

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 98-34 (C06980021).

After careful consideration of the Parties' written submissions and hearing oral argument,¹ the Hearing Officer denies _____ request for leave to file a late answer and grants his request for time to comply with the NASDR's requests for information.

Background

_____ associated with _____, a broker-dealer in Houston, Texas, in August 1995. While with _____, _____ held the following registrations, among others: General Securities Representative, General Securities Principal, and Financial and Operations Principal.²

On February 9, 1998, _____, a Special Investigator with NASD Regulation, Inc. (NASDR) in Dallas, Texas, sent a letter to _____ requesting that he supply certain information regarding a customer complaint that had been received by NASDR.³ _____ sent the letter to _____ at _____. On February 11, 1998, _____ received a telephone call from a former consultant to _____ who informed her that the address she was using for _____ was no longer valid and that the letter addressed to _____ had been forwarded to her by the United States Postal Service. The consultant told _____ that she did not have a current address for _____, which she characterized as having "packed up in the middle of the night and vanished."⁴

¹ A pre-hearing conference was held on November 12, 1998, to give the Parties the opportunity to present oral argument on these motions. Both _____ and his attorney called in to the conference, which was held by telephone conference call.

² Declaration of George C. McGuigan, Jr. in Support of a Motion for Entry of a Default Decision (McGuigan Decl.), Ex. CX-3.

³ Declaration of _____ ¶ 3, attached as Ex. CX-5 to McGuigan Decl.

⁴ Id. ¶ 4.

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Having learned that _____ could not be reached at _____, on March 6 and March 30, 1998, _____ sent _____ letters requesting information about the customer complaint to his last residential address in the Central Registration Depository (CRD Address). Both letters stated that they were sent pursuant to Rule 8210, and the March 30 letter warned _____ that his failure to respond may result in disciplinary action being taken against him.⁵ _____ sent each letter by first class mail and certified mail, return receipt requested. The United States Postal Service returned the March 6 certified mailing marked “unclaimed,” but not the March 6 first class mailing. The United States Postal Service returned both of the mailings dated March 30 marked “Forwarding Order Expired.”⁶

_____ also obtained an alternate address for _____ from a national credit reporting service. At the November 12 pre-hearing conference, _____ attorney represented that this was the home address for _____ parents. On March 30, 1998, _____ sent a duplicate copy of the request for information to this address. The United States Postal Service returned the signed return receipt for the certified mailing. It indicated that the certified letter had been delivered on April 20, 1998, but the signature is not legible. The United States Postal Service returned the first class mailing marked “Not Deliverable as Addressed, Unable to Forward.”⁷

_____ did not respond to any of the foregoing requests for information before Enforcement filed the Complaint.⁸

⁵ CX-7, CX-8.

⁶ Id.

⁷ CX-9.

⁸ McGuigan Decl.

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On July 14, 1998, Enforcement served _____ with the Complaint and Notice of Complaint by mailing them to him by certified and first class mail at his CRD Address and his parents' address. The United States Postal Service returned both mailings sent to the CRD Address. The certified mailing was marked "Unclaimed," and the first class mailing was marked "Attempted—Not Known." The United States Postal Service returned the signed Return Receipt Card for the certified mailing addressed to his parents' address reflecting that the certified mailing was delivered on July 22, 1998, but the signature is not legible. The first class mailing sent to his parents' address was not returned.⁹

_____ did not answer or otherwise respond to the Complaint, so Enforcement served him by mail with a Second Notice of Complaint (Second Notice) on August 18, 1998. Here again Enforcement sent the Second Notice by certified and first class mail to both addresses. Both mailings sent to _____ CRD Address were returned by the United States Postal Service marked "Attempted Not Known." The United States Postal Service returned the signed return receipt for the certified mailing sent to his parents' address reflecting that the certified mailing was delivered on August 25, 1998, but the signature is not legible. The first class mailing sent to his parents' address was not returned.¹⁰

In his motion for leave to file a late answer, _____ states that he was informed for the first time on October 12, 1998, that the "NASD attempted to serve him with a Request for Information in March of 1998" and Enforcement filed a complaint

⁹ McGuigan Decl. pp. 2-3.

¹⁰ Id.

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against him in July 1998. According to _____, he did not receive timely any of the mailings because _____ went out of business and he moved to a new residence in January 1998. At the November 12 pre-hearing conference, _____ attorney further explained that _____ did not receive promptly the mailings sent to him at his parents' home because he had moved from there and was estranged from his parents for a period of time following the closing of _____.¹¹ _____ attorney represents that it was not until October 10 or 11, 1998 that _____ mother told him about the mailings from the NASD.¹² According to his attorney, the first document _____ saw was the order directing Enforcement to file a motion for entry of a default decision.¹³

In October 1998, after _____ received a copy of the motion directing Enforcement to file for entry of a default decision, he offered to supply the information NASDR sought in its requests for information.¹⁴ _____, through his attorney, requested a copy of the information requests. But as of the November 12 pre-hearing conference, _____ had not received a copy from Enforcement.¹⁵

Standard for Granting Leave to File a Late Answer

The NASD Code of Procedure does not set out specific standards governing motions to file late answers. However, well accepted standards have been developed by the federal courts that can be applied in NASD disciplinary proceedings.

