

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

CMG Institutional Trading, LLC
Chicago, IL,

and

Shawn D. Baldwin
Chicago, IL,

Respondents.

DECISION

Complaint No. E8A20050252

Dated: February 20, 2008

Respondents failed to respond completely to written requests for information. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Pamela Shu, Esq., Richard S. Schultz, Esq., Leo F. Orenstein, Esq.,
Department of Enforcement, Financial Industry Regulatory Authority

For the Respondents: Nichole C. Patton, Esq., Ted M. Word, Esq.

Decision

Pursuant to NASD Rule 9311(a), CMG Institutional Trading, LLC (“CMG” or “the Firm”) and Shawn D. Baldwin (“Baldwin”) appeal a December 12, 2006 Hearing Panel decision. The Hearing Panel expelled CMG and barred Baldwin from associating with any member firm in any capacity for failing to respond completely to written requests for information in violation of

NASD Rules 8210 and 2110. The Financial Industry Regulatory Authority's¹ Department of Enforcement ("Enforcement") cross-appeals certain findings of the Hearing Panel related to alleged additional failures by CMG and Baldwin to respond to FINRA requests. After a complete review of the record, we affirm the Hearing Panel's liability findings. We reduce, however, the expulsion and bar imposed upon CMG and Baldwin, respectively, to a two-year suspension in all capacities for both CMG and Baldwin. In addition, CMG and Baldwin are fined \$25,000, jointly and severally.

I. Factual and Procedural History

A. Respondents' History

Baldwin entered the securities industry in 2000. He became registered with FINRA as a general securities representative in September 2000. Since November 2001, Baldwin has been registered as a general securities representative and general securities principal with CMG. CMG became registered with FINRA in December 2001. Baldwin acquired ownership of CMG in November 2001, and Baldwin is the president of CMG. CMG is a \$5,000 broker and is not permitted to engage in proprietary trading. During the relevant time periods it appears that the bulk of CMG's business was equity underwriting, and CMG had only institutional customers.

B. FINRA's Routine On-Site Examination of CMG and Exit Conference Report

In late June or early July 2005, FINRA commenced a routine, on-site examination of CMG. As part of this examination, FINRA staff orally requested a number of documents from CMG. Although CMG did not respond completely to these initial oral requests, CMG provided FINRA with approximately half of the documents requested. Consequently, FINRA staff made handwritten requests to CMG and gave such requests to Baldwin and Kila Weaver ("Weaver"), a registered principal of CMG and CMG's operations manager. FINRA received some additional documents in connection with its handwritten requests. FINRA also sent letters dated July 12, 2005 and July 14, 2005 (the "July 2005 Letters"), which requested additional documentation from CMG in connection with the examination.²

Subsequent to such requests, on July 22, 2005, FINRA staff conducted an exit conference with Baldwin and Weaver and gave Baldwin an exit conference report (the "Exit Conference Report"). The 17-page Exit Conference Report was intended to outline preliminary findings of deficiencies and violations discovered during the examination. The Exit Conference Report required that CMG respond to the report, in writing, and provide the documents requested in the report on or before August 5, 2005. The Exit Conference Report referenced the July 2005

¹ As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA"). References to FINRA shall include, by reference and where appropriate, references to NASD.

² The July 2005 Letters are not part of the record.

Letters and the information requested in such letters. Baldwin signed the Exit Conference Report and acknowledged its receipt.

FINRA did not receive written responses specifically addressing the Exit Conference Report on or before August 5, 2005. Consequently, FINRA staff sent CMG (to Baldwin's attention as CMG's president) a letter dated August 11, 2005, (1) reminding the Firm that pursuant to NASD Rule 8210, FINRA required written responses to the Exit Conference Report, and (2) extending the deadline for the Firm to respond. FINRA did not receive a written response to the August 11, 2005 letter, and sent two additional letters to CMG dated August 30, 2005 and September 14, 2005, which again requested that CMG and Baldwin respond to the Exit Conference Report in accordance with their obligations under NASD Rule 8210.

CMG and Baldwin failed to respond specifically to the Exit Conference Report requests by the deadlines imposed by FINRA's three letters. FINRA, however, received some information from respondents and admitted receiving responsive documents in a piecemeal fashion, both during the routine examination and subsequent to the issuance of the Exit Conference Report. FINRA's lead examiner identified a number of documents that CMG produced between August 2005 and December 2005 in response to the Exit Conference Report, although most documents appear to have been produced to FINRA without respondents identifying them as being responsive to specific requests set forth in the Exit Conference Report.³ For example, the respondents eventually sent FINRA documents in response to the July 2005 Letters. Further, respondents provided bank statements, payroll records, operating agreements for affiliates of CMG, documents evidencing capital infusions into CMG, and research reports drafted by CMG. The examiner, however, could not identify when he received the documents, nor could he identify with any specificity or certainty what items CMG failed to produce.

