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Admin. Proc. File No. 3-15964

In the Matter of the Application of

DAVID KRISTIAN EVANSEN

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY PROCEEDINGS

Former associated person of former member firm failed to timely respond to association's requests for information and failed to appear and provide testimony for on-the-record interviews with association staff. *Held*, association's findings of violation and sanction imposed are *sustained*.

APPEARANCES:

David Kristian Evansen, pro se.

Alan Lawhead and *Gary Dernelle*, for FINRA.

Appeal filed: July 3, 2014
Last brief received: October 15, 2014

David Kristian Evansen, formerly associated with Newbridge Securities Corporation, a FINRA member firm ("Newbridge"), appeals a decision by FINRA's National Adjudicatory Council ("NAC") barring him from associating with any FINRA member firm. The NAC found that Evansen violated FINRA Rule 8210 and Rule 2010 by failing to timely respond to requests for information and failing to appear and provide testimony for a FINRA investigation of allegations that Evansen engaged in misconduct in Newbridge customer accounts. The NAC found that Evansen defaulted by failing to respond to the complaint and that he demonstrated a "long-playing pattern of indifference to his responsibilities" to cooperate with FINRA investigations and proceedings.

Evansen primarily contends on appeal that FINRA lacked jurisdiction; that FINRA did not provide him proper notice of the requests for information, the requests for on-the-record interviews, or the disciplinary proceedings; and that FINRA engaged in various procedural violations reflecting its improper motives for pursuing this case, including a desire to retaliate for whistleblowing activities. Following our independent review, we reject Evansen's contentions and find that the record establishes his violations. We conclude that a bar is consistent with the FINRA Sanction Guidelines and is neither excessive nor oppressive. Accordingly, we sustain FINRA's action.

I. Background

A. FINRA sent Evansen two requests for information in connection with its investigation of his alleged wrongdoing in customer accounts.

Evansen was registered with FINRA from 1987 until 2010 through several FINRA member firms, including as a registered representative of Newbridge from October 20, 2003 to May 6, 2009.[1] In 2010, Newbridge made filings with FINRA describing customer complaints and arbitration claims alleging that Evansen, in his capacity as a Newbridge registered representative, had recommended unsuitable transactions, engaged in unauthorized trading, traded excessively or churned accounts, and fraudulently misrepresented and omitted material facts.

In November and December 2010, FINRA sought information from Evansen under Rule 8210. In each of its two requests, FINRA notified Evansen that it was "conducting inquiries with respect to Form U5 Filings and Complaint Disclosures made by" Newbridge. The letters directed Evansen to respond to the allegations and questions regarding the customer accounts and set response deadlines of November 22, 2010 and December 17, 2010, respectively. FINRA

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[1] Evansen was associated with Jesup & Lamont Securities Corp. ("Jesup"), a former FINRA member firm, from May 1, 2009 to July 14, 2010. Jesup filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") on July 14, 2010, stating that it terminated Evansen's association because it ceased operations as a broker-dealer. Evansen is not currently associated with a FINRA member.

sent both requests to Evansen's Boca Raton, Florida address listed in the Central Registration Depository ("Florida CRD address").[2] Evansen did not meet either deadline.

B. FINRA initiated an expedited disciplinary proceeding and suspended Evansen for failing to respond to its requests for information.

On March 7, 2011, FINRA initiated an expedited proceeding against Evansen pursuant to FINRA Rule 9552 based on his failure to provide information requested pursuant to Rule 8210.[3] FINRA notified Evansen that he would be suspended from associating with any member firm unless he complied fully with its two information requests by March 31, 2011. It also advised Evansen of his right to request a hearing that would stay the effective date of his suspension.

On March 31, 2011, FINRA suspended Evansen after he did not provide the requested information or contact FINRA to request a hearing. FINRA sent Evansen a notice of this suspension explaining that he could request termination of the suspension on the ground of his full compliance with the information requests. But it warned that he would be automatically barred from association with any FINRA member firm in any capacity on June 10, 2011 if he failed to request termination of the suspension based on full compliance.[4] FINRA sent the March 7 and March 31, 2011 notices to Evansen's Florida CRD address.[5]

On June 6, 2011, four days before the automatic June 10 effective date of the bar, Evansen requested termination of his suspension, claiming that he was "never noticed." He sent this letter from his Florida CRD address, but stated that he had been in Atlantic City, New Jersey for six months and "only recently" returned to Florida. His letter did not respond to the information requests and did not indicate that any responses would be forthcoming. On June 8, 2011, FINRA responded in a letter reiterating that the suspension would not be terminated "[u]ntil and unless [Evansen] . . . produce[d] the requested information and documents." This letter further stated that the FINRA correspondence and Rule 8210 requests were properly served at Evansen's Florida CRD address because Evansen "did not update [his] information in CRD . . . nor did [he] otherwise notify FINRA staff of a more current address," and pointed out that Evansen's June 6 letter had been sent from his Florida CRD address.

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2 Each Rule 8210 request in this case was sent by first-class and certified mail.

3 FINRA Rule 9552(a) states that if a person subject to FINRA jurisdiction fails to provide any information or testimony requested by FINRA staff, the association may provide a written notice "specifying the nature of the failure and stating that the failure to take corrective action within 21 days after service of the notice will result in [a] suspension."

4 FINRA Rule 9552(f) permits a suspended individual to file a written request for termination of the suspension on the ground of full compliance with the notice of suspension. Rule 9552(h) provides that a suspended person who fails to request termination of the suspension within three months of the original notice of suspension will be barred automatically.

5 FINRA sent these notices by overnight delivery and first-class mail pursuant to FINRA Rule 9552(b).

Two days later, Evansen received confirmation that FINRA had automatically barred him under Rule 9552(h) for his failure to comply with the suspension notice and respond to its requests. On or about that same day, Evansen sent a response to the information requests by fax and overnight delivery, asserting that he "had no other information or documentation that . . . would aid in [FINRA]'s inquiry," and again requesting termination of the suspension. Evansen sent this letter from his Florida CRD address and did not provide an updated address.

On June 14, 2011, FINRA terminated Evansen's suspension and vacated the automatic bar by notice to Evansen but informed him that FINRA reserved the right to ask him further questions, request additional information, and pursue disciplinary action against him, "including but not limited to" disciplinary action under Rule 8210 for his late response.[6] FINRA sent this notice to Evansen's Florida CRD address.

C. After vacating the automatic bar, FINRA sent three requests for Evansen's on-the-record testimony in connection with its ongoing investigation.

In spring 2012, as part of its continuing investigation, FINRA attempted to schedule interviews with Evansen under Rule 8210. FINRA staff sent Evansen two letters in April 2012 requesting his appearance for on-the-record interviews ("OTR") on April 25, 2012 and May 9, 2012, respectively. FINRA sent these requests to Evansen's Florida CRD address.[7] Evansen did not appear, attempt to reschedule, or otherwise respond to FINRA.

On May 10, 2012, the day after the second OTR was scheduled to occur, FINRA staff checked the CRD records and discovered that they listed a New Lisbon, Wisconsin address ("Wisconsin CRD address") for Evansen as of that date. FINRA sent a third letter to this Wisconsin CRD address that same day, requesting Evansen's appearance for an OTR on May 21, 2012.[8] Evansen again failed to appear, attempt to reschedule, or otherwise respond. Each of the three OTR notices warned Evansen that he was "obligated to appear as requested and to answer [its] questions fully, accurately, and truthfully" and that "failure . . . to satisfy these obligations could expose [him] to sanctions, including a permanent bar from the securities industry."[9]

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[6] The parties dispute exactly when FINRA sent the bar notice and when Evansen responded. Evansen submitted a fax transmittal report indicating that he faxed his response on June 10, but FINRA states that it was not received until June 13. Evansen also contends that FINRA staff prematurely sent the bar letter before June 10. These factual disputes became moot once FINRA vacated the bar and terminated the suspension.

[7] The record includes CRD printouts indicating that the Florida address was his CRD address as of the April 13, 2012 and April 25, 2012 dates of those letters. The record also includes copies of the envelopes indicating that the letters were returned to FINRA from the Florida CRD address as undeliverable on May 14, 2012 and June 11, 2012.

