FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. REBECCA A. REICHMAN, Respondent.	Disciplinary Proceeding No. 20080120960 Hearing Officer—RSH **HEARING PANEL DECISION** October 5, 2009

The Respondent violated Procedural Rule 8210 and Conduct Rule 2110 by failing to provide testimony and information to FINRA in connection with FINRA's investigation of her member firm and her resignation from the firm. For this violation, the Respondent is barred from associating with any member in any capacity.

Appearances

For Complainant: Ronald Sannicandro, Senior Litigation Counsel, Danielle I. Schanz, Senior Litigation Counsel, Linda S. Riefberg, Chief Counsel, Myles L. Orosco, Director, and Richard R. Best, Senior Trial Counsel, FINRA Department of Enforcement, New York, NY

For Respondent: Linda Imes, Charlita Mays, and Justin Deabler of Spears & Imes, LLP, New York, NY

DECISION

I. PROCEDURAL HISTORY[1]

On September 15, 2008, the FINRA Department of Enforcement ("Enforcement") filed a Complaint with the Office of Hearing Officers alleging that Respondent Rebecca A. Reichman ("Reichman") violated Procedural Rule 8210 and Conduct Rule 2110 by

[1] As of July 30, 2007, NASD and New York Stock Exchange Regulation, Inc. consolidated their member regulation functions and began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA"). References in this decision to FINRA include, where appropriate, NASD. Initially, FINRA adopted NASD's rules and certain NYSE rules, but it is in the process of establishing a consolidated FINRA rulebook. To that end, on December 15, 2008, certain consolidated FINRA rules became effective, replacing parallel NASD and/or NYSE rules, and in some cases the prior rules were re-numbered and/or revised. *See* Regulatory Notice No. 08-57, FINRA Notices to Members, 2008 FINRA LEXIS 50 (Oct. 2008). This Decision refers to and relies on the NASD rules that were in effect at the time of the Respondent's alleged misconduct and cited in the Complaint as the basis for the charges against her.

failing to appear for testimony and provide information in response to written requests made pursuant to Rule 8210.[2]

On October 6, 2008, instead of answering, Reichman filed a motion to dismiss the Complaint, asserting that FINRA lacked jurisdiction over her because she was not registered and was not an "associated person." Enforcement filed its opposition on October 27, 2008. Reichman filed a reply on October 29, 2008.

On November 3, 2008, Hearing Officer Perkins issued an order in which he noted that while FINRA's Code of Procedure does not explicitly permit a "motion to dismiss," Procedural Rule 9264 states that Hearing Officers may grant motions for summary disposition with respect to issues of jurisdiction.[3] However, Rule 9264 provides that motions for summary disposition may be filed only after the respondent's answer has been filed and documents have been made available to the respondent for inspection and copying pursuant to Rule 9251. Since those preconditions had not been met, Hearing Officer Perkins deferred ruling on the motion to dismiss until after Reichman had answered and Enforcement had produced documents pursuant to Rule 9251. He ordered Reichman to answer by November 7, 2008, and ruled that by answering the Complaint, Reichman would not be deemed to have waived her objection to FINRA's jurisdiction.

Reichman answered on November 7, 2008, and while admitting that she did not appear for testimony as requested, also asserted that she did not violate Rules 8210 and 2110.

On January 14, 2009, Reichman filed a Memorandum of Law in Support of her Renewed Motion to Dismiss. Enforcement filed its opposition on January 28, 2009. On January 30, 2009, Hearing Officer Perkins denied Reichman's Motion to Dismiss, and

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[2] FINRA Department of Enforcement was formerly the Division of Enforcement of NYSE Regulation, Inc.
[3] In support, Hearing Officer Perkins cited Rule 9264(e) and *Department of Enforcement v. Perles,* No. CAF980005, 2000 NASD Discip. LEXIS 55, at *19-20 (Aug. 16, 2000).

ruled that the "Complaint alleges that FINRA has jurisdiction in this proceeding because the Respondent was an "associated person" of a FINRA member firm. The allegations in the Complaint meet the pleading requirements of FINRA's procedural rules."

