 1994) (holding that respondent who signed and filed a Form U4, but who never worked for a member firm, was subject to NASD's jurisdiction). Like the respondents in those cases, Berger was never accepted as a registrant, but he took the concrete step of signing and filing a Form U4 in which he expressly consented to NASD's jurisdiction.

Accordingly, by applying for registration with NASD, Berger became an associated person of Millennium subject to NASD's jurisdiction. NASD staff requested, within two years of Berger's termination of his association with Millennium, that Berger attend two on-the-record interviews. Because Berger failed to appear at those interviews, he violated Procedural Rule 8210 and Conduct Rule 2110.[10]

B. The Proceedings Below Were Fair

Berger argues that, to fulfill the requirement in Section 15A(b)(8) of the Securities Exchange Act of 1934 ("Exchange Act") that he be afforded a "fair procedure," he should have been an afforded a "pre-sanction mechanism for challenging [NASD's] jurisdiction."[11] Berger also contends that, because he did not comply with the Rule 8210 requests "based on a bona fide jurisdictional objection," fairness permits imposing only a sanction that is "conditional" on a continued refusal to comply with the Rule 8210 requests.

Enforcement correctly argues that Berger has waived these fairness arguments. Although Berger challenged NASD's jurisdiction in the proceedings below, he made no arguments

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[10] A violation of another NASD rule, such as Rule 8210, constitutes a violation of Conduct Rule 2110. *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.

[11] For example, Berger contends that NASD should have afforded him a procedure similar to the practices under Rules 12 or 45(c) of the Federal Rules of Civil Procedure, which allow, respectively, defendants in federal civil lawsuits to file a motion to dismiss for lack of jurisdiction without having to first file an answer and recipients of subpoenas to challenge the subpoena before responding.

concerning the fairness of the investigation or this proceeding. In his reply brief, Berger argues that his counsel stated before the Hearing Panel that Berger might "show up and testify" should he lose his jurisdiction-based arguments and that such statement "signaled" Berger's argument that fairness permits no more than a "conditional" sanction. Although such a statement was premised on an assumption that Berger would not be barred, it did not ask for a "conditional" sanction, call for a "pre-sanction" procedure to challenge jurisdiction, or touch upon what Section 15A of the Exchange Act requires. Accordingly, Berger waived his fairness arguments. *See Dep't of Enforcement v. U.S. Rica Fin., Inc.*, Complaint No. C01000003, 2003 NASD Discip. LEXIS 24, at *26 n.9 (NAC Sept. 9, 2003) (determining that failure to raise argument before Hearing Panel constitutes waiver).

In any event, we reject the substance of Berger's arguments. Section 15A(b)(8) of the Exchange Act requires that SRO rules be in accordance with Section 15A(h) and, in general, "provide a fair procedure for the disciplining of members and persons associated with members." Section 15A(h)(1) of the Exchange Act requires that, in any proceeding by an SRO to determine whether a member or person associated with a member should be disciplined, the association "shall bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record." Section 15A(h)(1) further requires that any sanction imposed be supported by a written statement. The SEC has held that an analysis of the fairness of an NASD disciplinary proceeding looks to whether it was conducted in accordance with NASD's rules and whether NASD implemented its procedures fairly. *Robert J. Prager*, Exchange Act Rel. No. 51974, 2005 SEC LEXIS 1558, at *48-49 (July 6, 2005).

NASD provided Berger with all of the procedural safeguards expressly required by the Exchange Act and NASD's rules, and more. Enforcement made a written request to Berger to appear at an on-the-record interview. Enforcement informed Berger that he was obligated to appear and testify and that, should he fail to do so, he may be subject to an NASD disciplinary action and the imposition of sanctions, "including a bar from the securities industry." Enforcement also informed Berger that he may be represented by an attorney of his choice at the interview. When Berger failed to appear, Enforcement agreed to reschedule the interview. When Berger failed to appear at the second interview, NASD brought specific disciplinary charges against him, provided Berger with notice of those charges, afforded Berger an opportunity to defend against those charges, and kept a written record of the proceeding. Finally, the Hearing Panel issued a written opinion. *See, e.g.*, *Sundra Escott-Russell*, 54 S.E.C. 867, 873-74 (2000) (finding requirements of Section 15A(h)(1) met when NASD brought specific charges, the respondent had notice of such charges, the respondent had an opportunity to defend against such charges, and NASD kept a record of the proceedings).

