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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RESPONDENT, Respondent.	Disciplinary Proceeding No. 20090207019-01 Hearing Officer - MC **HEARING PANEL DECISION** November 8, 2013

The Department of Enforcement failed to prove by a preponderance of the evidence that Respondent engaged in unethical conduct. Accordingly, the Hearing Panel dismisses the cause of action charging him with alleged ethical violations of FINRA Rule 2010.

Respondent is censured for failing to provide timely responses to requests for information, in violation of NASD Rules 8210 and 2110, and FINRA Rules 8210 and 2010, and for failing to establish and maintain written supervisory procedures and a supervisory system reasonably designed to achieve compliance with Rule 8210, in violation of NASD Rules 3010, 2110, and FINRA Rule 2010.

Appearances

Jacqueline D. Whelan, Esq., Justin Chretien, Esq., and Sandra J. Harris, Esq. for the Department of Enforcement.

Mitchell J. Albert, Esq., Albert & Will, LLP for Respondent.

I. Background

The original Complaint in this case focused on numerous Rule 8210 violations for which the Department of Enforcement sought to impose substantial fines on Wedbush Securities, Inc. ("Wedbush") and Respondent, one of its compliance officers. However, on the eve of the scheduled hearing, the case transformed from a relatively commonplace Rule 8210 case into one

alleging ethical misconduct so serious that Enforcement seeks to bar Respondent from the securities industry.

A. The Original Complaint

In 2008 and 2009, Respondent was a co-chief compliance officer and manager of Wedbush's business conduct department.[1] Wedbush, previously known as Wedbush Morgan Securities,[2] is a FINRA member firm headquartered in downtown Los Angeles, with 700 representatives located in offices around the country.[3] Respondent was primarily responsible for responding to regulatory inquiries received by Wedbush.

The Department of Enforcement filed the original Complaint in this disciplinary proceeding on September 20, 2010. Its two causes of action concerned compliance with Rule 8210 between April 1, 2008, and February 28, 2010 (the "relevant period"). The first cause of action charged that Wedbush, acting through Respondent, failed, in 37 instances arising from 14 FINRA examinations, to respond to Rule 8210 requests in a timely manner and, in some instances, to provide any response at all. As a result of these failures, Enforcement complained that FINRA staff had to make repeated requests for information and follow up with telephone calls and e-mails, a number of which went unanswered, in order to acquire the overdue requested information. Most of the violations were charged against both Wedbush and Respondent, but several were charged only against the firm.

[1] Wedbush's other co-chief compliance officer was Vincent Moy. Hearing Transcript (Leong) 61-62. (References to witness testimony in the hearing transcript are cited as "Tr." followed by the name of the witness whose testimony is cited, and the page number or numbers on which the relevant testimony appears).

[2] The firm formally changed its name in late 2009 or early 2010. Hearing Transcript (Respondent) 945.

[3] Because Wedbush is a FINRA member firm, and Respondent remains registered with FINRA through Wedbush, FINRA has jurisdiction over Respondent for the purposes of this disciplinary proceeding pursuant to FINRA By-Laws, Article V, Section 4.

The second cause of action charged Wedbush and Respondent with failing to establish and maintain a supervisory system and written supervisory procedures reasonably designed to achieve compliance with Rule 8210. Respondent, who is an attorney, represented both Wedbush and himself.[4]

B. Respondent's Proposed Exhibits And Pre-Hearing Conference

As the hearing date approached, the deadline arrived for the parties to exchange proposed exhibits. Enforcement became suspicious when it saw three letters Respondent submitted as proposed exhibits. They appeared to be copies of letters Respondent had written in response to information requests that the Complaint alleged he had not responded to.

Enforcement immediately filed a motion for a postponement of the hearing, asserting that "Enforcement has come to question the provenance" of the letters and "the circumstances surrounding the creation of these documents and their inclusion in Respondents' Exhibits."[5]

On April 14, 2011, the Hearing Officer originally assigned to this matter convened a pre-hearing conference at which Enforcement requested that the Hearing Officer (i) postpone the hearing to permit Enforcement to investigate the authenticity of the letters, and (ii) order Respondent and Wedbush to preserve any existing electronic data relating to the creation of the letters to enable Enforcement to subject the data to forensic analysis.

C. The Hearing Officer's Order

The Hearing Officer orally issued a temporary order granting Enforcement's requests and gave Respondent until the following day to respond to Enforcement's motion.

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[4] Except for handling a contested will, the case was Respondent's first litigation experience. Tr. (Respondent) 1004-05.

[5] Enforcement's Mot. for Continuance, Authorization to Issue Rule 8210 Requests and Order Preserving Electronic Data 1, 3.

The next day, referring to Enforcement's suspicions that the letters responding to FINRA requests for information "may have been fabricated," the Hearing Officer granted Enforcement's motion over Respondent's opposition. The ensuing order continued the case, permitted Enforcement to issue additional Rule 8210 requests for testimony and information, and ordered Respondent and Wedbush:

> not to delete, destroy, alter, transfer, or modify any data, including, but not limited to, any and all drafts and versions of the Exhibits, or any metadata associated therewith, located on any computer, whether personally-owned or the property of Respondent Wedbush or Respondent, that was used to create, edit, transmit, receive or store any of the Exhibits or from which any of the Exhibits were printed at any time.[6]

D. Enforcement's Post-Complaint Investigation

For the next 10 months, Enforcement investigated the authenticity of the letters. It conducted on-the-record interviews of Respondent and others, cloned the contents of Respondent's firm-issued laptop computer and the computers used by 11 other Wedbush employees, duplicated the Wedbush computer network folder used by Respondent's department, and conducted a forensic analysis of the acquired data.

On February 24, 2012, Enforcement filed the Amended Complaint. The Amended Complaint retained the original Complaint's first two causes of action and added a third solely against Respondent.[7] In its motion to amend the Complaint, Enforcement noted that before Respondent submitted the letters as proposed exhibits, he had not informed Enforcement of their existence or produced them "notwithstanding their obvious significance," and that the "purported

[6] The Hearing Officer's order tracked a proposed order Enforcement sent by e-mail to the Hearing Officer and to Respondents during the April 14, 2011, pre-hearing conference. Tr. 917, 988.

[7] At the Final Pre-Hearing Conference preceding the hearing of the Amended Complaint, Enforcement announced it had reached a settlement with Wedbush of the allegations against the firm. Accordingly, proceedings against the firm were stayed pending approval of the settlement. Enforcement subsequently filed the Order Accepting Offer of Settlement on April 9, 2013. The settlement rendered moot the allegations in Paragraphs 20-23 of the first cause of action and removed Wedbush from the allegations in the second cause of action. The hearing therefore focused solely on the remaining allegations against Respondent.

FINRA staff addressees had never received them." According to Enforcement, Respondent, "by representing [the letters] as Rule 8210 responses provided to FINRA … falsified evidence in a FINRA proceeding."[8] In its pre-hearing brief, Enforcement accused Respondent of "fundamentally dishonest" conduct demonstrating "a willingness to mislead and deceive," consisting, essentially, of "fraud on the court."[9]

II. Respondent's Alleged Falsification Of Evidence: The Third Cause Of Action

The ethical misconduct charge alleges that:

a. on or about April 7, 2011, Respondent filed three letters as proposed exhibits for the original hearing;

b. Respondent represented that the letters were responses to FINRA Rule 8210 requests for information; however, he never sent the responses;

c. Respondent submitted the first letter knowing he had not created it on the date on its face, and knowing that he had not sent it to FINRA;

d. Respondent submitted the other two letters knowing, or recklessly not knowing, that he had not sent them to FINRA;

e. on the evening of the April 14, 2011, pre-hearing conference, Respondent violated the Hearing Officer's oral order by changing the date and time clock on his computer and creating a document identical to one of the letters he had submitted as a proposed exhibit, so that the computer's metadata falsely made it appear that the document was created on May 5, 2008; and

f. by representing that the exhibits were genuine, and by altering electronic data to conceal the fabrication of the letter, Respondent "engaged in conduct inconsistent with high standards of commercial honor and just and equitable principles of trade and violated FINRA Rule 2010."

A. The Byford, Han, And Cooper Letters

In chronological order, the letters Respondent submitted are:

[8] Mot. for Leave to File Am. Compl. 2.

[9] Department of Enforcement's Pre-Hearing Br. 83.

a. the "Byford letter," appearing to be a copy of a letter from Respondent to FINRA examiner Susan Byford dated May 5, 2008, on Wedbush Morgan Securities letterhead, bearing Respondent's signature and a handwritten notation stating "sent via mail 5/6/2008" under which appear Respondent's initials. The Byford letter is identical, except for the notation, to the document Respondent typed into his computer on April 14, 2011, after he changed the computer's clock;[10]

b. the "Han letter," appearing to be a copy of a letter from Respondent to Senior FINRA Regional Counsel John Han dated August 2, 2009, on Wedbush Morgan Securities letterhead, signed by Respondent, responding to Han's July 27, 2009, request for information. Han's request letter has on it a handwritten notation stating, "Response sent via US mail 8/2/09 for 8/3/09 pick up" over Respondent's initials;[11] and

c. the "Cooper letter," appearing to be a copy of a letter from Respondent to Senior FINRA Counsel Laura Cooper dated December 4, 2009, on Wedbush Morgan Securities letterhead, signed by Respondent, with a handwritten notation over Respondent's initials, stating "Sent via first class mail 12/4/09".[12]

B. The Requests For Information

1. The Byford Request

Susan Byford is an examiner employed at FINRA's Denver office. In April 2008, she investigated a customer complaint that two Wedbush registered representatives had made unsuitable recommendations. Byford sent Respondent a request for information pursuant to Rule 8210 (the "Byford request"). The deadline for the response was April 29, 2008.[13] Among other things, Byford requested written statements by the two representatives and their supervisor.[14] Respondent did not respond by the deadline, but called Byford a day afterward, on April 30, to

[10] Joint Exhibit 2. Hereinafter, joint exhibits are cited as "JX-" followed by page numbers when appropriate. Enforcement's exhibits are cited as "CX-_," and Respondent's exhibits are cited as "RX-_."

[11] Tr. (Respondent) 796-97; JX-3.

[12] JX-4.

[13] Tr. (Byford) 515-17.

[14] CX-4, at 1-2.

request a one-week extension, resetting the deadline to May 6.[15] Respondent explained that Wedbush's legal department needed to review the documents, thereby slowing the process.[16] Byford granted the extension. She testified that such extensions are commonly granted.[17]

On the May 6 deadline, Byford received a fax cover sheet and an attached "Case Cover Sheet" from a Wedbush paralegal describing the scope of an internal search of Wedbush mail archives for records related to her request.[18] But she did not receive the information she had asked for. She followed up by calling Respondent twice in June, and leaving messages.[19]

Byford testified that she finally received the response to her April request by regular mail on July 2, 2008.[20] The response consisted of a cover letter from Respondent dated July 1, 2008, with 98 pages of information, including letters addressed to her from the two Wedbush representatives, both dated May 5, 2008, and a letter from their supervisor, also addressed to Byford, dated April 29, 2008. The package also included one computer disk containing electronically recorded information.[21]

The disk contained two sets of data: (i) a series of e-mails related to the customer complaint that had sparked Byford's request for information; and (ii) Wedbush's written supervisory procedures dated May 27, 2008. The data sets had been recorded, or "burned," onto the disk on two different dates. The e-mail files were burned on May 5, 2008. The written

[15] Tr. (Byford) 518.

[16] JX-1.

[17] Tr. 518-19. Byford said, however, that extension requests are usually made before the deadline for production passes.

[18] CX-6.

[19] Tr. (Byford) 520.

[20] Tr. (Byford) 521.

[21] Tr. (Byford) 521-22; CX-7, at 1, 2, 7, 9.

supervisory procedures were burned on July 1, 2008, the same date Respondent mailed the response to Byford.[22]

Byford testified that Respondent gave her no indication that he had previously sent a response to her April request.[23] In early August 2008, Byford closed the investigation that had prompted her information request to Respondent.[24]

Later, after the April 14, 2011 pre-hearing conference, Byford learned that Respondent claimed that he had found a copy of a May 5 response letter to her. Byford searched for the original in every file that she had worked on during May 2008. She did not find it.

Byford did not search the files in the offices of her Denver colleagues, however, and she conceded that she has no way of knowing whether Respondent mailed the letter in May and for some reason it did not reach her.[25] But she testified that she is unaware of any instance in which incoming mail has been lost after being delivered to the Denver office.[26]

2. The Han Request

John Han is an Enforcement lawyer at FINRA's District Office in San Francisco.[27] On July 27, 2009, Han sent a request for information by e-mail and certified mail to Respondent (the "Han request") in an ongoing investigation into sales of auction rate securities by Wedbush representatives. This request sought, among other things, written statements by ten registered

[22] CX-36 (Hendry Forensic Report), at 12-13.

[23] Tr. (Byford) 525. However, she did not speak with Respondent. *Id.* at 527-28.

[24] Tr. (Byford) 534.

[25] Tr. (Byford) 528-29.

[26] Tr. (Byford) 525-26.

[27] Tr. (Han) 538.

representatives explaining their use of certain marketing materials in connection with sales of the securities.[28]

The Han request imposed a deadline of one week. Receiving no response, Han sent a second request for the information to Respondent by e-mail and regular mail on August 7, 2009.