On February 2, 2009, the hearing previously scheduled to commence on February 24, 2009, was adjourned, and the case was reassigned to Hearing Officer Hall. On February 19, 2009, Hearing Officer Hall issued an order ruling on six pre-hearing motions that had been filed by the parties. The order also set out the parameters of the hearing and Reichman's possible testimony. First, the sole issue to be decided at the hearing was whether FINRA had jurisdiction over Reichman at the time Enforcement issued its Rule 8210 requests. Because Reichman was not registered, jurisdiction hinged on whether, because of her duties and responsibilities, she was "engaged in the securities business," and therefore was an "associated person" of the FINRA member firm which employed her. Second, Enforcement could not compel Reichman to testify during its case-in-chief. Third, if Reichman chose to testify at the hearing, she would not waive her jurisdictional argument. Fourth, the general scope of Reichman's testimony would be limited to her duties and responsibilities while employed at FINRA member firm Merrill, Lynch, Pierce, Fenner & Smith ("Merrill Lynch"), and not while she worked at Merrill Lynch & Co. ("ML"), the non-member parent of Merrill Lynch.

The hearing was held on April 21 and 22, 2009, in New York, NY before a Hearing Panel composed of the Hearing Officer and one former and one current member of FINRA's District 10 Committee. Enforcement called three witnesses: Martha Dennis, the retail compliance officer with Merrill Lynch who supervised Reichman; Jeffrey Lau, the institutional compliance officer who supervised Reichman at Merrill Lynch; and Robert Butani, a FINRA case manager. Reichman did not testify and did not call any witnesses. The Hearing Panel accepted into evidence 47 exhibits submitted by

Enforcement, 20 exhibits submitted by Reichman, and 4 exhibits submitted jointly by the parties. The parties also stipulated to the facts contained in their Second Set of Stipulations, dated April 15, 2009.[4] Both parties submitted post-hearing briefs, with the final submissions filed on June 19, 2009.

Based upon a careful review of the entire record, the Hearing Panel makes the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

A. Jurisdiction

As explained below, the Hearing Panel finds that Reichman was associated with Merrill Lynch from October 10, 2005, to September 18, 2006. She has not been associated with a member firm or registered with FINRA since September 18, 2006.[5]

Although Reichman is not currently registered with FINRA, FINRA has jurisdiction of this disciplinary proceeding, pursuant to Article V, Section 4 of FINRA's Bylaws, because (1) the Complaint was filed within two years following the termination of her association with a FINRA member firm, and (2) the Complaint charges her with failing to respond to FINRA's requests for information and testimony made during the two-year period following the termination of her association with a FINRA member firm.[6]

B. Respondent

1. Reichman's Employment With ML

In August 2001, Reichman became employed with ML, the non-member parent company of Merrill Lynch, the FINRA member firm. After graduating from Brooklyn

[4] In this decision, "Tr." refers to the transcript of the hearing; "CX" to Enforcement's exhibits; "RX" to Respondent's exhibits; and "Stip." to the parties' Second Set of Stipulations (which replaced the parties' First Set of Stipulations).
[5] Stip. ¶8.
[6] Article V, Sec. 4(a), FINRA By-Laws, *available at* www.finra.org/rules.

Law School, she was admitted to practice law in the state of New Jersey in May 2005 and in the state of New York in September 2005. From June 2005 until October 2005, Reichman was employed as a non-registered attorney in ML's Regulatory Exams and Inquiries Group ("REIG"). REIG was part of ML's Office of General Counsel, and Reichman held the title of Assistant Vice President.[7] While at ML, Reichman never acted as an attorney or gave legal advice.[8]

2. Reichman's Duties in Merrill Lynch's Retail Compliance Group

On or about October 10, 2005, Reichman transferred from ML to Merrill Lynch, where she was a non-registered employee in the Firm's Global Private Clients ("GPC") group. GPC, which was part of the Office of General Counsel, was Merrill Lynch's retail compliance unit, and supported the retail sales business of the Firm.[9] Reichman initially held the title of Regulatory Initiatives Coordinator, and was promoted to Vice President in February 2006.[10] During Reichman's tenure in GPC, she reported directly to Martha Dennis ("Dennis"), who was then a GPC senior compliance officer and is currently Director of GPC.[11]

Although Reichman's attorneys attempted to portray Reichman as a low-level compliance clerk, Reichman's duties and responsibilities, as described in the written job description for her position,[12] and by Dennis, are those of an associated person. Dennis testified that Reichman was not a "lower level compliance person…. We have individuals in our branch examinations group and our surveillance group that we are typically hiring out of college who are training or just beginning to learn about the industry and the rules and regulations that relate to what we do, and those are typically

