

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 16-14 (2015044379701).

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT,

Respondent.

Disciplinary Proceeding
No. 2015044379701

Hearing Officer–DRS

ORDER DENYING RULE 9252 REQUEST

A. Introduction

On March 2, 2016, Respondent requested (“Request”) under FINRA Rule 9252 that FINRA invoke Rule 8210 to compel the production of documents and testimony from: (1) Union Bank, N.A.; (2) Unionbanc Investment Services, LLC; and (3) six persons described as current Union Bank and Unionbanc employees, namely, (a) HP, (b) MG, (c) JF, (d) MH, (e) MY, and (f) SC.¹ The Request focuses mainly on Union Bank’s practices, policies, and customs concerning the handling of customers’ wire transfer requests. It requests that Union Bank and Unionbanc provide 13 categories of documents and information and five categories of testimony. From the individuals, the Request seeks 11 categories of documents and information as well as testimony on unspecified subjects.

Enforcement opposed the Request on March 16, 2016, on the grounds that it failed to comply with the requirements of Rule 9252 in numerous respects. I agree and deny the Request.

B. Legal Standard Applicable to Rule 9252 Requests

Rule 9252 establishes the procedures for a respondent to request that FINRA invoke its authority under Rule 8210 to compel the production of documents or testimony from member firms or associated persons. Under this Rule, the request must:

¹ The Request includes no additional description of these individuals.

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describe with specificity the Documents, the category or type of Documents, or the testimony sought; state why the Documents, the category or type of Documents, or the testimony are material; describe the requesting Party’s previous efforts to obtain the Documents, the category or type of Documents, or the testimony through other means; and state whether the custodian of each Document, or the custodian of the category or type of Documents, or each proposed witness is subject to [FINRA’s] jurisdiction.²

Additionally, the Hearing Officer may grant the request only if:

the information sought is relevant, material, and non-cumulative; the requesting Party has previously attempted in good faith to obtain the desired Documents and testimony through other means but has been unsuccessful in such efforts; and each of the persons from whom the Documents and testimony are sought is subject to [FINRA’s] jurisdiction.³

Finally, the Rule directs the Hearing Officer to “consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.”⁴

C. Discussion

In applying the above standards to the Request, I find that, in a number of respects, it fails to meet the requirements under Rule 9252.

1. The Request Fails to Show that the Documents and Testimony Sought in Each Category is Relevant, Material, and Non-Cumulative

The Request does not address the relevance, materiality, or cumulativeness of each requested category of documents and testimony. Instead, the Request explains, more generally, that Respondent seeks documents and information proving that Union Bank’s actual practices regarding its handling of customer wire transfer requests differed from those contained in its policy manual. Because “[t]he alleged conduct that forms the basis of these proceedings took place during Respondent’s tenure at Union Bank,” Respondent explains, “[its] formal policies and the actual customs and practices of its employees concerning wire transfers are critical to this case.”⁵ While noting that “Union Bank’s Policy Manual allegedly prohibits employees from acting on customer email requests,” Respondent states that she “believes that the accepted custom and practice at Union Bank differed from the information contained in its manual.” Indeed, she contends, “Union Bank personnel instructed employees to treat private banking

² Rule 9252(a).

³ Rule 9252(b).

⁴ Rule 9252(b).

⁵ Request at 1.

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clients differently in some respects.” Thus, Respondent asserts that she “needs documents and information from Union Bank and its employees to challenge Enforcement’s allegations and to prove her defenses.”⁶

Respondent represents that the documents and testimony sought from Union Bank and Unionbanc “are directly relevant to the claims Enforcement is making;” that she needs “access to the policy manuals and other internal rules that Enforcement contends she violated;” and “information regarding Union Bank’s investigation into the wire request at issue.” Concerning the requests to the six individuals, Respondent contends that the desired documents and testimony are “directly relevant to the claims Enforcement is making.” And, further, she argues that “to adequately defend herself, [she] needs access to information regarding the customs and practices that were actually employed at Union Bank regarding wire requests, regardless of whether they were in accordance with Union Bank policy.”⁷ She goes on to explain that “[t]o the extent that other bank personnel employed the same practices that Enforcement alleges Respondent used, that information may mitigate Respondent’s culpability.” Finally, she suggests that “this information may provide evidence that Union Bank systematically trained its employees to not follow the manual as a way to make sure that private banking clients wire requests received priority.”⁸

