

This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-23 (C10970141).

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

---

DEPARTMENT OF ENFORCEMENT,	:	
	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. C10970141
v.	:	
	:	
	:	Hearing Officer - EAE
	:	
	:	
Respondents.	:	

---

**ORDER GRANTING RESPONDENTS' "OBJECTION TO RULE 8210  
REQUESTS" AND DENYING MOTION OF RESPONDENTS TO FILE REPLY  
MEMORANDUM**

On April 7, 1998, the Department of Enforcement (“Enforcement”) filed a Notice of Rule 8210 Requests (“Notice”).<sup>1</sup> Enforcement attached to the Notice two letters dated April 2, 1998, directed to Respondents \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, requesting information pursuant to Rule 8210.<sup>2</sup>

On April 7, 1998, Respondents \_\_\_\_\_ and \_\_\_\_\_, by and through \_\_\_\_\_ counsel, filed an Objection to the Rule 8210 Requests (“Objection”) requesting that the Hearing Officer “deny DOE the authority to require Respondents \_\_\_\_\_ and \_\_\_\_\_

---

<sup>1</sup> Pursuant to Code of Procedure Rule 9251(a)(2) Enforcement is required to notify the Hearing Officer and each other Party “if, after the issuance of a complaint, requests for information under Rule 8210 are issued under the same investigative file number under which the investigation leading to the institution of the disciplinary proceeding was conducted.”

<sup>2</sup> One of the two April 2, 1998 letters was directed jointly to \_\_\_\_\_ and \_\_\_\_\_, and the other was directed jointly to \_\_\_\_\_ and \_\_\_\_\_.

**This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-23 (C10970141).**

\_\_\_\_\_ to respond to the Rule 8210 requests \* \* \*.”<sup>3</sup> As grounds for their Objection, Respondents state that Enforcement did not ask permission of the Hearing Officer to file such requests, in contravention of the January 22, 1998 Initial Pre-Hearing Conference and Scheduling Order (“Order”).<sup>4</sup> Respondents also contend that Rule 9251 “is clearly intended to facilitate DOE’s obtaining documents from persons or entities other than respondents to a complaint.”<sup>5</sup>

On April 9, 1998, Enforcement filed a Response to Respondents’ Objection to Rule 8210 Requests (“Response”). Enforcement contends that staff initiated Rule 8210 requests are not motions and, thus, need not be filed within the time limits of the Order.<sup>6</sup> Enforcement also argues that Respondents have failed to “articulate any identifiable prejudice to them by complying with the subject requests \* \* \*.”<sup>7</sup>

Respondents' position that Rule 9251 cannot be used to obtain documents from respondents in a pending disciplinary proceeding is without merit. Nothing in the

---

<sup>3</sup> Objection at 2-3. On April 14, 1998, counsel for Respondent \_\_\_\_\_ filed an “Affirmation” joining in the “motion on behalf of \_\_\_\_\_ objecting to Complainant’s Rule 8210 request.” Hereafter, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ will be referred to as “Respondents.”

<sup>4</sup> The January 22, 1998 Order sets forth dates when discovery requests, motions, and other pre-hearing submissions are to be filed and served in this disciplinary proceeding. The Order provides that requests pursuant to Rule 8210 were to be served by March 16, 1998.

<sup>5</sup> Objection at 2.

<sup>6</sup> Response at 2.

<sup>7</sup> Response at 3. On April 20, 1998, Respondent \_\_\_\_\_ filed an Application to File Reply to Response to Opposition to Rule 8210 Demand (“Application”) which was opposed by Complainant’s filing of April 21, 1998. In its April 21, 1998 filing, Complainant also requested leave to file a sur-reply if Respondent’s Application were granted. Code of Procedure Rule 9146(h) provides that a moving party shall have no right to file a reply unless the Adjudicator permits a reply to be filed. In this instance, the Hearing Officer finds that Respondent \_\_\_\_\_ has not set forth any compelling reason why a reply is necessary or how it would assist the Hearing Officer in reaching a decision. Accordingly, the Application is denied.

**This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-23 (C10970141).**

language of Rule 8210 or the Code of Procedure limits the use of Rule 8210 requests to persons or entities other than respondents in a pending disciplinary hearing. The Rule provides that the Association shall have the right to require a member, a person associated with a member, or a person subject to the Association's jurisdiction to provide information "with respect to any matter involved in the investigation, complaint, examination or proceeding." The language of the Rule does not differentiate between respondents to a pending disciplinary proceeding and other parties or between pre-complaint and post-complaint requests for information.

The June 17, 1997 Comment Letter of the American Bar Association Ad Hoc Task Force on the NASD's Proposed Rules Relating to Investigations and Disciplinary Proceedings ("ABA Letter") is of assistance in understanding the scope of Rule 8210. In advocating for amendments to the Rule to change the practice of allowing the Association to obtain information and documents from a member or person associated with a member at any time, the letter made clear that Rule 8210 "does not differentiate between NASD's right to obtain information and documents prior to a complaint being filed \* \* \* and the propriety in making such demands once a proceeding is initiated." ABA Letter at 8. Further, the ABA Letter recognized that the Rule "does not distinguish between respondents and non-parties." Id. The ABA Letter contended that "such broad and unfettered right to obtain information and documents and compel testimony once a proceeding is commenced without review by the Hearing Panel (or, at a minimum, a Hearing Officer) deprives respondents of their right to fundamental fairness and creates an advantage in favor of the staff of the Department of Enforcement." Id.

