

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

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C02000037
v.	:	
	:	Hearing Officer - DMF
PAUL JOHN HOEPER	:	
(CRD #2318477),	:	HEARING PANEL DECISION
	:	
Newport Beach, CA	:	March 6, 2001
	:	
Respondent.	:	

Digest

The Department of Enforcement filed a Complaint charging that respondent Paul John Hoeper violated NASD Rules 8210 and 2110 by failing to respond to requests for information. Hoeper filed an Answer, but waived his right to a hearing.

Based on the written record, the Hearing Panel found that Hoeper violated Rules 8210 and 2110 by failing to respond to requests for information. As a sanction, the Hearing Panel barred Hoeper from associating with any member firm in any capacity.

Appearances

David A. Greene, Esq., Senior Regional Attorney, Los Angeles, CA, and Rory C. Flynn, Chief Litigation Counsel, Washington, DC, for the Department of Enforcement.

Paul John Hoeper, pro se.

DECISION

1. Procedural History

On June 19, 2000, the Department of Enforcement filed a Complaint charging that respondent Paul John Hoeper violated NASD Rules 8210 and 2110 by failing to respond to two requests for information issued by NASD Regulation, Inc. staff pursuant to Rule 8210. NASDR staff issued the requests in connection with an investigation of a customer complaint that Hoeper failed to effect trades in accordance with the customer's instructions.

Hoeper filed an Answer to the Complaint in which he stated that his "failure to respond to requests made by all NASD offices was caused by multiple home moves over the response period. Supporting documents needed to respond in full have been moved several times, are now in storage, and in some cases have been returned to [his former employer]. A full statement of answer with supporting documentation will be delivered as soon as full access to all needed documents has been secured." Hoeper did not request a hearing in his Answer, as required by Rule 9221.

On August 24, 2000, the Hearing Officer then assigned to this matter held a pre-hearing conference to, among other things, clarify whether Hoeper wanted a hearing on the charge. During the conference, Hoeper expressly waived his right to a hearing. (Tr. 4-6.) On August 28, 2000, the Hearing Officer issued an Order Following Pre-Hearing Conference in which she set a schedule for Enforcement to file a written submission in support of the Complaint, and for Hoeper to file a written submission in opposition.

In accordance with this schedule, Enforcement filed a written submission on October 2, 2000, including Declarations from Enforcement Senior Regional Attorney David A. Greene

(Greene Decl.) and NASDR Supervisor of Examiners Denise Evans (Evans Decl.), and 13 Complainant's Exhibits (CX 1-13). Hoeper did not file any written submission in his defense. On December 28, 2000, Greene filed a Supplemental Declaration stating that Enforcement had "received what appears to be a written response to" the requests for information. Greene stated that he had forwarded the response "to the NASD Regulation, Inc.'s Examination Staff for review and analysis." In light of this response, Greene suggested that the charge against Hoeper could be considered failure to respond to the requests in a timely manner, rather than failure to respond altogether.

2. Facts

The relevant facts are undisputed and are well documented in Enforcement's submission. From approximately January 4, 1999 through approximately March 19, 1999, Hoeper was associated with NASD member firm Raymond James Financial Services, Inc. (RJFS) as a General Securities Representative and a General Securities Sales Supervisor. He is not currently registered with any member firm.¹ (CX 1.)

On or about March 23, 1999, RJFS received a complaint from a customer of Hoeper alleging that on two occasions Hoeper had failed to effect trades in accordance with the customer's instructions.² RJFS notified NASD Regulation staff of the complaint, and on March 20, 2000, NASD Regulation staff sent a request for information to Hoeper, pursuant to Rule

¹ Hoeper is subject to NASD jurisdiction for purposes of this Complaint pursuant to Article V, Section 4 of the NASD's By-Laws, which provides that the NASD retains authority to request information from and to file a Complaint against a person whose association with a member has been terminated, and who is no longer associated with any member, for two years after the effective date of termination of the person's last registration with a member firm.

² In his Answer, Hoeper denied that he failed to execute any orders in accordance with the customer's instructions. The only charge against Hoeper is that he failed to respond to the staff's requests in a timely

8210, asking him to respond to the customer's allegations. The staff served the request by first class mail addressed to Hoyer at his most recent residential address as listed in the Central Registration Depository (CRD address). The staff requested a written response by April 4, 2000. Hoyer did not respond. (Evans Decl. ¶¶ 2-5; CX 2.)

On April 6, 2000, the staff sent Hoyer another request, pursuant to Rule 8210, reiterating the March 20 request for a response to the customer's complaint. The staff sent this request by both certified and first class mail to Hoyer's CRD address. The staff did not receive a receipt showing delivery of the certified mailing, but the Postal Service did not return either the certified or the first class mailing. The April 6 request required Hoyer to submit a written response by April 17. (Evans Decl. ¶ 6; CX 3.)

On April 13, Hoyer called Evans. He acknowledged that he had received the March 20 request and had received notification from the Postal Service that he could pick up the certified mailing of the April 6 request. Hoyer requested more time to respond to the requests and Evans agreed to extend Hoyer's time to respond until April 24. Evans sent Hoyer a written confirmation of the extension. Hoyer did not, however, respond to the requests by April 24. (Evans Decl. ¶¶ 7-8; CX 4.) As noted above, he finally responded to the requests in December 2000.

