SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 71970 / April 17, 2014

Admin. Proc. File No. 3-15183

In the Matter of the Application of

GREGORY EVAN GOLDSTEIN
c/o Martin P. Unger
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377 Oak Street, Concourse Level C2
Garden City, NY 11530

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDINGS

Failure to Provide Requested Information

Associated person, officer, and control person of member firm failed to fully respond to FINRA's requests for information and documents of such person made pursuant to FINRA Rule 8210. *Held*, association's findings of violation and imposition of sanctions are sustained, except the fine it imposed is set aside.

APPEARANCES:

Martin P. Unger, of Wexler Burkhart Hirschberg & Unger, LLP, for Gregory Evan Goldstein.

Robert L.D. Colby, Alan Lawhead, and *Carla Carloni*, for FINRA.

Appeal filed: January 22, 2013
Last brief received: May 29, 2013

Gregory Evan Goldstein, formerly an associated person, president, and control person of Marquis Financial Services, Inc. ("Marquis"), a FINRA member firm, seeks review of a disciplinary action taken against him by FINRA. FINRA found that Goldstein violated FINRA Rule 8210 by refusing to answer questions at an on-the-record interview ("OTR") and by failing to produce information and documents requested by FINRA about Wall Street at Home, Inc. ("Wall Street at Home"), a company that is eighty percent owned by Goldstein. Goldstein claims, among other things, that FINRA's requests went beyond the scope of Rule 8210. We disagree based on our independent review of the record, and we find that the requests were within the scope of Rule 8210 and sustain FINRA's findings of violation and imposition of sanctions, except that we set aside the fine imposed.

I. Background

A. Goldstein, Marquis, and Wall Street at Home

The parties do not dispute the relevant facts. Goldstein was registered with FINRA at Marquis from July 2001 through February 2013.[1] Marquis is ninety-five percent owned by the holding company Steven Gregory Securities ("SGS").[2] SGS is, in turn, wholly owned by Wall Street at Home. And Wall Street at Home is eighty percent owned by Goldstein. Goldstein is also the president of Marquis, SGS, and Wall Street at Home, and he is the sole officer and voting stockholder of Wall Street at Home.[3]

The remaining minority shares of Wall Street at Home were sold in a private offering in 2003 to approximately twenty to thirty investors, including customers of Marquis. Marquis served as the placement agent for the offering. Wall Street at Home, in its private placement memorandum, claimed to "operate a full service, retail securities brokerage business through [its] subsidiary, Marquis."

Wall Street at Home also has consulting clients. Goldstein provides all services to these clients, for which Wall Street at Home is paid directly by the clients. The consulting work includes the review of corporate structures and performance of due diligence to determine whether companies are viable.[4] Goldstein, the only person with access to Wall Street at Home's funds, stipulated that he "takes distributions of funds" from Wall Street at Home for services he

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[1] According to BrokerCheck, Goldstein either terminated or withdrew his registration with FINRA as of February 2013. We take official notice of this information on BrokerCheck, an electronic database maintained by FINRA and available at www.finra.org/Investors/Tools Calculators/BrokerCheck. *See* 17 C.F.R. § 201.323 (rule of practice relating to official notice).

[2] SGS has no operations other than owning Marquis.

[3] Neither SGS nor Wall Street at Home has ever had any employees.

[4] Wall Street at Home was also paid in 2004 by Headliners Entertainment Group, Inc. for introducing potential investors to it. As discussed below, Goldstein has refused to describe the precise nature of his work for Wall Street at Home.

performs on its behalf. Goldstein also pays Wall Street at Home's bills and expenses, such as his traveling expenses, with the company's funds.

B. FINRA's investigation

FINRA began investigating Marquis and its employees, including Goldstein, in 2010 after receiving a referral from FINRA Member Regulation regarding suspicious trading in penny stocks at Marquis. FINRA's investigation into Marquis and Goldstein, which is ongoing, also concerns other potential securities law violations, including whether they engaged in selling away, buying away, spinning, front-running, market manipulation, fraud, and violation of the anti-money laundering ("AML") rules. FINRA is also investigating potential conflicts between Marquis and Goldstein on the one hand and the customers of Marquis on the other.