In addition, in April 2006 FINRA sent respondents a final disposition letter with respect to the Exit Conference Report. At the hearing on this matter, two FINRA witnesses testified that neither CMG nor Baldwin responded to the final disposition letter, while one other FINRA witness testified that FINRA did receive a response to the final disposition letter. CMG did, in fact, respond to the final disposition letter, in writing, on or about May 1, 2006, and counsel for Enforcement later corrected the testimony of its two witnesses who stated that a response had not been received.⁴

³ At oral argument before the National Adjudicatory Council subcommittee ("Subcommittee") empanelled to hear this matter, Enforcement stated that respondents provided FINRA with "boxes and boxes of irrelevant and unresponsive materials[.]" Enforcement further stated that FINRA staff reviewed these materials and determined that they were neither material nor responsive to FINRA's requests.

⁴ The record does not include the final disposition letter or CMG's May 1, 2006 response to the final disposition letter.

On April 17, 2006, FINRA filed a complaint against respondents. On or about May 15, 2006, FINRA staff met with Baldwin. At this meeting, Baldwin hand-delivered a written response dated May 12, 2006, specifically addressing the Exit Conference Report, point-by-point. The May 12, 2006 response was, on its face, incomplete. For example, one question on the Exit Conference Report was left blank, and respondents did not include the exhibits and attachments referred to in the response.

C. Requests for Information Regarding CMG's Capitalization

1. SEC's Inquiry

In late September 2005, SEC staff informed Baldwin that CMG's net capital was below the minimum amount required by the Securities Exchange Act of 1934 Rule 15c3-1 and CMG was undercapitalized by at least \$44,000. Baldwin informed the SEC that to correct the deficiency he would contribute \$75,000 to CMG's capital. The SEC, however, did not receive any documentation evidencing a capital contribution to CMG, and requested that Baldwin provide evidence of a deposit and that such funds represented permanent capital and not a loan to CMG.⁵ On October 20, 2005, Baldwin met with SEC staff and provided documentation that on October 19, 2005, he had deposited \$100,000 into CMG's bank account. Baldwin also provided documentation indicating that the \$100,000 originated from an entity called FX Trading, LLC ("FX Trading"), a one-page account statement purportedly from FX Trading showing \$3 million held in a CMG account at FX Trading, and financial statements for CMG showing a \$3 million receivable from FX Trading. Baldwin also informed SEC staff that he was the source of the \$3 million in the FX Trading account. FINRA staff received CMG's financial statements and a copy of CMG's FX Trading account statement.

SEC staff viewed the FX Trading account statement as suspicious. First, the statement reflected a value of \$3 million for a one-day period rather than a typical one-month period. Second, Chicago was misspelled. Third, the \$3 million of equity listed on the statement appeared to have been altered. Fourth, the document contained no indication that the account was held at FX Trading, and the website address listed on the statement did not match FX Trading's website. Consequently, the SEC informed Baldwin that CMG could not count the \$3 million as capital until its existence could be confirmed.

Subsequently, SEC staff attempted to contact FX Trading to independently verify the existence of the funds. FX Trading did not respond to the SEC's inquiries, and SEC staff subsequently contacted the regulatory agency for FX Trading, the National Futures Association.⁶ On November 18, 2005, SEC staff sent Baldwin a letter informing him that they were unable to verify the existence of the funds and that Baldwin was thus required to produce a deposit ticket and bank statement to prove that the funds existed. Baldwin did not produce these documents.

⁵ SEC staff copied FINRA on this request, as was its standard practice.

⁶ On or about November 21, 2005, the National Futures Association suspended FX Trading and its principal.