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[7] Stip. ¶¶ 2-4.
[8] Tr. at pp. 211-212, 430-431.
[9] Tr. at pp. 54-55.
[10] Stip. ¶¶ 5-6.
[11] Tr. at p. 52.
[12] CX-11 at p. 67.

what would fall into that category. And I would never expect those individuals to be giving advice and guidance from a compliance perspective." [13]

Dennis testified extensively about Reichman's duties and responsibilities in GPC. When Dennis was looking for someone to fill the position for which Reichman was eventually hired, she wanted someone "who had the background and the ability to read and analyze laws, rules and regulations that apply to our industry in a critical way and…be able to provide a level of intelligent guidance to the compliance officer…and be able to help guide them in what needed to be done to help implement those rules and regulations."[14]

Dennis hired Reichman to assist with two major compliance projects. The first, and most significant, was to enable Merrill Lynch's Chief Executive Officer to execute the Firm's Annual Certification of Compliance and Supervisory Processes as mandated by NASD Rule 3013 ("3013 Certification").[15] It was Merrill Lynch's first 3013 Certification and was due April 1, 2006.[16] A steering committee of very high level Merrill Lynch business professionals initiated the process of complying with Rules 3012 and 3013 to ensure that all business professionals understood their obligations with respect to the rules.[17] If Merrill Lynch had failed to comply with the 3013 Certification process, the Firm could have been subject to disciplinary action as well as a wide range of other regulatory problems.[18]

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[13] Tr. at pp. 294-295.
[14] Tr. at pp. 71-72.
[15] Rule 3013(b) (now renumbered as FINRA Rule 3130) stated: "Each member shall have its chief executive officer (or equivalent officer) certify annually…that the member has in place processes to establish, maintain, review, test and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with applicable NASD rules, MSRB rules and federal securities laws and regulations, and that the chief executive officer has conducted one or more meetings with the chief compliance officer in the preceding 12 months to discuss such processes."
[16] Tr. at pp. 56-57.
[17] Tr. at pp. 237-239.
[18] Tr. at pp. 202-203.

Dennis testified that the impetus for NASD Rule 3013 and several other NASD and corresponding NYSE rules was concern resulting from the "Gruttadauria matter."[19] NASD Notice to Members ("NTM") 04-71, in explaining that the Gruttadauria case had precipitated NASD's creation and amendment of some of its rules, stated: "Adequate supervisory systems play an important role in assuring investor protection and the integrity of the markets…. The 2002 Gruttadauria case, which involved a branch office manager's misappropriation of approximately $40 million of customer funds, brought tremendous attention to the ongoing problem of operation and sales practice abuses at firms and the importance of ensuring that firms effectively monitor the activities of their employees."[20] Dennis testified that it was Reichman's job to read NTMs concerning the 3013 Certification process because "she needed to understand the framework of 3012 and 3013 to accurately guide the compliance officers in what their obligations were…"[21]

Approximately 75% of Reichman's time in GPC was devoted to the 3013 Certification process.[22] Among her duties and responsibilities, Reichman participated in identifying gaps where a securities rule did not have a corresponding Firm procedure. She also worked on confirming that testing had been conducted to ensure that Merrill Lynch procedures were designed to implement the relevant securities rules. Reichman was also responsible for ensuring that Merrill Lynch had complete records of the testing

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[19] Tr. at pp. 57-59.
[20] CX-134 at p. 4 (NASD NTM 04-71, Oct. 2004); See also In the Matter of Lehman Brothers, Inc., Exchange Act Rel. No. 48336, (Aug. 14, 2003) ("Respondent failed reasonably to supervise Frank D. Gruttadauria with a view to preventing and detecting his violations of the federal securities laws during the 15-month period that it employed him from October 2000 to January 2002. From 1987 to January 2002, while employed at a series of five different registered broker-dealers, Gruttadauria defrauded over 60 customers by lying about purchases and sales of securities, misappropriating funds and securities, and sending falsified account documents. By the time that Gruttadauria confessed generally to his fraudulent conduct in a letter to the Federal Bureau of Investigation on January 11, 2002, he had misappropriated over $115 million from customers over a period of 15 years - transferring most of the money to other customers to cover withdrawal requests - and overstated account values by more than $280 million.").
[21] Tr. at pp. 85-88.
[22] Tr. at p. 97.