FINRA's Rule 8210 authorizes FINRA to require associated persons to provide information or documents in an investigation.[5] Pursuant to this Rule, FINRA sent an initial Rule 8210 request to Goldstein with thirty-four enumerated requests for information and/or documents. The record does not reflect how Goldstein responded to this request, but we assume for purposes of this proceeding that he complied fully with it.[6]

FINRA subsequently conducted an OTR of Goldstein pursuant to Rule 8210 on January 9, 2012, during which Goldstein, who was represented by counsel, refused to answer certain questions about Wall Street at Home. Goldstein refused to identify Wall Street at Home's customers, or state which firm maintained Wall Street at Home's brokerage account. Goldstein's counsel asserted at the OTR that these questions about Wall Street at Home were beyond FINRA's authority.

Goldstein did answer other questions asked of him during the OTR concerning Wall Street at Home and other issues. But some of his responses demonstrated a lack of candor. When Goldstein was asked, for example, whether Wall Street at Home ever had an outside brokerage account, he responded, "I'm not sure" and "I can't recall."[7] Goldstein's response lacked credibility considering that he was the president and sole officer of Wall Street at Home, and that Wall Street at Home had no employees.

FINRA sent a subsequent Rule 8210 request to Goldstein on February 3, 2012, in which it renewed its request for the information Goldstein refused to provide during the OTR and sought additional information and documents relating to Wall Street at Home. In particular, FINRA requested that Goldstein (i) identify Wall Street at Home's owners and customers;

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[5] *See* Rule 8210(a).

[6] The record does not include a copy of this Rule 8210 request or Goldstein's response.

[7] Wall Street at Home did in fact have a brokerage account. Goldstein also denied holding an outside brokerage account in his own name (i) in his 2010 and 2011 annual written attestations for Marquis and (ii) in an email to a FINRA examiner dated May 28, 2010. But Goldstein held an outside brokerage account at UBS Financial Services, Inc. from 2008 through 2011.

(ii) describe the products, services, or business activities provided by Wall Street at Home; (iii) produce documents, including contracts, service agreements, and payment terms, relating to Wall Street at Home's customers, and if no such documents exist, provide a summary of the compensation received from those customers; (iv) identify each person who initiated, reviewed, or authorized any financial transaction for Wall Street at Home; (v) identify Wall Street at Home's bank and brokerage accounts and produce the monthly statements for those accounts; and (vi) produce Wall Street at Home's tax returns and supporting documents. Goldstein refused to comply with FINRA's request, stating in a letter from counsel dated February 16, 2012, that FINRA has no "authority to require a member or an associated person to produce documents belonging to a third party, particularly those unrelated to the member and/or associated person[']s securities activities (as here)."

On March 13, 2012, FINRA issued a Notice of Suspension informing Goldstein that he would be suspended, pursuant to FINRA Rule 9552(a), from association with any FINRA member firm in any capacity unless he complied with its Rule 8210 requests by April 6, 2012.[8] In response, Goldstein requested an expedited hearing,[9] and the parties subsequently agreed to a resolution of the matter on the basis of stipulated facts and legal briefs rather than an evidentiary hearing.

C. The FINRA proceeding below

In a decision dated January 4, 2013, a FINRA hearing panel found that Goldstein violated Rule 8210 by refusing to answer certain questions during the OTR or provide information and documents subsequently requested. The panel noted that the inquiries with which Goldstein refused to comply generally concern his outside business activities conducted through Wall Street at Home and that Goldstein owns, possesses, and controls the requested information. The panel also noted that "Goldstein's business activities through Wall Street at Home appear closely related to his conduct of a securities business through FINRA member firm Marquis."