Although the rules of evidence applicable in federal courts do not apply to FINRA disciplinary proceedings,⁹ the Federal Rules of Evidence can provide helpful guidance.¹⁰ In evaluating Respondent’s relevance and materiality arguments, I found the federal rule defining relevancy instructive. Under Federal Rule of Evidence 401, evidence is relevant if it has “any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” A fact is of consequence under this Rule, i.e., it is material, “when its existence would provide the fact-finder with a basis for making some inference, or chain of inferences, about an issue that is necessary to a” decision.¹¹ Stated another way, a fact is material if it “goes to the substantial matters in dispute or has a legitimate or effective bearing on the decision of the same”¹²

⁶ Request at 2.

⁷ Request at 5.

⁸ Request at 7.

⁹ See *Daniel D. Manoff*, 55 S.E.C. 1155, 1165 (2002); Rule 9145(a) (providing that the formal rules of evidence are not applicable to FINRA disciplinary proceedings); OHO Order 15-15 (201404096850) at 3 (Dec. 22, 2015), https://www.finra.org/sites/default/files/OHO_Order15-15_2014040968501.pdf.

¹⁰ *Dep’t of Enforcement v. Ahmed*, No. 2012034211301, 2015 FINRA Discip. LEXIS 45, at *112, n. 98 (NAC Sept. 25, 2015), *appeal docketed*, No. 3-16900 (SEC Oct. 13, 2015); OHO Order 15-15 at 3; OHO Order 12-07 (2010020846601) at 2 n.3 (Nov. 9, 2012), www.finra.org/sites/default/files/OHODecision/p229431.

¹¹ *U.S. v. McVeigh*, 153 F.3d 1166, 1190 (10th Cir. 1998) (quotations and citations omitted).

¹² *Moore v. Loney*, No. GLR-11-2638, 2014 U.S. Dist. LEXIS 22075, at *17 (D. MD 2014) (quoting *U.S. v. De Lucia*, 256 F.2d 487, 491 (7th Cir. 1958)).

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Applying these principles, I find that Respondent failed to establish relevance and materiality as required by Rule 9252. First, the Request does not address each document, category or type of document or testimony sought. Thus, it fails to show that each of the requested categories of documents and testimony: (1) has a tendency to make a fact more or less probable than it would be without the evidence, or (2) relates to a material fact.

Second, Respondent has not shown that it is material to this case if the practices of Union Bank were different than the policy set forth in its manual. Respondent argues that if she establishes this fact, it may “mitigate her culpability.” But while the Complaint references Union Bank’s alleged policy prohibiting employees from acting on email requests, Respondent is not charged with violating that policy or, for that matter, with failing to comply with any Union Bank policy, procedure, practice, or custom. Rather, the Complaint charges that she violated FINRA Rule 2010 by making untrue statements in an email to personnel at Union Bank in connection with a third party wire request that she received from a customer’s email account. Further, Respondent fails to explain, either by reference to the Sanction Guidelines or otherwise, how it would mitigate her culpability or impact a decision in this case if Union Bank’s practices differed from those set forth in its manual.

Finally, the Request does not address whether the requested documents and information are non-cumulative. Respondent fails to show (1) that each category of requested documents and testimony is non-cumulative of each other category;¹³ (2) that each category seeks only documents and information that she does not already possess; or (3) that it is not cumulative to request the same documents and testimony from multiple persons and entities.

2. The Request is Excessive in Scope, Oppressive, and Unreasonable

The Request is excessive in scope, oppressive, and unreasonable. It seeks a total of 29 categories of documents and information from two entities and six individuals. This number of categories and intended recipients is excessive, given that the stated purpose of the Request is to obtain documents and information related to one aspect of Union Bank’s policies, procedures, and practices, namely, the handling of customers’ wire transfer requests.