Not only did NASD follow all of its procedures, such procedures were fair. NASD's Investigations and Sanctions Rules and its Code of Procedure were approved by the SEC, which properly determined that such rules were fair and furthered the public interest. *See Order Approving Proposed Rule Change*, Exchange Act Rel. No. 38908, 1997 SEC LEXIS 1617 (Aug.

7, 1997).[12] Pursuant to these procedures, Berger had ample opportunities to raise his jurisdictional objections, both before a Hearing Panel and before the NAC. Principles of fairness do not require an additional procedure to allow persons to raise jurisdictional objections prior to responding to Rule 8210 requests. By analogy, even the SEC's Rules Relating to Investigations do not afford any procedure to challenge SEC requests for compelled testimony at a formal investigative proceeding. *See* 17 C.F.R. § 203.7 (concerning the rights of witnesses in SEC investigations).

Furthermore, the delays that would accompany an additional procedure to challenge NASD's jurisdiction would render it substantially more difficult for NASD to conduct its investigations efficiently and effectively. It is well settled that NASD should not have to bring a disciplinary proceeding in order to obtain compliance with its rules governing investigations. *Toni Valentino*, Exchange Act Rel. No. 49255, 2004 SEC LEXIS 330, at *15 (Feb. 13, 2004). Likewise, NASD should not have to litigate whether a person is subject to NASD's jurisdiction before obtaining answers to its Rule 8210 requests. It is also axiomatic that Berger was not "free to impose conditions on [his] responses." *Escott-Russell*, 54 S.E.C. at 872. Accordingly, we reject Berger's arguments that the proceedings below were not fair.

Berger's argument that fairness requires NASD to impose no more than a "conditional" bar against Berger is misplaced. The fairness requirements in Section 15A(b)(8) and (h) of the Exchange Act apply not to the level of sanctions that are imposed but to the *procedures* employed in disciplinary proceedings. Sanctions are governed, instead, by Section 15A(b)(7) of the Exchange Act, which requires that sanctions be "appropriate[ ]" or "fitting," and by the NASD Sanction Guidelines ("Guidelines"). We therefore consider Berger's arguments concerning a "conditional bar" in the sanctions section below.

V. Sanctions

For failure to respond violations, the Guidelines suggest that "[i]f the individual did not respond in any manner, a bar should be standard. Where mitigation exists, or the person did not respond in a timely manner, consider suspending the individual in any or all capacities for up to two years."[13] In determining the appropriate sanctions, we consider the principal considerations for cases involving failures to respond and the Principal Considerations in Determining Sanctions. As explained below, we affirm the Hearing Panel's decision to bar Berger.

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[12] In fact, the SEC expressly considered one comment that Rule 8210 did not address certain bases for objecting to requests for information. *Id*. at *47 (noting commenter's request that Rule 8210 address the assertion of privileges as a basis for objecting to requests for information).

[13] *NASD Sanction Guidelines* 35 (2006), http://www.nasd.com/web/groups/enforcement/documents/enforcement/nasdw_011038.pdf [hereinafter *Guidelines*].

By failing to appear at two on-the-record interviews, Berger failed to respond "in any manner." Failure to comply with a Rule 8210 request "is a serious violation justifying stringent sanctions." *Elliott M. Hershberg*, Exchange Act Rel. No. 53145, 2006 SEC LEXIS 99, at *10 (Jan. 19, 2006), *appeal docketed*, No. 06-1086 (2d Cir. Mar. 9, 2006). "When members and associated persons delay their responses to requests for information, they impede the ability of NASD to conduct its investigations fully and expeditiously." *Id*. at *8-9; *see also Valentino*, 2004 SEC LEXIS 330, at *15.

In addition to the serious nature of Berger's violation, he has a disciplinary history that aggravates his misconduct.[14] Specifically, on December 6, 1999, Berger settled allegations that he engaged in flipping, supervision, and registration violations. Berger was suspended in any principal capacity for two years, suspended in all capacities for 120 days, fined $20,000, and was required never to serve as a director of compliance, or otherwise function as the highest ranking person in a compliance department, of any member firm. On February 19, 1998, Berger settled allegations that he engaged in continuing education, complaint reporting, and supervision violations. Berger was censured, fined $10,000, and suspended for 10 business days.

Berger argues that he failed to appear at the interviews based on advice of his former counsel, Sorkin, and that his reliance on counsel mitigates his conduct. In an affidavit, Berger asserted that Sorkin advised him that he was not subject to NASD's jurisdiction, that if he appeared for an on-the-record interview he would waive his jurisdictional defenses, and that even if NASD determined it has jurisdiction over him, he would have an opportunity to testify before any sanction would be imposed. Berger's argument is unavailing.