[8] The certified mailing receipt for the third OTR notice was signed and returned by Evansen's father on May 17, 2012.

[9] The record includes a FINRA staff affidavit indicating that on May 9, 2012, FINRA staff verified that the CRD as of that date indicated that Evansen's residential address was the Florida

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D. FINRA initiated a disciplinary proceeding and issued a default decision when Evansen failed to respond to the complaint.

FINRA's Department of Enforcement ("Enforcement") initiated a disciplinary proceeding on June 12, 2012. The two-cause complaint alleged that Evansen violated Rules 8210 and 2010[10] by (i) providing late responses to FINRA's two information requests; and (ii) failing to appear and provide investigative testimony scheduled by FINRA on three occasions. The complaint specified a July 10, 2012 deadline for answering the disciplinary charges. On July 12, 2012, Enforcement sent Evansen a second notice, in accordance with FINRA Rule 9215(f), noting Evansen's failure to respond to the complaint, specifying a new July 30, 2012 deadline for an answer, and informing him that failure to answer by that date could be deemed an admission of the complaint's allegations and result in a default decision against him under FINRA Rule 9269 "without further notice." Enforcement filed a motion for default decision on August 7, 2012. Evansen did not respond to the complaint, the FINRA notices, or the motion for default, which were each sent to his Wisconsin CRD address.[11]

On August 24, 2012, the Hearing Officer issued a default decision.[12] The decision considered the two counts of the complaint separately and concluded that Evansen's failure to provide testimony warranted a bar from association with any FINRA member firm.[13]

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address. Evansen disputes the accuracy of the affidavit and asserts that it does not prove that the first two OTR notices went to the correct address. But as we explain more fully below, we do not rely on the affidavit to find that each OTR notice was mailed to the CRD address then on record. *See infra* note 42 and Section II.C.7.

[10] A violation of FINRA rules constitutes conduct inconsistent with just and equitable principles of trade and therefore also establishes a violation of FINRA Rule 2010. *See William J. Murphy*, Exchange Act Release No. 69923, 2013 WL 3327752, at *8 n.29 (July 2, 2013).

[11] The June 12 complaint and the July 12 notice were each sent to Evansen by first-class and certified mail. The certified mailings were delivered on June 18, 2012 and July 17, 2012, respectively, and the receipts for the certified mailings were signed by Evansen's father. The August 7 motion for default was sent by first-class mail. *See* Rule 9134(a)(2) (permitting service of papers other than a complaint by first-class mail).

[12] On August 24, 2012, the Hearing Officer issued a notice of default decision that incorrectly identified the date of the decision as August 20, 2012. On September 7, 2012, the Hearing Officer issued an amended notice of default decision to correct this error. In addition, the September 7 amended notice specified October 2, 2012 as the deadline for Evansen's appeal, recognizing that the incorrect date in the original notice could suggest an earlier deadline for filing an appeal than required under FINRA Rule 9311. Evansen timely appealed on October 1.

On appeal, Evansen points to a September 24, 2012 letter from FINRA's Department of Registration and Disclosure erroneously stating that his period for appeal ended on September 21, 2012, and claims that this error was evidence of wrongdoing. We find this claim moot because the NAC accepted his appeal as timely filed. *See infra* discussion at Section II.C.7.

E. The NAC affirmed the default decision and barred Evansen from association with any FINRA member firm.

On October 1, 2012, Evansen timely appealed to the National Adjudicatory Council (the "NAC"). On November 16, 2012, the NAC ordered Enforcement to supplement the record pursuant to FINRA Rule 9346(f).[14] On June 3, 2014, the NAC sustained the default, and, based on its review of the supplemented record,[15] barred Evansen from association with any member firm as a unitary sanction for the violations of Rules 8210 and 2010. The NAC found that Evansen's failure to provide testimony was complete and that his late response to the information requests was tantamount to a failure to respond. The NAC concluded that Evansen demonstrated a "long-playing pattern of indifference" to his FINRA responsibilities and that a bar was an appropriate sanction for his "entire course of misconduct." This appeal followed.

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[13] The Hearing Officer found that the late response to the FINRA information requests warranted a $25,000 fine and two-year suspension from association, but declined to impose these sanctions in light of the bar for the failure to appear for the OTRs.

[14] The NAC ordered that the supplement include evidence supporting the motion for default decision, a FINRA staff declaration in support of the motion for default decision, and evidence related to the Rule 9552 expedited proceedings. In its decision, the NAC explained that it ordered this supplement to ensure that the "record contain sufficient independent evidence to support FINRA's findings and enable the Commission to discharge its statutory review functions" under Exchange Act Section 19.

[15] Evansen sought leave to supplement the record with a Jesup pay stub and Form W-2, which, he claims, show that the NAC did not have jurisdiction in this case. The NAC denied Evansen's motion to adduce under FINRA Rule 9346(b). The NAC found that Evansen failed to "demonstrate why the evidence is material to the proceeding" because, as discussed below, it found that "the date upon which Evansen's association with Jesup was terminated is irrelevant" to FINRA's jurisdiction in this case. NAC Decision at 13 n.26.

In addition to the Jesup pay stubs and Form W-2, the NAC stated that Evansen submitted "a large volume of [other] documents that were not part of the record below" as attachments to his papers without seeking leave to adduce them under FINRA rules. The NAC explained that "where necessary to give full consideration to Evansen's arguments, [it] considered the substance of the documents" but found them "irrelevant to liability and sanctions in this matter." NAC Decision at 4 n.10.

II. Analysis

We base our findings on an independent review of the record and apply a preponderance of the evidence standard for self-regulatory organization disciplinary actions.[16] Pursuant to Exchange Act Section 19(e)(1), in reviewing an SRO disciplinary action, we determine whether the aggrieved person engaged in the conduct found by the SRO, whether such conduct violated the securities laws or SRO rules, and whether those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[17]

A. Evansen's failures to timely respond to information requests and to appear for testimony violated Rules 8210 and 2010.

The essential facts concerning Evansen's conduct are undisputed. FINRA sought information and testimony from Evansen pursuant to its authority under Rule 8210. Evansen did not provide any information until more than six months after FINRA requested it, and only on the automatic effective date of the bar. FINRA sought Evansen's testimony on three separate occasions, but Evansen failed to appear and never sought to reschedule. We therefore sustain FINRA's finding that Evansen failed to timely respond to the information requests and to appear for testimony at three OTRs.

We also sustain FINRA's finding that Evansen's conduct violated Rules 8210 and 2010. Under Rule 8210, FINRA has the authority to require any person subject to its jurisdiction to provide information in writing and to "testify at a location specified by FINRA staff, under oath or affirmation . . . with respect to any" FINRA investigation. Evansen had an unequivocal obligation to cooperate fully and promptly with FINRA's information and OTR requests.[18] Although Evansen contends that his responses to the information requests fully complied with his Rule 8210 obligations, the record supports FINRA's finding that he failed to provide the

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[16] *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *9 (May 27, 2011) (citing *Seaton v. SEC*, 670 F.2d 309, 311 (D.C. Cir. 1982) (upholding preponderance of evidence standard in Commission review of SRO disciplinary proceeding)), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

[17] 15 U.S.C. § 78s(e)(1); *see, e.g.*, *Joseph Abbondante*, Exchange Act Release No. 53066, 2006 WL 42393, at *6 (Jan. 6, 2006), *petition denied*, 209 F. App'x 6 (2d Cir. 2006). Evansen does not argue, and the record does not support a finding, that Rules 8210 and 2010 are, or FINRA's application of them was, inconsistent with the Exchange Act.

[18] *CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 WL 223617, at *5 (Jan. 30, 2009) (requiring full and prompt cooperation with requests); *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 WL 4899010, at *4 (Nov. 14, 2008) (explaining that the obligation to cooperate with Rule 8210 requests is "unequivocal" because "delay and neglect" by recipients of such requests "undermine the ability of [FINRA] to conduct investigations and thereby protect the public interest" and the "failure to respond impedes [FINRA]'s ability to detect misconduct that threatens investors and markets" (internal quotations and punctuation omitted)) *petition denied*, 347 F. App'x 692 (2d Cir. 2009).

information until almost six months after the initial request and well after the successive deadlines set in the information requests. We therefore sustain FINRA's finding that he violated Rules 8210 and 2010 by failing to respond promptly.

