

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

KENT D. SWEAT
(CRD No. 1157627),

and

INTERMOUNTAIN FINANCIAL SERVICES, INC.
(CRD No. 15386),

Respondents.

Expedited Proceeding
No. FPI100022

STAR No. 2010021333301

Hearing Officer – MC

HEARING PANEL DECISION

March 25, 2011

Respondents failed to provide information to FINRA in connection with a routine examination, and subsequently failed to respond to requests for the same information made pursuant to FINRA Rule 8210. Consequently, Respondent Kent D. Sweat is suspended from associating with any FINRA member in any capacity, and Respondent Intermountain Financial Services, Inc. is suspended from FINRA membership. Respondents are also assessed costs. If Respondents have not completely responded to the requests for information within three months after the date of this Decision, Respondent Sweat's suspension will automatically convert to a bar, and the firm's suspension will automatically convert to an expulsion.

Appearances

Sandra J. Harris, Deputy Regional Chief Counsel, Los Angeles, California, and Helen G. Barnhill, Senior Regional Counsel, Denver, Colorado, for the Department of Enforcement.

Kent D. Sweat, President, Intermountain Financial Services, Inc., Heber City, Utah, for Respondents.

DECISION

I. Background

On October 28, 2010, the Department of Enforcement issued a Notice of Suspension (“Notice”) to Respondents pursuant to FINRA Rule 9552 for failing to provide information requested pursuant to FINRA Procedural Rule 8210.¹ The Notice informed Respondents that the suspension would take effect on November 22, 2010, unless they took “corrective action by complying with the requests.” The Notice further stated that even if Respondents complied with the requests for information and avoided suspension, they might nonetheless “still be subject to a disciplinary action” for violating Rule 8210.

On November 19, 2010, in response to the Notice, Respondents filed a request for a hearing, which stayed the suspension and initiated this expedited proceeding. Pursuant to Rule 9559, a Hearing Panel convened and held the hearing by telephone on January 10, 2011. At the hearing, Respondent Kent D. Sweat represented Respondent Intermountain Financial Services, Inc. (“IFS”) and himself.²

II. The Hearing

A. Enforcement’s Case

The series of events leading to the issuance of the Notice began on May 18, 2010, when FINRA examiner Michael Fitzsimmons contacted Sweat from FINRA’s Denver district office to arrange for a routine examination of IFS. The examination, scheduled to begin on June 7, was to cover the period from March 2008 to the day prior to the examination.³ Sweat told Fitzsimmons

¹ The Notice is in evidence as CX-1, Exhibit F. (In this Decision, “CX” refers to Complainant’s exhibits and “Tr.” refers to the transcript of the hearing.)

² IFS has been a FINRA member firm since 1984. CX-1, p. 4. Sweat has been associated with IFS since April 1, 1995. He is the President and Chief Compliance Officer for IFS and is registered with FINRA as a General Securities Representative and a General Securities Principal. Tr. 37-38; CX-1.

³ Tr. 38-39. During the review period covered by the examination, IFS maintained 27 branches staffed by 30 to 36 representatives. Tr. 52-54.

that he was in the midst of negotiating a settlement with FINRA of issues arising from a 2008 examination and asked whether, as part of that settlement, the examination could be postponed until 2011. Fitzsimmons said no. Sweat then informed Fitzsimmons that he would be away for part of the two-week period required for the examination. Fitzsimmons said that the next available dates for the examination would be in September or October 2010.⁴

On August 25, 2010, Fitzsimmons told Sweat the examination would commence on September 20, 2010. Sweat said that he would again be away for part of the time required for the examination and once more requested a postponement until 2011. To support his request for a delay, Sweat explained that: (i) he was not feeling well, as a result of his diabetic condition; (ii) he was busy; and (iii) he needed time to organize his books and records for the examination and to correct deficiencies found in the 2008 examination. Fitzsimmons rescheduled the examination to begin on September 27, 2010.⁵