Han testified that he is certain that he did not receive any response to his July 27 and August 7 requests for information. He testified that "all of the responses that I received from Respondent in connection with the auction rate securities investigation, I received electronically via e-mail. And I looked through my e-mail box and there was no e-mail that was responsive to this request." When he did not find a response, Han testified that "I broached the subject with my managers and we discussed the possibility of bringing a separate action against the firm for the failure to provide the information."[29]

3. The Cooper Request

Laura Cooper is an Enforcement attorney supervised by Steven Korostoff, Enforcement Director in FINRA'S New York Office. In 2009, a New York Stock Exchange Hearing Board ordered Wedbush to retain an independent consultant by August 15, 2009, to assess the adequacy of Wedbush's compliance resources.[30] Cooper was responsible for monitoring compliance with the Hearing Board decision.[31] On August 14, 2009, by e-mail, Respondent asked for, and was granted, a two-week extension of the August 15 deadline to complete negotiations with prospective consultants.[32]

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[28] CX-14, at 1.

[29] Tr. (Han) 551.

[30] Tr. (Korostoff) 475; RX-55.

[31] Tr. (Korostoff) 472.

[32] Tr. (Korostoff) 476-78.

When Respondent did not notify Cooper of the retention of a consultant by the August 29 deadline, Korostoff and Cooper sent e-mail reminders on September 10, September 21, and October 20, 2009.[33] Receiving no reply, Korostoff and Cooper considered initiating a disciplinary action against Wedbush.[34] Cooper followed up with letters to Respondent on November 12 and December 2, 2009, invoking Rule 8210 and asking why Wedbush had not identified a consultant. She received no response from Respondent.[35]

Korostoff testified that he is "quite certain" his office did not receive the Cooper letter. After learning that in April 2011 Respondent submitted the Cooper letter as a proposed hearing exhibit, Korostoff personally searched over 50 boxes of documents containing all the files he believed could contain the original, without finding it.[36] If the letter had been received, Korostoff testified, it would have changed "the entire dynamics," because the letter conveyed the information Enforcement needed to know about the retention of the consultant by Wedbush.[37]

Another reason Korostoff doubts the authenticity of the Cooper letter is that in March 2010, Respondent, in an on-the-record interview, testified that he was unaware of Cooper's requests for the information, and gave no indication that he had responded to them. Korostoff believes it unlikely that Respondent would have been unaware of Cooper's requests in March 2010, if he really had composed the Cooper letter just three months before, on December 4, 2009.[38]

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[33] Tr. (Korostoff) 479-80.

[34] Tr. (Korostoff) 479. Enforcement charged Wedbush alone, not Respondent, with failing to provide a written explanation of why an outside consultant had not been retained by August 31, 2009, and why Wedbush failed to respond to the series of staff requests about the matter.

[35] Tr. (Korostoff) 485-87. The consultant later informed Korostoff that Wedbush had retained him on January 5, 2010. *Id.* at 488-89.

[36] JX-4; Tr. (Korostoff) 495-69.

[37] Tr. (Korostoff) 495.

[38] Tr. (Korostoff) 497.

Korostoff testified that he does not believe Respondent mailed the Cooper letter, because Enforcement did not receive it. He cannot know, however, whether it may have been lost in the mail or misplaced once it reached FINRA. But he does not recall any occasion on which a firm's correspondence was lost in the FINRA mail system.[39]

C. Enforcement's Forensic Analysis

Enforcement's expert, Patrick Hendry, a 12-year FINRA employee, is a forensic investigator. He collects and investigates data from digital devices and computers. This involves reviewing metadata, which is descriptive information a computer records, such as document creation dates, and dates on which a person accesses or modifies a document.[40] In the investigation of Respondent, Hendry reviewed: an image of the hard drive of Respondent's Wedbush laptop computer; data from computers used by 11 other Wedbush employees; data acquired from the network folder on the Wedbush company corporate network used by the business conduct department; a computer disk provided by the FINRA District Office in Denver; and another disk provided by Respondent. [41]

[39] Tr. (Korostoff) 508. Other testimony, however, illustrated instances in which FINRA staff believed Respondent had failed to respond to their inquiries, only to learn later that Respondent or an assistant had responded without their knowledge, or that the response was misplaced. Tr. (Respondent) 961-64; RX-71, at 9 (Wedbush co-compliance officer Vincent Moy responding that Wedbush had already provided requested information); RX-73, Tr. (Smith) 347-48 (Market Regulation analyst Smith testified that he sent an e-mail to Respondent to follow up on an earlier request, not realizing that another member of the business conduct department had sent the response to Smith's former manager); CX-27, at 14, Tr. (Han) 559-60 (Han asserted in a letter to Respondent that he had not received requested written supervisory procedures, but Wedbush had already e-mailed the procedures and Han had previously confirmed his receipt of them); RX-74, Tr. (Leong) 69-70 (Leong, a FINRA examiner, issued a request for information under another staff member's signature, the response was sent to that staff member, Leong believed it was not sent, and issued a second request after the information had been provided); RX-72, Tr. (Miller) 241-45 (On November 12, 2009, a FINRA examiner asked Respondent for a response that had been provided the previous August). In another example, a FINRA examiner in Dallas sent a request to Respondent on stationery used by FINRA's Denver office, as a result of which Respondent sent his response to Denver, and the Dallas examiner was unaware for a time that Respondent had provided the response. Tr. 1091.

[40] Tr. (Hendry) 596-97.

[41] CX-36, at 3.

Using the metadata he found on Respondent's computer, Hendry constructed a chronology of the activity on it during and after the pre-hearing conference held on April 14, 2011, starting at 9:00 a.m. Pacific Time. The chronology revealed the following activity Enforcement finds suspicious:

- at 9:52 a.m., Respondent ran a program called ATF Cleaner, used for deleting files, internet history, Internet cookies, and emptying the recycle bin;
- at 1:30 p.m., Respondent emptied the recycle bin;
- between 1:30 and 2:30, Respondent rebooted the computer four times;
- at 2:07 pm., the encryption system noticed an error, which could have involved a date change;
- at 4:21 p.m., Respondent viewed an article about metadata;
- at 4:29 p.m., Respondent shut the computer down;
- at 9:40 p.m., Respondent started the computer;
- at 9:58 p.m., Respondent changed the computer date clock, first to 5/5/05, then to 5/5/08;
- at 9:48 p.m., Respondent created a Word document titled "FINRA 2008 1026150 Response Letter," identical to the Byford letter;
- on April 14 and 15, Respondent opened the date and time properties window, which allows changing the computer date clock, 23 times;
- at 1:02 a.m., on April 15, Respondent shut down the computer.

Notably, Hendry concluded that Respondent changed the computer's date and time clock to May 5, 2008, before saving the Byford letter as "FINRA 2008 Response Letter.doc." Thus, the Byford letter appeared to have been created on May 5, 2008.[42]

[42] Tr. (Hendry) 614-16; CX-36, at 4. Hendry testified that the metadata showed the computer clock was originally set back to 2005, then reset to 2008, as if Respondent had made a mistake initially. Tr. (Hendry) 615. Hendry found there were other documents whose metadata showed they had been last accessed in 2005 and 2008. *Id*. at 616.

When Hendry first examined Respondent's computer drive, he found the Byford letter but not the Han and Cooper letters. Respondent later volunteered that when he saved the Byford letter on his computer, he did the same with the Han and Cooper letters. Armed with this information, Hendry searched the drive again and was able to find them, but found no evidence that Respondent had changed the clock for these two files.[43]

Significantly, Hendry found no evidence that Respondent had composed the letters on his hard drive prior to April 14, 2011.[44] Such evidence would be important, because it would support Enforcement's theory that Respondent fabricated the three letters before he submitted them as proposed exhibits.

Despite the lack of such evidence, Hendry insisted that Respondent could have previously fabricated the three letters on his laptop without leaving traces. He opined that the "lack of evidence is not proof that previous versions of the exhibits were not created on Respondent's computer. There are numerous ways that all traces of previous versions could have been lost." For example, according to Hendry, if Respondent had composed, printed, then deleted the letters, there would be no trace evidence of their creation.[45] And if he had saved them to the hard drive but deleted them, and emptied the recycle bin, the deleted files could have been overwritten, leaving no trace evidence.[46]

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[43] Tr. (Hendry) 621, 659-60. Thus, the Han and Cooper letters appear as if they had been created on August 2, 2009, and December 4, 2009, respectively.

[44] Tr. (Hendry) 621, 675.

[45] Hendry testified that if Respondent did this before April 14, 2011, the print log would not reflect that the documents had been printed. Respondent's office printer was on the Wedbush corporate network and connected to a network print server. The Wedbush network server print logs only retain a record of documents printed for two weeks, and Hendry's examination of the server print logs occurred more than two weeks after April 14, 2011. Tr. (Hendry) 626-27. Hendry testified that Microsoft Word records the dates documents are printed, but there was no record on Respondent's computer that the three documents he filed on April 14 had been printed. Hendry also testified that there was nothing unusual in the fact that Wedbush's print server log did not preserve a longer record of printed documents. *Id*. at 628.

[46] CX-36, at 8.

Hendry pointed out that, in the week between the entry of the three letters onto the hard drive and FINRA's duplication of the computer drive, Respondent continued to use the computer and created thousands of files. It was April, tax season, and Respondent installed Turbo Tax. It consisted of 3700 files. Respondent wrote an additional 1300 files onto the drive, which, Hendry speculated, "could have potentially overwritten deleted files on his hard drive." Hendry testified that when a file is deleted, it is placed into what is called "unallocated disk space," and when a new file is written to the drive, the system first looks for available empty space; if there is none, the system goes to unallocated space and overwrites what is there, wiping out the overwritten files.[47]

Despite these speculations, however, Hendry found no evidence on Respondent's computer that he "created" or printed the letters before saving them on the computer hard drive on April 14,[48] and he conceded that there is no forensic evidence showing that the three letters were originally composed on dates other than the dates on the faces of the letters.[49]

If Respondent's goal was, as he claims, to file the letters chronologically by the dates they were originally written, Hendry conceded that Respondent accomplished it.[50]

Hendry also examined the disk Respondent sent to Byford on July 1, 2008. The disk had data burned in both May and July. Hendry opined that if it was prepared on July 1 entirely from a pre-existing disk Respondent possessed in May, then all of the data would have been burned onto

[47] Tr. (Hendry) 624-25.

[48] Tr. (Hendry) 679. The ATF Cleaner Respondent used on April 14 would not have deleted or wiped out such evidence, but would have relegated it to unallocated hard drive space, where the letters could have been, but would not necessarily be, overwritten. *Id*. at 681.

[49] Tr. (Hendry) 692-93.

[50] Tr. (Hendry) 683.

the disk on July 1, 2008.[51] This is a major factor leading Enforcement to believe Respondent did not send Byford a response in May.

D. Enforcement's Accusations Of Unethical Conduct By Respondent

Enforcement's charges of unethical conduct are founded on its contentions that:

- "Because the examiners never received" the letters, "they were never sent."[52] Therefore, Respondent dishonestly submitted the three letters as if they were genuine, falsely representing that he had mailed them in response to Rule 8210 requests for information that he was accused of not providing.[53]

- the forensic analysis of Respondent's computer hard drive establishes that the Byford letter was "actually created on the Wedbush laptop on April 14, 2011, while the date on that computer was set to almost three years earlier."[54]

- the forensic analysis of the disk Respondent sent to Byford on July 1, 2008, and the copy he turned over to the forensic team, disprove Respondent's contention that he sent a complete response to the Byford inquiry in May 2008.[55]

- Respondent's "shifting" testimony[56] and statements during the investigation leading to the original Complaint, the pleadings he filed, and his testimony at the hearing, are based upon "layers of improbability"[57] and show Respondent not to be credible.[58]

- Respondent knew, and "any reasonable person" would have known, that by changing the computer clock and typing the three letters, he would alter metadata in violation of the Hearing Officer's Order.[59]

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[51] CX-36, at 13.

[52] Tr. 897-98.

[53] To believe otherwise, Enforcement argues, requires accepting a "perfect storm" of coincidences: that Respondent sent these three responses by first-class mail, not by e-mail or fax; that Respondent had no contemporaneously created record of these responses in his department's files, his firm's computer network, or on his own computer; and that the three letters were lost in the Wedbush mail system, the U.S. Postal Service, or the FINRA mail delivery system. Tr. 1125-26.

[54] Tr. 22.

[55] Tr. 1120.

[56] Tr. 904.

[57] Tr. 20.

[58] Tr. 1120.

[59] Tr. 891-92, 1144; Compl. ¶ 35.

III. Findings And Conclusions Dismissing The Ethical Misconduct Charge

A. Introduction: Respondent's Job Responsibilities At Wedbush

We begin with a brief overview of the context in which Respondent worked, and from which the alleged Rule 8210 and other violations arose, during the relevant period.

As manager of the business conduct department and co-chief compliance officer, Respondent had numerous responsibilities at Wedbush.[60] His primary area of responsibility, however, was to respond to regulatory inquiries.[61]

Although the parties disagree over the number of regulatory inquiries Wedbush received during the relevant period, the evidence shows that they were voluminous. Respondent testified that in 2008 and 2009, there were over 4,000 regulatory inquiries, not including cycle examinations, annual audits, as well as calls and letters that were not official Rule 8210 requests but required his response. Respondent estimates that his average workday at Wedbush was 12 to 14 hours, with multiple daily deadlines to meet.[62]

Respondent's assistant, Tamica Beckham, testified that in 2008 and 2009, Wedbush received approximately 40 to 70 requests for information daily, and as many as 25 per day from

[60] Besides responding to information requests, Respondent handled all registrations of Wedbush employees; filed Forms U4 and U5; provided training to representatives; handled circulation of annual questionnaires; responded to state regulatory inquiries; conducted office visits; spoke at firm conferences, primarily the annual managers' conference and industry conferences; provided compliance guidance for the firm's investment advisors; maintained and updated the code of conduct and written supervisory procedures; and prepared the annual CEO certification. Tr. (Respondent) 996-97. At the time of the hearing, Respondent testified that he was still "technically" co-chief compliance officer, but the firm had removed him from the position of manager of the business conduct committee. He testified the firm did so because, after the Amended Complaint was filed, the Securities Exchange Commission met with Wedbush's board of directors and strongly recommended against the firm keeping Respondent in his managerial position because of the nature of the new charges lodged against him. As a consequence, Wedbush informed Respondent that he would no longer be the manager of the business conduct committee, and the firm had placed an advertisement for a new co-chief compliance officer. Tr. (Respondent) 924-25.