**This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-23 (C10970141).**

In responding to the ABA Letter, the Association noted that changing the current practice would impede its investigatory and enforcement functions.<sup>8</sup> The Association stated that because of the obligations imposed on the Department of Enforcement under Code of Procedure Rule 9251(b) to turn over additional documents obtained pursuant to a Rule 8210 request to respondents, and because of an amendment to proposed Rule 9146(k) giving the Hearing Officer explicit authority to issue a protective order in a disciplinary hearing, "it is [n]either necessary or appropriate to limit the investigatory and enforcement functions of the [Association] during the pendency of a disciplinary proceeding in the manner suggested by the Ad Hoc Task Force."<sup>9</sup> Rule 8210 was approved by the Securities and Exchange Commission as proposed by the Association, without the proposed amendments suggested by the ABA Ad Hoc Task Force.<sup>10</sup>

Code of Procedure Rule 9251(a)(2) clearly provides that Enforcement need not file a motion when it seeks information pursuant to Rule 8210. Rule 9251(a)(2) only requires Enforcement, as it did here, to notify the Hearing Officer and Respondents of such a request if it is issued under the same investigative file as that which led to the institution of the disciplinary proceeding and to make available promptly to Respondents any relevant documents it obtains.<sup>11</sup>

---

<sup>8</sup> Letter of July 11, 1997, from Alden S. Adkins to Katherine A. England, Assistant Director, Division of Market Regulation, Securities & Exchange Commission ("Association Letter") at 6.

<sup>9</sup> Id.

<sup>10</sup> Exchange Act Release No. 38908 (August 7, 1997).

<sup>11</sup> As correctly noted by Enforcement, this procedure differs from that set forth in Code of Procedure Rule 9252(a)(1) which requires a respondent to file a motion requesting the

**This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-23 (C10970141).**

Enforcement, however, must exercise its right to issue post-complaint Rule 8210 requests in a manner consistent with the Hearing Officer's orders regarding scheduling and procedural matters. Code of Procedure Rule 9235(a) gives a Hearing Officer authority to "do all things necessary and appropriate to discharge his or her duties," including taking those actions that are necessary for regulating the course of the hearing and resolving any and all procedural and evidentiary matters and discovery requests. Pursuant to that authority and Code of Procedure Rule 9241, a Hearing Officer may hold a pre-hearing conference and, as a result of that conference, issue a scheduling or procedural order to govern the conduct of the proceeding. If a Hearing Officer's authority to conduct a disciplinary proceeding in an effective and organized manner is to mean anything, the Hearing Officer must have the ability to enforce such a procedural order and hold parties accountable for complying with deadlines.

The Hearing Officer held a Pre-Hearing Conference in this disciplinary proceeding and issued a scheduling order establishing dates for filings and other papers. Among other things, the Hearing Officer's January 22, 1998 Order set a date certain --- March 16, 1998 --- to serve and file "Discovery Motions" \* \* \* "including, but not limited to Motions to Compel, Motions for Production of Witness Statements, and Rule 8210 Requests." As distinguished from the other described filings, the word "motion" did not precede "Rule 8210 Requests" since it was contemplated by the Hearing Officer that the March 16, 1998 date was to apply both to requests by Respondents pursuant to

---

Association invoke Rule 8210 to compel the production of documents or testimony. Subsection (b)(2) sets forth the standards to be used by the Hearing Officer in deciding that motion.

**This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-23 (C10970141).**

Code of Procedure Rule 9252 and requests initiated by Enforcement pursuant to Code of Procedure Rule 9251(a)(2). Simply because Enforcement was not required to file a “motion” to invoke Rule 8210 does not excuse it from complying with the Hearing Officer’s Order setting a date certain for serving any such requests pursuant to Code of Procedure 9251(a)(2).

Moreover, Enforcement has failed to demonstrate any good cause for its very belated invocation of Rule 8210. The requests of April 2, 1998 are directed solely to Respondents’ affirmative defenses, i.e., the alleged improper conduct of NASD during the investigation that resulted in this disciplinary proceeding.<sup>12</sup> Enforcement has known of the affirmative defenses of \_\_\_\_\_ and \_\_\_\_\_ since their Answer was filed on December 19, 1997.<sup>13</sup> Yet, Enforcement failed to invoke Rule 8210 until April 2, 1998, over four (4) months later. Under such circumstances, the Hearing Officer finds no justifiable or compelling reason for allowing Enforcement to seek such information at this late date.

For the foregoing reasons, within the context of this disciplinary proceeding, the timing of Enforcement's Rule 8210 violates the Hearing Officer’s January 22, 1998 Order, and Respondents will not be required to respond to the Requests. Accordingly,

---

<sup>12</sup> The April 2, 1998 letters characterize the requests as “[i]n connection with the staff ‘s continuing investigation of \_\_\_\_\_ \* \* \*.” The information sought, however, is directed solely to the affirmative defenses interposed by Respondents. The Hearing Officer need not address the issue of the propriety of using Rule 8210 requests to discover information relating to a respondent’s affirmative defenses.

<sup>13</sup> Respondents \_\_\_\_\_ and \_\_\_\_\_ originally were represented by the same counsel and one Answer was filed on their behalf. Subsequently, Respondent \_\_\_\_\_ retained separate counsel.

**This order has been published by the NASDR Office of the Hearing Officers and should be cited as OHO Order 98-23 (C10970141).**

Respondents' request that it not be required to respond to the Rule 8210 requests set forth in the April 2, 1998 letters is granted.

SO ORDERED

Dated: May 6, 1998

---

Ellen A. Efros  
Hearing Officer