The panel ordered Goldstein to comply fully with the outstanding Rule 8210 requests within twenty-one days of the date of the decision and ordered a three-month suspension from association with any member firm in any capacity if he failed to comply within that period. The panel further ordered that "if the suspension is not terminated within three months for full compliance, then [Goldstein] will be barred from associating with any member firm in any

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[8] FINRA Rule 9552(a) provides that, if an associated person fails to provide any information, material, or testimony requested pursuant to FINRA rules, FINRA may provide written notice specifying the nature of the failure and stating that a failure to take corrective action within twenty-one days after service of the notice will result in a suspension.

[9] FINRA Rule 9552(e) provides that a person served with notice of a failure to provide requested information under Rule 9552(a) may file with the Office of Hearing Officers a written request for a hearing. A timely hearing request stays the suspension referenced in the notice unless the hearing officer orders otherwise. *See* Rule 9552(d); Rule 9559(c)(1).

capacity and fined $50,000."[10] Because FINRA's National Adjudicatory Council did not call the decision for review, the decision is the final action of FINRA in this proceeding.[11]

Goldstein did not comply with FINRA's outstanding requests within the period set by the panel, so he became barred from association with any FINRA member firm in any capacity and fined $50,000.[12]

II. Analysis of Violations

A. Standard of review

We base our findings on an independent review of the record and apply the preponderance of the evidence standard for self-regulatory organization disciplinary actions.[13] Pursuant to Exchange Act Section 19(e)(1), in reviewing an SRO disciplinary sanction, we determine whether the aggrieved person engaged in the conduct found by the SRO, whether such conduct violates the SRO's rules, and whether such SRO rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[14]

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[10] FINRA Rule 9552(f) provides for the termination of a suspension imposed pursuant to Rule 9552 upon full compliance with the notice of suspension or decision. If the suspension is not terminated within three months of the notice of suspension or decision, the suspension automatically becomes a bar pursuant to Rule 9552(h).

[11] The hearing panel submitted its proposed decision to the NAC in advance of January 4, 2013. When the NAC did not call the case for review within twenty-one days as provided in FINRA Rule 9559(q)(1), the hearing panel issued its decision on January 4, 2013, along with a Notice of Decision.

[12] We take official notice of this information on BrokerCheck (www.finra.org/Investors/Tools Calculators/BrokerCheck).

[13] *See David M. Levine*, Exchange Act Release No. 48760, 2003 SEC LEXIS 2678, at *36 n.42 (Nov. 7, 2003).

[14] 15 U.S.C. § 78s(e)(1). We previously found that Rule 8210 "is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association." Exchange Act Release No. 68386, 2012 SEC LEXIS 3798, at *26 (Dec. 7, 2012) ("Rule 8210 Order"); *see also* Exchange Act Release No. 38908, 1997 SEC LEXIS 1617, at *111-18 (Aug. 7, 1997). In particular, we found Rule 8210 to be "consistent with Section 15A(b)(6) of the Exchange Act, which requires, among other things, that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of Trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest." Rule 8210 Order, 2012 SEC LEXIS 3798, at *26.

B. Goldstein violated Rule 8210.

Goldstein does not dispute that he failed to respond to certain Rule 8210 requests and that, as a person associated with a member firm, he was required to comply with Rule 8210.[15] But Goldstein contends that he did not violate Rule 8210 because FINRA's requests were beyond the scope of the Rule.

Although the scope of Rule 8210 is broad, it is limited by its own language.[16] Rule 8210(a)(1), prior to its amendment effective on February 25, 2013,[17] stated in part that FINRA may, for the purpose of an investigation, "require a . . . person associated with a member . . . to provide information orally, in writing, or electronically . . . and to testify . . . *with respect to any matter involved in the investigation*."[18] Rule 8210(a)(2), prior to its amendment, stated in part that FINRA may, for the purpose of an investigation, "inspect and copy the books, records, and accounts *of such . . . person [associated with a member] with respect to any matter involved in the investigation*."[19] Under this language, requests under either subsection (a)(1) or (a)(2) of Rule 8210 must be "with respect to any matter involved in the investigation." In addition, requests under subsection (a)(2) of Rule 8210 must be "of such member or person" associated with a member.