As an initial matter, Berger's failure to appear at the *first* scheduled on-the-record interview was not due to Berger's reliance on advice of counsel. In a letter to NASD staff written on the day of the first scheduled interview, Solomon—then Berger's attorney—represented that Berger was simply "unavailable." Solomon did not, at that time, make any challenges to NASD's jurisdiction.

Berger's argument also fails for other reasons. The SEC has "repeatedly held that reliance on counsel does not excuse an associated person's obligation to supply information or testimony or otherwise cooperate with NASD investigations." *Valentino*, 2004 SEC LEXIS 330, at *13. Nor in this case should Berger's purported reliance on counsel mitigate his conduct. The Guidelines direct us to consider "[w]hether the respondent demonstrated reasonable reliance on competent legal . . . advice." The record does not demonstrate that Berger's reliance on counsel was reasonable. When Berger signed and submitted a Form U4, he agreed that he understood, and consented to abide by, NASD's rules and that he understood that he was subject to NASD's jurisdiction. *See* Form U4, Section 15A (individual/applicant's acknowledgements and consent). In addition, Berger has over ten years of experience in the securities industry, including various compliance positions. Furthermore, NASD staff specifically warned Berger that failing to appear and testify may subject him to a disciplinary action and the imposition of sanctions,

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[14] *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 1).

including a bar from the securities industry. Given Berger's agreement to comply with NASD's rules, his extensive experience in the industry, and the warnings from NASD staff, any purported reliance on counsel was not reasonable. *Cf. Valentino*, 2004 SEC LEXIS 330, at *14 (rejecting argument that respondent's reliance on counsel should be mitigating, where respondent agreed to comply with NASD rules and where NASD staff repeatedly warned that failing to appear could result in a bar).[15] Accordingly, we reject Berger's argument that his purported reliance on counsel mitigates his conduct.

In light of the absence of mitigating evidence, a bar is appropriate. Berger argues that we should follow the practice "commonly" employed by the NYSE in certain cases of affording a person who is found to have failed to respond to an NYSE request for information, in violation of NYSE Rule 477(c), a period of time to comply before a bar is made permanent. *See, e.g.*, *John Henry Libaire, Jr.*, Exchange Hearing Panel Decision 01-20, 2001 NYSE Disc. Action LEXIS 19 (Feb. 8, 2001) (barring former member for failing to comply with NYSE requests in violation of NYSE Rule 477, should he not comply with the exchange requests "within three months"). The NYSE disciplinary cases Berger cites involve a different SRO's rules and are of no precedential value in this proceeding. Even if they were, "appropriate sanctions depend on the particular facts and circumstances of each case, and cannot be determined by comparison with the action taken in other cases." *Montelbano*, 2003 SEC LEXIS 153, at *50.

More importantly, we do not think a "conditional bar" is a sufficient sanction for Berger's conduct. The sanction we impose will "serve as a deterrent to others who may be inclined to ignore NASD's information requests." *Hershberg*, 2006 SEC LEXIS 99, at *9. NASD staff already faces significant obstacles in conducting its investigations, including the lack of subpoena authority and a two-year period of retained jurisdiction that Enforcement frequently runs up against. *See id.* at *10 (holding that compliance with Rule 8210 requests "is essential to NASD's self-regulatory function because NASD lacks subpoena power"); NASD By-Laws, Art. V, Sec. 4. To afford Berger another chance to comply with the Rule 8210 requests—now over two years since the first request was issued—would seriously undermine both our efforts to deter others from failing to comply with NASD's requests for information and NASD's mission of investor protection. A bar "protects investors by encouraging the timely cooperation that assists in the prompt discovery and correction of wrongdoing." *Hershberg*, 2006 SEC LEXIS 99, at *9.

VI. Conclusion

We affirm the Hearing Panel's findings that Berger failed to appear at two on-the-record interviews, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. For this

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[15] Moreover, even if Berger's affidavit were credible, he did not explain what information he disclosed to his counsel. *Cf. Hal S. Herman*, Exchange Act Rel. No. 44953, 2001 SEC LEXIS 2173, at *13-14 (Oct. 18, 2001) (finding that respondent failed to prove reliance on counsel where it was unclear what information respondent conveyed to his attorney).

violation, we bar Berger. We also affirm the Hearing Panel's decision to impose $2,247.40 in costs, and we further assess Berger $1,496.83 in appellate costs.[16]

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President
and Corporate Secretary

[16] We have considered and reject without discussion all other arguments advanced by respondent.