it conducted as part of its 3013 Certification process.[23] In describing Reichman's work in this area, Dennis said, "…we relied on her analytical skills to drill down and act as quality control."[24] Reichman's day-to-day work entailed interacting with and guiding the compliance officers who supported Merrill Lynch retail brokers.[25] There were also times when, to assist compliance officers, she interacted with registered business professionals.[26]

Reichman was also hired to be "regulatory initiatives coordinator," which comprised about 20% of her work.[27] In this role, Reichman was responsible for "educating, providing guidance, and acting as a contact point [for compliance officers] regarding new regulations and initiatives."[28] Each week, Reichman identified and reviewed new and revised rules and regulations to determine whether any applied to the Firm's retail business. Reichman then identified the appropriate compliance officer(s) who supported the affected line of business, and "helped them understand what the requirements of the rule were." Reichman was also responsible for tracking the compliance officer's progress in implementing the applicable rule or regulation. Such implementation might include, for example, drafting a new policy or procedure.[29]

Approximately 5% of Reichman's time was devoted to working on "special items" for Sharyn Handelsman ("Handelsman"), Merrill Lynch's Managing Director of retail compliance.[30] One of these "special items" entailed researching and drafting a memorandum concerning revised rules for Merrill Lynch registered representatives who sought to work from locations other than their branch office, such as, from home.

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[23] Tr. at pp. 80-81, 84.
[24] Tr. at p. 81.
[25] Tr. at pp. 90, 98.
[26] Tr. at pp. 98-99.
[27] Tr. at p. 97.
[28] Tr. at pp. 293-294.
[29] Tr. at pp. 56-58.
[30] Tr. at p. 97.

According to Dennis, Reichman "helped complete the research that Handelsman and other compliance managers used to develop the ultimate policy and procedures."[31] Reichman also helped with an examination of a Merrill Lynch Miami office by talking to the examiner.[32]

Dennis appeared at the hearing pursuant to a Rule 8210 request made by Enforcement to Merrill Lynch. She testified that although she was not registered, she considered herself to be an "associated person" of Merrill Lynch, and believed she was required to testify at the hearing.[33]

3. Reichman's Duties in Merrill Lynch's Institutional Compliance Group

From August 7, 2006, until September 18, 2006, Reichman worked in her second position at Merrill Lynch, in the Compliance Equities group of Global Markets and Investing ("GMI"), which was also part of the Office of General Counsel. In GMI, Reichman was the only person reporting to Jeffrey Lau ("Lau"), who was the Director of Compliance for Merrill Lynch's institutional sales force.[34] Lau testified that he advised the institutional sales force "of the rules and regulations and the method to do business to adhere and stay within the rules and regulations of the industry."[35] Lau hired Reichman to assist him in (1) answering daily inquiries from administrative managers who were responsible for supervising the sales offices; (2) performing regulatory branch examinations; and (3) conducting continuing education of the registered personnel in those offices.[36]

Reichman only worked for Lau for five to six weeks, but Lau expected that she would eventually be able to perform branch reviews and continuing education for

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[31] Tr. at pp. 70-71, 143; CX-28, 48.
[32] Tr. at pp. 70-71, 143-144.
[33] Tr. at pp. 289-290.
[34] Stip. ¶ 7; Tr. at pp. 390-392.
[35] Tr. at p. 391.
[36] Tr. at pp. 392-395.

registered personnel on her own.[37] Because her prior experience was in retail sales, she spent her time in GMI learning about institutional sales and training for her new role.[38] Reichman assisted Lau in performing an examination of Merrill Lynch's New York middle markets sales office. As part of that review, she interacted with the sales personnel, support staff, and the middle markets management team.[39] The management and sales personnel were all Series 8, 9 or 10-registered.[40] While working in GMI, Reichman attended a mandatory compliance training session given by Lau for Series 7 registered representatives. Although Reichman's name was listed as a presenter on the written materials distributed at the meeting, Lau did not recall whether she spoke at the meeting or not. She was at the meeting primarily to watch and learn from Lau. Lau testified that Reichman spoke to sales people during the time she worked for him; however, he did not recall the subject of the conversations.[41]

Reichman resigned from Merrill Lynch on September 16, 2006. She is currently employed as a Senior Regulatory Affairs Associate at a non-member organization.[42]

C. Enforcement's Investigation of a Merrill Lynch Branch Examination

Enforcement's investigation began in December 2005 with a referral from an NYSE examination report of potential sales practices violations discovered during an examination of a Merrill Lynch branch office.[43] In the course of its investigation, Enforcement came to believe that Merrill Lynch was improperly withholding information. In the early part of September 2006, Merrill Lynch informed Enforcement that Reichman had resigned from the Firm. When Enforcement asked Merrill Lynch about the circumstances of her resignation, the Firm claimed that because it was

