

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ROBERT HENDERSON
(CRD No. 1160413),

Respondent.

Disciplinary Proceeding
No. 2017053462401

Hearing Officer—RES

ORDER DENYING RESPONDENT'S MOTION TO AMEND ANSWER

I. Enforcement's Complaint and Respondent's Answer

FINRA's Department of Enforcement filed a Complaint against Respondent Robert Henderson, formerly a registered representative, on December 6, 2019. The Complaint consists of two causes of action. The first cause of action alleges that from December 2010 through October 2018, Respondent engaged in three outside business activities ("OBAs") without providing prior written notice to his then-employer firm, IFS Securities ("IFS"), which is a FINRA member.¹ The second cause of action alleges that from October 2014 through October 2018, Respondent failed to timely amend his Uniform Application for Securities Industry Registration or Transfer (Form U4) to disclose four federal tax liens, totaling \$368,220 ("Liens").² According to the Complaint, Respondent's alleged failure to provide prior written notice of the putative OBAs violated FINRA Rules 3270 and 2010, and Respondent's alleged failure to amend his Form U4 was willful, in violation of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010.³

Respondent requested and received a four-week extension of time to file his Answer. Respondent failed to meet this extended deadline, necessitating that Enforcement serve a Second Notice of Complaint. Respondent filed an Answer several days later, but the Office of Hearing

¹ Complaint ("Compl.") ¶¶ 1, 5-27.

² Compl. ¶¶ 2, 30-70. All monetary amounts in this Order are rounded to the nearest dollar.

³ Compl. ¶¶ 1-2, 59, 70.

Officers rejected it because it did not comply with FINRA Rule 9215. It was then—on February 14, 2020—that Respondent filed an Amended Answer.⁴

In his Answer, Respondent denies violating FINRA By-Laws or Rules. In response to the first cause of action, Respondent states that, on becoming registered with FINRA through IFS in 2010, his Form U4 disclosed that he was a real estate broker and the owner and president of a DBA doing business in real estate, and that he had been in real estate investment and brokerage since 1979.⁵ As to the second cause of action, Respondent claims he “mistakenly but in good faith believed that [the Liens] related to one or more tax liens that he had previously disclosed in an amendment to his Form U4.”⁶ The only other defense Respondent raised was that “[t]he definition customarily afforded the word ‘willfully’ by FINRA (that the respondent knows what he is doing) is inconsistent with the meaning of ‘willfully’ under section 3(a)(39) of the Securities Exchange Act and therefore is not authorized by law.”⁷

II. Respondent’s Motion to Amend His Answer and Enforcement’s Opposition

Respondent filed a motion (“Motion”) to amend his Answer to add an affirmative defense to the effect that FINRA is a “state actor” and FINRA Rule 3270 is unconstitutionally vague.⁸ In his Motion, Respondent contends there is good cause for permitting the amendment because, in the absence of unfair prejudice to opposing parties, all parties should be permitted to raise all legally cognizable claims and defenses.⁹

Enforcement filed an opposition to the Motion (“Opposition”). In its Opposition, Enforcement contends, first, that Respondent should have included any and all affirmative defenses when he filed his Answer on February 14, 2020.¹⁰ Second, it is well settled that FINRA is not a state actor and, therefore, a proposed defense that FINRA Rule 3270 is unconstitutionally vague fails as a matter of law.¹¹

⁴ In the remainder of this Order, I will refer to the Amended Answer as “the Answer.”

⁵ Amended Answer (“Ans.”) ¶ 1.

⁶ Ans. ¶¶ 35, 39, 49.

⁷ Ans. at 7.

⁸ The proposed affirmative defense is that “FINRA, in issuing rules and disciplining members and associated persons, either serves as an agency or instrumentality of the government of the United States or is a ‘state actor,’ and Rule 3270 is unconstitutionally vague.” Motion at 1.

⁹ Motion at 2.

¹⁰ Opposition at 2.

¹¹ Opposition at 2-4.

III. Discussion

Having reviewed the Complaint, the Answer, the Motion, the Opposition, and the record of this case, I conclude that Respondent's Motion is without merit. For the reasons stated below, I **DENY** the Motion.

FINRA Rule 9215 governs amendments to an answer. That Rule provides, “[u]pon motion by a Respondent, the Hearing Officer may, after considering good cause shown by the Respondent and any unfair prejudice which may result to any other Party, permit an answer to be amended.”¹²

Respondent has not shown good cause for allowing him to amend his Answer to add an affirmative defense that FINRA is a state actor and FINRA Rule 3270 is unconstitutionally vague. First, Respondent had two months before filing the Answer on February 14, 2020, and should have included any and all affirmative defenses at that time. Three months have passed since then, and Respondent has not articulated any reason why he waited this long before seeking to add an affirmative defense. He has not presented newly discovered evidence and, as far as I know, there has been no change in applicable law.

Second, FINRA is not a state actor subject to Constitutional restriction.¹³ As the Securities and Exchange Commission recently noted, “FINRA is a private entity: It operates as a private, Delaware non-profit corporation, it receives no funding from any government; and the positions within it are not created by federal law.”¹⁴ If added, the proposed defense would fail as a matter of law. It would be futile to grant Respondent leave to add an affirmative defense that would immediately be subject to being stricken as a matter of law. Where a proposed amendment would be futile, a respondent cannot show good cause for a Hearing Officer to allow it.


¹² FINRA Rule 9215(d).

¹³ *Dep't of Enforcement v. White*, No. 2015045254501, 2019 FINRA Discip. LEXIS 30, at *48 (NAC July 26, 2019) (“FINRA is not a state actor subject to Constitutional restrictions”); *Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 917, at n.142 (Apr. 3, 2020) (“Decades of judicial decisions considering the role of self-regulatory associations like FINRA within the securities industry confirm that FINRA is ‘a private organization, not an arm of the government’”) (quoting *Ford v. Hamilton Inves., Inc.*, 29 F.3d 255, 259 (5th Cir. 1994)); *D.L. Cromwell Inves., Inc. v. NASD Regulation, Inc.*, 279 F.3d. 155, 162 (2d Cir. 2002) (“It has been found, repeatedly, that the NASD itself is not a government functionary”).

¹⁴ *Newport Coast Sec., Inc.*, 2020 SEC LEXIS 917, at n.143-44.

In sum, I conclude that the Motion's arguments are invalid. FINRA is not a state actor, and FINRA Rule 3270 cannot be challenged as being unconstitutionally vague. Furthermore, Respondent has not shown good cause for seeking to assert his proposed affirmative defense at this stage of the proceeding. For these reasons, the Motion is **DENIED**. Respondent is not allowed to amend his Answer.

SO ORDERED.



Richard E. Simpson
Hearing Officer

Date: May 27, 2020

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