2. FINRA's Inquiries

In connection with the information received from the SEC and respondents, FINRA shared the SEC's concern regarding the validity of the \$3 million in the FX Trading account and the \$100,000 capital contribution that had purportedly originated from FX Trading. Consequently, on November 29, 2005, FINRA staff sent Baldwin an NASD Rule 8210 request seeking the following information: (1) copies of bank or account statements evidencing the source of funds for the \$3 million allegedly held at FX Trading; (2) copies of all statements of account for the FX Trading account for July 2005 through October 2005; and (3) copies of all agreements, resolutions, minutes, or other documentation characterizing the funds as a loan or capital contribution to CMG. The request required a response by December 7, 2005.⁷

FINRA did not receive a response. On December 8, 2005, FINRA staff hand-delivered a second request to respondents. The request was delivered by hand because FINRA staff hoped to examine the requested documents in CMG's office at that time, although they did not call ahead to arrange this with CMG. Weaver informed the FINRA staff members delivering the request that responsive documents were locked in Baldwin's office and that Baldwin was in a meeting out of town. Weaver further stated that responsive documents would be faxed to FINRA later that day. FINRA staff sent a fax to Weaver confirming the visit, reminding Weaver that the NASD Rule 8210 request remained in effect, and advising her that if CMG needed additional time to respond to the request she should contact staff to arrange a reasonable production date. FINRA staff also immediately sent a letter to Baldwin confirming their visit to CMG's office. The letter also advised Baldwin that the denial of the request to review the documents in CMG's office violated NASD Rule 8210, and requested that Baldwin provide a date on which the documents could be reviewed.⁸

At or around this time, Baldwin left eight voice mails over the course of five or six days for a FINRA supervisor of examiners. The voice mails focused on FINRA's inquiries and CMG's compliance with net capital requirements. Baldwin expressed his frustration with FINRA throughout these messages, some of which were hostile. In one such voice mail, Baldwin stated the following:

Second, I'm telling you this so you clearly get it; the \$3 million came from an account from me. That's at FX. Prior to where it came from that is, quite frankly, none of your business. It came from another account from me, but I'm not going to share that with you because I don't think you've been the most scrupulous of people. So I'll send you the account information that I have at FX, and I will send you the account information for CMG Institutional Trading and you'll see that it comes from the Shawn Baldwin account to CMG.

⁷ In addition, on December 7, 2005, FINRA sent a letter to CMG stating that CMG was out of compliance with the net capital rule and was required to cease conducting securities business.

⁸ Baldwin asserted that he wrote to FINRA on or about December 9, 2005, seeking clarification of the NASD Rule 8210 requests. The record does not support Baldwin's assertion.

On December 13, 2005, Baldwin sent FINRA a letter. The letter asserted, among other things, that “[w]e have established that the \$3 million capital contribution made by me on October 6 to CMG Institutional Trading LLC is immaterial to the firm’s compliance with the net capital rule.” The letter further asserted that CMG had submitted all supporting documents for its net capital computation, that CMG had submitted a net capital computation that excluded the \$3 million capital contribution because FINRA had deemed such capital non-allowable, and that all sources of capital reflected in the net capital computation were clearly evidenced in documentation already submitted to FINRA.

3. Meeting with Baldwin and Subsequent Response

On December 15, 2005, Baldwin and his attorney met with SEC staff to discuss the unresolved issues concerning the \$3 million and CMG’s FX Trading account.⁹ FINRA staff members were also present at this meeting. During the meeting, Baldwin stated that the \$100,000 capital contribution made in October 2005 had been returned, which consequently caused CMG to be out of compliance with its net capital requirements. Baldwin also explained that the \$3 million originated from a foundation whose identity was confidential (despite his earlier statements that he was the source of the funds), and that documentation concerning the FX Trading account was unavailable to him at that time and he would send such information once he obtained it from FX Trading.

On December 21, 2005, CMG’s counsel wrote to SEC staff and informed them that the foundation’s name was Amaranth Holdings (“Amaranth”). Counsel further stated that Baldwin had requested information from Amaranth but that, to date, a response had not been received, and that FX Trading had suspended CMG’s access to its online account.¹⁰ Finally, counsel stated that information regarding the \$100,000 capitalization would be provided at a later time. The following documents were attached to the December 21, 2005 letter: (1) a demand note dated August 18, 2005, from Capital Management Group Securities LLC¹¹ to Amaranth in the amount of \$3 million; (2) a guaranty from Baldwin in favor of Amaranth in connection with the demand note; and (3) a one-page account statement identical to the document delivered to the

⁹ Baldwin argues that he requested the December 15, 2005 meeting with the SEC and FINRA and that this demonstrates that he attempted to cooperate and comply with FINRA’s requests. The record, however, is silent as to whether Baldwin, the SEC, or FINRA requested that the parties meet in December 2005.

¹⁰ It appears from the record that Amaranth and FX Trading had, at a minimum, one principal in common. The relationship between the two entities, however, is unclear.