[61] Vincent Moy was Wedbush's other co-chief compliance officer during the relevant period. In 2008 they shared compliance responsibilities, but Respondent assumed, and continues to assume, more of the responsibility than Moy for responding to Rule 8210 requests. For his part, Moy has taken on more of the responsibility for on-site examinations. Tr. (Respondent) 1002-03.

[62] Tr. (Respondent) 930-33.

FINRA alone.[63] Beckham's log, which included blue sheet requests, recorded 1,151 SEC inquiries in 2008, and 1,503 in 2009; 522 FINRA Market Regulation Department inquiries in 2008, and 892 in 2009.[64]

When he started at Wedbush in October 2001, the business conduct department had insufficient resources to respond properly to regulatory information requests.[65]

B. The Byford Letter

The Byford letter appears to be a copy of a letter from Respondent to Byford dated May 5, 2008. It displays the Wedbush Morgan Securities letterhead which was in use at the time, bears Respondent's signature, and has a handwritten notation stating "sent via mail 5/6/2008" with Respondent's initials underneath.

Until FINRA's forensic examination, Respondent was uncertain about what computer he used to compose the Byford letter.[66] Respondent testified that he now believes he typed the Byford letter on May 5, 2008, on his home computer.[67] He had obtained an extension of the due date from Byford, so he thought the response was timely. Respondent made the handwritten notation to document when he mailed the response. Respondent testified that it is his practice to make such notations on copies of documents he sends or receives, "as often as I remember."[68]

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[63] Tr. (Beckham) 430.

[64] Tr. (Beckham) 371-72. Testimony at the hearing established that Beckham's log was far from perfect, containing perhaps less than half of the incoming requests for information. Tr. (Beckham) 402-10.

[65] Tr. (Respondent) 966.

[66] Respondent was not certain that he had not saved the Byford letter on his Wedbush laptop until FINRA completed its examination of his laptop's hard drive and the business conduct department's network and found no trace of the letter in either place. Tr. (Respondent) 928-29. Respondent testified without contradiction that his home computer ceased to function and he discarded it in January 2010. Tr. (Respondent) 929.

[67] Tr. (Respondent) 926.

[68] Tr. (Respondent) 927. He produced examples of other instances in which he made similar notations on a letter he received from an examiner on November 5, 2009, and another letter from an examiner on July 30, 2008. Tr. (Respondent) 928-29; RX-18, RX-22.

Respondent does not dispute that Byford did not *receive* the response in May.[69] The documents he found with the letter persuade him, however, that he *sent* the response to her on May 6, 2008.[70] One of the documents, a letter from a registered representative, has a stamp showing it was received by Wedbush's business conduct department on May 5, 2008.[71] Another, a letter from a second representative, has a stamp showing it was received by Wedbush's legal department on May 6, 2008.[72] Another stamp shows that the business conduct department received a stack of documents covered by Byford's request on April 30, 2008.[73] His copy of the disk shows the e-mails were burned onto the disk on May 5.[74] Respondent believes that once he got the disk, he copied the written supervisory procedures he needed from Wedbush's business conduct drive and added them to the disk.[75]

Taken together, the time stamps on these documents establish that by May 6, 2008, Respondent had collected everything he needed to respond to Byford's request. Having done so, he believes he would have mailed the package on the date indicated on the Byford letter.[76]

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[69] Tr. (Respondent) 776, 929-30.

[70] Tr. (Respondent) 930.

[71] CX-7, at 2.

[72] Tr. (Respondent) 934; CX-7, at 9.

[73] CX-7, at 14.

[74] Tr. (Respondent) 935; CX-6.

[75] Tr. (Respondent) 936. At the time of his on-the-record interview, Respondent believed he had obtained the disk from Wedbush's legal department or technology department; now he believes someone in legal or technology gave him a copy of the disk containing the e-mails on May 5, 2008, and that he then added the written supervisory procedures. *Id*. at 936-37. Wedbush maintains a copy of its written supervisory procedures on the firm's business conduct computer system. *Id*. at 740.

[76] Tr. (Respondent) 936. Respondent has no independent memory of originally preparing or sending the Byford and Han letters, and only a slight recollection of the circumstances surrounding the Cooper letter. However, with all three letters, Respondent candidly acknowledged that it is possible that he prepared them, planned to mail them, and then for some reason failed to do so. *Id.* at 849-50.

C. The Han Letter

The Han letter appears to be a copy of a letter from Respondent to Han dated August 2, 2009, on Wedbush Morgan Securities letterhead. Respondent testified that he found it with Han's request letter, dated July 27, 2009, imposing a response deadline of August 3, 2009. Han's request letter has a notation in Respondent's handwriting. After finding them, Respondent looked without success for copies on his computer and in other locations.[77]

As with the Byford letter, Respondent has no independent memory of composing the Han letter, but the notation on the face of Han's request letter persuades him that he sent the response to Han. Respondent now believes he composed the Han letter on his home computer on Sunday, August 2, 2009, the date on the face of the letter, printed it on letterhead, and brought it to work with him on the next day.[78] Respondent's notation reads "Response sent via US mail 8/2/09 for 8/3/09 pickup."[79] Respondent agrees the note is inaccurate, because the response was not "sent" on Sunday August 2.[80]

Enforcement pressed Respondent on what it perceives as this anomaly in the note. Enforcement asked "So if you knew it wasn't going to be mailed until the 3rd, why didn't you just say response sent via U.S. mail 8/3/09?" Respondent does not remember writing the notation, but surmises that after drafting the Han letter at home, he took it to work the next day, made the notation and initialed it, then realized that it was August 3 that he was sending the letter, and added "for 8/3/09 pickup."[81]

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[77] Tr. (Respondent) 792-93.

[78] Tr. (Respondent) 795-96.

[79] JX-3, at 3.

[80] Tr. (Respondent) 796-97.

[81] Tr. 800.

Having received no response to his July 27 request, Han sent Respondent a second request for the information dated August 7, 2009.[82] Respondent does not recall receiving it, but testified "my guess would be I see that letter coming knowing I just mailed a response. I figured they just crossed in the mail. And after that August letter from Mr. Han, I never heard anything about it again from him. So I had assumed at that point that he had received it."[83]

The fact that Respondent mailed the letter, instead of sending it by e-mail, is another reason Enforcement disbelieves him. Respondent explained, however, that the Han letter was a single-page document. To send it by e-mail, Respondent testified, would have required extra steps, to scan it and then e-mail it, and, in Respondent's words, "It was probably just easier" to simply print, sign, and mail it.[84]

D. The Cooper Letter

The Cooper letter appears to be a copy of a letter from Respondent to Cooper dated December 4, 2009, on Wedbush Morgan Securities letterhead, with a notation in Respondent's handwriting over his initials stating "Sent via first class mail 12/4/09." It purports to respond to Enforcement's inquiry into the status of the firm's effort to hire an independent consultant. It states that the firm was negotiating with a prospective consultant and was "in the process of signing the agreement."[85]

After the New York Stock Exchange Hearing Board ordered Wedbush to hire a consultant, Respondent assumed responsibility for following up. He proposed several consultants to Enforcement. He then assisted Edward Wedbush, Wedbush's president, with contract negotiations. Then negotiations stalled. Mr. Wedbush delayed approving the contract until long

[82] CX-14, at 5.

[83] Tr. (Respondent) 953-54.

[84] Tr. (Respondent) 798-99.

[85] JX-4.

after the 30-day deadline had expired. Respondent felt "left kind of in the middle" as a go-between in the negotiations. Mr. Wedbush refused to approve the contract even after Respondent told him that the consultant had agreed to all of Wedbush's conditions.[86]

Respondent believes he mailed the Cooper letter to request an extension of the deadline on December 4, 2009, as his notation on it states, hoping that it would take several days to reach Cooper, and that by the time the letter reached her, Mr. Wedbush would have approved the contract. The contract was finalized in late December. When he heard nothing more from Cooper, Respondent assumed she had received the letter.[87]

E. Respondent's Discovery Of The Letters

As noted above, preparing to defend the firm and himself at the hearing of the original Complaint, Respondent searched through various files for potentially relevant documents. Shortly before the deadline for submitting proposed exhibits, Respondent remembered, or thought he remembered, that he had sent FINRA a particular document that he had not been able to locate. His office contained stacks of paper and "boxes and boxes of files and papers."[88] In a final effort to find the document, he went through the documents stacked in his office, which he had not previously done. To his surprise, he found the Byford, Han, and Cooper letters.[89] He recognized them as evidence that he had sent responses to three of the numerous information requests at issue in the case. Respondent's discovery occurred the weekend before the deadline for filing exhibits for the hearing.[90]

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[86] Tr. (Respondent) 956.

[87] Tr. (Respondent) 958.

[88] Tr. (Respondent) 941.

[89] Respondent did not find the document he initially went looking for. Tr. (Respondent) 1006-07.

[90] Tr. (Respondent) 776-77.

The letterhead of the documents was significant to Respondent. In late 2009, the firm changed its name from Wedbush Morgan Securities to its current name, Wedbush Securities, Inc. In September 2009, the firm's marketing department sent a notice urging employees to use up old letterhead.[91] In March 2010, the firm sent a reminder that the process of making the name change was complete, and directed personnel thenceforth to use only the firm's new name on all communications.[92] Respondent testified that he was using only the new letterhead by the first week of April 2010, and that by April 2011, when he submitted his exhibits, the old letterhead was no longer available.[93] All three of the letters — to Byford, Han and Cooper — are on the old Wedbush Morgan Securities letterhead.

According to Respondent, when he found the letters, at the eleventh hour of preparing for the hearing, he was excited. He made copies and submitted them with other proposed exhibits to Enforcement and the Office of Hearing Officers. From his viewpoint, the letterhead, his signature, and the notations he made, were evidence that he had sent these responses, even though Byford, Han and Cooper said they had not received them.[94]

Consequently, at the pre-hearing conference on April 14, 2011, when Enforcement accused him of fabricating the documents, Respondent was upset, insulted, and angry.[95]

F. Respondent's Use Of His Computer And The Hearing Officer's Order

Respondent testified that the April 14 pre-hearing conference put him on notice that FINRA was going to examine his computer. He understood that the Hearing Officer's oral order, and the written order the following day, forbade him from altering anything pertaining to the

[91] RX-68.

[92] RX-69.

[93] Tr. (Respondent) 945-46.

[94] Tr. (Respondent) 940.

[95] Tr. (Respondent) 947.

documents that Enforcement questioned, or changing "anything regarding this case that was already on the computer,"[96] but that the order did not require him to stop working on his computer.[97]

Respondent believed the order "had everything to do with documentation regarding this case" and "nothing to do" with his personal information.[98] Understandably, Respondent did not want the FINRA examiners to see his personal information — his personal cookies, passwords and the like — and for that information to be "sitting around FINRA."[99] Consequently, he ran the ATF Cleaner program to clear out his personal information. Respondent testified he did not run it intending to violate the order.[100] Respondent believed that the ATF Cleaner would not eliminate metadata. In fact, he checked some Internet sites to confirm the correctness of his understanding.[101]

After finding the letters, Respondent decided to save them as Word documents filed by the dates on the letters.[102] This required changing the computer's clock date and time clock. Before he did so, he consulted Mathias Tornyi, the chief of Wedbush's technology department,

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[96] Tr. (Respondent) 951.

[97] The order, in pertinent part, directed Respondent "not to delete, destroy, alter, transfer, or modify any data, including, but not limited to, any and all drafts and versions of the Exhibits, or any metadata associated therewith, located on any computer … that was used to create, edit, transmit, receive or store any of the Exhibits or from which any of the Exhibits were printed at any time." Order Granting Enforcement's Mot. for Continuance, Authorization to Issue Rule 8210 Requests, and Order Preserving Electronic Data 3. Enforcement does not suggest that the order prohibited Respondent from using his computer.

[98] Tr. (Respondent) 948.

[99] *Id*.

[100] *Id*.

[101] Tr. (Respondent) 828-33. Indeed, the parties stipulate that the ATF Cleaner "does not overwrite or wipe-out files that it deletes." Stipulation ("Stip.") ¶ 15.

[102] Respondent testified that he had not previously filed an electronic copy of the letters on his laptop, presumably because he wrote and saved the letters originally on his home computer, which broke down irreparably in early 2010. Tr. (Respondent) 949-50. Respondent testified that his practice, when he works at home, is to create an electronic copy in Word of letters he drafts, and to file them chronologically by the date of creation of the documents. *Id.* at 1007.

to find out whether, if he changed the computer date and time clock to file the letters chronologically, the change would be visible when the computer was examined. The answer was yes. He went to Wedbush's former chief of technology, Jeff Bell, who oversees the technology department, and asked the same question, just to be sure. Bell confirmed the answer.[103]

Respondent testified that if the answer had been different, he would have waited until after the forensic examination to type the letters into his computer.[104] To file the letters chronologically as was his custom, he "put copies" into his computer that he typed "from the existing letters."[105] Respondent testified that in the brief time after he found the letters, on approximately April 7, until April 14, he had been too busy to do this.[106] Respondent testified that he did not intend to violate the Hearing Officer's order and that he did not believe that the order prohibited him from adding the documents onto his hard drive.[107]

G. Enforcement Did Not Meet Its Burden Of Proof

Enforcement bears the burden of proving the Complaint's allegations of misconduct by a preponderance of the evidence.[108] That evidence may be, and in this case is, largely circumstantial.[109] Enforcement describes its ethical misconduct case against Respondent as consisting of "facts and circumstances kind of like … a murder case without a body, in a

[103] Tr. (Respondent) 949-50.