Also, many of the requested categories are overbroad, as they lack a narrow focus tailored to the Request’s stated purpose or a time-period limitation. For example, the Request seeks, among other things:

¹³ It is by no means clear that the requests are non-cumulative. For example, two of the requests appear to overlap in part. Request at 3, No. 7 seeks “[a]ll documents, including communications and electronic communications, that relate to any training given to employees of Union Bank regarding the handling of wire transfer requests (including email transaction requests) for non-retail customers. And Request at 3, No. 8 requests “[a]ll, documents, including communications and electronic communications, that relate to any instructions given to employees of Union Bank regarding the handling of wire transfer requests (including email transaction requests) for non-retail clients.”

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- “All documents, including communications and electronic communications, in Respondent’s personnel file, including hiring paperwork, write-ups, performance evaluations, payroll records, and wage statements;”¹⁴
- “All policy manuals, guidebooks, employee handbooks in use at Union Bank for the duration of Respondent’s employment;”¹⁵
- “All communications, including electronic communications, sent or received by Respondent during the entire month of January 2015;”¹⁶
- All communications, including electronic communications, between any employee of Union Bank and the customer who’s account is at issue;”¹⁷
- “All documents including communications and electronic communications, that relate to any training given to employees of Union Bank regarding the handling of wire transfer requests (including email transaction requests) for non-retail clients;”¹⁸ and
- “All documents that relate to any investigations of other employees of Union Bank relating to improperly handling wire transfer requests for non-retail clients.. . .”¹⁹

Additionally, the Request fails to explain why Unionbanc and the six individuals likely possess documents and information responsive to the Request. Given that the Request seeks documents and testimony regarding non-FINRA member Union Bank’s policies, practices, and customs, the answer is not self-evident.

Moreover, the Request is tentative about whether the responses, if any, would assist Respondent’s defense, as she represents only that she “*believes*” the practices at Union Bank “were different than the stated policy” and that responses to the Request “*may* provide evidence that Union Bank systematically trained its employees to not follow the manual.” [Emphasis added]. These statements, coupled with the excessiveness of the Request and Respondent’s failure to demonstrate that it is likely to yield relevant and material responses, show that the

¹⁴ Request at 3, No. 1.

¹⁵ Request at 3, No. 2.

¹⁶ Request at 3, No. 3.

¹⁷ Request at 3, No. 5.

¹⁸ Request at 3, No. 7.

¹⁹ Request at 3, No. 9.

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Request is part of a fishing expedition for useful documents.²⁰ A respondent, however, may not invoke FINRA’s Rule 8210 authority for that purpose.²¹

Therefore, I find that it would be unreasonable, oppressive, and excessively burdensome, to issue the Request.

3. Respondent Has Not Shown that She Previously Attempted in Good Faith to Obtain the Requested Documents and Testimony

Respondent represents that she served Union Bank and Unionbanc with “similar discovery” in a pending employment action in California state court but that they have, thus far, refused to respond. But she provides no details regarding her attempts to obtain the documents and information in the state court proceeding. Moreover, having failed to obtain the documents and testimony for use in that proceeding, Respondent is not relieved of her obligation to attempt to obtain them in connection with this proceeding. Respondent does not state, however, whether she made any attempts to do so. Additionally, Respondent does not represent that she made any attempts to obtain the documents and testimony from the six individuals. The Request states only that “she has not served these individuals with any discovery” as they are not named defendants in her pending employment action.²²

Therefore, Respondent did not comply with Rule 9252’s requirement that she show that she has previously attempted, in good faith, to obtain the desired documents and testimony through other means but has been unsuccessful in such efforts.

4. Additional Deficiencies Impacting Specific Requests

a. The Request Seeks Written Responses in Addition to Documents and Testimony

Under Rule 9252, a respondent may request “that FINRA invoke Rule 8210 to compel the production of Documents or testimony.” Rule 9252 does not, however, permit a respondent to use Rule 8210 to issue requests for information in the form of interrogatories.²³ In addition to seeking documents and testimony, the Request seeks eight descriptions concerning Union Bank’s wire transfer practices.²⁴ These description requests are in the nature of interrogatories and are not authorized by Rule 9252.