The material requested from Goldstein fell squarely within the language of the Rule, even under a narrow interpretation of its scope. The information requested was "with respect to any matter involved in the investigation," notwithstanding Goldstein's contention that "the relevance to FINRA's investigation of the names of the 20-30 Wall Street [at Home] shareholders and . . . customers, the 'business services' provided by Wall Street [at Home] to its customers, the compensation Wall Street [at Home] received for the consulting services provided, Wall Street[] [at Home's] tax returns, and so on remains elusive." FINRA's Rule 8210 requests were with respect to matters involved in the investigation of Marquis and Goldstein, including the nature

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[15] *See* Rule 8210(a)(1) (requiring an associated person to provide information); Rule 8210(a)(2) (stating that FINRA may inspect and copy an associated person's books, records, and accounts). Under FINRA Rule 8210(c), it is a violation of the rule for an associated person to "fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts."

[16] *Jay Alan Ochanpaugh*, Exchange Act Release No. 54363, 2006 SEC LEXIS 1926, at *13 (Aug. 25, 2006).

[17] In December 2012, we approved FINRA's proposed amendments to Rule 8210, which became effective on February 25, 2013. Rule 8210 Order, 2012 SEC LEXIS 3798; *see also* FINRA Regulatory Notice 13-06, 2013 FINRA LEXIS 8 (Jan. 2013) (providing notice that the Commission approved FINRA's proposed amendments to Rule 8210). But FINRA applied and we are applying the version of Rule 8210 that existed at the time of the conduct at issue here.

[18] Rule 8210 Order, 2012 SEC LEXIS 3798, at *1; Exchange Act Release No. 60836, 2009 WL 3344377, at *1 (Oct. 16, 2009) (Notice of Filing of Proposed Rule Change; File No. SR-FINRA-2009-060) ("Notice") (emphasis added).

[19] *Id.* (emphasis added).

and scope of Goldstein's outside business activity as a paid consultant for, and president of, Wall Street at Home. FINRA's investigation also included whether there was any misconduct arising from conflicts between Marquis, Goldstein, and Marquis's customers, including selling away, buying away, spinning, front-running, market manipulation, fraud, and violation of AML rules. FINRA's Rule 8210 requests concerned those aspects of the investigation because Wall Street at Home purported to run a full-service brokerage through its ownership of Marquis, and Goldstein, an associated person of Marquis, was the eighty percent owner and president of Wall Street at Home with sole control over all of Wall Street at Home's financial activities and records. FINRA had reason to question whether Goldstein's consulting work, or any investment or financial activity of Wall Street at Home, involved the possible illegal activity of Marquis. Moreover, because Marquis had offered interests in Wall Street at Home while owned by one of its associated persons (*i.e.*, Goldstein), FINRA's Rule 8210 requests were with respect to the investigation of possible conflicts in Marquis's business.

In addition, as an associated person, Goldstein may not "second guess" FINRA's requests for information, or "take it upon [himself] to determine whether information is material to [a FINRA] investigation of [his] conduct."[20] And "Rule 8210(a) has no requirement that [FINRA] explain its reasons for making the information request or justify its relevance."[21]

For the foregoing reasons, FINRA's information and document requests satisfied the requirement that requests under subsections (a)(1) and (a)(2) of Rule 8210 be "with respect to any matter involved in the investigation." Accordingly, because subsection (a)(1) has no additional limitations on its scope, and because Goldstein failed to provide testimony or information requested under that subsection, we find that Goldstein violated Rule 8210(a)(1).

FINRA's requests pursuant to subsection (a)(2) of Rule 8210 met the additional requirement that they be "of such member or person" associated with a member. In asserting that the documents requested are "of" a third party, Wall Street at Home, which is not a member or person associated with a member, and are not his documents to provide, Goldstein misconstrues FINRA's request.