¹¹ Baldwin owned Capital Management Group Securities LLC and served as its president and CEO. Capital Management Group Securities LLC is not (and has never been) a FINRA member firm. Baldwin testified that he procured the \$3 million loan on behalf of Capital Management Group Securities LLC to cure CMG’s \$44,000 net capital deficiency as alleged by the SEC and to ensure that there were no further issues concerning CMG’s compliance with net capital rules.

SEC in October 2005. FINRA received a copy of this letter and the attached documentation.¹² In addition, a FINRA examiner testified that during the course of FINRA's investigation staff "may have received" a document entitled "Resolution of the Sole Member of CMG" dated October 6, 2005, which indicated that Baldwin contributed \$3 million to CMG as a capital contribution.¹³

In early January 2006, CMG provided additional documentation, including statements showing that additional funds had been deposited into CMG's accounts, leading the SEC and FINRA to conclude that CMG had become net capital compliant as of January 4, 2006.

D. Procedural History

On April 17, 2006, Enforcement filed a one-cause complaint against CMG and Baldwin. The complaint alleged that CMG, acting through Baldwin, violated NASD Rules 8210 and 2110 by failing to respond to two distinct written requests for information (i.e., the requests related to the Exit Conference Report and the requests related to the \$3 million and CMG's FX Trading account). Respondents filed an answer denying Enforcement's allegations.

A two-day hearing was held on July 27 and August 24, 2006. Enforcement called six witnesses: four FINRA staff members, one SEC staff member, and Baldwin. Respondents did not call any witnesses and rested their case after cross-examining Baldwin. On December 12, 2006, the Hearing Panel issued its decision. With respect to the requests for information related to the Exit Conference Report, the Hearing Panel found that Enforcement had not demonstrated by a preponderance of the evidence that respondents failed to respond. The Hearing Panel found, however, that CMG and Baldwin failed to respond fully to FINRA's requests for information issued in November and December 2005, in violation of NASD Rules 8210 and 2110. For this misconduct, the Hearing Panel expelled CMG and barred Baldwin from associating with a FINRA member firm in any capacity.

Respondents' appeal followed. Enforcement cross-appealed the Hearing Panel's finding with respect to the Exit Conference Report.

II. Discussion

NASD Rule 8210 requires persons subject to FINRA's jurisdiction to provide information requested by FINRA and to permit the inspection and copying of books, records or accounts. As has been often observed, because FINRA lacks subpoena power, it must rely upon NASD Rule 8210 "to police the activities of its members and associated persons." *Joseph Patrick Hannan*, 53 S.E.C. 854, 858-59 (1998). The failure to provide information subverts

¹² It is unclear exactly when FINRA received this information.

¹³ In addition, in mid-October, 2005, FINRA received a copy of an agreement between FX Trading and CMG relating to the net capital treatment of assets in the proprietary account of CMG (the "PAIB Agreement").

FINRA's ability to carry out its self-regulatory functions and is, therefore, a serious violation. *Id.*; *Rooney A. Sahai*, Exchange Act Rel. No. 55046, 2007 SEC LEXIS 13, at *10 (Jan. 5, 2007) (“Rule 8210 is an essential tool for NASD’s enforcement responsibilities under the Securities Exchange Act of 1934. . . . [i]t is well settled that, because 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.”). It is well established that a member or an associated person “may not second guess[] an NASD information request and that a belief that NASD no longer needs the requested information provides no excuse for a failure to provide it.” *Dennis A. Pearson, Jr.*, Exchange Act Rel. No. 54913, 2006 SEC LEXIS 2871, at *17 (Dec. 11, 2006) (internal quotes omitted). Thus, a member or associated person must respond to a FINRA request even if he believes that he has already provided FINRA with the information it seeks. *Id.* Likewise, associated persons “cannot take it upon themselves to determine whether information requested is material to an NASD investigation of their conduct.” *Dep’t of Enforcement v. Sturm*, Complaint No. CAF000033, 2002 NASD Discip. LEXIS 2, at *9 (NASD NAC March 21, 2002).¹⁴

We apply these standards first to the Hearing Panel’s finding that Enforcement did not demonstrate that respondents failed to respond to the NASD Rule 8210 requests related to the Exit Conference Report. We then apply these standards to the finding that respondents failed to respond completely to the NASD Rule 8210 requests related to CMG’s capitalization.

