

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

KEVIN RICHARD GRAETZ
(CRD No. 1935982),

Respondent.

Disciplinary Proceeding
No. 2014038847602

Hearing Officer-LOM

**ORDER DENYING MOTION TO QUASH AND REQUIRING RESPONDENT TO
RESPOND TO RULE 8210 REQUESTS NO LATER THAN MARCH 31, 2017**

I. INTRODUCTION

This case concerns allegations that Respondent failed to timely disclose thirteen federal and state tax liens totaling over \$1 million. Respondent is alleged to have acted willfully. If proven, a finding of willfulness would subject him to a statutory disqualification. Respondent maintains in his defense that he was unaware that he was subject to the tax liens at the time they were recorded and for some time afterward. A three-day hearing is scheduled to begin July 11, 2017.

The Department of Enforcement filed with the Office of Hearing Officers a Notice of Issuance of Rule 8210 Request (respectively, "Notice" and "Rule 8210 Requests"¹) on February 8, 2017, the deadline set in the Case Management Order for issuing any Rule 8210 requests for information (except for requests for testimony at the hearing). The Rule 8210 Requests specified a February 22, 2017, deadline for responding.

On February 22, 2017, Respondent did not provide the information requested. Instead, he filed and served Respondent's Opposition To Enforcement's Rule 8210 Requests ("Opposition"). In his Opposition, Respondent asks that the Rule 8210 Requests be "denied."

On March 8, 2017, Enforcement filed and served Enforcement's Response To Respondent's Opposition To Enforcement's Rule 8210 Requests ("Response"). Enforcement asserts that it has clear authority to issue post-complaint Rule 8210 requests and that the

¹ Although Enforcement gave Notice of a single Rule 8210 Request, the Request contained three different inquiries. Other filings refer to Requests, plural. For that reason, we refer to what is denominated Request as Requests.

particular Rule 8210 Requests seek highly probative evidence regarding the central issue in the case: when Respondent had notice of his tax liens.

For the reasons discussed below, I treat Respondent's Opposition as a motion to quash the Rule 8210 Requests and deny Respondent's motion. I further Order Respondent to comply with the Rule 8210 Requests no later than March 31, 2017.

II. DISCUSSION

A. The Rule 8210 Requests

The Rule 8210 Requests at issue contain three inquiries. The first is a request that Respondent sign a standard Internal Revenue Service ("IRS") form, the Form 8821, authorizing the IRS to provide to FINRA staff information regarding any tax liens and levies, as recorded on IRS Forms 1040 and 668Y. This request covers tax years 2001 through 2013. Enforcement has explained in its Response the reason that the request covers those years. The first tax lien at issue was filed against Respondent in 2007 and related to the 2001 tax year.

The second request is that Respondent sign another standard IRS Form, the Form 4506-T. By signing that form, Respondent would enable Enforcement counsel to obtain an "Account Transcript." An Account Transcript contains information on the financial status of an account, such as payments made on the account. It does not include all the line items of a tax return, but is limited to tax liability and estimated tax payments. It states on the form that Account Transcripts are available for most returns and most requests will be processed within ten business days.

The third request is for documents related to any actual or attempted home refinancing during the relevant time period, January 1, 2007 through December 31, 2013. Enforcement explains in its Response that documents related to any attempted or actual home refinancing would likely include information regarding tax liens and be probative as to Respondent's awareness of those tax liens.

B. Issues

1. Authority To Issue Post-Complaint Rule 8210 Requests

Respondent argues that post-complaint Rule 8210 requests are improper because, he asserts, there is no specific, express authority for issuing such requests. While acknowledging that there is no prohibition on post-complaint Rule 8210 requests, he contends that the "more persuasive" argument is that an express grant of authority is necessary.²

² In its Response, Enforcement correctly notes that the authorities on which Respondent relies for its argument are about entirely different issues, not Rule 8210. They do not support Respondent's argument here. For example, *see Fiero v. Fin. Indus. Regulatory Auth., Inc.*, 660 F.3d 569, 575 (2d Cir. 2011) (FINRA not authorized by the Exchange Act to seek a court order to enforce its fines).

Respondent is incorrect. There is specific authority, even if the words “post-complaint” do not appear in the Rule. FINRA Rule 8210(a) provides that either an adjudicator or FINRA staff “shall have the right” to require an associated person “to provide information” for the purpose of a “proceeding,” as well as an investigation, complaint, or examination. Not only is there no limit on when a Rule 8210 request can be issued, the Rule specifically contemplates using such a request for purposes of a “proceeding.” This is a proceeding—and it became a proceeding only upon the filing of the Complaint. Furthermore, it is only after the filing of a complaint that an adjudicator would be involved, and the Rule authorizes an adjudicator, as well as FINRA staff, to issue a request under Rule 8210. Furthermore, FINRA Rule 9251(a)(2) requires Enforcement to provide the Notice that it provided of the issuance of a post-complaint Rule 8210 request, and further requires that Enforcement make any relevant and material documents available to a respondent within fourteen days of receiving them. The Rules thus in conjunction contemplate Rule 8210 requests for information, in appropriate circumstances, post-complaint.