FINRA's request falls within the ambit of Rule 8210(a)(2) because the documents are "of" Goldstein. Goldstein's ownership interest in the information and documents is established

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[20] *CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21, *26 (Jan. 30, 2009) (citation omitted); *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *18-19 (Nov. 8, 2007) ("As we have often noted, recipients of requests under Rule 8210 must promptly respond to the requests or explain why they cannot. They may not refuse such requests on the grounds of relevance or otherwise set conditions on their compliance, and [FINRA] is not required to justify its information requests in order to obtain compliance from members and their associated persons.").

[21] *CMG Institutional Trading*, 2009 SEC LEXIS 215, at *26; *see also Ochanpaugh*, 2006 SEC LEXIS 1926, at *21 (explaining that "the only recourse against possible overreaching by [FINRA] is for the person to whom the [Rule 8210] request is directed to refuse to comply, and to appeal any consequent disciplinary action to the Commission").

through his eighty percent ownership of Wall Street at Home. Goldstein admitted in his motion for a stay before us that he had possession of the information and documents sought by FINRA, and that Goldstein is Wall Street at Home's president and sole officer with sole control over its finances, books, and records. That Wall Street at Home is not itself a FINRA member or associated person is immaterial to the conclusion that documents in which Goldstein has a majority ownership interest and over which he has sole possession and control are within the scope of Rule 8210's requirement that the documents be "of such member or person."

Moreover, FINRA has compelling enforcement objectives at stake.[22] Specifically, Wall Street at Home is the indirect owner of Marquis through a holding company. Marquis is a member firm that is being investigated by FINRA. Further, Wall Street at Home has described its business plan in its private placement memorandum as to "operate a full service, retail securities brokerage business through [its] subsidiary, Marquis." Marquis also served as the placement agent for Wall Street at Home's 2003 offering in which Wall Street at Home sold units to Marquis's customers. These relationships and activities concern FINRA's enforcement objectives in understanding the possible involvement of Goldstein and Marquis in securities violations including selling away, buying away, spinning, front-running, market manipulation, fraud, and violation of AML rules.

Accordingly, we conclude that the documents requested here are within the scope of Rule 8210(a)(2). Because FINRA's document request fell squarely within the scope of subsection (a)(2), and because Goldstein failed to comply with that request, we find that Goldstein violated Rule 8210(a)(2).

C. Rule 8210 was applied consistently with the Exchange Act.

1. FINRA properly applied the version of Rule 8210 as it existed at the time of Goldstein's conduct.

We reject Goldstein's argument that the text of Rule 8210 did not require associated persons to produce documents in their "possession, custody or control" until the rule was amended after the relevant period here. His contention that such material was not covered by the version of Rule 8210 in effect at the time FINRA made its requests misapprehends both the scope of pre-amendment Rule 8210 and the issue addressed by the amendment—whether the rule applies to documents over which a member or associated person has possession, custody, or control but *does not* have an ownership interest. That issue is not implicated in this case, because as discussed above Goldstein has a majority ownership interest in the documents FINRA requested, and this alone made them unquestionably subject to Rule 8210 both before and after it was amended.

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[22] *See Ochanpaugh*, 2006 SEC LEXIS 1926, at *19-20 ("There may be circumstances in which possession and control of documents by [a FINRA] member or associated person, together with some other interest in the documents short of an ownership interest, may be sufficient given the enforcement objectives of [FINRA] to trigger application of the Rule.").