Evansen also argues that his failure to appear for the OTRs did not violate Rule 8210. He argues that his earlier written responses obviated the need to appear, and that when FINRA accepted those responses, it also accepted his representation that he "had no other information or documentation that . . . would aid in [FINRA]'s inquiry." Evansen is mistaken. It is well established that recipients of Rule 8210 requests cannot second-guess whether compliance with a particular request is necessary.[19] A failure to comply is not excused by the recipient's belief that responding or appearing would not yield useful information for the investigation—the request triggers an obligation to respond "even if [the recipient's] response [is] a statement that he believed he had already provided [FINRA] with the information it had requested."[20] Moreover, even if a former associated person cannot provide the information sought by OTR, he or she "nonetheless has the obligation 'to explain the deficiencies in [his or her] responses or answer as completely as [he or she is] able.'"[21] Here, when FINRA terminated his suspension it specifically notified Evansen that it reserved the right to ask additional questions and request additional information.

Finally, Evansen argues that he did not act with the state of mind necessary to violate Rule 8210, claiming that his whistleblowing efforts show that he would not deliberately "miss a hearing, by an examiner in District Seven on [his] own license."[22] But scienter is not an element

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[19] *See Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 WL 1494527, at *5 & n.20 (Apr. 17, 2014) (stating that an associated person may not "take it upon [himself] to determine whether [a Rule 8210 request] is material to [a FINRA] investigation of [his] conduct"); *Louis F. Albanese*, Exchange Act Release No. 39280, 1997 WL 665082, at *4 n.12 (Oct. 27, 1997) ("[R]egardless of what other information [FINRA] may have had, Albanese was required to provide on-the-record testimony as requested by [FINRA].").

[20] *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 WL 3306103, at *4 (Nov. 8, 2007) (internal quotations omitted), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

[21] *Joseph Patrick Hannan,* Exchange Act Release No. 40438, 53 SEC 854, 1998 WL 611732, at *3 (Sept. 14, 1998) (internal citations omitted); *see also id.* at *4 (confirming that a former associated person had "an obligation to make himself available and to provide whatever information he possessed to [FINRA]").

[22] He further claims that his whistleblowing communications with the Commission and FINRA are evidence of the legitimacy of his appeal. But his whistleblowing efforts are not relevant to the Rule 8210 violations. *See Asensio & Co.*, Exchange Act Release No. 68505, 2012 WL 6642666, at *15 (Dec. 20, 2012) ("Efforts to expose stock fraud, regardless of motive, do not indicate a greater likelihood of compliance with Rule 8210, which pertains to an associated person's cooperation with FINRA investigations."). Further, we find that there is no evidence that FINRA's investigation, disciplinary proceeding, or sanctions were retaliation for any purported whistleblowing efforts. *See infra* Sections II.C.5-7.

of a Rule 8210 violation.[23] We therefore sustain FINRA's finding that Evansen's failure to appear for the OTRs violated Rules 8210 and 2010.

B. FINRA maintained jurisdiction to file its complaint against Evansen.

Under FINRA Bylaw Article V, Section 4(a)(i), FINRA maintains jurisdiction over formerly associated persons for two years after their FINRA registration ends, *i.e.*, "two years after the effective date of termination of registration." We reject Evansen's contention that the two-year window for FINRA's continuing jurisdiction closed before FINRA filed its complaint on June 12, 2012. Evansen claims that his employment and association with Jesup ended before the Firm filed with FINRA a Form U5 Uniform Termination Notice for Securities Industry Registration. But "the termination upon which [FINRA's] continuing jurisdiction is predicated is not termination of employment or association [with a member firm], but termination of *registration.*"[24]

Evansen's jurisdictional challenge fails because it ignores the express terms of FINRA's continuing jurisdiction under Section 4(a)(i) and is contrary to FINRA's system of continuing jurisdiction and registration set forth in its bylaws. Evansen contends that his own actions opened FINRA's two-year window of continuing jurisdiction—even before FINRA received the notice for terminating his registration. This is incorrect. FINRA is in charge of its own registration system and requires filings from its members, including on Forms U5, to administer registration changes and the consequences that flow from changes in registration status.[25] A person who becomes registered remains registered until FINRA (not the registered person) ends the registration, based, among other things, on the Forms U5 it receives.[26] A registered person cannot unilaterally terminate his or her FINRA registration before FINRA receives the

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23 *Berger*, 2008 WL 4899010, at *11. As explained below, whistleblowing is not a defense to a Rule 8210 violation.

24 *Donald M. Bickerstaff*, Exchange Act Release No. 35607, 1995 WL 237230, at *2 (Apr. 17, 1995) (emphasis in original) (interpreting a prior version of the bylaw and finding that a pending examination "prevented the termination of [Bickerstaff's] registration from becoming effective").

25 *See generally* FINRA Bylaws Article V (describing registration process); *Notice of Filing of Proposed Rule Change Relating to Proposed Changes to Forms U4 and U5*, Exchange Act Release No. 59616, 2009 WL 1212330, at *8 (Mar. 20, 2009) (confirming that "the authority to declare the effective date of termination for purposes of FINRA registration resides with FINRA").

26 FINRA deems any "natural person who is registered" to be a "person associated with a member." FINRA Bylaws, Article I(rr) (defining "person associated with a member" as including, among others, "a natural person who is registered" with FINRA and a person "engaged in the investment banking or securities business who is directly or indirectly . . . controlled by a member, whether or not such person is registered or exempt from registration . . .").

prescribed form.[27] Moreover, the registered person receives a copy of the form filed with FINRA, with express reminders that he or she will "continue to be subject to the jurisdiction of regulators for at least two years after [his or her] registration is terminated" and that FINRA "determines the effective date of termination of registration."[28]

Evansen claims that his employment and association with Jesup ended on May 29, 2010,[29] but that Jesup failed to file the Form U5 within thirty days as required. He contends that it is unfair for Jesup's late filing to delay the two-year window of continuing jurisdiction. But as explained above, the two-year window opens when FINRA terminates the registration, and FINRA must be able to rely on its receipt of notices to set a date certain for terminating registration.[30] Here, the two-year jurisdictional window opened on July 14, 2010. In any case, FINRA's June 12, 2012 complaint would have been timely even if Jesup had filed the Form U5 thirty days after May 29, 2010.

Evansen argues that Bylaw Article V, Section 4(a)(iii) applies to him instead of Section 4(a)(i). Under Section 4(a)(iii), the two-year window begins to run after *association* ends, not registration. But Section 4(a)(iii) applies only to persons who were formerly associated in an unregistered capacity.[31] Because Evansen was formerly associated in a registered capacity,

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[27] FINRA Bylaws Article V, Section 3(a) (requiring member firm to notify FINRA "following the termination of the [registered person's] association" with the member firm and to "concurrently" provide a copy of the FINRA termination notice to the registered person).

[28] We take official notice, pursuant to Rule of Practice 323, 17 C.F.R. § 201.323, of the Form U5, available at http://www.finra.org/sites/default/files/Form_U5_060115.pdf (last visited June 16, 2015).

[29] Evansen cites a Jesup W-2 and paycheck as evidence of the end of his association. We treat Evansen's resubmission of this evidence as a motion to adduce pursuant to Rule of Practice 452. Although these documents are not relevant to FINRA's jurisdiction in this case, we admit them as an exercise of discretion to address his contentions.

[30] *See* FINRA Bylaws Article V, Section 3(a) (stating that a member firm's failure to give 30 days' notice of termination of association will result in a late fee, but that FINRA "may in its discretion declare the termination effective at any time"); Instructions to Form U5 (stating that "[t]he SRO/jurisdiction determines the effective date of termination of registration").

[31] The specific terms of Sections 4(a)(i) and (ii) apply to persons who were registered when formerly associated while the general terms of Section 4(a)(iii) apply to persons who were previously associated but unregistered. *See generally Baltimore Nat. Bank v. State Tax Commission of Md.*, 297 U.S. 209, 215 (1936) ("It is a well-settled principle of construction that specific terms covering the given subject-matter will prevail over general language of the same or another statute which might otherwise prove controlling." (internal citations omitted)); *Reed A. Hatkoff*, Exchange Act Release No. 33087, 51 SEC 769, 1993 WL 430292, at *3 (Oct. 21, 1993) (rejecting a formerly registered person's attempt to claim status as an "unassociated person" to avoid FINRA jurisdiction when the interpretation would "allow an associated person to immunize himself from being probed regarding his wrongdoing by the simple device of leaving the industry").