[104] Tr. (Respondent) 1008.

[105] Tr. (Respondent) 824-25. Respondent explained that "Those letters were not on the computer, and I was just simply adding those with a trail that would show they were added on that date." *Id.* at 951.

[106] Tr. (Respondent) 1008. The original hearing date was April 27, 2011. Until the April 14 pre-hearing conference, Respondent was preparing for the hearing as well as attending to his other responsibilities at Wedbush.

[107] Tr. (Respondent) 948-51.

[108] *Andrew P. Gonchar*, Exchange Act Rel. No. 60506, 2009 SEC LEXIS 2797, at *47-48 (Aug. 14, 2009), *aff'd*, 409 F. App'x 396 (2d Cir. 2010); *John D. Audifferen*, Exchange Act Rel. No. 58230, 2008 SEC LEXIS 1740, at *12 n.9 (July 25, 2008) (*citing David M. Levine*, 57 S.E.C. 50, 73 n.42 (2003)); *Kirk A. Knapp*, 51 S.E.C. 115, 130 n.65 (1992).

[109] Circumstantial evidence may be more than sufficient to satisfy the burden of proof. *Audifferen*, 2008 SEC LEXIS 1740, at *12 n.9 (*citing Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983) and *Donald M. Bickerstaff*, 52 S.E.C. 232, 238 (1995)).

sense,"[110] requiring the Hearing Panel to "put together all of the information related to these documents, the electronic information, the documentary information, the testimonial information, and the reasonable inferences" in order to "conclude … [t]hese documents are not what [Respondent] says they are. They are not responses that were provided to FINRA, not timely, not ever."[111]

We find, however, that the circumstantial evidence, considered in its totality, is no more probative of wrongdoing by Respondent than it is consistent with Respondent's exculpatory explanations. When, as in this case, the "totality of the evidence suggests an equally or more compelling inference than [Enforcement's] allegation," Enforcement fails to meet its burden.[112]

1. Enforcement Failed To Establish That The Letters Are Not Genuine

Enforcement's misconduct case is grounded fundamentally on the predicate fact that the letters did not reach Byford, Han and Cooper. Therefore, Enforcement concludes, Respondent did not prepare or send them. Enforcement contends that it would require a "perfect storm" of coincidences — that the letters were sent by mail, were not on the "business conduct drive to which regulatory responses and requests were from time to time uploaded," and were lost in transit[113] — to make it believable that Respondent could have written and mailed these three letters on the dates appearing on them.

The Hearing Panel understands why Enforcement was originally suspicious, but nonetheless, it disagrees with Enforcement's logic. The fact that Byford, Han, and Cooper did not receive the letters could have resulted from Respondent not sending them. But it is not

[110] Tr. 1118-19.

[111] Tr. 24.

[112] *Dep't of Enforcement v. Reynolds*, No. CAF990018, 2001 NASD Discip. LEXIS 17, at *54 (N.A.C. June 25, 2001) (*citing SEC v. Moran*, 922 F. Supp. 867, 892 (S.D.N.Y. 1996) (equally compelling inferences do not suffice to prove a cause of action by a preponderance of the evidence)).

[113] Tr. 1125-26.

evidence that Respondent did not compose them on the dates indicated intending to send them, or that he did not mail them, or that he acted unethically by submitting them as genuine. Enforcement failed to present sufficient evidence to conclude that Respondent did not prepare the letters on the dates indicated, or that he did not mail them, and Enforcement presented no persuasive evidence, forensic or otherwise, that he fabricated them.

2. The Forensic Evidence Does Not Support The Allegations That Respondent Fabricated The Letters Or Improperly Altered Metadata On His Computer

The parties stipulate that "Enforcement's forensic examination uncovered no evidence or information … that the Letters were created on Respondent's laptop or any other Wedbush computer prior to April 14, 2011" and "no evidence … that the Letters were deleted from Respondent's laptop or any other Wedbush computer."[114]

The forensic evidence provides no support for Enforcement's insistence that the Byford letter "was actually created on the Wedbush laptop on April 14th, 2011."[115] Rather, the forensic evidence is consistent with Respondent's testimony that on April 14, 2011, he filed the letters on his laptop, after changing the computer's date and time clock to do so chronologically.

Respondent's highly qualified expert, Donald Vilfer,[116] confirmed that there is no evidence on Respondent's hard drive to indicate that Respondent had previously created versions of the letters on the hard drive before typing them onto it on April 14, 2011,[117] and that there is

[114] Stip. ¶¶ 13-14.

[115] Tr. 22.

[116] Vilfer holds an undergraduate degree in criminal justice and a law degree. He served as a special agent of the Federal Bureau of Investigation, and became a supervisor of a white collar crime and computer crime unit in Sacramento, California. Tr. (Vilfer) 1034. He has completed various white collar crime and computer crime courses, has received training in computer forensics, and has testified about computer forensics in more than 40 cases. RX-76, at 1.

[117] Tr. (Vilfer) 1035; RX-76, at 2.

no forensic evidence that contradicts Respondent's representations that the letters were written on the dates shown on them, well before he sent copies of them to FINRA.[118]

Given the forensic evidence, we reject Enforcement's claims that "it's possible that after the [April 14] prehearing conference [Respondent] actually did delete previously created documents that matched those exhibits"[119] and "perhaps other similar documents, documents we've been unable to find, were also created in the days leading up to the admission of the exhibits."[120] These assertions are entirely speculative and without foundation in the evidence.

Furthermore, we find Vilfer persuasive, and Hendry unpersuasive, on one of the two significant issues over which they disagree. Hendry testified that Respondent could have drafted the letters on the computer prior to April 14, 2011, and deleted them without leaving trace evidence, thus enabling him to offer them as pre-existing documents he had "found" just before the April 27 original hearing date. But Vilfer testified that any time a Word document is opened and viewed on a computer screen, Word saves it as a temporary file so that if the computer shuts down unexpectedly, or fails, the document can be recovered.[121]

Vilfer explained that more than half of Respondent's computer's hard drive consisted of unallocated, unused space. Vilfer recovered 75 temporary Word documents, many with full content, created from 2008-2011, and almost 190,000 deleted files from the unallocated space to which they had, when deleted, been relegated. This leads Vilfer to reason that if Respondent had written, printed, and deleted the letters without saving them, the files would have resided as

[118] Tr. (Vilfer) 1038.

[119] Tr. 1133.

[120] Tr. 1143.

[121] Tr. (Vilfer) 1035-36.

temporary files in the hard drive's allocated space, or deleted files in its unallocated space, and that he could have found them.[122] The Hearing Panel finds Vilfer's testimony persuasive.

3. Respondent Did Not Conceal Evidence On His Computer

Enforcement contends that by changing the computer date and time clock on April 14, Respondent violated the Hearing Officer's order and attempted to conceal the date he composed the Byford letter. However, the Hearing Panel credits Respondent's testimony that he did not change the date on the computer clock until after he had confirmed with Tornyi and Bell that doing so would leave an evidentiary trail showing the date he actually entered the documents onto the computer. Tornyi confirmed he had the conversation with Respondent before the forensic team visited Wedbush.[123] Tornyi testified that he informed Bell of his conversation with Respondent. Bell testified that he does not recall Respondent coming directly to him with his question, but he clearly remembers talking with Tornyi about it, and agreed with the answer Tornyi gave Respondent.[124]

We find that Tornyi and Bell corroborate Respondent's testimony that he consulted with them before filing the letters on his laptop. The fact that he did so undermines Enforcement's contention that Respondent intended to conceal evidence and deceive FINRA's forensic team when it conducted its examination of his hard drive. We find that Respondent knew when he

[122] Tr. (Vilfer) 1037-39; RX-76, at 4.

[123] Tr. (Tornyi) 1012-14, 1018. Tornyi could not recall the precise date of the conversation, but the Hearing Panel found his testimony, as well as Bell's, credible.

[124] Tr. (Bell) 1022-26. Neither Tornyi nor Bell could recall the precise date Respondent asked about the computer clock, but the Panel finds their testimony credible and corroborative of Respondent. The gaps and minor inconsistencies in their recollection are consistent with the limitations of ordinary memory, and indicative that their testimony was not rehearsed. Bell gave reasonable explanations as to why he would not have a recollection of a conversation about the computer clock with Respondent, because the question is one he is commonly asked, why he would recall his conversation with Tornyi, and why he thinks it likely that Respondent did approach him with the question.

saved the letters that the changes he made to the computer clock would be visible to the forensic examiners.

4. Respondent's Credibility

Enforcement urges the Hearing Panel to consider the pleadings Respondent filed in answering the original Complaint, along with excerpts from Respondent's testimony in on-the-record interviews, and his hearing testimony, as evidence that Respondent has been untruthful.

The Hearing Panel reviewed the pleadings, excerpts from on-the-record testimony, and hearing testimony, and carefully observed Respondent's demeanor at the hearing. Over time, Respondent's answers to some questions changed. We do not agree with Enforcement that this proves that Respondent's explanations of his conduct are constructed upon "layers of improbability."[125] Rather, we find that there are reasonable explanations for the changes. As we explain below, we therefore conclude that the pleadings, excerpts, and hearing testimony do not establish that Respondent has been untruthful.

5. The Answer

In his Answer to the original Complaint, Respondent stated that he sent an incomplete response to Byford on April 29, 2008, and "additional information was prepared and sent on May 6, 2010."[126] When Respondent filed the Answer, he had not yet found the Byford letter. But he had located copies of documents Byford requested. These were letters in the firm's legal department that appeared to be written to Byford by two Wedbush representatives and their supervisor relating to Byford's investigation. Respondent had assumed the authors wrote directly to Byford and sent courtesy copies to the legal department. This is why, in his Answer, Respondent represented that Wedbush had made at least a partial response to Byford's request.

[125] Tr. 20.

[126] Answer ¶ 4.

At the hearing, Respondent testified that he later learned his assumption had been mistaken. The authors sent the letters to Wedbush's legal department for review, not to Byford.[127] We do not find Respondent's rendition of these events unreasonable.[128]

6. The Excerpts: The March 2010 Testimony

During Respondent's March 15, 2010 on-the-record interview, Enforcement informed Respondent that Byford said that his July 1, 2008 response was "the only response she received" to her April inquiry. Enforcement then asked Respondent: "Do you have any reason to believe that there was another [earlier] response?" Respondent's answer was "No. If she says it's the only response, I would believe that."[129] Enforcement argues that this is an admission that Respondent had not sent an earlier response.

Enforcement contends that Respondent made similar admissions regarding the Han and Cooper letters. When Enforcement showed Respondent the Han request, he testified that it did not "ring a bell."[130] He testified that he did not recall writing Cooper about the selection of an independent consultant, as his "main concern was to try to get a consultant hired and to get the undertaking done. I wasn't overly concerned with communicating."[131] Enforcement stresses that the March 2010 testimony was "closer in time" to the requests than his hearing testimony, so he presumably should have remembered, yet, "Nothing in his testimony in March 2010, suggests the possibility that he had responded to the requests at the time he now claims that he did."[132]

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[127] Tr. 768-69.

[128] We note that Respondent presented a character witness, James Kruger, who has known Respondent since 1983, and worked with him closely for almost 20 years, who testified that it would be out of character for Respondent to falsify documents. Tr. (Kruger) 1057-58. This testimony was consistent with other character assessments elicited from Respondent's colleagues at Wedbush. Tr. (Tornyi) 1017, Tr. (Bell) 1026, Tr. (Beckham) 435.

[129] CX-3, at 8-9.

[130] CX-3, at 10-12.

[131] CX-3, at 3, 5-7.

[132] Tr. 1128.

We note that the March 2010 interview occurred almost two years after the date of the Byford letter, almost eight months after the date of the Han letter, and three months after the date of the Cooper letter.

Respondent testified at the hearing that because of the pace and volume of incoming inquiries at Wedbush, he found it difficult to recall exactly what he had done as recently as two weeks before. Respondent's answers at the March 2010 interview are consistent with this. They are also consistent with his testimony about how he coped with the volume of inquiries. He testified that once he dealt with a request, he put it out of mind to focus on the next one.[133]

The Hearing Panel credits Respondent's testimony that when he answered the questions in March 2010, he did not remember sending the three letters. It was not until he found copies of the letters in April 2011 that he believed he had evidence to counter these particular allegations that he violated Rule 8210.

7. Respondent's Failure To "Come Forward"

Enforcement finds it suspicious that Respondent, when he found the Byford, Han, and Cooper letters, "didn't contact … the purported recipients to see whether or not they'd gotten them."[134] Respondent testified that it would have been pointless to do so. He knew that they had not received his responses because he had been charged with violating Rule 8210 for failing to produce them.[135]

Enforcement also faults Respondent for not volunteering the information that he had changed the time and date clock and filed the three letters on his laptop. Specifically, Enforcement points to the fact that he did not inform FINRA's Director of Forensic

[133] Tr. 933.

[134] Tr. 1130-31.

[135] Tr. (Respondent) 940.

Investigations, Mark Susens, and the FINRA forensic team of the changes when they visited Wedbush on April 20, 2011, to duplicate the contents of his hard drive.[136]

However, Respondent testified that the forensic team "didn't ask me any questions; so I didn't offer any information ... if [Susens] would have asked me, I would have told him."[137] During the visit, the forensic team focused on explaining what they were about to do. They spoke briefly, and then proceeded to copy Respondent's computer and the hard drives of the computers of everyone in the business conduct committee.[138] As for informing anyone else at FINRA, Respondent testified that he saw no reason to do so.[139]

We do not find Respondent's conduct, and his explanations, probative of wrongdoing or concealment of wrongdoing. We find no basis to disbelieve Respondent's reason for not contacting Byford, Han, and Cooper upon discovering the letters. In addition, his account of the meeting with FINRA's forensic team is consistent with Susens' description. The focus of the forensic team was to acquire data from Wedbush computers, not to interview Respondent.