3. Discussion

The above facts establish that Hoyer failed to respond to requests for information, in violation of Rules 8210 and 2110. Rule 8210 allows NASD Regulation staff, "[f]or the

manner. Therefore, the Hearing Panel makes no findings and reaches no conclusions as to whether Hoyer effected customer orders as instructed.

purpose of an investigation, ...[to] require a ... person subject to the Association's jurisdiction to provide information ... in writing ... with respect to any matter involved in the investigation ...” The purpose of this Rule is to provide a means for the NASD to carry out its self-regulatory functions in the absence of subpoena power. As the SEC has stated:

We 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. Since the NASD lacks subpoena power, it must rely on Rule 8210 in connection with its obligation to police the activities of its members and associated persons. 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, 1998 SEC LEXIS 1955 at *8 (Sept. 14, 1998) (footnotes omitted).

In this case, the requests were properly issued to Hoeper in connection with an investigation while Hoeper was subject to NASD jurisdiction under Article V, Section 4 of the By-Laws. Because the requests were sent to Hoeper at his CRD address, he is deemed to have received them, pursuant to Rule 8210(d). Furthermore, in his telephone conversation with Evans, Hoeper admitted he received the first request and knew the second request was waiting for him at the post office.

Although Hoeper responded to the requests in December, that did not cure his earlier failure to respond. The SEC has emphasized that recipients of requests for information have “a duty to give the NASD full and prompt cooperation when the request for information [is] made. Otherwise the NASD would be unable to carry out its regulatory functions.” In re Brian L. Gibbons, Exchange Act Rel. No. 37170, 1996 SEC LEXIS 1291 at *7 (May 8, 1996), aff'd, 112 F.3d 516 (9th Cir. 1997) (table).

In his Answer, Hoepfer contended that his “failure to respond to requests made by all NASD offices was caused by multiple home moves over the response period. Supporting documents needed to respond in full have been moved several times, are now in storage, and in some cases have been returned to RJFS.” Hoepfer offered no evidence to support these representations, but even assuming they are true, they do not excuse his failure to respond to the requests in any manner until well after this proceeding was begun.

The National Business Conduct Committee addressed similar arguments in District Business Conduct Committee for District No. 10 v. David A. Blech, Complaint No. C10960019, 1997 NASD Discip. LEXIS 72 at *9 (NBCC Dec. 1, 1997):

Even if we credit Blech’s explanation regarding the destruction of the Firm’s documents, that does not excuse Blech’s failure to respond, nor does it provide mitigation. Blech failed to inform staff that the documents were destroyed until after the complaint was issued. . . . The NASD should not have had to resort to filing a complaint in order to have received a response from Blech. Moreover, the requests for information not only requested documents, they requested a statement regarding the customers’ allegations against the former [firm’s] brokers. Blech might have been able to respond by providing an answer even without access to the documents. Blech, however, failed to make a good faith effort to respond in any manner.

Similarly, in this case, if Hoepfer did not have access to the requested documents, he was required to respond with that information; he could not simply ignore the requests. Furthermore, as in Blech, in addition to documents, the requests asked Hoepfer to provide “a detailed, signed statement” addressing specific questions regarding the customer’s complaint. Even if Hoepfer did not have access to the requested documents, he was required to make a good faith effort to respond as fully as possible to the questions posed. See In re Robert A. Quiel, Exchange Act Rel. No. 39056, 1997 SEC LEXIS 1878 at *8 (Sept. 11, 1997) (“even if

Quiel could not access readily the information that the NASD requested, we find that he failed to ... answer as completely as he was able”). Hoeper made no such effort.

Therefore, the Hearing Panel finds that Hoeper violated Rule 8210 by failing to respond to the requests for information. By violating Rule 8210, Hoeper also violated Rule 2110. See In re Joseph Patrick Hannon, 1998 SEC LEXIS 1955 at *2.

4. Sanctions

For failing to respond to requests for information in any manner, the NASD Sanction Guidelines provide that “a bar should be standard.” As noted above, however, Hoeper did respond to the requests in December, and Enforcement suggested that, in light of the response, Hoeper could be sanctioned for failing to respond in a timely manner, rather than failing to respond altogether. For such violations, the Sanction Guidelines recommend that the respondent be suspended in any or all capacities for up to two years and fined \$2,500 to \$25,000. NASD Sanction Guidelines, p. 31 (1998 ed.). Enforcement suggested a one-year suspension and a \$10,000 fine.

The Hearing Panel carefully considered Enforcement’s suggestion, but concluded that under the facts of this case it would be inappropriate to treat Hoeper’s belated response as mitigating his earlier failure to respond. The requests sought Hoeper’s response to a serious customer complaint, which clearly called for investigation. Hoeper’s failure to respond impeded that investigation. The staff sent two requests. Hoeper received the initial request and knew the other was waiting for him at the post office. He asked for more time to respond, which the staff granted. Nevertheless, Hoeper failed to respond in any manner for several months, until after this disciplinary proceeding was filed. As the National Business Conduct Committee explained

in Blech, even if Hoyer did not have access to responsive documents, that would not mitigate his complete failure to respond to the requests. All of these aggravating factors suggest the need for substantial sanctions, and the Hearing Panel concludes that to reduce the standard sanction for failure to respond under these circumstances would reward Hoyer for his intransigence and would undermine the remedial purposes of sanctions.

5. Conclusion

The Hearing Panel finds that respondent Paul John Hoyer violated NASD Rules 8210 and 2110 by failing to respond to requests for information issued and served in accordance with Rule 8210. As sanctions, the Hearing Panel orders that Hoyer be barred from associating with any member firm in any capacity. The bar shall become effective immediately if this Decision becomes the final disciplinary action of the NASD.³

HEARING PANEL

By: _____
David M. FitzGerald
Deputy Chief Hearing Officer

Copies to:

Paul John Hoyer (via overnight delivery and first class mail)
David A. Greene, Esq. (electronically and via first class mail)
Rory C. Flynn, Esq. (electronically and via first class mail)

³ The Hearing Panel has 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.