Section 4(a)(i) applies. As explained above, under Section 4(a)(i), the two-year window began on "the effective date of termination of registration."

Finally, Evansen challenges FINRA's jurisdiction by citing the Exchange Act definition of an associated person, which includes an exception for persons acting in a solely clerical or ministerial role.[32] Evansen contends that his association ended when he gave notice of his resignation to Jesup in April 2010 and then performed clerical work at the end of his tenure. But the exception is limited to certain Commission administrative proceedings under Section 15(b) of the Exchange Act; it does not apply to the FINRA registration or continuing jurisdiction bylaws or to FINRA disciplinary proceedings that we review pursuant to Exchange Act Section 19(e). And even if a FINRA registered person could unilaterally terminate his registration while continuing to perform work for a member firm, Evansen has not substantiated his claim that his responsibilities at Jesup were solely clerical beginning from April 2010.[33]

For the foregoing reasons, we find that the complaint was timely filed under FINRA Bylaw Article V, Section 4 and that FINRA had jurisdiction for purposes of these proceedings.

B. FINRA provided Evansen with a fair proceeding.

FINRA must provide procedural protections in its disciplinary proceedings pursuant to Exchange Act Sections 15A(b)(8) and 15A(h)(1).[34] Evansen makes several procedural arguments concerning the sufficiency of the Rule 8210 requests, timing of the OTRs, and entry of default. He also argues that the proceedings were unfair and were the result of selective prosecution, bias, and retaliation for his whistleblowing activities. For the reasons set forth below, we reject his arguments and find that FINRA provided Evansen with a fair proceeding.[35]

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[32] Exchange Act Section 3(a)(18), 15 U.S.C. § 78c(a)(18) (defining associated person to include "any employee . . . except that any person associated with a broker or dealer whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of section 15(b) of this title (other than paragraph (6) thereof)").

[33] In order to establish that he resigned in April, Evansen introduced a personal e-mail to another potential employer in which he stated that he "officially notified my company, my general manager and compliance" of his plans. But because Evansen did not send this message to Jesup, it is not relevant evidence of his resignation or the end of his association and, in fact, Evansen previously argued that he resigned in early June 2010. And this e-mail casts doubt on Evansen's claim that his work during May 2010 was purely clerical because it stated that he was "facilitating a seamless transition with my clients with other brokers."

[34] Exchange Act Section 15A(b)(8), 15 U.S.C. § 78*o*-3(b)(8), as relevant here, requires FINRA to provide a fair procedure for disciplining persons associated with members. Section 15A(h)(1), 15 U.S.C. § 78*o*-3(h)(1), in relevant part, requires that FINRA bring specific charges; notify such person of, and give him an opportunity to defend against, the charges; and keep a record of the proceedings.

[35] Evansen asserts that he has been deprived of due process. We have long held that the requirements of constitutional due process do not apply to FINRA proceedings because FINRA

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1. FINRA sent proper notice of the information requests in 2010.

We reject Evansen's claim that the Rule 8210 requests were deficient because FINRA sent them to his CRD address on record instead of searching for an alternative address or contacting him by cell phone or e-mail. During the period at issue, Evansen was subject to FINRA's continuing jurisdiction, and, as a result, he was required to update and receive mail at his CRD address on record.[36] A Rule 8210 notice is deemed received when mailed to the formerly registered individual's last known residential address reflected in the CRD.[37] Thus, when the Rule 8210 requests and disciplinary complaints were mailed to Evansen's CRD address they were "deemed to have been received there, whether or not [he] actually receive[d] them."[38] When Evansen registered with FINRA, he agreed to comply with these continuing obligations and to be bound by these rules.[39] Here, CRD printouts in the record establish that FINRA

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is not a state actor. *See, e.g., Eric J. Weiss*, Exchange Act Release No. 69177, 2013 WL 1122496, at *6 n.40 (Mar. 19, 2013) (citing cases). Nevertheless, the Exchange Act provisions requiring fair procedures in FINRA disciplinary proceeding give rise to "due-process-like" requirements. *D'Alessio v. SEC*, 380 F.3d 112, 121, 123 (2d Cir. 2004). Thus, we consider Evansen's arguments in light of these statutory fairness requirements.

[36] In order to facilitate FINRA investigations, former registered persons must cooperate with FINRA investigations for "at least two years *after* an individual's registration has been terminated by the filing of" a Form U5, and are also required to update their CRD mailing address during that period. NASD Reminds Registered Persons of Continuing Obligation to Update NASD Records, NASD Notice to Members 97-31, 1997 WL 1909798, at *1-2 (May 1, 1997) (emphasis in original) ("Continuing Obligation Notice"); *see Dennis A. Pearson, Jr.*, Exchange Act Release No. 54913, 2006 WL 3590274, at *6 & n.33 (Dec. 11, 2006) (stating that "a failure to respond to [FINRA] in connection with an investigation . . . is not excused by that person's having temporarily moved from the address listed in the CRD" and that persons have "a continuing duty to . . . receive and read mail sent to [them] at" the CRD address).

FINRA may retain jurisdiction for longer than two years if there are pending disciplinary complaints or an amended Form U5. *See* Continuing Obligation Notice, 1997 WL 1909798, at *2 (noting "even if a Form U5 has been filed, the termination of an individual's registration does not take effect until all disciplinary complaints against them are resolved" and that the SRO "may retain jurisdiction over a registered individual for four years after the original Form U5 is filed" if an amended Form U5 is filed two years after the original Form U5); FINRA Bylaws, Article V, Sections 3(a), 4(a).

[37] Rule 8210(d) ("A notice under this Rule shall be deemed received by the . . . formerly registered 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.").

[38] Continuing Obligation Notice, 1997 WL 1909798, at *1.

[39] Bylaws, Article IV, Section 2(a)(1) (requiring registered persons to agree, as a condition to membership, to comply with FINRA Bylaws, rules, and regulations); *Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 WL 6985131, at *12 n.36 (Dec. 11, 2014)
(continued...)

investigative staff complied with the Rule 8210(d) requirements when it sent each of the requests for information and OTRs, including when the staff mailed the final request to Evansen's Wisconsin CRD address on record.

Rule 8210(d) provides for an exception if the FINRA staff responsible for sending the notice "has actual knowledge that the address in the Central Registration Depository is out of date or inaccurate" and requires the notice to be mailed to "any other more current address . . . known to" the person responsible for the mailing. But this exception did not apply here. There is no evidence that the FINRA investigative staff had actual knowledge that Evansen was staying in New Jersey when they sent the requests. In fact, Evansen first mentioned to FINRA that he had temporarily relocated *after* FINRA had sent the first two Rule 8210 requests. At that time, FINRA investigators reminded Evansen that he was deemed to have received notice of the information requests at his Florida CRD address. The purpose of the CRD address requirements is to ensure that FINRA is able to rely on its records when sending notices, and, accordingly, persons subject to those requirements "cannot shift the burden of keeping [address] information current" to FINRA.[40]

2. FINRA sent proper notices of the OTRs in 2012.

With respect to the OTR notices that FINRA sent in April 2012, Evansen argues that he did not receive proper notice because they were sent to his old Florida CRD address after he sent his updated Wisconsin address to FINRA. To support this claim, on appeal to the NAC he introduced a letter dated and notarized on March 27, 2012 (the "Address Change Letter") in which he requested that the CRD be updated to reflect his Wisconsin address. On appeal to the Commission, he further seeks to adduce a May 2, 2012 letter from FINRA's Registration and Disclosure Department (the "CRD Response") acknowledging receipt of Evansen's "request dated March 27, 2012 for an address change" and stating that "we have updated Web CRD with your new address."[41]

(...continued)
(citing *Toni Valentino*, Exchange Act Release No. 4925, 54 SEC 330, 2004 WL 3000098, at *5 (Feb. 13, 2004) (finding that that, by registering, a registered representative "consent[s] to abide by [FINRA's] rules")); *Erenstein*, 2007 WL 3306103, at *6 ("Erenstein's contractual relationship with [FINRA], entered into when he became an associated person with [a FINRA] member, included his agreement to abide by all its rules.").