Furthermore, on one occasion, Respondent did volunteer information unknown to Enforcement. At his June 2011 on-the-record interview, Respondent volunteered that he had filed the two letters in addition to the one that they had already discovered on his computer. Hendry had not found the other two in his examination of the computer. Offering this information was inconsistent with intent to conceal the fact he had filed the letters on the computer.

8. The Notations On The Letters

Enforcement disbelieves Respondent's testimony about when he wrote the notes on the

[136] Tr. (Susens) 590-91, 1130.

[137] Tr. (Respondent) 841, 1011.

[138] Tr. (Respondent) 1011.

[139] Tr. (Respondent) 843.

Byford and Cooper letters, and the Han request. Enforcement argues that "we don't believe those notations were on those documents at the time they were found, if they were indeed found in the piles of paper as he claims."[140]

Respondent testified that he typically, but not invariably, wrote notes on file copies of requests he received or response letters he prepared, to document his actions.[141] This is corroborated by evidence of other instances in which Respondent made notations on correspondence and by Respondent's assistant, Beckham, who testified that it was "common" for Respondent to do so.[142]

The evidence does not support Enforcement's assumption that Respondent misrepresented how the notes were written, or that Respondent added the notations to the letters after he found them. In addition, the letterhead on which the letters appear corroborates Respondent and provides circumstantial evidence that the letters are genuine. There is no evidence contradicting Respondent's testimony that the old Wedbush Morgan Securities letterhead was replaced in early 2010, and was unavailable to him by April 2011.

[140] Tr. 1131.

[141] Tr. (Respondent) 927.

[142] Tr. (Beckham) 431-32; RX-18, RX-22. Enforcement aggressively cross-examined Beckham by confronting her with a number of response letters Respondent sent to FINRA, with no notations on them (CX-7, CX-8, at 15, CX-10, at 6, 9, CX-11, at 7, CX-15, at 9, CX-16, at 18, CX-18, at 12, CX-19, at 7) and asking "So having seen these documents with no handwriting on them, is it still your testimony that - - that he did that regularly?" Tr. (Beckham) 446. The question was misdirected and, whether intentionally or not, misleading. Beckham had testified that Respondent made notes on copies of inquiry letters he *received*, and on *file copies* of response letters he *sent*, that he retained for his own files; he did not write the notes on the letters he sent to FINRA. Tr. (Beckham) 447-48. We are therefore unpersuaded by Enforcement's challenge to Beckham's testimony on this point.

9. The Disks

Enforcement contends that Respondent has given "shifting" and inconsistent explanations about the disk he sent to Byford. Enforcement argues that the disk proves that Respondent did not send a response to Byford in May 2008.[143] We disagree.

Enforcement's disbelief of Respondent stems from the inferences it draws from the file copy disk Respondent provided to FINRA's forensic team on April 20, 2011. The disk contains e-mails burned in May, but no written supervisory procedures.[144] Enforcement claims that if Respondent sent Byford a disk in May 2008, the file copy that he turned over to the forensic team should have contained *both* e-mails *and* supervisory procedures burned onto the disk in May. [145] According to Enforcement, "There couldn't have been a complete response in May because no disk has been produced that has on it the … files burned on May 5th, as well as a set of written supervisory procedures burned before July 1st, 2008."[146]

Enforcement points to Respondent's June 21, 2011, on-the-record testimony about the disk. Referring to the disk Respondent sent in July, Enforcement asked, "And it was a new disk that they burned?" and Respondent answered, "Correct."[147] Enforcement asked, "[S]o the disk that was sent in July was a disk created from information that was on the network as opposed to being copied off another disk?" and Respondent answered, "That would be correct." Then Enforcement asked if Respondent was the only person at Wedbush who had a copy of the disk

[143] Tr. 903-04.

[144] Tr. (Respondent) 789-90, Tr. (Hendry) 687.

[145] "[Respondent] could not have sent to Susan Byford in May a responsive request. Because the WSPs were requested in April. They were responsive to the request, but there was no disk that shows that WSPs responses to Susan Byford's request were burned onto a disk in May. That disk doesn't exist." Tr. 904.

[146] Tr. 1120.

[147] CX-34, at 3.

sent previously in May, and Respondent answered "Correct. As far as I know. I don't know if legal had a copy, but I doubt it."[148]

At the hearing, Respondent testified differently. Based on what he has learned since the on-the-record interview, Respondent testified that he now believes Wedbush's legal or technology department gave him an extra copy of the disk containing e-mails burned on May 6, 2008, to send with the July 1 response, and that the business conduct department later added the Wedbush written supervisory procedures.[149]

Enforcement challenged Respondent, asserting that his June 2011 testimony was false. Respondent responded that he had, in June, answered based on what he had surmised, had given his "best guess at that time," and that he had not been intentionally untruthful. Because he had not created the disk, but received it with the e-mails already on it, he had not known how the information was put onto it.[150]

In sum, Enforcement argues only two disks exist: (1) the one Respondent sent to Byford on July 1, 2008, with e-mails burned onto it on May 5, 2008, and supervisory procedures burned onto it on July 1, 2008; and (2) the file copy Respondent turned over to FINRA, containing only e-mails burned onto it on May 5, 2008. What is damning, according to Enforcement, is that "there is no disk" with *both* the e-mails *and* the supervisory procedures burned onto it in May 2008: "That disk doesn't exist."[151] Therefore, Enforcement concludes, Respondent did not send Byford a response on May 6, 2008, and the Byford letter is a fabrication.

[148] CX-34, at 4-5.

[149] Tr. (Respondent) 785-87.

[150] Tr. (Respondent) 785-86.

[151] Tr. 904.

We disagree. The testimony established that Wedbush's supervisory procedures, unlike the e-mails, are located on the business conduct department's drive, and can be added to a disk by simply inserting the disk into a computer, then dropping a copy onto the disk. We find credible Respondent's explanation that doing this would have been consistent with his normal practice[152] and that in his investigative testimony he answered the questions by giving his "best guess at the time." Experience teaches that not every inconsistency is evidence of a lie. We do not find that the changes over time in Respondent's testimony about the disks prove that he was lying, or that he did not prepare a response to Byford in May 2008.

10. The Management Committee Report

One of Beckham's tasks at Wedbush was to prepare a report sent to the senior management committee summarizing the current status of regulatory requests.[153] One such report, CX-28, listed the status of regulatory requests from March 1 through May 29, 2008.[154] It depicted the Byford request as open, not responded to, as of May 29, more than three weeks after the date of the Byford letter.[155]

Enforcement argues that Respondent would have noticed this, and corrected it, if he had actually sent a response to Byford on May 6.[156] But Enforcement did not question Respondent about CX-28 at the hearing. There is no evidence that Respondent saw the report on May 29, 2008, had an opportunity to change it, or was present when it was disseminated to the management committee.

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[152] Tr. (Respondent) 937.

[153] Tr. (Beckham) 390-91.

[154] Tr. (Beckham) 412-13.

[155] CX-28.

[156] Tr. 1121.

H. Summary

In making its findings, the Hearing Panel considered all of the evidence, including the forensic analyses by the two experts; the three letters; the statements made by Respondent in on-the-record interviews; Respondent's representations in the Answer to the original Complaint; Respondent's lengthy testimony at the hearing, weighing its substance and assessing his demeanor; and the extent to which other witnesses and evidence corroborate Respondent.

After doing so, giving special attention to Enforcement's challenges to Respondent's credibility, and considering the briefs and arguments of the parties, we conclude that Enforcement has failed to prove by a preponderance of the evidence that Respondent (i) fabricated the Byford letter and did not compose the Han and Cooper letters on the dates shown on them; (ii) altered electronic data in violation of the Hearing Officer's Order to conceal the fabrication; (iii) did not mail the letters to FINRA; (iv) and fraudulently submitted them to the Office of Hearing Officers and to Enforcement as if they were genuine. Thus we find that the evidence does not establish that Respondent dishonestly and unethically violated FINRA Rule 2010 as alleged in the Amended Complaint's third cause of action.

We therefore dismiss the Amended Complaint's third cause of action.[157]

IV. The Rule 8210 Charges

As noted above, prior to the hearing Enforcement announced that it had reached a settlement with Wedbush, resolving the charges against the firm in the first two causes of action

[157] Respondent requests that we expunge the record of the charges against him from the Central Registration Depository. Tr. 1199-1200. He argues that the Hearing Panel has the authority to do so, and cites Notices to Members 99-09 and 99-54. We note that the cited Notices to Members relate to a moratorium on arbitrator-ordered expungements arising from arbitrations of customer complaints against firms, and do not provide us with the authority to expunge the record of any portion of these proceedings.

of the Amended Complaint.[158] The settlement imposed a censure and a fine of $75,000 upon the firm and removed from our consideration three alleged violations of Rule 8210 directed against the firm alone. It left standing the remaining Rule 8210 and supervision violations directed against Respondent.

A. Late Responses And Failure To Respond: The First Cause Of Action

At the hearing, Enforcement proceeded against Respondent under the Amended Complaint's first cause of action for violating Rule 8210 by failing to respond in a timely manner to 14 requests for information and by completely failing to respond to one additional request for information.[159]

Enforcement does not claim that the violations are egregious. Enforcement acknowledges that Respondent had "no intent to withhold information from FINRA," and he did not "attempt to conceal sales practice problems at the firm or mistakes made in trading or some other form of improper conduct."[160] Rather, Enforcement asserts that the cause of the Rule 8210 violations was "the negligence of [Respondent] and … derivatively the firm … in failing to have systems and procedures" to enable them to make timely responses to the Rule 8210 requests described in the Amended Complaint. Enforcement concedes that "[Respondent] did not have the resources that

[158] These included the violations charged against the firm and Respondent, and three Rule 8210 violations charged only against the firm.

[159] For the period from April 1, 2008, through December 14, 2008, the failures are charged as violations of NASD Rules 8210 and 2110, and for the period from December 15, 2008, through February 28, 2010, as violations of FINRA Rules 8210 and 2010, because these FINRA rules superseded NASD rules as a result of NASD's consolidation with the regulatory arm of the New York Stock Exchange in July 2008. *See* NASD to FINRA Conversion Chart Spreadsheet, *available at* www.finra.org. A new Consolidated Rulebook was adopted on December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). FINRA's Rules (including NASD Rules) are available at www.finra.org/Rules.

[160] Tr. 1148.

would have been very helpful in enabling him to do his job … much better and much faster." Enforcement nonetheless argues that there are "more aggravating factors than … mitigating."[161]

In Enforcement's view, the aggravating factors include Respondent's "failure to determine the status of the requests … his lack of proactive communications to the staff, and … his own failure to follow up on promises he made about providing information or the rest of requested information by a specific date."[162]

For the purposes of sanctions, Enforcement labeled the violations according to what it deemed to be their seriousness. Enforcement assigned the violations "high, medium-high, [or] medium … importance or significance." Enforcement's view is that none of the Rule 8210 violations could be assigned "low importance or significance" because if it were, it "wouldn't be in the case." Enforcement assigned only one violation "high" significance. This is the violation related to the Han request, to which Enforcement believes Respondent provided no response at all.[163]

The factors Enforcement took into consideration include: the length of the delay from the initial deadline to the receipt of the complete response; the number of requests the staff issued for the same information; the number of missed deadlines; and the number of follow-up inquiries the staff made in pursuit of the information.[164]

Enforcement has concluded that the appropriate fine for a "medium" violation should be $5,000; for "medium-high" violation, $7,500; and for the single "high" violation, $10,000. With

[161] Tr. 1148-49.

[162] Tr. 1149.

[163] Tr. 1147. Enforcement stated that it ranked two other matters as having "high" significance, but they were removed from consideration when Wedbush agreed to the settlement, because they were both charged only against the firm. Tr. 1083-84.

[164] Tr. 1147.

15 violations, one ranked high, six ranked medium-high, and eight ranked medium, Enforcement recommends imposing a fine of $95,000.

We do not agree in every instance with Enforcement's assessments. To explain why requires us to review the facts of each alleged Rule 8210 violation, and the context in which it occurred.

1. The Byford Request

Byford requested information on April 15, 2008, setting a deadline of April 29. This is the request involving the Byford letter.

On April 30, Respondent asked for a week's extension of the deadline. Byford agreed, and reset the deadline to May 7, 2008. The Byford letter is dated May 5. The letter, and the materials with it, indicate that Respondent prepared a complete response to the request by May 5, and his note says he mailed it to Byford on May 6, 2008, a day before the extended deadline. The response did not reach her. If it had taken two days to reach Byford, the response would have reached her eight days past the first deadline, and one day after the extended due date.

After Byford left two voicemails in June informing Respondent that she had not received the materials, he mailed a complete response which reached her on July 2, 2008. Thus, the response reached her 64 days after the first due date, and 56 days after the second.[165]

Enforcement, having concluded that the Byford letter is a fabrication and that Respondent did not respond until July 2, 2008, rates this as a failure of "medium high" importance.[166]

Enforcement takes the position that any time a request for an extension of a deadline is made after the first due date has passed, it constitutes a violation because "the due date is a hard

[165] Tr. (Byford) 534.