A. Enforcement Failed to Prove that Respondents Violated NASD Rules 8210 and 2110 in Connection with the Exit Conference Report

The Hearing Panel found that Enforcement failed to demonstrate that CMG and Baldwin violated NASD Rules 8210 and 2110 in connection with the Exit Conference Report. Noting that the evidence showed that respondents provided responses to at least some of the items referenced in the Exit Conference Report, the Hearing Panel found that Enforcement’s primary witness was unable to specify what FINRA had and had not received from respondents. The Hearing Panel further noted that Enforcement’s witness admitted receiving certain responses from respondents that were not contained in the record, and was disturbed by statements from several of Enforcement’s witnesses that respondents did not respond to the final disposition letter, when in fact they did respond.

We affirm the Hearing Panel’s finding that Enforcement failed to prove that respondents violated NASD Rules 8210 and 2110 with respect to the Exit Conference Report. The testimony presented by Enforcement with respect to CMG and Baldwin’s responsiveness to the Exit

¹⁴ A violation of NASD Rule 8210 constitutes a violation of NASD Rule 2110. *Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999). NASD Rule 2110 requires that “a member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.” NASD Rule 0115 provides that FINRA 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.

Conference Report was, to say the least, confusing. For example, the FINRA lead examiner who conducted CMG's examination testified repeatedly that he had received certain documents from respondents prior to the filing of the complaint, but could not specify requests contained in the Exit Conference Report to which respondents failed to respond. Further, the examiner initially testified that respondents had attempted to respond to the request for documents, but later stated that the respondents did not "directly" attempt to respond.¹⁵ In addition, the investigator testified that the July 2005 Letters, to which CMG and Baldwin responded, were separate and apart from the Exit Conference Report despite the fact that they are referenced repeatedly and incorporated in the Exit Conference Report.

Moreover, we find troubling the contradictory statements given by Enforcement's witnesses with respect to respondents' failure to respond to the final disposition letter. The differing responses from Enforcement's witnesses, coupled with the confused nature of the FINRA examiner's testimony, raise considerable questions concerning the accuracy of Enforcement's general assessment that respondents did not respond completely to the requests. Consequently, while we do not necessarily agree with respondents' claims that they responded fully and repeatedly to these requests, we find that Enforcement did not satisfy its burden of proof with respect to respondents' alleged violations of NASD Rule 8210 related to these requests.

B. Respondents Failed to Respond Fully to Requests Regarding CMG's Capitalization

The Hearing Panel found that respondents violated NASD Rules 8210 and 2110 in connection with the requests for information related to CMG's capitalization and capital contributions. In reaching this conclusion, the Hearing Panel "gave particular weight to Baldwin's express refusal to provide information as to the source of the capital contribution" as evidenced by his voice mail to FINRA staff. The Hearing Panel also considered Baldwin's statement that the \$3 million contribution was immaterial to CMG's compliance with net capital rules. For the reasons stated below, we find that CMG and Baldwin failed to respond fully to the NASD Rule 8210 requests related to CMG's capitalization and capital contributions.

The November 29, 2005 request for information sought copies of (1) bank or account statements evidencing the source of funds for the \$3 million allegedly held at FX Trading, (2) all statements of account for the FX Trading account for the period between July 2005 and October 2005, and (3) all agreements, resolutions, minutes, or other documentation characterizing the

¹⁵ An analysis created by FINRA's lead examiner purported to show that respondents' written response to the Exit Conference Report dated May 12, 2006, failed to respond to a number of requests contained in the Exit Conference Report. However, we agree with the Hearing Panel that the fact that items were omitted from the May 12, 2006 written response does not negate the possibility that respondents provided responsive information prior to May 12, 2006. Indeed, the analysis categorizes several responses to individual requests for information as "unacceptable" and notes that certain documentation is missing from the May 12, 2006 response although testimony revealed that respondents had earlier provided information responsive to these requests in connection with the July 2005 Letters.

funds as a loan or capital contribution to CMG. Respondents failed to respond by the December 7, 2005 deadline, and FINRA staff hand-delivered its second request reiterating its requests on December 8, 2005.

Respondents provided some of the requested information at or shortly subsequent to the December 15, 2005 meeting. For example, copies of the demand note indicating that Amaranth was the initial source of the \$3 million were delivered shortly after this meeting at which Baldwin stated that the funds had come from a foundation.¹⁶ In addition, FINRA staff testified that prior to the requests, FINRA “may have received” the corporate resolution characterizing the funds as a capital contribution, and received the PAIB agreement and the one-page FX Trading account statement (which respondents provided again after the meeting).¹⁷ Further, in the December 21, 2005 letter, respondents, through counsel, generally stated that they were attempting to obtain additional information from FX Trading and Amaranth but were unsuccessful in doing so.

