

This Order has been published by the NASDR Office of Hearing Officers and should be cited as OHO Order 99-18 (CAF980002).

**NASD REGULATION, INC.
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,	:	
	:	
Complainant,	:	Disciplinary Proceeding
	:	No. CAF980002
	:	
v.	:	
	:	
	:	Hearing Officer - DMF
	:	
	:	
Respondents.	:	
	:	

**ORDER DENYING RESPONDENTS'
MOTION FOR RECONSIDERATION**

On September 28, 1999, the _____ Respondents filed a motion requesting the Hearing Officer to reconsider the order dated September 27, 1999, denying their request that the Hearing Officer invoke Rule 8210 to compel the attendance and testimony of 11 witnesses at the hearing in this matter, which is scheduled to begin on October 4, 1999. In the alternative, the _____ Respondents asked the Hearing Officer to “strike” all requests issued by the Department of Enforcement pursuant to Rule 8210 to compel the attendance and testimony of witnesses at the hearing, on the ground that Enforcement has issued such requests without leave of the Hearing Officer, contrary to a provision of the order issued April 14, 1999. On September 28, 1999, the Hearing Officer issued an order directing Enforcement to show cause why, in light of the _____ Respondents’ allegations, all such Rule 8210 requests should not be quashed. Enforcement filed its response to the order on September 29, 1999.

In its response, Enforcement indicates that on September 2, 1999, it issued Rule 8210 requests requiring the attendance and testimony of seven individuals at the hearing scheduled to begin on October 4, 1999. Enforcement offers a number of arguments why this did not violate

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the requirement in the April 14, 1999, order that Enforcement “shall not issue any additional Rule 8210 requests seeking information for use in this proceeding without leave of the Hearing Officer.”

Background

As a general matter, the Code of Procedure applies different standards to Enforcement and respondents concerning Rule 8210. Enforcement is generally free to make use of Rule 8210 without direct oversight by the Hearing Officer, provided it makes the disclosures required by Rule 9251(a)(2). In contrast, under Rule 9252, respondents must request that the Association, through the Hearing Officer, invoke Rule 8210 in their behalf; they must submit such a request no later than 21 days prior to the hearing; and the request must contain specific information and make a specific showing. The Rule also requires that the Hearing Officer consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome. As explained in the prior order, these requirements reflect the significant burdens imposed on recipients of Rule 8210 requests, and the sanctions that can be applied on those who do not comply.

Enforcement’s authority to resort to Rule 8210 in a disciplinary proceeding is subject to the Hearing Officer’s authority under Rule 9235 to manage the proceeding in a fair and effective manner. In this particular case, the Hearing Officer became concerned because in January 1999, shortly before the hearing in this matter was scheduled to begin, Enforcement issued a Rule 8210 request to a member firm for a substantial volume of documents for use in this proceeding. Under Rule 9251(a)(2), Enforcement was required to make the responsive documents available to the _____ Respondents for inspection and copying. As a practical matter, this meant that the Respondents received and had to evaluate a substantial number of documents shortly before the hearing was to begin, and their task was further complicated by Enforcement’s unreasonable

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refusal to give the Respondents a copy of the Rule 8210 request to which the documents were responsive, until the Hearing Officer ordered Enforcement to do so. Although the hearing was subsequently postponed for other reasons, the Hearing Officer was concerned that Enforcement's actions might have forced the postponement of a two week hearing, disrupting the plans and schedules of the Hearing Panelists and the parties. The fact that the postponement that did occur, for other reasons, led to a delay of many months in holding the hearing shows the significance of this concern. It was to avoid any repetition of these circumstances that the Hearing Officer took the unusual step of ordering Enforcement to seek leave before issuing any additional Rule 8210 requests seeking information for use in this proceeding.

Discussion

Enforcement's response to the order to show cause demonstrates that on September 2 Enforcement merely renewed Rule 8210 requests that Enforcement first sent in January 1999 to compel the same individuals to appear and testify at the then-scheduled hearing. Notice of those requests was given to the Hearing Officer and respondents at that time. Although the letters that Enforcement sent these individuals on September 2 invoke Rule 8210, in effect they simply reschedule the witnesses appearances, as mandated by the January Rule 8210 requests. The Hearing Officer agrees with Enforcement that, under these circumstances, the September 2 requests do not violate the April 14 order; more importantly, they do not raise the same concerns that prompted that order. Therefore, the Hearing Officer will not quash these requests.

Turning to the _____ Respondents' request for reconsideration, as the Hearing Officer explained in the September 27 order, the Respondents' request was untimely under both the schedule established in the April 14 order for motions pursuant to Rule 9252, and the specific provisions of Rule 9252, requiring that any request by a respondent to invoke Rule 8210 be filed

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at least 21 days prior to the hearing. Furthermore, the Hearing Officer explained in the prior order that, by waiting until the last minute to file their request, the Respondents made it impossible, as a practical matter, for the Hearing Officer to conduct the careful review of such requests required under Rule 9252. Respondents' argument that they should be allowed to ignore these deadlines, because the individuals whose appearance and testimony they seek to compel have previously been identified as potential witnesses, actually weighs against their position. Because they have long known they wanted to call these individuals as witnesses, they could have met the deadlines for filing their request. They have no one but themselves to blame for having failed to do so.

Therefore, the _____ Respondents' motion for reconsideration of the order denying their request to invoke Rule 8210, or, in the alternative, to strike Enforcement's Rule 8210 requests, is denied.

SO ORDERED

David M. FitzGerald
Hearing Officer

Dated: Washington, DC
September 30, 1999