[166] CX-48.

stop."[167] Here, Respondent requested an extension one day after the initial deadline, and appears to have mailed the response one day before the second deadline. While Respondent did not reply as he should have to Byford's two June voicemail messages, he sent, or thought he sent, a complete response shortly thereafter. Within a reasonable time afterwards, Respondent sent the second response that satisfied Byford, and in August she closed the investigation for which she needed the documents.[168]

Under these circumstances, we find that Respondent responded in a reasonably timely manner to Byford's request. Even if we accept Enforcement's "hard stop" assessment that Respondent violated Rule 8210 by failing to ask for an extension until a day after the first deadline, the violation in this instance was minor.[169]

2. The Freeman Request

Examiner Jason Freeman sent an information request to Respondent by regular mail on December 23, 2008, containing 15 specific queries related to a customer arbitration claim against a Wedbush representative. The response deadline was January 6, 2009.[170] A day after the deadline, Respondent called Freeman to ask for an extension; Freeman directed him to ask for it

[167] Tr. 1235-36.

[168] Tr. (Byford) 534.

[169] As noted above, Byford testified that it is common for examiners to grant extensions of deadlines upon request. Respondent argued what he termed a theory of "estoppel," contending that Enforcement should be "estopped" from claiming he violated Rule 8210 in instances in which FINRA granted an extension of the initial deadline. Respondent also suggested tardiness should be excused in instances in which FINRA issued a request with no explicit threat of disciplinary action. In Respondent's view, if he missed an initial deadline, and FINRA issued a second request with a new deadline and a warning that he *might* be subject to disciplinary action if the new deadline were not met, FINRA tacitly bound itself not to take disciplinary action if he met the new deadline. Respondent's Pre-Hearing Br. 19-20; Tr. 1209-12. We disagree. "Member firms and associated persons violate Rule 8210 when they fail to provide full and prompt cooperation to NASD in response to an NASD request for information." *CMG Institutional Trading, LLC*, Exchange Act Rel. No. 59325, 2009 SEC LEXIS 215, at *15 (Jan. 30, 2009). Respondent's reliance on *Klein v. SEC*, 224 F.2d 861 (2d Cir. 1955) is misplaced: the court in *Klein* specifically *declined* to apply a theory of estoppel. *Id*. at 864. We agree with Enforcement that, generally speaking, a deadline is a "hard stop" in the absence of a request for an extension that is made before the deadline has passed. Tr. 1236. We also agree, however, with Enforcement's concession that it is "essential" for FINRA and its examiners to be flexible, to make allowances for human error and unintentional failures to meet all deadlines. Tr. 1230.

[170] CX-8.

in writing, which Respondent did. The new deadline was January 14. Respondent sent responses in a series of e-mails on January 14 and 15.[171]

On February 19, Freeman sent a second request for four items he thought were missing from Respondent's responses, and set a deadline of March 5.[172] Respondent missed the deadline. Freeman left a voicemail message on March 9. He followed up with an e-mail on March 13, and tried to leave another voicemail message, but Respondent's voicemail was full.[173] Freeman received a letter by e-mail from Respondent on March 13, with attachments. In the letter, Respondent stated that he had previously provided documentation for three of the items Freeman said were missing, but he was sending that information again. Respondent sent an e-mail with further information on March 18, 2009, which Freeman considered a complete response.[174] This was 13 days after the extended deadline. Enforcement rates this as a violation of "medium" import.[175]

Although Respondent did not initially provide all the information Freeman asked for, Freeman was essentially satisfied with Respondent's March 18 response.[176] At that point, Freeman closed the investigation.[177] This evidence suggests that Respondent was working cooperatively to provide a complete response, and did so, albeit after the extended deadline. Under these circumstances, we find the Rule 8210 violation to be minor.

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[171] Tr. (Freeman) 75-79. Respondent sent several e-mails because of the volume of the attachments. Two of the e-mails reflect transmission times shortly after 7:00 p.m. on January 14 and 15. CX-8, at 8-9.

[172] Tr. (Freeman) 81; CX-8, at 10-11.

[173] Tr. (Freeman) 84-85.

[174] Tr. (Freeman) 85. Freeman received the March 13 letter by e-mail on March 18. *Id.* at 97.

[175] CX-48.

[176] Tr. (Freeman) 92-93, 95.

[177] Tr. (Freeman) 94.

3. The First Enos Request

Examiner Anne Enos sent Respondent a request for information concerning allegations that a Wedbush representative had engaged in excessive trading in a customer account. Enos sent it by regular mail and fax on March 19, 2009, with a deadline of April 2. Receiving no reply, Enos sent a second request by the same means on April 13, with a deadline of April 27. On April 29, Respondent's assistant, Tamica Beckham, contacted Enos to ask for an extension because there was a delay in obtaining information from Wedbush's technology department.[178] Enos set a new deadline of May 4. Beckham sent a complete response by e-mail on May 1.[179] The response was 29 days after the initial deadline, but three days prior to expiration of the third deadline. Enforcement rates this violation as "medium" in importance.

Respondent's inaction violated Rule 8210. When Wedbush's technology department encountered difficulty producing the needed data, Respondent should have promptly informed Enos and requested an extension. However, Beckham's subsequent communications, and production of the response, ameliorated the seriousness of the violation.

4. The Second Enos Request

As Enos pursued her excessive trading investigation, she found she needed additional information. She requested it by regular mail and fax to Respondent on July 15, 2009, and followed with a fax to Beckham on July 22. The deadline was July 29. On August 19, 2009, Beckham asked for an extension; Enos reset the deadline to September 2, 2009. This deadline passed. On September 9, Enos sent an e-mail to Beckham asking when the information would be provided. Enos received an "out of office" automatic reply to her query. On September 15, Enos called Respondent and left a message. She reached Respondent on Thursday, September 17, and

[178] RX-9.

[179] CX-9, at 6.

Respondent said he would provide the response the following Monday. Instead, Respondent sent the response by e-mail the next day.

On the following Monday, September 21, Respondent sent Enos another e-mail to inform her that the response was incomplete because it lacked an electronically formatted trade blotter.[180] Respondent sent Enos the trade blotter on September 25, with a cover letter apologizing for the delay, stating that he had "missed the fact that we still owed this information to you."[181] Respondent provided the completed response, therefore, slightly less than two months after the original deadline, and three weeks after the extended deadline. Enforcement rates this as a failure of "medium high" importance.

Enos displayed understandable frustration about the delays in obtaining this information. Nonetheless, Enos testified that she felt that Beckham was "probably doing her job to the best of her ability," but was contending with circumstances that were not under Beckham's control. Enos had the impression that Respondent, too, was trying to obtain the information she needed, but because of the missed deadlines, she was unsure "how important it was for him" to do so in a timely manner.[182]

In this instance, Respondent clearly violated Rule 8210 and the Hearing Panel finds that the delay was significant.

5. The Stendell Request

Aaron Stendell, a FINRA examiner in the Dallas, Texas, District Office sent Respondent a request for information by registered mail on May 14, 2009, with a deadline of May 28. Respondent did not respond. On June 4, Stendell sent a second request by regular mail, setting a

[180] Tr. (Enos) 107-13.

[181] CX-10, at 9.

[182] Tr. (Enos) 126-27.

new deadline of June 11. Respondent sent a complete response on June 17, one month and three days after the original deadline, and six days after the extended deadline. Enforcement rates this as a failure of "medium" import.[183]

This is a straightforward late response in violation of Rule 8210. Enforcement notes that Stendell mistakenly composed his second request on the stationery of the Denver District Office, and as a result, Respondent sent the response to Denver, not to Dallas, on June 17. Thus there was an additional delay occasioned by the examiner's inadvertent error, which, Enforcement agrees, is not attributable to Respondent.[184] It illustrates, however, that unforeseeable, inadvertent mistakes by FINRA examiners as well as firms can slow the information-gathering process.

6. The First Hegeman Request

On the same date as the Stendell request, FINRA examiner Michael Hegeman sent a request by first-class mail to Respondent with a deadline of May 28. Receiving no response, Hegeman sent a second request on June 3, with a new deadline of June 15. On June 11, Beckham asked for an extension, and Hegeman set a third deadline of June 19. Once again, the deadline passed with no response. Hegeman called Beckham on June 29. She transferred Hegeman to Respondent's line, and he left a voicemail message. Hegeman sent the request again on June 30, by certified and first-class mail, to both Respondent's office and home address, with a fourth deadline of July 14. Respondent provided the response on July 14 by e-mail.[185] Enforcement rates this as a failure of "medium-high" import.[186]

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[183] CX-48, at 2, CX-11, RX-20-23.

[184] Tr. 1091-92.

[185] Tr. (Hegeman) 172-77, 198.

[186] CX-48, at 2, CX-12, RX-24-29.

In this case, Respondent missed three deadlines, and FINRA staff waited 47 days after the original due date to receive his response. We agree with Enforcement's assessment of this violation.

7. The First Han Request

On June 25, 2009, Respondent provided Han with information that Wedbush previously agreed to send relating to Han's ongoing auction rate securities sales investigation. Han believed this response was incomplete, and on the same date asked Respondent to complete it by July 3. Respondent did not respond.[187] Han sent a second request on July 7, with a new deadline of July 15. Respondent supplied the complete response on July 16. Enforcement rates this as a failure of "medium" import.[188]

Here, Han gave Respondent eight days to supplement the information provided on June 25. His second request set another deadline of eight days. Respondent satisfied Han's request 13 days after the first deadline, and one day after the second. Respondent should have responded by the July 3 deadline, or requested an extension. He did, however, respond only one day after the deadline Han set in his second request, and approximately two weeks after Han's initial deadline. We consider this to be a minor Rule 8210 violation.

8. The Second Han Request

This is the single instance Enforcement considers to be a failure of "high" importance. As discussed above, on July 27, 2009, Han sent an information request relating to his auction rate securities investigation and set a one-week deadline of August 3. Receiving no response, Han sent a second request on August 7. He did nothing further.

[187] Tr. (Han) 543-46; CX-13.

[188] Tr. (Han) 547-48; CX-48, at 3.

Because Han did not receive any response, Enforcement considers this to be a complete failure by Respondent to respond to a request for information in an important investigation.[189] Enforcement argues, alternatively, that even if Respondent sent the Han letter, "it was not responsive"[190] because Han had asked for written statements from Wedbush representatives about their use of certain sales materials, and Respondent did not provide such statements but simply informed Han that the representatives had not used the materials.[191]

Because we credit Respondent's testimony that he composed the Han letter, intended to mail it on August 3, 2009,[192] and thought that his response crossed Han's second request in the mail, we disagree with Enforcement. The evidence is insufficient to prove by a preponderance that Respondent violated Rule 8210 by failing in this instance to respond to Han's request. We make no findings as to whether Respondent's letter was unresponsive, as Han testified, because the Amended Complaint charges that Respondent failed to respond, not that what he provided was incomplete or unresponsive.[193]

9. The First Wong Request

On July 22, 2009, FINRA examiner Joshua Wong sent a request for information to Respondent in a bond tender examination to the wrong fax number, but he sent it also by regular mail to Respondent at Wedbush. The deadline was August 5.[194] Between August 5 and 7, Respondent informed Wong that he had not received the letter. Wong accepted this

[189] CX-48, at 3.

[190] Tr. 1123.

[191] Tr. (Han) 553.

[192] Tr. (Respondent) 953-54.

[193] Amended Compl. ¶¶ 14(g) - (k); *see Dep't of Enforcement v. Zenke*, No. 2006004377701, 2009 FINRA Discip. LEXIS 37, at *11 (N.A.C. Dec. 14, 2009).

[194] CX-15.

representation and sent a second request on August 7, with a new deadline of August 21.[195] Respondent did not meet the deadline. On September 10, Wong sent a third request, and gave Respondent a week to respond. Respondent provided a full response on September 17.[196] Enforcement rates this as a failure of "medium-high" import.[197]

Enforcement calculates that the length of Respondent's delay from the first deadline was one month and 12 days. Enforcement discounts the fact that Wong sent the request to the incorrect fax number, because he backed it up with a mailing to the correct address.[198] However, Wong accepted Respondent's representation that he did not receive the letter. Counting the tardiness of Respondent's response from the second deadline, it was 27 days overdue. We note that Wong testified that there were numerous requests issued to Respondent in this investigation to which Respondent properly responded.[199]

Respondent should not have let the second deadline pass without at least contacting Wong, which would have informed Wong of the status of the response and perhaps avoided the necessity of a third request letter. We find that this is a clear Rule 8210 violation, but we do not consider it to be as serious as Enforcement contends, and would categorize it as minor in import.

10. The Second Wong Request

On December 3, 2009, Wong issued another request in his bond tender examination to Respondent by first-class mail and fax, and set a deadline of December 17.[200] The request called

[195] Tr. (Wong) 212-13.

[196] Tr. (Wong) 215-16.

[197] CX-48, at 3.

[198] Tr. 1095.

[199] Tr. (Wong) 226.

[200] CX-16.

for production of all e-mail communications of Respondent, Edward Wedbush, and three Wedbush representatives from March through December 2, 2009.[201]

According to Wong, Respondent expressed concern that producing some of the e-mails might implicate attorney-client privilege issues.[202] As a result, Wong sent an amended request on December 7. The amended request narrowed the content of the target e-mails, but was considerably more expansive in another regard. It required production of bond-related e-mails sent or received by *any* Wedbush employee, not just the five persons originally identified. In addition, Wong directed Respondent to provide the date and time of any privileged e-mail, the name of the sender and recipients of the e-mail, every person copied on the e-mail, all recipients of forwarded copies, and the identity of each sender and recipient who was not a firm employee.[203]

Despite the increased scope of the request, Wong did not extend the December 17 deadline.[204] Respondent missed it. Wong issued a second request on December 22, with a demand in bold-faced type that the "**The previously requested materials must arrive in this office immediately.**" Wong included this demand, he said, because he perceived an emerging "pattern" of difficulty in obtaining timely responses from Wedbush.[205]

On December 29, Wong issued a third request, repeating his demand for an immediate response.[206] Respondent provided a complete response on December 31, 2009.[207] Enforcement rates this as a failure of "medium" significance.