The 2013 amendment clarifying Rule 8210 was in response to our decision in *Ochanpaugh* in which we indicated that the pre-2013 text of Rule 8210 may extend to documents within the possession and control of an associated person, *even if owned by a third party.*[23] In that proceeding, NASD—a predecessor self-regulatory organization to FINRA—sought documents of a church of which Ochanpaugh was president on the grounds that Ochanpaugh had "possession and control" of the requested documents.[24] We held that the evidence did not support a finding that Ochanpaugh had such possession and control. In so deciding, we did not reach the question whether possession and control alone would be sufficient to establish whether the requested documents fell within the scope of Rule 8210. Instead, we left "it to NASD to develop further its analysis with respect to the scope of Rule 8210." [25]

FINRA clarified the scope of Rule 8210 through the 2013 amendments. FINRA's amendment to Rule 8210, effective February 25, 2013, added the text italicized in the following excerpt: "For the purpose of an investigation . . . FINRA staff shall have the right to: . . . (2) inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding *that is in such member's or person's possession, custody or control*."[26] The Supplementary Material to the amended Rule 8210 further provides:

> In specifying the books, records and accounts "of such member or person," paragraph (a) of the rule refers to books, records and accounts that the broker-dealer or its associated persons make or keep relating to its operation as a broker-dealer or relating to the person's association with the member. This includes but is not limited to records relating to a FINRA investigation of outside business activities, private securities transactions or possible violations of just and equitable principles of trade, as well as other FINRA rules, MSRB rules, and the federal securities laws. It does not ordinarily include books and records that are in the possession, custody or control of a member or associated person, but whose

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[23] Rule 8210 Order, 2012 SEC LEXIS 3798, at *5 n.10; *Ochanpaugh*, 2006 SEC LEXIS 1926, at *19-20.

[24] *Ochanpaugh*, 2006 SEC LEXIS 1926, at *17.

[25] *Id.* at *22. We noted in *Ochanpaugh* that, while we were not addressing the boundaries of Rule 8210(a)(2), "[t]here may be circumstances in which possession and control of documents by an NASD member or associated person, together with some other interest in the documents short of an ownership interest, may be sufficient [to extend Rule 8210 to documents that may belong to a third party] given the enforcement objectives of the NASD to trigger application of the Rule." *Id.* at *19-20. We also noted that, "[i]n other circumstances, the NASD's authority under the Rule might not extend to documents that may belong to a third party, or that may contain a third party's confidential information not closely related to securities trading with a member or associated person, even if those documents were in the possession and control of a member or associated person." *Id.* at *20.

[26] Rule 8210 Order, 2012 SEC LEXIS 3798, at *1; Notice, 2009 WL 3344377, at *1.

> bona fide ownership is held by an independent third party and the records are unrelated to the business of the member.[27]

Thus, neither FINRA's amendment to Rule 8210 nor the Commission decision in *Ochanpaugh* that prompted that amendment raised any doubt that the sort of ownership interest Goldstein has here was sufficient to make documents subject to pre-amendment Rule 8210.

Because Goldstein has an ownership interest in the records of Wall Street at Home through his eighty percent ownership of the company and those records are related to the business of both Marquis and Goldstein, they were within the scope of Rule 8210 prior to the 2013 amendments.

2. Goldstein has not been denied due process.

Goldstein contends that, while FINRA is a private entity, it should be deemed a "state actor" here because it is a government regulated entity exercising power granted to it, derivatively by Congress and through the Commission pursuant to the Exchange Act, to enforce the federal securities laws as they apply to its members and associated persons. As a "state actor," Goldstein contends that FINRA was required to provide him with Constitutional protections, and it failed to do so because Rule 8210 is "unconscionably vague" in violation of due process requirements.[28] We disagree.

To be subject to Constitutional due process scrutiny, a private entity's actions must be "fairly attributable" to the State.[29] Actions are "fairly attributable" to the State where "there is a sufficiently close nexus between the State and the challenged action."[30] Facts tending to "bear on the fairness of such an attribution" include whether a challenged action "results from the State's exercise of its coercive power"; whether "the State provides significant encouragement, either overt or covert"; or whether "a private actor operates as a willful participant in the joint activity with the State or its agents."[31] But "[m]ere approval of or acquiescence in the initiatives

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[27] *Id.*

[28] Goldstein cites to the Fourteenth Amendment in making his due process argument, which applies Fifth Amendment due process requirements to state governments. "The procedural due process protections under the Fifth and Fourteenth Amendments are the same." *English v. District of Columbia*, 717 F.3d 968, 972 (D.C. Cir. 2013).