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[37] Tr. at p. 399.
[38] Tr. at pp. 398-399, 449.
[39] Tr. at pp. 417-419, 431-432.
[40] Tr. at p. 426.
[41] Tr. at pp. 442-444, 409-410.
[42] Stip. ¶ 8.
[43] Tr. at p. 308.

conducting an internal review of the matter, information about Reichman's resignation was privileged.[44]

D. Reichman Failed to Comply With FINRA's 8210 Requests

1. Background—NYSE Requests

Enforcement's first request for testimony was made in a letter dated November 8, 2006. In the letter, NYSE Enforcement staff[45] notified Reichman that, pursuant to NYSE Rules 476 and 477, it was conducting an investigation of, among other things, the circumstances surrounding her resignation from Merrill Lynch. The letter's author, Robert K. Butani ("Butani), who was then Senior Principal Enforcement Investigator, wrote: "Enforcement is investigating the possibility that during your employment at the Firm [Merrill Lynch], including but not limited to your role as an attorney, Assistant Vice President and Vice President in the Firm's Office of General Counsel, you may have, among other things, made misstatements and instructed other Firm employees to make misstatements in connection with one or more NYSE examinations of the Firm." Enforcement requested that she appear to testify on December 11, 2006.[46]

In a letter dated December 4, 2006, Reichman's attorney asserted that "the NYSE does not have jurisdiction to request a written statement or take testimony from Ms. Reichman on the subject matter that we understand is the current focus of the NYSE's investigation."[47] Enforcement nevertheless requested that Reichman appear to testify on January 16, 2007, and renewed a request that she provide a written statement prior to her testimony.[48] Reichman did not appear for testimony on January 16, 2007, and did not provide the written statement requested.[49]

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[44] Tr. at pp. 311-313.
[45] See fn. 1, *supra.*
[46] Stip. ¶ 9; CX-102; RX-16.
[47] Stip. ¶ 13; CX-106; RX-19.
[48] Stip. ¶ 14; CX-107; RX-20.
[49] Stip. ¶ 16.

2. FINRA's Rule 8210 Requests

On September 25, 2007, after the merger of NASD and portions of NYSE Regulation, FINRA Enforcement sent a letter to Reichman again requesting, this time pursuant to Rule 8210, that she appear to testify concerning FINRA's investigation of the Merrill Lynch office examination identified in previous requests. In the letter, FINRA notified Reichman that it was also investigating whether she and other Merrill Lynch employees had violated NASD Rule 3070.[50] In a letter dated October 18, 2007, Reichman's attorneys reiterated her position that FINRA lacked jurisdiction to compel her to appear for testimony.[51] On October 22, 2007, Reichman failed to appear for her scheduled testimony, and Enforcement made a transcribed record of her non-appearance.[52]

By letter dated July 31, 2008, Enforcement issued a second request pursuant to Rule 8210 that Reichman appear to testify, and scheduled her testimony for August 11, 2008.[53] On August 11, 2008, Reichman failed to appear for her testimony, and Enforcement made a record of her non-appearance.[54]

E. Reichman's Failure to Testify Adversely Impacted FINRA's Investigation

Butani testified that Reichman's failure to appear for her testimony adversely impacted FINRA's investigation of possible sales practice violations by Merrill Lynch. After the examination report was referred to Enforcement, Enforcement staff interviewed over a dozen people in connection with its investigation. Based on those interviews, Enforcement determined that Reichman had information that "was very important to the investigation…she was a person of interest."[55] Butani testified that Enforcement's

[50] Stip. ¶¶ 17, 18; CX-11; RX-26.
[51] Stip. ¶ 19; CX-112; RX-27.
[52] Stip. ¶ 20; CX-101.
[53] Stip. ¶ 21; CX-114; RX-32.
[54] Stip. ¶ 23; CX-113.
[55] Tr. at pp. 308-309, 368.

investigation is still ongoing; however, Reichman's failure to cooperate has made it difficult to "put together" exactly what happened.[56]

III. CONCLUSIONS OF LAW

It is undisputed that Reichman failed to comply with Enforcement's Rule 8210 requests for information and testimony.[57] The issue to be decided in this case is whether Reichman was *required* to comply with Enforcement's requests. The threshold question is whether Reichman was an "associated person" when she worked at Merrill Lynch. The Hearing Panel concludes that Reichman was an associated person of Merrill Lynch and was therefore required to comply with Enforcement's Rule 8210 requests.