Respondents, however, did not respond fully and completely to FINRA’s requests. The December 21, 2005 written response did not provide any details regarding how the \$3 million eventually was placed in CMG’s FX Trading account, and Baldwin’s testimony concerning the origin of the funds was confusing and contradicted his statements in October 2005 that he was the source of these funds. Further, while respondents stated that they were unsuccessful in their attempts to obtain information from FX Trading and Amaranth, the December 21, 2005 letter did not describe in detail respondents’ efforts to obtain documents, nor did it explain why respondents were not in possession of the requested account statements. *See Sahai*, 2007 SEC LEXIS 13, at *13 (“We have long said that if a respondent is unable to provide the information requested, there remains a duty to explain that inability.”).

Moreover, the December 21, 2005 letter does not describe why respondents could not provide copies of bank or account statements showing movement of the \$3 million as eventually described by Baldwin at the hearing. Indeed, Baldwin’s attempt at the hearing to explain such matters simply raised more questions, and even if Baldwin had provided FINRA with a coherent explanation in December 2005, it is highly likely that FINRA staff would have sought additional information. In short, rather than provide detailed written explanations to FINRA in December 2005, respondents provided incomplete responses to three rather simple requests for information. In so doing, respondents violated their obligations under NASD Rule 8210 to answer fully FINRA’s requests for information. *See Perpetual Sec., Inc.*, Exchange Act Rel. No. 56613, 2007 SEC LEXIS 2353, at *38 (Oct. 4, 2007) (holding that respondents violated NASD Rules 8210

¹⁶ We note that Baldwin’s explanation that a foundation was the source of the funds and subsequent production of the demand note occurred several days after the voice mail message in which Baldwin stated that he would not provide the information. *See also* Part III, *infra*.

¹⁷ Given the relatively narrow scope of FINRA’s requests for information, which included copies of all resolutions characterizing the funds as a loan or capital contribution to CMG, we are somewhat troubled by the inability of FINRA staff to state with certainty whether they received any corporate resolution.

and 2110 by failing to respond completely and in a timely manner to FINRA requests for information).

Respondents argue that because CMG Management Group Securities LLC, a non-regulated entity, was the maker of the demand note, they were not obligated to produce any information related to this entity and thus their response to the NASD Rule 8210 requests was complete. In support of this argument, respondents cite to *Jay Alan Ochanpaugh*, Exchange Act Rel. No. 54363, 2006 SEC LEXIS 1926 (Aug. 25, 2006). In *Ochanpaugh*, the Commission found that three checks drawn on the bank account of a church for which respondent served as an elder and account signatory were not within the possession and control of respondent, and thus outside of the scope of NASD Rule 8210. Unlike *Ochanpaugh*, Baldwin has never claimed that records in the possession of CMG Management Group Securities LLC were not within his possession and control. In fact, the record shows that Baldwin owned and controlled CMG Management Group Securities LLC. See, e.g., *Dep't of Enforcement v. Respondent Firm 1*, Complaint No. C8A990071, 2001 NASD Discip. LEXIS 6, at *38-39 (NASD NAC April 19, 2001) (rejecting claim that respondent, president and controlling shareholder of broker-dealer and its parent, had no access or legal authority to produce information in the possession of parent). Further, respondents' argument ignores that the NASD Rule 8210 requests primarily sought information regarding CMG.

Finally, respondents argue generally that Enforcement's actions against CMG and Baldwin are the result of an "inherent bias" against Baldwin. To demonstrate that FINRA has engaged in selective prosecution, respondents must demonstrate that: (1) they were singled out for enforcement while others similarly situated were not; and (2) such prosecution was motivated by arbitrary or unjust considerations (e.g., race, religion, or the desire to prevent the exercise of a constitutionally protected right). See *Terrance Yoshikawa*, Exchange Act Rel. No. 53731, 2006 SEC LEXIS 948, at *28-29 (Apr. 26, 2006). The record is devoid of evidence to support such a contention.¹⁸ Consequently, we reject respondents' claims of bias.

