

**NASD REGULATION, INC.  
OFFICE OF HEARING OFFICERS**

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DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10000139
v.	:	
	:	<b>Hearing Panel Decision</b>
FRANK A. PERSICO	:	
(CRD #1693712),	:	Hearing Officer - GAC
	:	
Staten Island, NY	:	
	:	
	:	April 30, 2001
Respondent.	:	

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**Registered representative failed to answer questions at an on-the-record interview conducted by NASD Regulation, Inc. pursuant to an authorized investigation. Respondent was found liable for violations of NASD Procedural Rule 8210 and NASD Conduct Rule 2110 and barred from association with any NASD member firm in any capacity.**

***Appearances***

Philip A. Rothman, Esq., New York, New York (Rory C. Flynn, Washington, DC, Of Counsel), on behalf of the Department of Enforcement.

Frank A. Persico appeared *pro se*.<sup>1</sup>

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<sup>1</sup> Respondent Persico was represented by counsel at the time he filed his Answer and throughout certain pre-hearing conferences. That counsel withdrew his representation of Respondent prior to the Hearing at the request of the Respondent.

## DECISION

### I. PROCEDURAL BACKGROUND

#### A. Complaint

Enforcement filed a single cause Complaint on July 31, 2000, charging Respondent with violating NASD Conduct Rule 2110 and NASD Procedural Rule 8210. The Complaint alleged that Respondent was subject to the NASD's jurisdiction pursuant to Article V, Section 4 of the Association's By-laws since his last association with a member firm terminated on August 10, 1998. The Complaint further alleged that on May 18, 2000, Respondent appeared for an on-the-record interview conducted by the NASD Regulation, Inc. ("NASDR") staff. The interview was requested pursuant to NASD Procedural Rule 8210.

According to the Complaint, Respondent appeared with counsel for the scheduled interview, but refused to answer any of the NASDR staff's questions. The Complaint alleges that Respondent's refusal to answer questions constituted a violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

#### B. Answer

Respondent filed an Answer on August 30, 2000, in which he stated that he is not, nor has he been associated with a member firm for over two years.<sup>2</sup> Respondent further denied that he appeared for the on-the-record interview but refused to answer any of the NASDR staff's questions.<sup>3</sup> Respondent also filed 23 affirmative defenses.

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<sup>2</sup> Answer, ¶ 3.

<sup>3</sup> Answer, ¶ 6.

### C. Pre-Hearing

Prior to Hearing, Enforcement filed a Motion for Summary Disposition, arguing that there were no material issues of fact, and that it was entitled to summary disposition as a matter of law. Respondent did not respond to the motion. The Hearing Officer denied the motion, finding that Respondent's denial of his association with a member firm, contained in his Answer, and his claims of lack of jurisdiction raised in other pre-hearing submissions constituted a genuine issue as to the NASD's jurisdiction over Respondent. Respondent also failed to appear for the final pre-hearing conference held by telephone on January 12, 2001, despite having received due notice of the conference.

### D. The Hearing

The Hearing was held in New York, New York on January 19, 2001, before a Hearing Panel composed of the Hearing Officer and two current members of the District Committee for District No. 10. Respondent Persico did not appear at the Hearing. Enforcement presented Rosalyn Marcus, an NASDR examiner, as its only witness. The Hearing Officer admitted into evidence all 11 exhibits offered by Enforcement (CX 1-11).<sup>4</sup>

## II. **FINDINGS OF FACT**

### A. Background of Respondent

From August 1987 through June 1998, Respondent Persico was registered as a General Securities Representative at various times with nine different member firms.<sup>5</sup>

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<sup>4</sup> Hearing Tr., p. 23.

<sup>5</sup> CX 1.

Respondent was associated with member firm LCP Capital Corp. (“LCP”) in an unregistered capacity from May 12, 1998 until August 10, 1998.<sup>6</sup> Respondent has not been associated with another member firm since his association with LCP terminated.<sup>7</sup>

B. Respondent’s Refusal to Answer Questions

On March 22, 2000, the NASDR staff sent Respondent a letter in which it requested, pursuant to NASD Procedural Rule 8210, that he appear for an on-the-record interview at the NASDR’s offices in New York City on April 25, 2000. According to the March 22 letter, the NASDR staff was “reviewing matters related to [Respondent’s] employment in the securities industry, and specifically referenced a member firm with whom he had been previously registered. (CX 6.)

In a letter to the NASDR staff dated March 28, 2000, counsel for Respondent noted his representation of Respondent and informed the NASDR staff that Respondent would not be able to appear for the on-the-record interview on April 25, 2000. Counsel stated that he would contact the NASDR staff to reschedule the interview. (CX 7.)

On April 5, 2000, counsel for Respondent notified the NASDR staff of Respondent Persico’s availability on May 18, 2000 for the on-the-record interview. (CX 9) On April 6, 2000, the NASDR staff confirmed in a letter to Respondent, and copied to his counsel, that his on-the-record interview had been rescheduled for May 18, 2000. The April 6 letter noted that the request for Respondent’s interview was made pursuant to NASD Procedural Rule 8210. (CX 8.)