A. Reichman was an Associated Person of Merrill Lynch

Procedural Rule 8210 gives FINRA staff authority to compel a "person associated with a member" to provide information and appear to testify. The definition of "person associated with a member" is contained in the FINRA By-Laws,[58] which provide, in pertinent part: "'person associated with a member' or 'associated person of a member' means: …a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration… under these By-Laws..."[59]

The only part of this definition the parties disagree on is whether Reichman was "engaged in the securities business." The FINRA By-Laws define the investment banking and securities business as "the business, carried on by a broker, dealer…of underwriting or distributing issues of securities, or of purchasing securities and offering the same for sale as a dealer, or of purchasing and selling securities upon the order and

[56] Tr. at pp. 368-375.
[57] Stip. ¶¶ 16, 20 & 23.
[58] Throughout this proceeding, for ease of reference, the parties referred to FINRA By-Laws, which are substantially identical to the respective NASD By-Laws in effect when the Respondent was employed by Merrill Lynch—from October 10, 2005 to September 18, 2006.
[59] Article I, Sec. (rr) FINRA By-Laws.

for the account of others."[60] In interpreting the phrase "engaged in the securities business," Reichman argues that the phrase should be narrowly construed and that Reichman should only be found to have been "engaged" in the securities business if she herself was actively involved in the sales of securities at Merrill Lynch.

Reichman argues that this is a case "of first impression," because "neither party has cited a prior FINRA or NASD case deciding whether a non-registered compliance employee, performing compliance-related functions (and not exempt from registration) is engaged in the securities business and therefore an associated person subject to FINRA's jurisdiction..."[61] While it is true that there do not appear to be any reported cases in which compliance professionals asserted that they were not associated persons of their brokerage firms, the Hearing Panel finds that Reichman's job fits easily within the types of work already found to constitute "engaging in the securities business." And, as the Securities and Exchange Commission ("SEC") recently noted, "[i]t is obvious that a violation can be found even though the rule or concept at issue has never been litigated."[62]

Both the SEC and the National Business Conduct Committee ("NBCC") (the predecessor of the National Adjudicatory Council ("NAC")) have interpreted the meaning of "associated person." The *Carter* case is similar to Reichman's and reflects the SEC's broad reading of the By-Laws definition of the precise phrase at issue in Reichman's case—"engaged in the securities business."[63] In *Carter*, a non-registered cashier at a member firm argued that NASD did not have jurisdiction over him because he was not engaged in the sale of securities and was therefore not an associated person.

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[60] Article I, Sec. (u) FINRA By-Laws.
[61] Respondent's Post-Hearing Submission, p. 18, fn. 36.
[62] *Wanda P. Sears,* Exchange Act Rel. No. 58075, 2008 SEC LEXIS 1521, n. 25 (July 1, 2008).
[63] *In Re Stephen M. Carter,* Exchange Act Rel. No. 26264, 1988 SEC LEXIS 2204 (Nov. 8, 1988); *See also DBCC No. 8 v. Cannatella,* Complaint No. C8A920075, 1994 NASD Discip. LEXIS 227 at *31 (NBCC, Oct. 12, 1994) ("...when the duties of a member firm's clerical staff are part of the conduct of the firm's securities business, the person is associated with the member.").

Although Carter's duties as a cashier (receiving and recording checks and securities in the firm's computer system, preparing checks and deposit slips for signature, furnishing account balances and other information to customers) were primarily clerical and did not involve selling securities to customers, the SEC found that his functions were clearly "part of the conduct of a securities business, and we agree with the NASD that he was engaged in that business within the meaning of the NASD's By-Laws."[64]

In the *Paramount* case, the NBCC noted that "the NASD had always construed [the definition of associated person] broadly, as it must in order to take regulatory action in circumstances where a person's connection with a member firm implicates the public interest."[65] The NBCC found that a non-registered, non-managerial consultant to a member firm, who recruited new brokers to the firm and provided them with sales training, was an "associated person" under NASD By-Laws because he "participated in the firm's investment banking and securities business." This was true even though the training the consultant provided did not include specific securities products, because it "clearly related to the most basic functions of Paramount's registered representatives." [66]