¹¹ TR. at 7.

¹² TR. at 10.

¹³ TR. at 11.

¹⁴ TR. at 11.

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The federal courts treat a motion for leave to file a late answer under the same standards that apply to a motion to set aside entry of a default.¹⁶ Generally, they consider the following three factors: (1) whether the default was willful; (2) whether setting aside the default would prejudice the opposing party; and (3) whether a meritorious defense is presented.¹⁷

Discussion

In this proceeding, these factors weigh heavily in favor of denying _____ motion for leave to file a late answer. Of primary consideration is the fact that _____ has not proffered a meritorious defense to the underlying charge. He asserts that he did not respond to NASDR's requests for information because he did not receive them. _____ argues that at the time the requests were mailed to him he was no longer working in the industry and that he had moved from his CRD Address. _____ further argues that there is no procedure for a formerly-associated person to update his CRD address. In his view, he is being victimized by this deficiency. _____ proffered defense to the charge of failing to respond to the requests for information lacks merit as a matter of law. First, under Rule 8210, notice of a request for information is sufficient if it is mailed to a registered representative's last CRD

¹⁵ Id.

¹⁶ See, e.g., John v. Sotheby's, Inc., 141 F.R.D. 29, 35 (S.D.N.Y. 1992).

¹⁷ Id.

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Address.¹⁸ As a registered representative, _____ had a continuing duty to notify the NASD of his current address and to receive and read mail sent to him at that address.¹⁹ _____ remained subject to this duty despite terminating his association with an NASD member in January 1998.²⁰ Under Article V, Section 4 of the NASD By-Laws, the NASD retains jurisdiction over associated persons for two years following termination of their association with an NASD member, and the NASD may file a complaint against a formerly-associated person during this period of retained jurisdiction based upon that person's failure to respond to requests for information under Rule 8210.

Second, the NASD does provide a mechanism for formerly-associated persons to update their CRD address after their registrations terminate. NASD Notice to Members 97-31 (May 1997) reminded registered persons of this obligation. It further explained that registrants who are no longer affiliated with an NASD member should send notice of their address change to NASD's Membership Services Department.

Equally without merit is _____ argument that his failure to respond to the Complaint timely should be excused. As already discussed, _____ had a duty to update his CRD Address, which he failed to do. If _____ did not receive the

¹⁸ Rule 8210 (d) provides that:

A notice under this Rule shall be deemed received by the member or person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository. If the Adjudicator or Association staff responsible for mailing or otherwise transmitting the notice to the member or person has actual knowledge that the address in the Central Registration Depository is out of date or inaccurate, then a copy of the notice shall be mailed or otherwise transmitted to: (1) the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository, and (2) any other more current address of the member or the person known to the Adjudicator or Association staff who is responsible for mailing or otherwise transmitting the notice.

¹⁹ John G. DeGolyer, 46 S.E.C. 324, 327 (1976).

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Complaint timely, it is because he failed to update his CRD Address. Since both notices of complaint were mailed to _____ last known address in CRD within two years after he terminated his association with _____, _____ is deemed to have received proper notice of each. Indeed, on this record, it is fair to infer that _____ received actual notice of the requests for information and notices of complaint but chose to ignore them until he was confronted with the prospect that a default decision was about to be entered against him.

Even though no undue prejudice would be suffered by Enforcement if _____ is permitted to file a late answer, he has shown no reason why a default decision should not be entered. Accordingly, the Hearing Officer finds that _____ has defaulted.

However, _____ has proffered that he is willing to respond to the requests for information and has requested 30 days to do so. For requests under Rule 8210, the NASD Sanction Guidelines distinguish between a “failure to respond” and a “failure to respond in a timely manner” and suggest substantially lesser sanctions for the latter violation.²¹ Thus, as Enforcement itself recognizes, if _____ provides the information requested by NASDR, this may constitute a substantial mitigating circumstance that should be considered in assessing sanctions in this proceeding.²² For this reason, _____ is granted 30 days from the date of this Order to provide the information requested by NASDR, and this proceeding is set for an additional conference

²⁰ William T. Banning, 50 S.E.C. 415, 416 (1990).

²¹ NASD Sanction Guidelines 31 (1998).

²² TR. at 18-19.

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on January 7, 1999, at 2:00 PM, EST, at which both Parties may present argument and evidence on the issue of sanctions. If the Parties intend to rely upon documents that have not already been filed in this proceeding, they should be filed with the Office of Hearing Officers no later than January 4, 1999. The conference will be conducted by conference call, and the parties will be advised before the conference of the telephone number they must call in order to participate. The Hearing Officer will issue a default decision after this conference.

SO ORDERED.

Andrew H. Perkins
Hearing Officer

Dated: Washington, DC
December 2, 1998