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<sup>6</sup> CX 1, p. 14.

<sup>7</sup> CX 1.

On May 18, 2000, Respondent appeared with counsel for the on-the-record interview, as scheduled. After having been duly sworn, the NASDR staff asked Respondent a series of questions relating to his prior employment in the securities industry, as well as his familiarity with certain individuals. Respondent refused to answer each and every question ask of him, replying only, "I respectfully wish to rely on my Fifth Amendment right and decline to answer this question." (CX 10, pp. 9-12.)

After asserting his rights under the fifth amendment to the U.S. Constitution, the NASDR staff reminded Respondent that his testimony had been requested pursuant to NASD Procedural Rule 8210, and that his failure to provide information as requested by the NASDR staff could be viewed as activity inconsistent with Rule 8210. The NASDR staff further noted that such conduct "would be the basis for the initiation of a disciplinary proceeding that could lead to the imposition of sanctions including a bar, censure, suspension, and/or fine." (CX 10, p. 7.)

Counsel for the NASDR staff also advised Respondent that "the NASD and NASD Regulation are not government entities, therefore, your Fifth Amendment privileges against self-incrimination are not available in these proceedings. Rule 8210 of the Association's procedural rules requires you to respond to all of our questions without qualification. I want to advise you [of] that before we proceed any further." (CX 10, p. 10.)

Respondent's counsel then asserted that the "NASD is a quasi governmental agency and the Fifth Amendment right to the Federal Constitution as well as the New York State Constitution rights apply in these proceedings and Mr. Persico will be asserting his Fifth Amendment rights." (Id.) Thereafter, in response to additional

questions posed by the NASDR staff, Respondent continued to decline to answer the questions, and continued instead, to assert his Fifth Amendment right. (CX 10, pp. 11-12.)

Based on Respondent's continued refusal to respond to any of the NASDR staff's questions, the NASDR staff reminded him that pursuant to NASD Procedural Rule 8210, he was obligated to respond to the questions. The NASDR staff advised Respondent that his refusal to respond to the questions might result in disciplinary action, and thereafter concluded the interview. (CX 10, pp. 11-12.)

### **III. LEGAL DISCUSSION**

#### **A. Jurisdiction**

Article V, Section 4 of the NASD By-Laws creates a two-year period of retained jurisdiction over a person whose association with a member has been terminated and is no longer associated with any member. The jurisdiction covers conduct that occurred prior to termination of an individual association and failures to provide information requested, pursuant to Rule 8210, during the period of retained jurisdiction. As noted *supra*, Respondent's association with LCP was terminated on August 10, 1998. Enforcement filed the Complaint on July 31, 2000, within two years of the termination of Respondent's association with LCP. The Complaint alleged a failure to respond to questions during an on-the-record interview that occurred during the period of retained jurisdiction. Therefore, the Hearing Panel finds that the NASD has jurisdiction over Respondent for purposes of this proceeding, pursuant to Article V, Section 4 of the NASD By-Laws.

## B. Failure to Respond

NASD Conduct Rule 2110 requires that a member “in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade.” The ethical standards imposed on members in Rule 2110 apply equally to persons associated with members. NASD Rule 0115. Rule 8210(a)(1) authorizes the NASD to require a “person subject to the Association’s jurisdiction to provide information orally, in writing, or electronically...with respect to any matter involved in [an] investigation...” This Rule provides a means for the NASD to carry out its regulatory functions in the absence of subpoena power. A violation of Rule 8210 is also a violation of Rule 2110.

The Securities and Exchange Commission (“SEC”) stated that “[w]e have repeatedly stressed the importance of cooperation in NASD investigations. We have also emphasized that the failure to provide information undermines the NASD’s ability to carry out its self-regulatory functions.... Failures to comply are serious violations because they subvert the NASD’s ability to carry out its regulatory responsibilities.” In re Joseph Patrick Hannan, Exchange Act Rel. No. 40438 (September 14, 1998) (*omitting citations noted therein*).

The Federal Courts have consistently held that the Fifth Amendment claim against self-incrimination cannot be properly asserted when appearing before a self-regulatory organization. As explained in the recent Federal court decision in D.L. Cromwell Investments, Inc., et al., v. NASD Regulation, Inc., the Fifth Amendment privilege does not apply to the NASDR in performing its statutory mandate, since it is not a government actor. 2001 U.S. Dist. LEXIS 1912 (SDNY February 26, 2001). In D.L. Cromwell, the court held that

[t]he Fifth Amendment prohibits only governmental action. The NASD and [NASD] Regulation are private entities.... Hence, even if the individual plaintiffs are being compelled to give evidence against themselves by the threat of NASD sanctions, [NASD] Regulation's actions raise no Fifth Amendment issue unless it fairly may be said that its actions are fairly attributable to the government. This in turn requires that the government have "exercised coercive power or....provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the" government or, at least, that [\*14] "the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'"