[40] *See Pearson*, 2006 WL 3590274, at *6; *see also Alan Howard Gold*, Exchange Act Release No. 33675, 51 SEC 998, 1994 WL 62099, at *3 (Feb. 24, 1994) (noting that the applicant could not "shift the burden of keeping [CRD] information current from the individual, who possess the information, to the Exchange, which does not").

[41] On appeal Evansen seeks to adduce this CRD Response and other documents that he claims are relevant to his whistleblower-related actions, including (i) FINRA's 2012 Year in Review and Annual Financial Report, which Evansen claims reflected the results of his 2011 whistleblower report; (ii) an SEC press release dated May 14, 2014 which he claims also resulted from his 2011 whistleblower report; (iii) Evansen's letter to FINRA dated May 21, 2013 describing the 1993 criminal conviction of a former regional director of the FINRA district office
(continued...)

Neither of these letters shows that the April 2012 OTR notices were required to be sent to Evansen's Wisconsin address under Rule 8210(d). First, these letters do not show that the FINRA staff that sent the OTR notices actually knew Evansen's Wisconsin address in April when they sent them. Rather, the record includes evidence indicating that the CRD showed the Florida address on April 13, 2012 and April 25, 2012 when these notices were sent and that Evansen used his Florida address in his June 2011 correspondence with FINRA investigative staff. Second, the correspondence cited by Evansen was with the FINRA Registration Department, but his contention relies on a Rule 8210 exception that applies to the actual knowledge of the staff sending the notice—not the Registration Department. Third, even if the Rule 8210(d) exception applied to the actual knowledge of the Registration Department staff, Evansen has not demonstrated that his Address Change Letter was sent or received for processing by that department before investigative staff sent the April 13 and April 25 OTR notices. The Address Change Letter was dated and notarized on March 27, 2012, but the CRD Response Letter states that it was processed by the Registration Department on May 2—after the two April OTR notices had been sent.[42]

Moreover, Evansen independently violated Rule 8210 when he failed to appear or even respond to the final OTR notice. Evansen concedes that this notice and the complaint were sent to his Wisconsin address and that his father signed a certified mail notice for them, but he claims that FINRA failed to prove personal service. Evansen claims that personal service was not

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(...continued)
that conducted the investigation; and (iv) a June 14, 2013 Reuters article describing Evansen's May 21, 2013 letter and the official's resignation. FINRA opposes Evansen's motion.

Rule of Practice 452 requires that the party seeking to adduce evidence "show with particularity that such additional evidence is material and that there were reasonable grounds to adduce such evidence previously." 17 C.F.R. § 201.452. We find that Evansen has not shown reasonable grounds for failing to introduce the evidence at an earlier stage, or demonstrated that any of this evidence is material to the Rule 8210 violations, but as an exercise of discretion, we admit the CRD Response and Evansen's May 21, 2013 letter, which were sent to or from FINRA before Evansen filed his July 3, 2014 appeal to the Commission. We also take official notice, pursuant to Rule of Practice 323, 17 C.F.R. § 201.323, of the publicly available FINRA 2012 annual report, the May 14, 2014 press release, and the June 14, 2013 Reuters article.

But none of these documents affects the outcome here. They do not demonstrate that FINRA failed to comply with notice requirements or excuse Evansen's violations. Nor do they support Evansen's claim that FINRA's investigation was triggered by his purported whistleblowing, which, as noted above, began only after FINRA began its investigation.

[42] As Evansen points out, the May 2 letter stating that the CRD had been updated is inconsistent with the FINRA affidavit stating that a May 9 CRD check showed Evansen's Florida address. Evansen contends that this inconsistency is evidence of perjury or bad faith on the part of FINRA investigative staff. But the May 9 CRD check was not dispositive because the relevant notices were mailed on April 13 and April 25. Other evidence shows that investigative staff checked the CRD record on May 10, saw the Wisconsin address, and sent a third OTR notice to the Wisconsin address.

properly achieved because his father had vision and mobility problems when he signed.[43] Evansen also argues that his attendance at the last OTR was not required because the return receipt for the notice was not signed until May 17, two business days before the May 21 OTR.

Under Rule 8210(d), as a formerly registered person, Evansen was deemed to have received the requisite constructive notice of the final OTR when the notice was sent to his most recent CRD address. For the final OTR, Evansen does not dispute that the notice was sent to the correct CRD address.[44] While Rule 8210 requires personal service for persons "formerly associated with a member in an *unregistered* capacity" (emphasis added), this personal service requirement does not apply to Evansen because he was formerly associated in a registered capacity. And even if personal service had been required, service on his father would have complied with FINRA's personal service rule, which allows service by leaving a copy with a person of suitable age and discretion who resides at the address.[45] FINRA had no obligation to confirm the mobility and vision of persons who signed certified mail receipts. Contrary to his claim that he received only two business days' notice of the final OTR, Evansen was deemed to have received the notice under FINRA rules when it was sent on May 10, not when the return receipt was signed.[46]

3. Evansen did not seek to reschedule the OTRs.

Evansen contends that he was not required to appear for the OTRs because the notices did not give him sufficient time to prepare and the last OTR conflicted with his commitment to give grand jury testimony in another matter. He suggests that FINRA was deliberately scheduling the OTRs to make it impossible for him to comply, and that his grand jury subpoena bound him to secrecy that prevented him from appearing for any OTR. To the contrary, recipients of Rule 8210 requests should contact FINRA staff to fully and promptly resolve such scheduling issues.[47] Evansen provides no explanation for his failure to reschedule and fails to substantiate his suggestion that the secrecy of the grand jury deliberations excused his failure to

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[43] Evansen claims that "No documents were EVER personally handed to me; no documents were EVER left at my office, and NO documents were ever left with someone of . . . 'suitable age and discretion.'" But Evansen does not explain how he learned about the final OTR, the disciplinary action, or the other FINRA documents sent to his Wisconsin CRD address.

[44] *See Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 WL 1683913, at *3 (Apr. 18, 2013); *see also* Rule 9134(b)(1) (providing that "[p]apers served on a natural person may be served at the natural person's residential address, as reflected in the [CRD]"); Rule 9134(a)(3) ("Service by mail is complete upon mailing.").

[45] *See* FINRA Rule 9134(a)(1) (indicating that personal service "may be accomplished by . . . leaving a copy . . . with a person of suitable age and discretion residing therein").

[46] *See supra* text accompanying notes 37 and 44.

[47] *CMG Inst. Trading*, 2009 WL 223617, at *7 ("If Applicants had a problem meeting the deadline set by [FINRA], they should have 'raised, discussed, and resolved [it] with the [FINRA] staff in the cooperative spirit and prompt manner contemplated by the Rules.'" (internal citation omitted)).

provide on-the-record testimony for a FINRA investigation of his own conduct.[48] Nor is there any evidence that the FINRA investigative staff had any knowledge of Evansen's schedule. Moreover, Evansen's consistent pattern of failing to respond to Rule 8210 requests or related FINRA notices until there is an imminent threat of discipline casts doubt on his claim that he had genuine scheduling or grand jury secrecy concerns.

4. FINRA procedures for the default and NAC decision were appropriate.

Evansen contends that the NAC improperly denied him the opportunity for oral argument. Under FINRA Rule 9344(a), the NAC may issue a decision "on the basis of the record and other documents" without oral argument if the appealing party did not answer the complaint and "fail[ed] to show good cause for the failure to participate." Like the NAC, we find that Evansen failed to show good cause for his failure to participate in the proceeding below; accordingly, the NAC properly denied the request for oral argument on that ground.