On September 1, 2010, Fitzsimmons sent Sweat an e-mail asking him to fill out an online questionnaire in advance of the examination, and setting a deadline of September 8 for its completion.⁶ When Sweat did not complete the questionnaire, Fitzsimmons called him to find out why. Sweat said he was feeling unwell and did not have the time to gather the requested information.⁷ Fitzsimmons asked Sweat to comply by September 15, 2010, and confirmed the new deadline by e-mail.⁸

⁴ Tr. 39-40. The 2008 examination led to a Complaint filed by FINRA against Respondents that was resolved by an Offer of Settlement, which included findings that Respondents had failed to: implement procedures concerning retention of electronic mail communications; enforce procedures concerning annual compliance meetings, branch office inspections and other matters; maintain copies of correspondence; and implement anti-money laundering procedures. Respondents accepted the sanctions of a censure, a fine of \$12,750 against the firm, and a five-day suspension in principal capacities and fine of \$7,500 against Sweat. The settlement was accepted on August 25, 2010. The agreement contemplated payment of the fines in installments. CX-1, Exhibit E; Tr. 55-56.

⁵ Tr. 41.

⁶ CX-2.

⁷ Tr. 43-44.

⁸ Tr. 44; CX-3.

On September 16, 2010, Fitzsimmons and his supervisor, Larry Holzen, a FINRA examination manager in the Denver district office,⁹ called to ask Sweat when he planned to respond to the questionnaire. Sweat told them that he was unsure when he would respond. Sweat again asked for a postponement because of his illness and because he wished to hire someone to assist him. Fitzsimmons and Holzen advised Sweat that it was necessary for the examination to occur on September 27, 2010.¹⁰ When Sweat said he was unable to participate on that date, they asked if IFS's second principal or a consultant with whom Sweat was working could assist them in conducting the examination instead. Sweat replied that the second principal did not reside in Utah and would not be able to do it, and that it would not be feasible for a consultant to participate.¹¹

On September 17, 2010, Fitzsimmons e-mailed Sweat a six-page Requested Records List identifying some of the records Sweat should make available for review at the examination. These included records for the review period of March 4, 2008, to September 26, 2010, relating to IFS's financial operations, including bank statements, canceled checks, the firm's general ledger, and records relating to general operations, including AML testing and findings, compliance meeting materials, correspondence files, evidence of internal reviews, and all e-mail and messaging addresses used by IFS.¹²

Because Sweat had still not submitted answers to the online questionnaire, Fitzsimmons called him on September 23, 2010. Sweat told Fitzsimmons again that he was not feeling well. He also said that he was in Atlanta for a wedding, and that he had not had time to collect the books and records in the Requested Records List, but that he would try to do so upon returning to

⁹ Tr. 64.

¹⁰ Tr. 66-67.

¹¹ Tr. 67-68.

¹² CX-4.

Utah. Without further explanation, Sweat again requested a postponement of the examination.

Fitzsimmons denied the request, and told Sweat the examination would occur on September 27.¹³

On September 27, 2010, Fitzsimmons and a FINRA regulatory coordinator traveled from Denver, Colorado, to the IFS office, which is located in Sweat's home in Heber, Utah, to conduct the examination.¹⁴ When they arrived, Sweat said he was not feeling well enough and was not prepared to allow the examination to proceed. Fitzsimmons then contacted Holzen for guidance.¹⁵ After speaking with Holzen, Fitzsimmons informed Sweat that if he would not permit the examination to proceed, FINRA would require him to bring the records to the Denver district office for inspection.¹⁶

Holzen then consulted Joseph McCarthy, the FINRA district director,¹⁷ and together they called Sweat. Sweat told them that he did not know when he would be well enough for the examination to proceed. He said he would like to delay the examination until 2011, or at least until December 2010. McCarthy told Sweat that further delay was not possible and reiterated Fitzsimmons's declaration that if Sweat did not allow the examination, he would have to bring the records to the Denver district office.¹⁸ According to McCarthy, Sweat indicated he could travel to Denver in December 2010 or January 2011. McCarthy replied, "That is not how it works," and said that FINRA, not Sweat, would determine the date of the review.¹⁹ Sweat protested that he was being treated unfairly. McCarthy ended the conversation.²⁰

¹³ Tr. 45-46.