Respondent’s argument is also contradicted by long-standing precedent. FINRA Rule 9235 provides that a Hearing Officer “shall have authority to do all things necessary and appropriate” in the management of a case. Pursuant to that authority, Hearing Officers regularly reject respondents’ attempts to foreclose post-complaint Rule 8210 requests where those requests are for purposes of obtaining evidence for use at a hearing and narrowing the issues.³ Clarification of what is truly disputed and what is not helps a Hearing Panel reach a considered decision grounded on facts. Clarification also aids efficiency. Permitting post-complaint Rule 8210 requests “to explore the factual bases” for issues raised in an answer is appropriate and may expedite the hearing.⁴

In fact, in 1997, when the SEC approved the NASD version of what is now Rule 8210, the SEC rejected one commentator’s proposal to limit post-complaint Rule 8210 requests. The NASD took the position that the Hearing Officer was empowered under FINRA Rule 9235 to protect against any abuses of Rule 8210 requests. A Hearing Officer’s “paramount duty is to ensure that the disciplinary proceeding is conducted fairly.”⁵ Indeed, from time-to-time, a

³ See *Dep’t of Enforcement v. Respondent*, No. 2013036217601, 2015 FINRA Discip. LEXIS 79, at *5-6 & nn.2-4 (Feb. 13, 2015) (collecting cases).

⁴ *Id.*

⁵ See OHO Order 01-01 (C10000172), 2001 NASD Discip. LEXIS 9, at *3 & n.1 (Jan. 23, 2001) (citing and quoting Section 15A(b)(8) of the Exchange Act, which requires that “the rules of the association ... provide a fair procedure for the disciplining of members and persons associated with members”).

Hearing Officer has exercised that authority to protect a Respondent from an inappropriate post-complaint inquiry under Rule 8210.⁶

Thus, I conclude that there is sufficient authority for post-complaint Rule 8210 requests, and that it is my responsibility to do what is fair in the circumstances.

2. Fairness

I now turn to whether the particular requests are appropriate and fair. I find that they are.

In determining that the requests are appropriate and fair, I have considered the standard set forth in FINRA Rule 9252(b), which governs the issuance of a post-complaint Rule 8210 at a respondent's request for production of documents or testimony at the hearing. The requesting party must show (i) that the information sought is relevant, material, and non-cumulative, (ii) that the requesting party has made good faith attempt to obtain information but has been unsuccessful, and (iii) that the documents and testimony are subject to FINRA jurisdiction. Additionally, a Hearing Officer shall also consider whether the request is unreasonable, oppressive or unduly burdensome.

Although this standard does not tidily fit when Enforcement is the party seeking information pursuant to Rule 8210, it provides some roughly analogous guidelines.

First, without a doubt, the information sought by Enforcement is relevant, material, and non-cumulative. If the tax records reveal that Respondent was engaged in correspondence with the IRS to negotiate and settle his various tax obligations, that would be relevant and material evidence as to when he had notice. Similarly, if records relating to any proposed or finalized home refinancing reveal that Respondent was told that a tax lien was an issue, that evidence also would be relevant and material to when he had notice.

Second, with respect to whether the requesting party has made an unsuccessful but good faith attempt to obtain information, Respondent contends that Enforcement could have and should have made the Rule 8210 requests during its investigation. Respondent asserts that it is simply too late and would be unfair to allow Enforcement to pursue the Rule 8210 requests post-complaint. There is no inherent unfairness in the circumstances here, however, in allowing these Rule 8210 Requests. It was always contemplated that such requests might be made—a deadline for making them was included in the parties' jointly proposed schedule and the Case Management Order for this case. The information sought by these Rule 8210 Requests is Respondent's information, and whatever it reveals should be no surprise to him. Providing the information does not appear to be particularly burdensome or difficult and does not interfere with Respondent's ability to prepare for the hearing. Respondent has failed to show that he would

⁶ *Dep't of Enforcement v. Respondents*, No. CAF000045, 2001 NASD Discip. LEXIS 7, at *12-13 & nn.3-7 (OHO Feb. 14, 2001) (quashing Rule 8210 request similar to contention interrogatories as premature and unfair, because requests were made before the respondent had had time to review discovery).

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 17-08 (2014038847602).

suffer any prejudice. In fact, it is Respondent who is asserting a defense—lack of notice—but seeking to deprive Enforcement of the ability to test the factual basis for that defense. It would be more unfair to Enforcement to deny it the information.

Third, the information is subject to FINRA jurisdiction because it is information “of” the Respondent. If he does not have the information in hand, he can ask for it or more simply grant access to Enforcement.⁷

Finally, I do not find the requests unreasonable, oppressive or unduly burdensome. The circumstances here do not present an abuse of the power to issue post-complaint Rule 8210 requests.

III. ORDER

Respondent is **ORDERED** to comply with Enforcement's pending Rule 8210 Requests no later than March 31, 2017. Pursuant to FINRA Rule 9251(a)(2), Enforcement is **ORDERED** to make available to Respondent any documents it receives in response no later than 7 days after receiving them.

SO ORDERED.

Lucinda O. McConathy
Hearing Officer

Dated: March 21, 2017

⁷ *North Woodward Fin. Corp. and Troszak*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, at *16-21 (May 8, 2015).