FINRA Rule 9269(a)(1) authorizes a Hearing Officer to issue a default decision if a respondent fails to answer a complaint within the time afforded under Rule 9215. Evansen contends that the default was improper. He claims that he had good cause for his failure to appear and that the hearing had "no legal significance" because he did not know about it and was not properly served with the complaint or notice of the hearing. As explained above, there is no merit to these claims. Two notices of the complaint were properly served at the Wisconsin CRD address pursuant to FINRA Rules 9131 and 9134.[49] The certified mail receipts were returned to FINRA with signatures. The second notice specifically warned that failure to answer could result in a default, and the hearing officer followed the default procedures in Rule 9269.[50] Under these circumstances, Evansen has not demonstrated good cause for his failure to participate or any error in the NAC's decision to forgo oral argument.

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[48] *See* Fed. R. Crim. P. Note 2 to subdivision 6(e) (confirming that the "rule does not impose any obligation of secrecy on witnesses"); *cf. United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960) (explaining that the secrecy requirements did not apply to "testimony . . . sought . . . for its intrinsic value in the furtherance of a lawful investigation" and that the rule "is intended only to protect against disclosure of what is said or what takes place in the grand jury room").

[49] Like Rule 8210(d), FINRA Rule 9134(b)(1) focuses on the actual knowledge of the person sending the mailing:

> Papers served on a natural person may be served at the natural person's residential address, as reflected in the Central Registration Depository, if applicable. When a Party or other person responsible for serving such person has actual knowledge that the natural person's Central Registration Depository address is out of date, duplicate copies shall be served on the natural person at the natural person's last known residential address and the business address in the Central Registration Depository of the entity with which the natural person is employed or affiliated.

[50] Evansen filed his NAC appeal after receiving a notice of the default.

5. Evansen's whistleblower defense is without merit.

Evansen argues that FINRA issued the Rule 8210 requests, instituted this disciplinary proceeding, and imposed sanctions to retaliate for: (a) Evansen's former association with Jesup, his purported whistleblowing, or the fact that he conducted such activities through an attorney disfavored by FINRA; or (b) his letter dated May 21, 2013 describing the criminal record of a former FINRA official involved in the investigation.

Evansen's retaliation claims are not supported by the chronology of events in this matter or other evidence. Evansen claims that he began whistleblowing to the Commission in May 2011. But FINRA issued the first two Rule 8210 requests in November and December 2010, which was *before* Evansen began his purported whistleblower activities. In addition, each of the Rule 8210 requests stated that FINRA was investigating "Form U5 Filings and Complaint Disclosures" by Newbridge regarding allegations that Evansen engaged in wrongdoing in customer accounts—a legitimate and routine basis for FINRA investigation.[51]

Further, Evansen offers no evidence that FINRA investigators knew about his purported whistleblowing in June 2011, when FINRA told him that it reserved the right to ask further questions or pursue further disciplinary action under Rule 8210. And Evansen sent his letter regarding the former FINRA official in May 2013—*after* the Hearing Panel issued its decision, after he appealed to the NAC, and after the NAC ordered a supplement to the record. Although the NAC decision followed Evansen's letter, he fails to substantiate his assertion that the NAC decision was in retaliation for the letter or for whistleblowing.

In any case, whistleblowing "does not provide [an applicant] with an affirmative defense or immunity from sanction" for his own misconduct, and improper FINRA motives are not defenses to the underlying violations.[52] We have found no evidence that the Newbridge filings were an improper basis for a FINRA investigation.

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[51] *See, e.g.*, *Mullins*, 2012 WL 423413, at *5 (stating that "FINRA launched an investigation of the events at issue in this proceeding after Morgan Stanley filed a Form U5 with FINRA"); *Houston*, 2011 WL 6392264, at *5 ("After [the firm] terminated Houston, [FINRA] staff began an investigation into his possible misconduct at the firm."); *Richard A. Neaton*, Exchange Act Release No. 655598, 2011 WL 5001956, at *3 (Oct. 20, 2011) ("Shortly after Securian submitted the amended Form U5, FINRA's Department of Enforcement . . . commenced an investigation of Neaton."); *see also* Continuing Obligation Notice, 1997 WL 1909798, at *2 ("For at least two years after an individual's registration has been terminated by the filing of a [Form U5], the NASD may use Rule 8210 to investigate whether the individual violated any of the NASD's rules and may bring disciplinary action if the individual fails to comply with Rule 8210.").

[52] *Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 WL 3228694, at *13 (Nov. 8, 2006).

6. Evansen was not subject to selective prosecution.

Evansen argues that he was subject to selective prosecution for his religious beliefs, which he claims were reflected in his Rule 8210 responses and in his blog, or for exercising his speech rights as a whistleblower.[53] To establish a claim of selective prosecution, an applicant must demonstrate that he was unfairly singled out for enforcement action when others who were similarly situated were not, and that that his prosecution was motivated by improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right.[54] Here, there is no evidence substantiating Evansen's speculation that he was unfairly singled out for investigation or enforcement based on any of those grounds. Rather, as noted above, FINRA's investigation was triggered by filings relating to Evansen's conduct in customer accounts, and FINRA routinely investigates such filings and routinely prosecutes violations of Rule 8210.[55] Moreover, none of the documents that Evansen cites demonstrate any link between Evansen's religious beliefs and the requests at issue in these proceedings. Nor is there evidence that FINRA's investigation, which began in 2010, was triggered by his whistleblowing, which did not begin until May 2011. Evansen has not shown that FINRA's investigative staff was aware of the blog, its religious content, or his whistleblowing efforts when it began its investigation.[56]

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[53] For instance, Evansen responded to the Rule 8210 requests with what he describes as a "sensational golf story with significant religious overtones" and his blog asserted the religious significance of certain numbers.

[54] *United States v. Huff*, 959 F.2d 731, 735 (8th Cir. 1992); *Terrance Yoshikawa*, Exchange Act Release No. 53731, 2006 WL 1113518, at *7 (Apr. 26, 2006) (rejecting selective prosecution claim by noting proceedings charging similar violations).

Evansen cites 42 U.S.C. § 1983 in support of his selective prosecution claim, but offers no precedent or analysis indicating that the statute establishes an affirmative defense in FINRA disciplinary proceedings. *See* 42 U.S.C. § 1983 (creating a private right of action for violations of civil rights under color of law). As noted, we consider Evansen's arguments in light of the Exchange Act's fairness requirements. *See supra* notes 34 and 35 and accompanying text.

[55] *Shellenbach v. SEC*, 989 F.2d 907, 911 (7th Cir. 1993) (stating "[w]e need not ponder petitioner's theories about a conspiracy among 'rogue' staff members, however, because courts will not inquire into a prosecutor's ill motive unless there is a showing of selective enforcement" or "an attempt to discriminate by arbitrary classification"); *Nicholas T. Avello*, Exchange Act Release No. 46780, 2002 WL 31487442, at *7 n.19 (Nov. 7, 2002) ("Avello has failed to bring to light any evidence of—much less establish—any improper motive on the part of the NASD.").

[56] In his reply brief, Evansen asserts that he cited his blog in correspondence to FINRA's Regional Chief Counsel, but he does not identify the date of this purported correspondence or show that religious content in the blog influenced FINRA's Rule 8210 requests.

7. Evansen does not demonstrate any unfairness or bias in the NAC decision.

Evansen also alleges that FINRA's investigation relied on biased or unfair investigative methods. He asserts that FINRA investigative staff improperly contacted (a) his former Newbridge customers in 2009 and 2012, (b) the notary of his Address Change Letter on May 10, 2012, and (c) his former Jesup supervisor in 2014. As an initial matter, we note that the Exchange Act procedural requirements do not extend to FINRA investigations because "[t]he purpose of an investigation is to 'determine whether the SRO's investigation has produced evidence meriting further proceedings' —not to determine whether a violation has actually occurred."[57] Evansen does not show that FINRA's efforts to contact others prevented him from responding to Rule 8210 requests or answering the complaint. And, if FINRA's investigative staff repeatedly contacted the notary on May 10, 2012 about Evansen's Address Change Letter as he claims, that would suggest that the staff first learned about this letter and his Wisconsin address on that date—*i.e.*, after staff had already sent the first two OTR requests to the Florida address in April. Similarly, any communications between FINRA investigators and his former customers or supervisors do not raise any logical inference that the Rule 8210 requests at issue here were improper and had no bearing on whether Evansen violated Rule 8210 or whether the NAC properly found the violations charged.