¹⁴ Tr. 37-38, 47-48.

¹⁵ Tr. 48.

¹⁶ Tr. 49.

¹⁷ Tr. 49.

¹⁸ Tr. 72-73.

¹⁹ Tr. 92.

²⁰ Tr. 72-74.

Before leaving Sweat's home, Fitzsimmons informed Sweat that he would be required to turn over IFS's financial books and records on the following day.²¹ Pursuant to Rule 8210, Holzen sent Sweat a letter by facsimile and e-mail directing the production of IFS's financial information for the month of August 2010 by 1:00 p.m. the next day.²² On September 28, 2010, Sweat provided some documents to Fitzsimmons, but they were incomplete.²³

Because Sweat had prevented the FINRA examiners from conducting their examination, on October 5, 2010, Holzen issued a request pursuant to Rule 8210 to Respondents to produce the necessary books and records at FINRA's Denver district office on October 19, 2010.²⁴ To ascertain whether Sweat intended to comply with the request, Holzen called Sweat on October 13. During the conversation, Sweat did not indicate directly whether he was going to appear at the Denver district office as required, but said that he had a previously scheduled commitment on that date.²⁵ On October 18, Holzen again called Sweat to ask if he intended to appear. Sweat said he did not and reiterated his complaint that FINRA was treating him unfairly.²⁶

Sweat failed to appear at the Denver district office on October 19, 2010. Consequently, on the following day, Holzen issued a second request pursuant to Rule 8210, directing Respondents to appear at the Denver district office on October 27 with all of the information and documents requested in the Rule 8210 letter dated October 5, 2010.²⁷ Sweat failed to appear or provide any of the requested information or documents on October 27, 2010.²⁸

²¹ Fitzsimmons testified that FINRA staff needed these financial records to verify whether IFS had sufficient capital after paying the settlement it had reached with FINRA the preceding August. Tr. 50-51.

²² CX-6.

²³ Tr. 51.

²⁴ Tr. 74-76; CX-7.

²⁵ Tr. 77.

²⁶ Tr. 78.

²⁷ Tr. 79-80; CX-10.

²⁸ Tr. 81.

Enforcement issued the Notice on the following day. On November 19, 2010, Respondents filed their request for a hearing, stating that Sweat's illness had rendered him "unable to respond to [the] requests from FINRA" that led to the issuance of the Notice.

B. Sweat's Testimony

Sweat testified that his chronic diabetes, from which he has suffered for some time, has worsened in the past several years, leaving him "sick almost every day." Although he did not present any corroborating evidence relating to his medical condition or its treatment, he testified that recently he has made progress working with a physician to adjust his medications.²⁹

Sweat described IFS as a small firm for which a FINRA examination is an arduous, stressful process. He said that in the past he has hired consultants to help prepare documents for the examiners and assist with the examination itself. This time, however, the consultant he ordinarily used was unavailable and, partly because of the costs of the settlement he had just reached with FINRA, he lacked the funds to hire another consultant.³⁰

Sweat testified that when he was first called about the examination in May 2010, he explained that he would be away for a family reunion.³¹ Sweat said that shortly after he settled the charges stemming from the 2008 examination, FINRA called again to schedule the 2010 examination.³² He informed FINRA staff that he was too ill to complete the stressful preparation necessary for the two-week examination.³³ Preparation for such an examination, Sweat testified, requires "a lot of work."³⁴ Sweat also claimed that he needed time to have his medications

²⁹ Tr. 117.

³⁰ Tr. 118-121.

³¹ Tr. 117-118.

³² Tr. 119-120.

³³ Tr. 120.