¹⁸ Prior to the hearing in this matter, the Hearing Officer denied as untimely all of respondents' proposed exhibits. Respondents do not challenge this ruling, and in accordance with NASD Rule 9267(b), such excluded exhibits were attached to the record. As expressly set forth in NASD Rule 9267(b)(2), such documents, while attached to the record, do not constitute part of the record. Respondents, however, attached a number of these excluded exhibits to their briefs and referred to such exhibits throughout their briefs. We find that the Hearing Officer properly excluded the exhibits. Respondents disregarded the Hearing Officer's pre-hearing order requiring that all proposed exhibits be labeled, identified, and filed. Further, subsequent to the Hearing Officer's decision to exclude respondents' proposed exhibits, respondents disregarded the Hearing Officer's instructions that they file a motion setting forth the reasons for their failure to comply with the order. Rather, respondents simply resubmitted their proposed exhibits without explanation. Consequently, we do not consider respondents' excluded exhibits in connection with this decision.

III. Sanctions

The FINRA Sanction Guidelines (“Guidelines”) state that, if a person does not respond to a FINRA request for information in any manner, a bar should be the standard sanction.¹⁹ If there are mitigating factors present, or the person did not respond in a timely manner, adjudicators should consider suspending the individual in any or all capacities for up to two years.²⁰ In the case of a firm, the Guidelines state that in egregious cases expulsion is the appropriate standard. If there are mitigating factors present, adjudicators should consider suspending the firm with respect to any or all activities or functions for up to two years. For failing to respond completely, the Guidelines also suggest a fine of \$10,000 to \$25,000.²¹

The Guidelines list two principal considerations for adjudicators to assess in determining appropriate sanctions for violations of NASD Rule 8210, as well as the principal considerations and general principles applicable to all violations.²² First, adjudicators are instructed to consider the nature of the information requested. Second, adjudicators are advised to consider whether the information was provided and, if so, the number of requests made, the time it took the respondent to respond, and the degree of regulatory pressure required to obtain a response.²³

The Hearing Panel found that respondents’ conduct was egregious and it expelled CMG and barred Baldwin in all capacities.²⁴ The Hearing Panel found that FINRA’s inquiry was serious and involved a large, suspicious capital contribution to CMG intended to bring CMG into compliance with net capital rules. The Hearing Panel further found that while the requests spanned only a short period of time, they were repeated and included an in-person visit to CMG’s offices. Finally, the Hearing Panel found that Baldwin’s “hostile voice mail,” in which he stated that the source of the capital contribution was none of FINRA’s business, was aggravating and illustrated his intentional and unequivocal refusal to cooperate with FINRA.

We agree that FINRA’s requests to respondents in November and December 2005 concerned important information regarding CMG’s capitalization and compliance with the net capital rule. The net capital rule “is one of the most important tools that the SEC and NASD use to protect investors because it imposes financial responsibility on the securities industry by: (1) establishing minimum net capital requirements for broker-dealers; and (2) defining the process

¹⁹ *FINRA Sanction Guidelines* 35 (2007), <http://www.finra.org/web/groups/enforcement/documents/enforcement/p011038.pdf> [hereinafter *Guidelines*].

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ In light of the bar, the Hearing Panel did not impose any fines.

used by broker-dealers to determine their net capital at all times.” *Dep’t of Enforcement v. Inv. Mgmt. Corp.*, Complaint No. C3A010045, 2003 NASD Discip. LEXIS 47, at *14 (NASD NAC Dec. 15, 2003). FINRA’s requests sought material information related to a suspicious capital contribution allegedly designed to bring CMG in compliance with its minimum net capital requirements. Despite the importance of the information requested, CMG and Baldwin provided incomplete responses to FINRA’s requests that hindered FINRA’s investigation into CMG’s capitalization and compliance with net capital rules.²⁵

We reject respondents’ argument that we should consider it mitigating that no customer was harmed by respondents’ misconduct. While direct financial harm to a customer may not have occurred as a result of respondents’ failure to respond fully to FINRA’s requests, “[t]he harm in such instances, as here, is to the self-regulatory process and to investors’ confidence in that process.” *Dep’t of Enforcement v. Dieffenbach*, Complaint No. C06020003, 2004 NASD Discip. LEXIS 10, at *40 n.18 (NASD NAC July 30, 2004), *aff’d on other grounds*, *Rooms v. SEC*, 444 F.3d 1208 (10th Cir. 2006).²⁶

Moreover, respondents’ incomplete responses to FINRA’s requests appear to be part of a larger pattern.²⁷ For example, and in addition to the issues raised by respondents’ responses to the Exit Conference Report, a FINRA staff member testified that in early 2006 he sent two additional NASD Rule 8210 requests to Baldwin in connection with CMG’s FOCUS reports. CMG provided information to approximately half of FINRA’s inquiries, and such responses were forthcoming only after FINRA repeatedly asked for the information. In addition, CMG was suspended in April 2006 for failing to file its annual audit.