Evansen also contends that staff from a FINRA district office engaged in perjury and that the staff's affidavit and other NAC submissions contained inaccurate and misleading dates. Evansen's challenges do not establish any deliberate misconduct by staff and, in any case, do not bear on the substantial evidence establishing his Rule 8210 violations. For instance, Evansen disputes the exact dates of correspondence that he sent to and received from investigative staff between June 9 and June 13, 2011.[58] But as noted above, these disputes are moot because the June 2011 bar at issue was terminated on June 14, 2011 and his responses were more than six months late—regardless of when during the four-day period at issue he sent them. Evansen also disputes the FINRA affidavit, which states that staff first learned his CRD Wisconsin address on May 10, 2012. As noted above, this claim is not determinative because evidence—apart from the disputed affidavit—shows that the April 2012 requests were sent to the CRD addresses on record at that time. Finally, contrary to Evansen's contention that the index of evidence submitted to the NAC suggested a misleading chronology, we do not find that the NAC was improperly influenced by the order in which the documents were listed on the index.

Nor has Evansen demonstrated how any other purported procedural errors before his NAC appeal prevented him from complying with his Rule 8210 obligations or participating in the proceeding. For instance, Evansen argues that FINRA's Department of Registration and Disclosure sent a September 2012 letter incorrectly stating that the deadline for appealing to the NAC had passed. But rather than prejudicing his defense, the NAC considered his appeal timely

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[57] *Cody*, 2011 WL 2098202, at *16.

[58] The staff stated that Evansen's response to information requests was received on Monday, June 13, 2011 while Evansen claims that he first faxed the response the previous Friday, June 10. Evansen also argues that the letter confirming the automatic June 2011 bar was sent on June 9, 2011 rather than the June 10, 2011 date cited by the Division.

filed on October 1, 2012. He further claims that the investigative staff improperly denied him discovery of the CRD Response. But there is no support for Evansen's contention that he was entitled to discovery under FINRA's rules after he failed to answer the complaint.[59]

Evansen further contends that the NAC orders to supplement the record and to extend the briefing deadlines demonstrated a deficiency in its decisional process. To the contrary, the NAC order to supplement the record demonstrated that FINRA's "procedures . . . seem to have worked as intended"[60] and confirm that the NAC conducted a de novo review of the evidence and Evansen's arguments.[61] It is the opinion of the NAC, not the Hearing Panel, that is the final FINRA action subject to our review.[62] He offers no reason to believe that extensions to the briefing schedule were improper or prejudiced his defenses to the Rule 8210 violations.[63]

Finally, on appeal to the Commission, Evansen asserts that the NAC decision was in retaliation for his May 21, 2013 letter about a former FINRA official or to cover-up wrongdoing by FINRA staff. But he offers no evidence that his letter motivated the NAC's decision, and as noted, the NAC's order to supplement the record demonstrates its de novo review of the evidence

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[59] Under Rule 9251(d) and (a)(1), a respondent's answer in a disciplinary proceeding generally triggers an obligation to provide discovery of evidence "prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings." Here, it is undisputed that Evansen never filed an answer to trigger this discovery rule and there is no indication that the letter would have been covered by the rule if he had. Moreover, Rule 9251(g) states that a failure to make a document available does not give rise to a right of rehearing or amended decision "unless the [r]espondent establishes that the failure to make the [d]ocument available was not harmless error." Here, even if the letter were covered by Rule 9251, we do not find any evidence of prejudice because Evansen had already received this same letter from another FINRA department.

[60] *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 WL 6044123, at *15 (Nov. 15, 2003).

[61] *Harry Friedman*, Exchange Act Release No. 64486, 2011 WL 1825025, at *7 & n.22 (citing authority) (May 3, 2011) ("[T]he NAC reviews the Hearing Panel's decision de novo and has broad discretion to modify [its] decisions and sanctions."). On appeal from a Hearing Panel decision, the NAC "may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction." *Id.* & n.23.

[62] *Erenstein*, 2007 WL 3306103, at *8; *see also Frank J. Custable, Jr.*, Exchange Act Release No. 33324, 51 SEC 855, 1993 WL 522322, at *7 n.22 (Dec. 10, 1993) ("Even if a member of the staff were biased, that would not mean that the NASD decision is biased.").

[63] Evansen argues that amendments to the briefing schedule were unfair because the NAC had warned that further extensions would not be granted. But the NAC retained discretion to grant those extensions despite any prior warnings. *See* FINRA Rules 9322(a) and 9313(a)(2) (authorizing the NAC, and counsel to the NAC, to extend filing deadlines).

and Evansen's arguments.[64] In any case, our independent review cures any bias that may have existed below.[65] We have reviewed the record and Evansen's arguments and find that the record supports FINRA's findings of violation, and that Evansen was afforded fair procedures to challenge those findings. Evansen chose not to answer the disciplinary charges until after he defaulted and faced disciplinary consequences for his failures to do so.[66]

Accordingly, for the foregoing reasons, we find that Evansen engaged in the conduct found by FINRA, that such conduct violates Rule 8210, and that Rule 8210 is, and was applied in a manner, consistent with the purposes of the Exchange Act.

III. Sanction

Pursuant to Exchange Act Section 19(e)(2), we will sustain a FINRA sanction unless we find, "having due regard for the public interest and the protection of investors," that the sanction is excessive or oppressive or imposes an unnecessary or inappropriate burden on competition.[67] As part of this review, we must consider any aggravating or mitigating factors,[68] and whether the sanctions imposed by FINRA are remedial and not punitive.[69] Though not bound by FINRA's Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2).[70]

The Sanction Guidelines state that "[a]ggregation or batching of violations may be appropriate for purposes of determining sanctions" and that "numerous, similar violations may

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[64] It is well established that "[a]dverse rulings, by themselves, generally do not establish improper bias." *Mitchell M. Maynard*, Investment Advisers Act Release No. 2875, 2009 WL 1362796, at *9 (May 15, 2009) (citing *Scott Epstein*, Exchange Act Release No. 59238, 2009 WL 223611, at *18 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010)).

[65] *Brokaw*, 2013 WL 6044123, at *15.

[66] Parties should develop the record before the FINRA hearing panel rather than adducing it on appeal to the NAC or the Commission. *Cf. Goldstein*, 2014 WL 1494527, at *9 (finding that "requiring an associated person to submit to disciplinary proceedings before determining the scope of FINRA's authority to request information does not violate the fairness requirements of the Exchange Act," and that this requirement "serves an important public interest by promoting the development of a record at the SRO level and giving the SRO an opportunity to resolve disputes").

[67] 15 U.S.C. § 78s(e)(2). Evansen does not claim, and the record does not show, that FINRA's action imposed an unnecessary or inappropriate burden on competition.

[68] *See Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *Paz Sec., Inc. v. SEC*, 494 F.3d 1059, 1064-65 (D.C. Cir. 2007).

[69] *See Paz*, 494 F.3d at 1065 ("The purpose of the order [must be] remedial, not penal.") (quoting *Wright v. SEC*, 112 F.2d 89, 94 (2d Cir. 1940)).

[70] *John Joseph Plunkett,* Exchange Act Release No. 69766, 2013 WL 2898033, at *11 (June 14, 2013).

warrant higher sanctions since the existence of multiple violations may be treated as an aggravating factor."[71] The Sanction Guidelines also provide specific guidance for Rule 8210 violations. They state that a bar should be the standard sanction if the individual did not respond to a request in any manner or responded only after FINRA filed a complaint.[72] The Sanction Guidelines further state that a bar should be the standard sanction for a partial but incomplete response unless the individual "demonstrate[s] that the information provided substantially complied with all aspects of the request."[73]

The Sanction Guidelines describe several "principal considerations" for partial or untimely responses, including: the importance of the information requested from FINRA's perspective; the number of requests, the time the applicant took to respond, and the degree of regulatory pressure required to obtain a response; and, for a partial but incomplete response, whether the applicant "thoroughly explains valid reason[s] for the deficiencies."[74]

A. FINRA's imposition of a bar was neither excessive nor oppressive.

We sustain the sanction imposed by the NAC because we find that a bar is consistent with the considerations in the Sanction Guidelines and is neither excessive nor oppressive. As FINRA noted, Evansen's complete failure to respond to its OTR notices and his failure to respond to its information requests until after a complaint had been issued, each individually merit a bar under the Sanction Guidelines. Together with Evansen's failure to respond to disciplinary proceedings until after he was suspended or barred, these violations demonstrate Evansen's longstanding indifference to his Rule 8210 responsibilities and unwillingness to abide by basic prerequisites to association with any FINRA member firm.