³⁴ Tr. 138.

adjusted.³⁵ He testified that he asked what FINRA policy is when someone is ill, but received no answer.³⁶

Sweat testified that FINRA staff came to his home on September 27, 2010, despite the fact that he asked them not to come.³⁷ In contrast to the testimony of FINRA staff, Sweat maintained that he was not trying to dictate a schedule to FINRA, but rather that he suggested postponing the examination to December 2010 or January 2011 because he was ill and hoped FINRA would work with him. He did not produce the requested documents after receiving the Notice, he testified, because he did not know that was an option. He said he believed that FINRA was simply going to put him out of business.³⁸ At some point he realized that the Notice states that the suspension might not take effect if he provided the documents, but by then limited time and funds prevented him from providing them.³⁹ According to Sweat, he was “overwhelmed” by the combination of the pressures associated with the 2008 examination, negotiating the settlement, and the demands placed by FINRA in connection with the 2010 examination, along with attending to the needs of his firm’s customers.⁴⁰ Sweat testified that all he had asked was to delay the examination and that he had even offered to travel to Denver in December 2010.⁴¹ He asserted that he has “done the best [he] could being sick.”⁴²

III. Findings of Fact

As Enforcement contends, and Sweat concedes, Respondents failed to provide access to IFS records for examination by FINRA staff, and subsequently failed to provide the records to FINRA in response to requests issued pursuant to Rule 8210. Sweat’s assertions about the

³⁵ Tr. 128.

³⁶ Tr. 125.

³⁷ Tr. 131.

³⁸ Tr. 139-140.

³⁹ Tr. 157-158.

⁴⁰ Tr. 160-162.

⁴¹ Tr. 176-177.

⁴² Tr. 143.

debilitating effects of his medical condition, and his consequent inability to cope with the combined stresses of his settlement with FINRA and the pending examination, do not constitute a defense or otherwise excuse Respondents from their responsibility to produce the information and documents FINRA requested pursuant to Rule 8210.

IV. Sanctions

The Notice informed Respondent Sweat that, pursuant to FINRA Rule 9552, he would be suspended from associating with any FINRA member in any capacity and IFS would be suspended from FINRA membership for failing to respond to requests for information and documents issued pursuant to Rule 8210, unless Respondents took corrective action by complying with the requests. They did not comply. At the hearing, Sweat presented no evidence that he or IFS has fully complied with the Rule 8210 requests for information. Having failed to present a defense, Respondents are no longer entitled to the stay of the effective date of the suspensions resulting from their request for a hearing, and are subject to suspension as described in the Notice pursuant to FINRA Rule 9552.⁴³

V. Conclusion

Pursuant to Rule 9559(n), for failing to provide information to FINRA as requested under the authority of Rule 8210 on October 5 and October 20, 2010, Respondent Kent D. Sweat is suspended from associating with any FINRA member firm in any capacity, and Respondent Intermountain Financial Services, Inc. is suspended from FINRA membership. The suspensions shall remain in effect until Respondents fully comply with the requests for information. At the

⁴³ The Notice also informed Respondents that even if they complied with the Rule 8210 requests, they “may still be subject to a disciplinary action for [their] failure to respond timely to a request for information under FINRA Rule 8210.” At the hearing, Enforcement recommended imposing a bar upon Sweat and an expulsion upon IFS. The Hearing Panel declines to do so. The Hearing Panel concludes that suspending Respondents, as contemplated by the Notice, is sufficient to address Respondents’ failures to provide FINRA with access to IFS’s books and records. Should it choose to do so, Enforcement retains the ability to file an additional disciplinary action against Respondents for violating Rule 8210 by failing to respond to Enforcement’s requests for information.

end of three months, if Respondents have not fully complied with the information requests, Sweat's suspension will automatically convert to a bar, and IFS's suspension will automatically convert to an expulsion. In addition, Respondents are ordered jointly and severally to pay costs of \$2,216.85, which include an administrative cost of \$750 and the cost of the hearing transcript. The costs shall be due as of a date established by FINRA.⁴⁴

HEARING PANEL.

By: Matthew Campbell
Hearing Officer

Copies to:

Kent D. Sweat (*via e-mail, overnight courier and first-class mail*)
Intermountain Financial Services, Inc. (*via e-mail, overnight courier and first-class mail*)
Helen G. Barnhill, Esq. (*via e-mail and first-class mail*)
Sandra J. Harris, Esq. (*via e-mail*)

⁴⁴ The Hearing Panel has considered and rejects without discussion all other arguments of the parties.