Respondents’ failure to respond fully and completely to FINRA’s requests was a serious violation of NASD Rule 8210 and respondents’ obligations thereunder. For the reasons set forth below, however, we find that the Hearing Panel’s sanctions of CMG and Baldwin were

²⁵ See *Guidelines*, at 35 (instructing adjudicators to assess the nature of the information requested). Respondents attempt to diminish the seriousness of their violations by arguing that CMG was in compliance with net capital requirements during all relevant time periods and did not perpetrate fraud on any party. Respondents’ obligations to comply with FINRA requests for information, however, are not conditioned on the ultimate validity of the underlying inquiry. See *Charles R. Stedman*, 51 S.E.C. 1228, 1232 (1994) (holding that even if respondent were innocent of any wrongdoing that was the subject of inquiry, the “obligation under [NASD Rule 8210] to respond to NASD requests for information is independent of his obligation to refrain from misconduct with respect to his customer’s accounts.”). Moreover, while the record is unclear regarding CMG’s compliance with its net capital obligations during most of the time periods in question, the record indicates that CMG was not in compliance with its net capital requirements for at least several weeks in December 2005 and early January 2006.

²⁶ We further note that the fact that neither respondent has a disciplinary record is not a mitigating factor. See *Rooms*, 444 F.3d at 1214.

²⁷ See *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 8).

unnecessarily harsh. In assessing sanctions and finding that respondents' misconduct was egregious, the Hearing Panel placed undue emphasis on a single voice mail from Baldwin to a FINRA staff member in which Baldwin stated that he would not provide information regarding the source of the funds. Without question, respondents were obligated to cooperate fully in connection with FINRA's inquiries. *See Hannan*, 53 S.E.C. at 859-60 (holding that respondent is obligated to cooperate fully with FINRA investigations regardless of disagreements with FINRA staff); *Richard J. Rouse*, 51 S.E.C. 581, 584 n.9 (1993) (holding that "[a]ny 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 the NASD in the cooperative spirit and prompt manner contemplated by [NASD Rule 8210]."). Baldwin's voice mails were generally hostile and unnecessarily antagonistic towards FINRA staff. Yet despite Baldwin's statement in one of the voice mails that he would not provide information concerning the source of the funds, Baldwin did in fact provide the SEC and FINRA with the requested information. Thus, his statement that he would not provide information was quickly contradicted by his actions in providing certain information to FINRA. While Baldwin's messages were in poor taste, we find that under the circumstances the Hearing Panel erred in placing undue emphasis on the voice mail as an aggravating factor and finding that Baldwin's conduct was egregious.

In addition, we note that FINRA received certain information orally from Baldwin at the December 15, 2005 meeting, and approximately one week later received additional information from respondents' counsel. Thus, the requests spanned a short period of time and respondents provided certain information to FINRA shortly after the meeting. Moreover, Baldwin generally informed FINRA that he was having difficulty obtaining certain documents from Amaranth and FX Trading, and the SEC experienced similar difficulties in seeking information from FX Trading.

In light of the foregoing, and under the particular facts and circumstances of this case, we impose a two-year suspension in all capacities on both CMG and Baldwin, and impose a \$25,000 fine upon CMG and Baldwin, jointly and severally. Such sanctions are appropriately remedial under the circumstances and reflect the serious nature of respondents' violations. Further, the sanctions we impose reflect that respondents' misconduct subverted FINRA's ability to carry out its self-regulatory functions, including its ability to protect investors by ensuring that member firms comply with net capital requirements. Finally, such sanctions will discourage respondents and other broker-dealers and associated persons from engaging in similar misconduct.

IV. Conclusion

We affirm the Hearing Panel's finding that respondents violated NASD Rules 8210 and 2110 by failing to respond completely to written requests for information related to CMG's capitalization. We further affirm the Hearing Panel's finding that Enforcement failed to demonstrate that respondents did not respond to requests for information related to the Exit Conference Report. We find, however, that under the facts and circumstances of this case the Hearing Panel's expulsion of CMG and imposition of a bar against Baldwin were excessive. Accordingly, we suspend CMG in all capacities for two years, suspend Baldwin from associating with any FINRA member in any capacity for two years, and impose a \$25,000 fine upon CMG and Baldwin, jointly and severally.²⁸

On behalf of the National Adjudicatory Council,

Marcia E. Asquith,
Senior Vice President and Corporate Secretary

²⁸ Pursuant to NASD Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.

We also have considered and reject without discussion all other arguments of the parties.