Id. at \*13-14, *citing* Blum v. Yaretsky, 457 U.S. 991, 1004-05, 73 L. Ed 2d 534, 102 S. Ct. 2777 (1982) (*quoting* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353, 42 L. Ed 2d 447, 95 S. Ct. 449 (1974)). In denying a Fifth amendment claim in a New York Stock Exchange proceeding, the Court of Appeals for the Second Circuit stated that

interrogation by the New York Stock Exchange in carrying out its own legitimate investigatory purposes does not trigger the privilege against self-incrimination.... Most of the provisions of the Fifth Amendment, in which the self-incrimination clause is embedded, are incapable of violation by anyone except the government in the narrowest sense. . . . [T]his is but one of many instances where government relies on self-policing by private organizations to effectuate the purposes underlying federal regulating statutes.

United States v. Solomon, 509 F.2d 863, 867, 869 (1975).<sup>8</sup>

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<sup>8</sup> *See, e.g.,* Jones v. SEC, 115 F.3d 1173, 1182-83 (4<sup>th</sup> Cir. 1997) (rejecting claim based on the Fifth Amendment's Double Jeopardy Clause because the NASD is not a government agency); Datek Securities, Inc. v. NASD, 875 F. Supp. 230, 234 (S.D.N.Y. 1995) (dismissing Fifth and Fourteenth Amendment claims challenging the fairness of a disciplinary proceeding because the NASD is not a state actor.)



The SEC and NASD have likewise consistently held that an individual subject to NASD jurisdiction cannot properly invoke the Fifth Amendment privilege in response to a request for information pursuant to Rule 8210.<sup>9</sup> There is no evidence that the government exercised coercive powers over the NASDR or encouraged the NASDR to conduct the on-the-record interview. The Hearing Panel therefore finds that the invocation of the Fifth Amendment privilege against self-incrimination was not a valid defense to a violation of Rule 8210.

By reason of the foregoing, the Hearing Panel finds that Respondent Persico violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by refusing to respond to questions during the May 18, 2000 on-the-record interview.

#### **IV. SANCTIONS**

Enforcement requests that the Hearing Panel bar Respondent from associating with any member in any capacity. The NASD Sanction Guidelines (“Guidelines”), as amended, provide that in the case of a failure to respond, “a bar should be standard.”<sup>10</sup>

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<sup>9</sup> See In re Vladislav S. Zubkis, Exchange Act Release No. 40409, n.2 (Sept. 8, 1998) (“It is well established . . . that the self-incrimination privilege does not apply to questioning in proceedings by self-regulatory organizations, since such entities are not part of the government.”); In re Edward C. Farni II, 51 S.E.C. 1118, 1994 SEC LEXIS 1630, at \*3 (1994) (“a refusal to provide information is a violation [of Rule 8210], without regard to invocation of the right against self-incrimination”); In re Daniel C. Adams, 47 S.E.C. 919, 921 (1983) (an invocation of the Fifth Amendment privilege would not affect the right of the NASD to sanction the respondent for his refusal to provide information, since the NASD is not a part of the government); In re Richard Neuberger, 47 S.E.C. 698, 699 (1982); In re Lawrence H. Abercrombie, 47 S.E.C. 176, 177 (1979). See also District Bus. Conduct Comm. No. 10 v. Gerald Cash McNeil, No. C3B960026, 1999 NASD Discip. LEXIS 3, at \*13-15 (NAC Jan. 21, 1999).

<sup>10</sup> NASD Sanction Guidelines, p. 31 (1998 ed.).

In this case, the NASDR staff provided Respondent with the opportunity to reschedule the interview for a date convenient to him. During the course of the on-the-record interview, the NASDR staff notified Respondent that the Fifth Amendment privilege could not be invoked in order to avoid his obligations under NASD Rule 8210. The NASDR staff also advised Respondent that his refusal to respond to questions may result in a disciplinary proceeding and sanctions that could include a bar. The Hearing Panel therefore did not find Respondent's invocation of the Fifth Amendment to be a mitigating factor that requires a sanction different from what is recommended in the Guidelines..”

Given the lack of mitigating circumstances and Respondent's intentional refusal to answer questions posed to him during the on-the-record interview, the Hearing Panel finds that a bar from associating with any member in any capacity, as requested by Enforcement, is appropriate under the facts and circumstances of this case.

## **V. CONCLUSION**

The Hearing Panel found that Respondent Persico violated NASD Conduct Rule 2110 and NASD Procedural Rule 8210 as alleged in the Complaint.<sup>11</sup> The Hearing Panel

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<sup>11</sup> The Hearing Panel considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.

barred Respondent Persico from association with any member firm in any capacity. The bar shall become effective immediately upon this Decision becoming the final disciplinary action of the NASD.

Hearing Panel

by: \_\_\_\_\_  
Gary A. Carleton  
Hearing Officer

Copies to:

Via Overnight Courier and First Class Mail  
Frank Anthony Persico

Via First Class Mail and Electronic Transmission  
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