Reichman argues that Rule 1031 requires persons who are "engaged in the securities business" to be registered, and because Reichman was not registered, she must not have been "engaged in the securities business." The Hearing Panel rejects this circular reasoning. The fact that Reichman was not registered does not mean that she was not an associated person, nor does it mean that she was not required to be registered; it simply means that she was not registered. The definition of associated person clearly contemplates that there may be some persons who are "engaged in the securities business" who are nevertheless exempt from registration. The question of whether

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[64] *Id.* at *3.
[65] *DBBC No. 3 v. Paramount,* 1995 WL 1093392 (NASDR Oct. 20, 1995) at *4.
[66] *Id.*

Reichman was required to be registered is not before this Hearing Panel. Our analysis is limited to the question of whether Reichman was engaged in the securities business and was, therefore, an "associated person" subject to Rule 8210.

If the Hearing Panel were to adopt Reichman's reasoning, the logical result would be that Reichman, a Merrill Lynch employee who was extensively involved in one of her firm's most important compliance projects, one that affected policies and procedures meant to protect public investors, would be beyond FINRA's reach. It would mean, for example, that a registered representative who is barred by FINRA from "associating with any member firm in any capacity," could nevertheless become employed by a brokerage firm's compliance department. Such an incongruous result is not supported by the applicable case law.

The Hearing Panel finds that, like the respondents in *Carter* and *Paramount*, Reichman was an associated person of Merrill Lynch because she participated in the Firm's securities business. Her role was designed to ensure that the Firm's registered representatives conducted their sales of securities in accordance with securities laws and FINRA rules and regulations. While working for Dennis, Reichman educated registered compliance officers. Although she did not work for Lau long enough to become fully trained, her job description included conducting mandatory training for registered sales personnel. The work Reichman did in compliance is not only clearly part of the conduct of the securities business; it is an essential part of that business. A securities firm cannot do business without an effective compliance function. If Reichman did not perform her job functions in helping to prepare Merrill Lynch's CEO for the Firm's Rule 3013 certification, Merrill Lynch would have been subject to regulatory penalties, including suspension of its business.[67]

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[67] *See* NASD Rule 3013.

B. Reichman Violated Rules 8210 and 2110

Having concluded that Reichman was an associated person of Merrill Lynch and was therefore subject to Rule 8210, the Hearing Panel finds that by failing to comply with Enforcement's requests for testimony and information, Reichman violated Procedural Rule 8210. A violation of Rule 8210 is also a violation of Conduct Rule 2110.[68]

IV. SANCTION

The *FINRA Sanction Guidelines* ("*Guidelines*") provide that if a person does not respond in any manner to a request for information made pursuant to Rule 8210, a bar should be the standard sanction. If there are mitigating factors present, adjudicators should consider suspending the individual in any or all capacities for up to two years.[69] While Reichman concedes that her challenge of FINRA's jurisdiction over her does not constitute a valid response to Enforcement's Rule 8210 requests or absolve her of liability for violating Rule 8210, she argues that the Hearing Panel should find mitigation because her failure to comply with Rule 8210 was based on a good-faith jurisdictional defense.

Reichman's challenge of jurisdiction, through letters from her attorney in response to Enforcement's Rule 8210 request, is not a defense, nor is it mitigating. In the *Berger* case,[70] Berger's counsel notified NASD that Berger would not appear for testimony scheduled pursuant to Rule 8210 because he was not an associated person and NASD therefore did not have jurisdiction over him. The NASD found that it had jurisdiction over Berger and barred him for failing to provide testimony as required by Rule 8210. The SEC, in upholding the bar, specifically considered and rejected Berger's

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[68] *Wanda P. Sears,* Exchange Act Rel. No. 58075, 2008 SEC LEXIS 1521, n. 28 (July 1, 2008); *Anthony H. Barkate,* 57 S.E.C. 488, 489, n.1 (2004).

[69] *FINRA Sanction Guidelines* 35 (2007), http://www.finra.org/RegulatoryEnforcement/index.htm (then follow "FINRA Sanction Guidelines" hyperlink).