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[201] CX-16, at 5 ¶ 8.

[202] Tr. (Wong) 218.

[203] Tr. (Wong) 219; CX-16, at 8-9.

[204] Tr. (Wong) 230-31; CX-16, at 9.

[205] Tr. (Wong) 221-22; CX-16, at 11.

[206] Tr. (Wong) 222-23.

Respondent testified that he initially asked Wong to reduce the burdensome scope of the original request, by narrowing it to only those e-mails related to the bonds under review.[208] By requiring Respondent to review the bond-related e-mails of all Wedbush employees, the amended request required a search of over 700 separate e-mail boxes, instead of five.[209] According to Respondent, this made the task of reviewing e-mails "probably a thousand times worse."[210] Wedbush's antiquated e-mail system at the time had no efficient search capability, which meant that the technology department had to search each person's e-mail box separately.[211] Respondent testified that he did his best to meet the deadline, but it was impossible to respond by December 17. Respondent acknowledged that he should have contacted Wong to request an extension, but did not.[212]

Respondent challenged Wong's implication that he and Wedbush were non-cooperative. Respondent testified that he and Wedbush were "extremely cooperative" in producing information to Wong throughout this lengthy investigation, from October 2009 through November 2010, often responding to telephone calls without requiring written Rule 8210 requests, and putting Wong directly in contact with firm personnel when appropriate.[213]

We accept Respondent's testimony that Wong's substantially expanded amended information request made the original deadline unreasonable.[214] Respondent, as he admits,

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[207] Tr. (Wong) 223.

[208] Tr. (Respondent) 982.

[209] Tr. (Respondent) 999.

[210] Tr. (Respondent) 982.

[211] Tr. (Respondent) 971-72.

[212] Tr. (Respondent) 983-84, 994-95.

[213] Tr. (Respondent) 983-84; RX-35.

[214] We also note that Wong's second request, demanding an immediate response and dated December 22, was issued three days before the Christmas holiday. Tr. (Wong) 232-33.

should have asked for an extension. Under the circumstances, however, Respondent's response within two weeks of the original deadline was not a significant violation of Rule 8210. We do not discern a pattern of non-cooperativeness here. Rather, it appears that Respondent tried to be cooperative in responding to this challenging request and with the numerous other information requests in this lengthy investigation.

11. The Sonoiki Request

FINRA's Department of Market Regulation sent Respondent a Rule 8210 request on July 23, 2009, with a deadline of August 6,[215] by fax and regular mail.[216] After the deadline passed with no response, on August 17 Market Regulation analyst Tosin Sonoiki called Christina Fillhart, senior vice president in Wedbush's correspondent services division, because Fillhart had provided a response to an inquiry in the same investigation the previous year.[217]

Fillhart told Sonoiki that she had not seen the July 23 request, so Sonoiki sent it to her by fax, and extended the deadline to August 31.[218] On September 2, Fillhart asked for another extension, and Sonoiki set a new deadline of September 11.[219] On September 18, having received no response, Sonoiki drafted and sent Respondent a second Rule 8210 request by regular mail and fax with a deadline of September 25.[220] On the 25th, Sonoiki called Fillhart to check on the status of the response. Fillhart mailed the response to Market Regulation on

[215] CX-17.

[216] Tr. (Sonoiki) 322-23.

[217] Tr. (Sonoiki) 323.

[218] Tr. (Sonoiki) 310.

[219] Tr. (Sonoiki) 311.

[220] Tr. (Sonoiki) 313; CX-17, at 7-8.

October 1, and Sonoiki received it on October 6.[221] Enforcement rates this as a failure of "medium-high" import.[222]

Sonoiki testified that it is routine to grant reasonable extensions.[223] He testified that it is not uncommon for firms in some cases "to request numerous extensions" in order to avoid sending a "rolling response."[224] According to him, a two-week deadline is standard, but it is a flexible standard, depending upon circumstances at the firm. He generally expects to see a response within a month or so after the issuance of a request.[225]

Here, the completed response was two months late, counting from the deadline set in the initial request letter, which apparently Respondent did not receive. Market Regulation granted two extensions before sending the second request. Sonoiki sent the second request with the purpose of exerting pressure on the firm to prompt a response.[226] Fillhart mailed the response six days after the deadline set by the second request letter, and Market Regulation received it 11 days after the expiration of that deadline. Respondent is responsible for this clear and significant, but not egregious, violation of Rule 8210. [227]

12. The Second Hegeman Request

On September 17, 2009, FINRA examiner Michael Hegeman, conducting a suitability investigation, sent an information request by fax and regular mail with a response deadline of

[221] Tr. (Sonoiki) 315-16.

[222] CX-48, at 3.

[223] Tr. (Sonoiki) 323-24, 330.

[224] Tr. (Sonoiki) 312.

[225] Tr. (Sonoiki) 330.

[226] Tr. (Sonoiki) 334.

[227] Respondent argues that because Beckham handled Enos' request, the responsibility to provide a timely, complete response was Beckham's, not his. He is incorrect. "The duty to respond … falls upon any associated person to whom a request is directed." *Richard J. Rouse*, 51 S.E.C. 581, 585 (1993). As in *Rouse*, because the request was directed specifically to him, as well as because of his position as co-chief compliance officer, Respondent "had a duty to respond himself or supervise others diligently with adequate follow-up to ensure a prompt response to [FINRA]." *Id.*

October 1.[228] Receiving no response, he left a voicemail message for Respondent on October 5.[229] On October 6, because he personally knew Wedbush's other co-chief compliance officer, Vincent Moy, and viewed him as a "go-to person if we were having trouble getting a response," Hegeman sent an e-mail to Moy asking about the status of the response. Hegeman received no reply.[230] On October 9, Hegeman sent a second request by regular and certified mail as well as by fax with a deadline of October 23. This time, Hegeman sent a copy of the request to Edward Wedbush as well. [231]

On October 23, Respondent provided a response. Respondent explained that there were three items missing from the materials and promised to provide them by October 26.[232] He did not. On December 16, Hegeman e-mailed Respondent asking about the overdue information, and set a deadline of December 23. Receiving no response, Hegeman sent an e-mail to Moy, who sent the rest of the information on January 7, 2010, in an e-mail.[233] Enforcement rates this as a failure of "medium-high" import.[234]

In this instance, Respondent provided a partial response three weeks late, and Moy completed the response 98 days after the initial deadline. Hegeman testified that during this time, his office was experiencing delays in obtaining information from Wedbush, suggesting this was not an isolated incident.[235]

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[228] CX-18, at 1-3.

[229] Tr. (Hegeman) 178-85.

[230] Tr. (Hegeman) 185-86, 202.

[231] CX-18, at 8-9.

[232] Tr. (Hegeman) 189.

[233] Tr. (Hegeman) 190-92.

[234] CX-48, at 4, RX-29.

[235] Tr. (Hegeman) 202. Hegeman was unaware that, when Moy sent the last three items of information, Respondent was on his honeymoon. *Id.* at 201.

Respondent is responsible for violating Rule 8210 by not responding to the request, or contacting Hegeman to ask for an extension, by the first deadline. He was not, however, completely unresponsive. He provided a partial response by the deadline Hegeman set in his second request, and alerted Hegeman that it was not complete. Respondent then failed to supply the remaining information when promised, and did not contact Hegeman to discuss the situation. Based on the length of the delay, and Respondent's failure to respond or to contact Hegeman until the due date of the second request, we consider this to be a significant Rule 8210 violation.

13. The First Tapper Request

FINRA examiner Christopher Tapper sent Respondent a Rule 8210 request by regular mail for information about an examination waiver request by a Wedbush employee. Tapper sent it on September 17, 2009, with a response deadline of October 2.[236] After Respondent failed to meet the deadline, Tapper sent a fax to Respondent on October 26 with the original request letter, and asked Respondent to call. The following day, Tapper called Respondent, who said that he was unable to find Tapper's letter. Tapper followed up the next day with another call and informed Respondent that he should respond by November 6. On October 29, Tapper sent Respondent a second request by certified and first-class mail with the November 6 deadline. Respondent provided a response on November 10.[237] Enforcement rates this as a failure of "medium" import.

The delay in the response was one month and eight days from the first deadline, and four days after the second deadline. Respondent did not request an extension before the first deadline, presumably because he did not see Tapper's initial request, and did not do so, although he should have, by the second deadline. This is a straightforward, significant Rule 8210 violation.

[236] CX-19, at 1-3.

[237] Tr. (Tapper) 144-46; CX-19, at 4.

14. The Second Tapper Request

Over a month later, Tapper determined that Respondent's response was insufficient, and on December 22, 2009, he sent Respondent a letter outlining the needed information, and adding a new request with a January 5, 2010, deadline.[238] Tapper intended to send the request by both e-mail and certified mail, but by mistake failed to transmit the e-mail. Receiving no reply, Tapper sent a second request on January 25, by regular mail and e-mail, calling for a response no later than February 8.[239]

On February 10, they spoke. Respondent explained he had not received the e-mail request, had just located the December 22 letter, was struggling with "an excessive amount of work," but would try to respond the following day. Tapper agreed to extend the deadline to February 11.[240]

Respondent sent a partial response on February 12, and explained that it was incomplete. Respondent said he would try to provide the missing information the following day. According to Tapper, Respondent had failed to include certain compensation data. Approximately a month later, on March 10, Tapper sent Respondent an e-mail asking for the data, and Respondent responded on the next day.[241] Enforcement rates this violation as a "medium" violation.

Tapper acknowledged that he sent the initial request letter three days before Christmas, but was unaware that the deadline was during Respondent's honeymoon. He sympathized with Respondent's complaint of being busy. Tapper testified that Respondent provided all of the information FINRA needed, albeit late, and that Respondent was cooperative.[242]

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[238] CX-20, at 1-5.

[239] CX-20, at 5-6.

[240] Tr. (Tapper) 162.

[241] Tr. (Tapper) 146-52, 162-63.

[242] Tr. (Tapper) 164.

Respondent's partial response was five weeks after the first deadline, and one day after the extension Tapper granted. Respondent did not complete the response until after the considerable delay of almost an additional month. We concur with Enforcement that this is a significant, but not egregious, Rule 8210 violation.

15. The Pikel/Sonoiki Request

Market Regulation Department team leader Matt Pikel sent an information request in connection with a new trade reporting rule compliance sweep to Respondent on October 23, 2009, with a deadline of November 6, by regular mail and fax.[243] On November 18, Sonoiki called Respondent to inform him that the staff had not yet received the response, and Respondent stated he would look for the request.[244] From the conversation, Sonoiki could not tell if Respondent had received it.[245] When Respondent did not call him back, Sonoiki drafted and sent a second request on November 20, setting a new deadline of November 27.[246]

At the time, Samantha McAfee worked in the capital markets section of Wedbush's business conduct department and was responsible for FINRA requests for trade reporting information.[247] She generally received them from Respondent, Moy, or Beckham.[248] On this occasion, McAfee obtained a copy of the October 23 letter after she answered a phone call from Sonoiki on November 23, 2009, and told him that she would send the information as soon as possible.[249] McAfee expressed surprise that Sonoiki had called Respondent instead of her to follow up on the original request because she could access the information more readily than

[243] Tr. (Sonoiki) 316-17; CX-21, at 1-2.

[244] Tr. (Sonoiki) 317-19.

[245] Tr. (Sonoiki) 326.

[246] Tr. (Sonoiki) 321; CX-21, at 6.

[247] Tr. (McAfee) 288-90.

[248] Tr. (McAfee) 291-92.

[249]Tr. (McAfee) 295-96; CX-27, at 23-24.

Respondent, and Sonoiki had on prior occasions called her directly.[250] She sent the completed response by e-mail and overnight express mail on November 30.[251] Enforcement rates this as a failure of "medium" significance.[252]

Respondent should have routed the request promptly to McAfee. McAfee did not see it until after her November 23 conversation with Sonoiki, a month after it was sent. Soon afterward, she sent the response to FINRA, three weeks and three days after the first deadline, and three days after the second. This significant, but not egregious, Rule 8210 violation is attributable to Respondent's failure to identify and forward the request in a timely manner.

16. Respondent Violated NASD Rules 8210 And 2110, And FINRA Rules 8210 And 2010 By Making 13 Untimely Responses

In sum, after reviewing the evidence relating to the Rule 8210 violations alleged in the first cause of action, we find the evidence insufficient to support the violations involving the Byford and Han letters. As for the remaining 13 violations, we find Respondent responsible for delays in responses to Rule 8210 requests FINRA directed to him from December 2008 through December 2009, ranging from 13 to 98 days. Eight of the delays were for significant lengths of time. The others were minor. Overall, the testimony depicts Respondent as overwhelmed and at times unaware of Rule 8210 requests sent by mail, e-mail, and fax. Although it appears he was difficult to reach at times, it also appears that he was generally courteous, cooperative, and trying to meet multiple deadlines, ultimately providing complete, albeit late, responses.

B. Inadequate Procedures: The Second Cause Of Action

The Amended Complaint's second cause of action alleges that during the relevant period Respondent violated NASD Rule 3010 by failing to establish and maintain a supervisory system,

[250] Tr. (McAfee) 297-299.

[251] Tr. (Sonoiki) 317-321; CX-21, at 8-10.