The sanction analysis applied by FINRA was consistent with its Sanction Guidelines and with relevant Commission precedent. The Sanction Guidelines specifically consider the importance of the information sought; the number of notices and warnings, the degree of regulatory pressure, and the length of time required to obtain any responses; and the absence of any valid explanation for the violative conduct.

The information sought by FINRA was important. Each of the requests concerned an investigation of serious wrongdoing in customer accounts by Evansen. And contrary to Evansen's claims that his eventual responses to the information requests rendered FINRA's later OTR requests unimportant or moot, the Sanction Guidelines expressly indicate that the importance of any Rule 8210 request is assessed from FINRA's perspective. FINRA was entitled to require Evansen's on-the-record testimony to follow up on his written responses without having to justify or explain the need for the follow-up. FINRA's letters notifying him of the

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71 FINRA Sanction Guidelines at 4 (2013).

72 *Id.* at 33 & 33 n.1.

73 *Id.* at 33.

74 *Id.*

OTRs clearly stated that Evansen was obligated to appear under Rule 8210 and specifically indicated that their purpose was to discuss accounts of his former customers at Newbridge.

When Evansen did respond to FINRA's requests for information, he did so only after significant delay and after FINRA exerted significant regulatory pressure through two Rule 8210 requests, two suspension notices, and a letter warning him that full compliance was the only way to avoid a bar. Even then, Evansen did not send any response until the automatic effective date of the bar and more than six months after FINRA's first request. FINRA was never able to secure Evansen's attendance or testimony at any OTR, despite the possibility of disciplinary action under Rule 8210. Evansen did not respond to the disciplinary proceeding until after his failure to answer FINRA's two notices of the complaint resulted in a default decision and he was barred. We have stated repeatedly that an SRO "should not have to bring a disciplinary proceeding in order to obtain compliance with its rules governing investigations."[75] Evansen's failure to respond until a FINRA bar had already been imposed, and the extensive regulatory resources expended to reach that point, aggravate the seriousness of his violations.[76]

Evansen has not provided any valid explanation for his violations or for his failure to respond to these disciplinary proceedings until he defaulted. We already have rejected his notice and jurisdiction arguments, as well as his due process and procedural contentions. He has no excuse for his failure to comply with FINRA's requests or to follow FINRA procedures for contesting the violations, especially in light of the numerous opportunities FINRA afforded him to do so and the warnings it gave about the consequences of failing to respond.

Nor do we find any mitigating factors here. Evansen argues that he is not a threat to investors because he has not been sued since 2000, the Newbridge complaints have been resolved, he responded to FINRA's 2011 information requests, and he appeared for interviews with Florida regulators in 2009 and 2010. He further claims that his whistleblowing efforts reflect his attempts to protect investors. Although it was Newbridge, rather than Evansen, that was sued by the customers, his BrokerCheck record confirms that the complaints alleging misconduct in Evansen's Newbridge customer accounts resulted in settlements of $150,000, $125,000, and $37,500. And his refusal to cooperate with FINRA's investigation thwarted FINRA's ability to determine whether he should be subject to discipline based on those

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[75] *Berger*, 2008 WL 4899010, at *8 (internal quotation omitted).

[76] A partial but incomplete response merits a bar when, as in this case, the circumstances as a whole demonstrate a "willingness to defy the regulatory process and impede FINRA's investigation into potentially serious misconduct." *Goldstein*, 2014 WL 1494527, at *12; *cf. Houston,* 2011 WL 6392264, at *8 (remanding a bar based on a complete failure to respond when applicant responded to some Rule 8210 requests before the complaint was filed and submitted an answer to the disciplinary proceeding); *Plunkett*, 2013 WL 2898033, at *14 (finding that FINRA's sanction analysis did not take into account applicant's compliance with several earlier Rule 8210 requests during the same investigation). FINRA's Sanction Guidelines expressly indicate that failure to respond until after FINRA files a complaint, as here, triggers the presumption of a complete failure to respond.

complaints, thus undermining FINRA's ability to protect the public.[77] Evansen's self-professed willingness to expose misconduct by others does not demonstrate a public interest in permitting his association with a member firm or mitigate the seriousness of his violations.

Nor is the seriousness of Evansen's violative conduct mitigated by the age of this case. We note that the age of this case is partly a function of Evansen's own pattern of ignoring and delaying FINRA's investigation. His unwillingness to submit to FINRA interviews, procedures, or jurisdiction to respond to allegations of serious securities-related misconduct demonstrates his continuing unfitness for association with a FINRA member firm.

The NAC also found that Evansen's explanations for his failures to respond are evidence of a serious risk that he would engage in a similar pattern of delay and uncooperative conduct in any future association. We agree. For instance, Evansen asserted that his travels prevented him from responding and that FINRA had an obligation to provide him with personal service at an address that did not appear in the CRD records. In light of the multiple warnings and notices he received, these claims amount to little more than attempting to shift his burden to comply to FINRA and denying that Rule 8210's procedures and requirements apply to him. There is a serious risk that he would continue to do so in any future associations.[78]

B. FINRA's sanction is remedial and not punitive.

We find the bar remedial and not punitive. We have stressed that "FINRA must rely on Rule 8210 to obtain information . . . to carry out its investigations and fulfill its regulatory mandate" and its "obligation to police the activities of its members and associated persons."[79] Failure to respond to Rule 8210 requests "impedes [FINRA]'s ability to detect misconduct that threatens investors and markets."[80] It is therefore "critically important to the self-regulatory system that members and associated persons cooperate with [FINRA] investigations."[81]

Although Evansen does not profess a desire to be associated with a FINRA member firm, he could seek to associate absent a bar. His longstanding failure to cooperate demonstrates that permitting him to associate would present a continuing danger to the public interest in securing voluntary cooperation with investigations and, ultimately, detecting and preventing industry

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77 *Berger*, 2008 WL 4899010, at *7.

78 *See Paz Sec., Inc.*, Exchange Act Release No. 57656, 2008 WL 1697153, at *8 (Apr. 11, 2008) ("Because Mizrachi thus has demonstrated a disregard for his duty to . . . respond to requests sent to [his] CRD address[] while he is out of the country, NASD faces a great risk of being unable to obtain from Applicants information necessary for the protection of investors."), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009).

79 *CMG Institutional Trading*, 2009 WL 223617, at *15, *5 (quoting *Paz*, 2008 WL 1697153, at *4).

80 *Berger*, 2008 WL 4899010, at *4 (Nov. 14, 2008).

81 *Erenstein*, 316 F. App'x at 871.

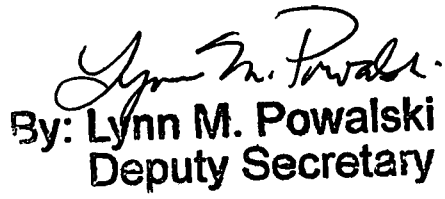
misconduct. We find that the bar will protect the public by preventing Evansen from impeding regulatory investigations, and that it will serve as a deterrent to other securities professionals tempted to evade FINRA's investigations.[82]

Accordingly, for the foregoing reasons, we find that the sanction imposed on Evansen is neither excessive nor oppressive within the meaning of Exchange Act Section 19(e).

An appropriate order will issue.[83]

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN and PIWOWAR).

Brent J. Fields
Secretary



By: Lynn M. Powalski
Deputy Secretary

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82 *See Siegel v. SEC*, 592 F.3d 147, 158 (D.C. Cir. 2010) (noting that deterrence may be considered as part of the overall remedial inquiry in determining sanctions).

83 We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 75531 / July 27, 2015

Admin. Proc. File No. 3-15964

In the Matter of the Application of

DAVID KRISTIAN EVANSEN

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by FINRA against David Kristian Evansen is hereby sustained.

By the Commission.

Brent J. Fields
Secretary

By: Lynn M. Powalski
Deputy Secretary