[70] *Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141(Nov. 14, 2008).

argument that he should not be barred when he had raised a good faith challenge to NASD's jurisdiction.[71] As the SEC explained, because NASD lacks subpoena power, "[i]t must therefore rely on Procedural Rule 8210 in connection with its obligation to police the activities of its members and associated persons…The rule is at the heart of the self-regulatory system for the securities industry…The failure to respond impedes NASD's ability to detect misconduct that threatens investors and markets…The imposition of a bar as the standard sanction for a complete failure to respond to NASD information requests reflects the judgment that, in the absence of mitigating factors, a complete failure to cooperate with NASD requests for information or testimony is so fundamentally incompatible with NASD's self-regulatory function that the risk to the markets and investors posed by such misconduct is properly remedied by a bar…Because we conclude that removing those who present such a risk is necessary to further the Exchange Act's basic purpose of protecting public investors, a bar in such circumstances—a complete failure to respond and no mitigation—has a remedial, and not a punitive purpose."[72]

PAZ Securities, another SEC decision which held that the imposition of a bar for violation of Rule 8210 is remedial, not punitive, was recently upheld by the U.S. Court of Appeals for the District of Columbia.[73] In *PAZ Securities,* the SEC, in explaining why a bar is the appropriate sanction for a failure to respond to Rule 8210 said, "A complete failure to respond to a request for information issued pursuant to Rule 8210 renders the violator presumptively unfit for employment in the securities industry because the self-

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[71] "Berger contends that, because he had an 'objectively reasonable' belief that he was not subject to NASD's jurisdiction, he should not have been sanctioned at all. Our prior opinion in this case determined that NASD does not have a mechanism for resolving questions of jurisdiction prior to a respondent's scheduled appearance at an OTR; …that subjecting oneself to NASD's disciplinary process, interposing one's objection, and relying on NASD's procedures is the appropriate route to challenge NASD jurisdiction." *Berger* at *20.

[72] *Berger,* at *13-16, internal citations omitted. *See also Charles C. Fawcett, IV,* Exchange Act Rel. No. 56770, (Nov. 8, 2007).

[73] *PAZ Securities v. SEC,* 566 F.3d 1172, 2009 U.S. App. LEXIS 11500 (May 29, 2009).

regulatory system of securities regulation cannot function without compliance with Rule 8210 requests.[74]… In addition to protecting investors by barring individuals and firms who have already demonstrated a refusal to be investigated, failures to cooperate should be prevented…by the very real threat of a bar and expulsion. The possibility of receiving a bar for failure to cooperate may have a very specific deterrent effect on all current and future SRO members and associated persons. NASD members and associated persons who know of wrongdoing and are approached by NASD with a request for information as part of an investigation should be deprived of any incentive to fail to cooperate."[75]

A principal consideration in determining sanctions in a failure to cooperate case is the "nature of the information requested."[76] Reichman, by virtue of her job at Merrill Lynch, was privy to information FINRA sought in connection with its investigation of Merrill Lynch and its registered representatives. By failing to cooperate with FINRA's investigation, Reichman adversely impacted not only the investigation of her own conduct, but that of Merrill Lynch and others under investigation.

In addition to finding no mitigation, the Hearing Panel finds several aggravating factors that make a bar appropriate in this case. Respondent has maintained her silence despite receiving numerous requests for written information and testimony over an extended period of time (Principal Considerations 8 and 9). Her misconduct was clearly intentional, and Enforcement gave her several prior warnings that she could be barred for failing to cooperate (Principal Considerations 13 and 15).

Reichman was a Merrill Lynch employee whose job was to make sure that her member firm and its registered representatives followed securities rules. Yet, she herself refused to comply with the fundamental rule in the securities industry of cooperating with

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[74] *In Re PAZ Securities, Inc.,* Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820 at *10 (Apr. 11, 2008).
[75] *Id.* at *14.
[76] Guidelines, p. 35.

regulators. She should not be permitted to return to a position in a FINRA member firm where she might be advising the member and its associated persons on their obligations under the securities laws. Therefore, the Hearing Panel finds that she should be barred from associating with any member firm in any capacity.

V. ORDER

For violating Procedural Rule 8210 and Conduct Rule 2110, Respondent Rebecca A. Reichman is barred from associating with any member in any capacity. In addition, she is ordered to pay costs in the amount of $4,878.66, which includes a $750 administrative fee and the cost of the hearing transcript. The fine and costs shall be payable on a date set by FINRA, but not less than 30 days after this decision becomes FINRA's final disciplinary action in this matter. If this decision becomes FINRA's final disciplinary action, the bar will take effect immediately.[77]

Rochelle S. Hall
Hearing Officer
For the Hearing Panel

Copies to:

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[77] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.