[252] CX-48, at 5.

and written supervisory procedures, reasonably designed to achieve compliance with Rule 8210.[253] The specific deficiencies alleged include:

1. inadequate practices and procedures for accurately recording the receipt of FINRA requests for information and due dates for responding to requests, and for verifying that information and records were timely and completely provided;

2. inadequate practices and procedures for monitoring the preparation and collection of information and adherence to deadlines for responses to inquiries;

3. absence of practices and procedures ensuring that Wedbush made timely requests for extensions of deadlines and responded to inquiries from FINRA staff about missed deadlines;

4. absence of practices and procedures to identify late, incomplete or missing responses; and

5. absence of practices and procedures for evaluating the adequacy of Wedbush's resources available to comply with Rule 8210.[254]

Respondent testified that although Wedbush's supervisory system was "far from perfect,"[255] since he and Wedbush responded timely to the "overwhelming number of requests," the supervisory system was "reasonable by definition."[256] Therefore, he contends, the second cause of action should be dismissed.[257]

However the "overwhelming number of requests" may have been handled, the Hearing Panel's focus is confined to the evidence presented to us in the course of the hearing. The evidence established that Wedbush's system, during the relevant period, was deficient in reasonably ensuring compliance with Rule 8210.

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[253] It also alleges that by doing so, Respondent violated NASD Rule 2110 and FINRA Rule 2010. As with the Rule 8210 violations, as explained in note 159, for the period from April 1, 2008, through December 14, 2008, the supervisory failures are charged as violations of then-applicable NASD Rules 3010 and 2110, and for the period from December 15, 2008, through February 28, 2010, as violations of NASD Rule 3010 and FINRA Rule 2010.

[254] Amended Compl. ¶ 26.

[255] Tr. (Respondent) 1001-02.

[256] Tr. 28-29.

[257] Respondent's Pre-Hearing Br. 34-36.

Wedbush's business conduct department maintained both paper and electronic files of requests for information and responses. Recipients of information requests were supposed to provide them to Beckham for her to place in physical files, and scan copies of requests and responses into the business conduct computer drive. [258]

Beckham had the responsibility of maintaining a log of information requests and creating files for requests and responses. Beckham necessarily relied on the person handling a request to keep her informed of its status.[259] Because her other duties required Beckham to spend more than half of her time away from Wedbush's headquarters, and because there was no enforced practice or procedure for notifying her of requests, Beckham and Respondent both estimated that her log recorded receipt of less than half of the incoming requests.[260] By stipulation, the parties agree that during the relevant period, 18 FINRA requests for information were not recorded on the log Beckham maintained.[261] And there was no procedure in place for follow up with business conduct personnel to monitor the status of responses.[262]

Respondent acknowledges that he was the person ultimately responsible for his department's responses to Rule 8210 requests for information.[263] Respondent clearly did not fulfill his responsibility, as business conduct department manager and co-chief compliance officer, to ensure that he and other business conduct personnel routinely notified Beckham of

[258] Tr. (Respondent) 737-40.

[259] Tr. (Respondent) 733.

[260] Tr. (Beckham) 410-11, Tr. (Respondent) 733.

[261] Tr. (Beckham) 402-407.

[262] Beckham testified she would remind people of deadlines, but could do so only if she had notice of them. Tr. (Beckham) 411-12.

[263] Tr. (Respondent) 720-22.

requests. Indeed, he admits that he was "probably one of the worst" in keeping Beckham advised of requests.[264]

Respondent also admits that, particularly at the beginning of his tenure at Wedbush, he was not "very good" at consistently uploading requests and responses onto the business conduct drive.[265] In addition, the flow of voicemail and e-mail messages overwhelmed him and was unmanageable. During the relevant period, he was unable to read all of his e-mail, his voicemail box, with a capacity of 100 messages, was frequently full, and he often deleted messages without listening to them.[266]

For these reasons, we find that Respondent failed to establish and maintain a supervisory system and written supervisory procedures reasonably designed to achieve compliance with Rule 8210.

V. SANCTIONS

A. Introduction

FINRA's Sanction Guidelines for Rule 8210 violations recommend a fine ranging from $2,500 to $25,000 for untimely responses,[267] and $5,000 to $50,000 for failures to supervise.[268]

Enforcement originally argued that Respondent and Wedbush were equally responsible for the Rule 8210 and 3010 violations.[269] At the hearing, however, Enforcement re-allocated its assessment of relative culpability. It now argues that Respondent was more responsible than the

[264] Tr. (Respondent) 732.

[265] Tr. (Respondent) 741.

[266] Tr. (Respondent) 727-29.

[267] *FINRA Sanction Guidelines* 33 (2011). The applicable Principal Considerations are the (i) importance of the information requested as viewed from FINRA's perspective; (ii) number of requests made and the degree of regulatory pressure required to obtain a response; and (iii) length of time to respond.

[268] *Id.* at 103.

[269] Department of Enforcement's Pre-Hearing Br. 82.

firm for the Rule 8210 violations, and that the sanctions should reflect an assignment of responsibility for the misconduct of "around 60 percent [Respondent] and around 40 percent the firm."[270] Consequently, Enforcement recommends imposing fines of $95,000 for the Rule 8210 violations and $25,000 for the Rule 3010 violations, for a total of $120,000. As noted above, Wedbush settled the charges against it in the first two causes of action accepting a censure and a fine of $75,000.[271]

Respondent argues that "he shouldn't get any sanction" for the Rule 8210 and 3010 violations because they were attributable largely to the conditions he inherited at Wedbush. He maintains that he did the best he could to function within the limitations of the conditions at the firm, and that he tried to improve the firm's ability to manage its responsibilities under Rule 8210.[272]

The Hearing Panel fully recognizes the importance of timely responses to Rule 8210 requests and the necessity of procedures to ensure compliance with Rule 8210. "The rule is at the heart of the self-regulatory system for the securities industry" and imposes an "unequivocal responsibility" to comply with information requests.[273]

Nonetheless, the record in this case reveals the presence of mitigating factors that weigh in Respondent's favor that we must incorporate into our sanctions analysis. It is axiomatic that

[270] Tr. 1118.

[271] We recognize "that settled cases generally result in lower sanctions than fully litigated cases to provide incentives to settle." *Guidelines* at 1. We also note that the parties stipulated that if Edward Wedbush had testified, he would have said that the firm would pay any fines imposed on Respondent and not seek reimbursement from him. Stip. ¶ 17.

[272] Tr. 1216-18.

[273] *Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008).

the appropriate sanction "depends on the facts and circumstances of each particular case."[274] The Hearing Panel is mindful of its obligation to fashion sanctions that are remedial, not punitive.[275]

Taking into consideration all of the circumstances of this case, the Hearing Panel concludes that finding Respondent responsible, and censuring him, will suffice to remediate his misconduct, and to deter others. We find that his testimony reflects a recognition of his and Wedbush's deficiencies during the relevant period and a commitment to comply with Rule 8210 appropriately going forward. We conclude that the circumstances of this case justify the exercise of the broad discretion afforded us to impose sanctions below those recommended by Enforcement and suggested by the Guidelines.[276]

B. Discussion

When Respondent started working at Wedbush in October 2007, he "inherited" the firm's inadequate systems and resources.[277] Enforcement agrees that "The firm did not give [Respondent] what he needed" to ensure that Rule 8210 requests for information were monitored and responded to in a timely fashion,[278] and "[Respondent] did not have the resources that would have been very helpful in enabling him to do his job … much better and much faster."[279]

Although he felt compelled to work within the constraints he inherited at Wedbush, Respondent did not merely accept them. He sought to improve them. Respondent requested

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[274] *Raghavan Sathianathan*, Exchange Act Rel. No. 54722, 2006 SEC LEXIS 2572, at *44 (Nov. 8, 2006), *aff'd*, 304 F. App'x 883 (D.C. Cir. 2008).

[275] *McCarthy v. SEC*, 406 F.3d 179, 188-89 (2d Cir. 2005); *Guidelines* at 2.

[276] *Philip A. Lehman*, Exchange Act Rel. No. 2565, 2006 SEC LEXIS 2498, at *10 (Oct. 27, 2006); "The guidelines recommend ranges for sanctions and suggest factors that Adjudicators may consider in determining, for each case, where within the range the sanctions should fall or whether sanctions should be above or below the recommended range. These guidelines are not intended to be absolute. Based on the facts and circumstances presented in each case, Adjudicators may impose sanctions that fall outside the ranges recommended and may consider aggravating and mitigating factors in addition to those listed in these guidelines." *Guidelines* at 1.

[277] Tr. (Respondent) 966.

[278] Tr. 1118.

[279] Tr. 1148-49.

additional resources at each budget cycle.[280] His first opportunity came in June 2008, when he submitted a proposal for fiscal year 2009 requesting three new positions and the replacement of one employee.[281] Wedbush did not approve the new positions.[282] In 2008, Respondent presented Wedbush's audit committee with what he believed should be the firm's top ten technology projects.[283] In 2009, he renewed his request for additional personnel for fiscal year 2010, and again Wedbush denied his request.[284]

According to Respondent, the firm's e-mail system was the most problematic aspect of Wedbush's compliance system in the relevant period. The system was antiquated, with no search capability, and even though Respondent believed it did not meet SEC requirements, it took Wedbush years to replace it.[285]

It is not surprising that, under these circumstances, requests for information and responses were occasionally misdirected, or even lost.

The record discloses that, subsequent to the relevant period, Respondent has been responsible for making significant improvements to Wedbush's systems and procedures that should address the deficiencies highlighted by this case. In 2010, he instituted a "regulatory inquiry e-mail box" to which regulators direct their requests, which then circulates them to everyone involved in or responsible for responding to them. Requests for and grants of extensions of deadlines are also routed to the regulatory inquiry e-mail box, as well as notices of

[280] Tr. (Respondent) 966-67.

[281] Tr. (Respondent) 968; RX-62.

[282] Tr. (Respondent) 968.

[283] RX-63.

[284] Tr. (Respondent) 969-70. In his plan for fiscal year 2011, Respondent asked for only one new position because he had succeeded in obtaining new systems that were helpful, and had been permitted to hire a new administrative assistant. Tr. (Respondent) 970; RX-65.

[285] Tr. (Respondent) 970-71.

responses.[286] Respondent worked with the firm's technology department to reconfigure the system for responding to blue sheet requests, which until changes were implemented consumed up to three hours of his staff's time on a daily basis.[287] Wedbush's technology director, Tornyi, described Respondent as "a very strong supporter and advocate" for improvements, who made the case for Wedbush to invest in new technology, presenting his recommendations to the management committee repeatedly, starting in 2008.[288]

As Enforcement concedes, because of its size and the nature of its business, Wedbush received a "very large number of requests from a number of different regulators" during the relevant period.[289] According to Enforcement, FINRA has no system for tracking the number of inquiries issued to member firms, so Enforcement cannot determine from FINRA records how many requests it issued to Wedbush during the relevant period.[290] But Enforcement disputes the testimony of Beckham and Respondent that there were over 4,000 inquiries in that time.

Enforcement argues that Wedbush did not corroborate Beckham's and Respondent's estimates with sufficient documentation. However, Beckham testified that her estimate was based on records of regulatory requests at Wedbush, including her own incomplete tracking log.[291] By her count, there were 1,151 SEC inquiries in 2008, and 1,503 in 2009; 522 Market

[286] Tr. (Beckham) 427-28.

[287] Tr. (Respondent) 974.

[288] Tr. (Tornyi) 1015-16.

[289] Tr. 18-19.

[290] Tr. 1074-75. In his testimony, Market Regulation's Sonoiki stated that examiners might be able to track their departments' inquiries to a firm, but do not do so. Tr. (Sonoiki) 331-32.

[291] Tr. (Beckham) 369-72.

Regulation Department inquiries in 2008, and 892 in 2009.[292] She also testified that there were days when the firm received between 40 and 70 requests.[293]

Enforcement estimates there were far fewer requests, based on its evaluation of Beckham's logs for 2008 and 2009, and the Management Committee Regulatory Request Charts provided by Wedbush, purportedly listing requests from March to July, 2008. Assuming that the logs captured less than half of the actual number of requests, Enforcement speculates that there were approximately 1,000 requests, approximately one third of which would have been handled by the business conduct department.[294] If true, this would mean Wedbush received approximately two requests each workday.

Whatever the actual number, we have no reason to disbelieve Beckham and Respondent and their estimates that they received more requests than Enforcement estimates, and that on some days they received more than 40.

It is undisputed that the late responses in the Amended Complaint comprise a tiny fraction of the volume of requests sent to Wedbush in the relevant period, most of which were responded to satisfactorily. The timing of the requests described in the Amended Complaint also suggests Wedbush received multiple requests on a daily basis.[295]

It is also worth noting that Respondent's violations were not committed in order to frustrate FINRA investigations. Rather, the record reflects that Respondent tried to provide all of the information requested, even when he believed a request was unduly burdensome. By his conduct, and in his testimony, Respondent recognized his obligation to cooperate with FINRA

[292] Tr. (Beckham) 370-72.

[293] Tr. (Beckham) 430.

[294] Tr. 1076-77.

[295] Of the 15 requests described in the first cause of action, a number were issued close in time to each other: two were issued on May 14, 2009; four were issued between July 15 and July 27, 2009; two were issued on September 17, and a third on September 18, 2009.

investigators. None of the investigators found him uncooperative or intransigent in the face of their requests.

We find that although these considerations do not relieve Respondent of responsibility for failing to properly comply with Rule 8210, they "constitute substantial mitigation."[296] Precedent teaches that it is proper, when fashioning sanctions in such a case, to give weight to the evidence that Respondent tried to maintain good relationships with FINRA examiners, worked to make Wedbush more responsive to FINRA's inquiries, and sought to improve, and over time succeeded in improving, Wedbush's compliance procedures and systems.[297]

C. Conclusion

For these reasons, we censure Respondent for violating NASD Rules 8210 and 2110, and FINRA Rules 8210 and 2010, as charged in the first cause of action, and NASD Rules 3010 and 2110, as well as FINRA Rule 2010, as charged in the second cause of action.[298]

HEARING PANEL.

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Hearing Officer

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[296] *Rouse*, 51 S.E.C. at 587. Rouse involved six untimely responses ranging from 27 to 84 days. *Id.* at 583.

[297] *Id.* at 583-84.

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