²⁰ See OHO Order 98-24 (CAF970002) (May 18, 1998) at 6–7 (“Respondent’s expansive request cannot be justified on the speculative hope of discovering evidence that is of limited substantive relevance and otherwise collateral.”), <https://www.finra.org/sites/default/files/OHODDecision/p007757.pdf>.

²¹ See OHO Order 06-05 (CLI050016) (Jan. 10, 2005) at 3, <https://www.finra.org/sites/default/files/OHODDecision/p016220.pdf>; OHO Order 06-08 (C07050029) (Jan. 12, 2006) at 3, <https://www.finra.org/sites/default/files/OHODDecision/p016223.pdf>.

²² Request at 7.

²³ OHO Order 98-24 at 9.

²⁴ Request at 4, Nos. 12 and 13; Request at 6–7, Nos. 6–11.

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b. The Request Does Not Describe with Specificity the Testimony Sought from the Individuals.

The Request states that it seeks documents and testimony from Union Bank, Unionbanc, and six individuals. With respect to Union Bank and Unionbanc, the Request specifies both the categories of documents and testimony sought from these entities. But while the Request also states that it seeks both documents and testimony from the individuals, it only contains a list of requested documents and not testimonial subjects. Thus, as to the individuals, the Request does not comply with Rule 9252’s requirement that a request describe with specificity the testimony sought.

c. The Request Does Not Demonstrate that Each Person from Whom Documents and Testimony are Sought is Subject to FINRA’s Jurisdiction

Respondent must show that each person from whom she seeks documents and testimony is subject to FINRA jurisdiction. FINRA has jurisdiction over Unionbanc because it is a FINRA member firm. But as Respondent admits in the Request, Union Bank is not a member firm.²⁵ Nevertheless, according to Respondent, it “should be estopped from arguing it is not subject to FINRA jurisdiction because it has compelled [her] to FINRA arbitration to litigate several employment claims she personally brought in state court.” This argument misses the mark. Respondent must show that FINRA has jurisdiction over Union bank. Even if Union Bank did compel Respondent into FINRA arbitration—an assertion for which Respondent offers no proof—that does not establish FINRA’s jurisdiction over the bank for the purposes of Rule 9252 and Rule 8210.

Respondent also failed to prove that FINRA has jurisdiction over all six individuals. In the Request, Respondent represents that two of the six are “FINRA members,” namely, JF and SC, and includes their CRD numbers. In its Opposition, Enforcement does not dispute that FINRA has jurisdiction over these two persons. But Respondent failed to demonstrate that the other four individuals are subject to FINRA’s jurisdiction. Rather, she stated only that “[i]t is unclear whether [HP, MG, MH and MY], are FINRA members.”²⁶ For its part, Enforcement represents in the Opposition that three of the four—HP, MG, and MY—are not subject to FINRA jurisdiction. As to the fourth person, MH, Enforcement does not affirmatively state, and the record does not otherwise show, that he is subject to FINRA jurisdiction. Accordingly, Respondent has not demonstrated that FINRA has jurisdiction over HP, MG, MY, and MH.

²⁵ Request at 5.

²⁶ Request at 7.

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D. Order

For the reasons detailed above, the Request fails to satisfy the requirements of Rule 9252. I further find that because the Request failed to comply with the requirements of Rule 9252 in numerous respects, it should be, and hereby is, **DENIED**, rather than limited or modified.²⁷

SO ORDERED.

David R. Sonnenberg
Hearing Officer

Date: March 25, 2016

²⁷ The Request did not contain a certification of consultation as required by Section 2(b) of the Case Management and Scheduling Order (“CMSO”). Moreover, according to Enforcement’s opposition, Respondent did not contact it before filing the Request. Respondent is reminded that she must comply with this provision in the CMSO when filing any future motions. As stated in that provision, any motion failing to do so “may be summarily denied.”