[29] *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001); *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir. 2002).

[30] *D.L. Cromwell Inv.*, 279 F.3d at 161 (quoting *Jackson v. Metro. Edison Co.,* 419 U.S. 345, 351 (1974)). The Supreme Court in *Jackson* noted that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of" Constitutional due process. *Jackson*, 419 U.S. at 350.

[31] *Brentwood Acad.*, 531 U.S. at 296 (internal quotations omitted). The Supreme Court in *Brentwood* noted that "no one fact can function as a necessary condition across the board for

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of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the [due process clause]."[32]

We have found repeatedly that "FINRA is not a state actor and thus, traditional Constitutional due process requirements do not apply to its disciplinary proceedings."[33] Numerous courts have also found that FINRA (and its predecessor, NASD) is not a state actor subject to Constitutional restrictions.[34] Moreover, the record does not reflect, and Goldstein does not point to, any evidence of a "sufficiently close nexus between the State" and FINRA's actions here.[35]

Goldstein instead cites cases, *Weissman v. NASD* and *Austin Municipal Securities, Inc. v. NASD*, which both find the NASD entitled to absolute immunity for conduct in exercising its quasi-governmental authority.[36] But neither case finds that NASD is a state actor, and we have previously found such precedent not to "controvert the numerous decisions that squarely hold that NASD is a private actor."[37]

(... continued)
finding state action; nor is any one set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." *Id.* at 295-96.

[32] *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982).

[33] *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *34 (Oct. 20, 2011); *Asensio & Co., Inc.*, Exchange Act Release No. 68505, 2012 SEC LEXIS 3954, at *61 (Dec. 20, 2012) ("It is well established that the requirements of constitutional due process do not apply to FINRA because FINRA is not a state actor.").

[34] *See, e.g., Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) ("The NASD is a private actor, not a state actor. It is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee."); *Jones v. SEC*, 115 F.3d 1173, 1183 (4th Cir. 1997).

[35] In support of his argument that FINRA is a state actor, Goldstein attached as an exhibit to his reply brief a May 1, 2013 letter from FINRA in an unrelated proceeding. In the letter, FINRA asserted an entitlement to the governmental investigatory file privilege in response to a subpoena request. We treat Goldstein's submission of this letter as a motion to adduce additional evidence pursuant to Rule of Practice 452, 17 C.F.R. § 201.452, which requires that Goldstein "show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously." Goldstein did not make this showing because the letter does not address whether FINRA may be deemed a state actor in the context of a Rule 8210 request and is therefore irrelevant in this proceeding. Nevertheless, we admit the letter in an exercise of discretion.

[36] *Weissman v. NASD*, 468 F.3d 1306, 1313 (11th Cir. 2006); *Austin Mun. Sec., Inc. v. NASD*, 757 F.2d 676, 692-93 (5th Cir. 1985).

[37] *Fawcett*, 2007 SEC LEXIS 2598, at *4 n.19; *see also Scher v. NASD*, 386 F. Supp. 2d 402, 408 (S.D.N.Y. 2005) ("[I]t is by no means inconsistent to find that, on the one hand, the NASD exercises insufficient state action to trigger constitutional protections . . . while nevertheless

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Goldstein also notes that in *Crimmins v. American Stock Exchange, Inc.*, a district court held that the American Stock Exchange "engage[s] in governmental action" when it conducts disciplinary proceedings.[38] But *Crimmins* is not good authority for Goldstein's assertion that FINRA is a state actor because the Second Circuit subsequently found that FINRA's predecessor NASD was "not a state actor."[39]

Goldstein further notes a Report of the Senate Banking, Housing and Urban Affairs Committee concerning 1975 amendments to the Exchange Act, which states: "Recognizing that the self-regulatory organizations utilize governmental-type powers in carrying out their responsibilities under the Exchange Act highlights the fact that these organizations must be required to conform their activities to fundamental standards of due process."[40] But the Report was referring to the need for Exchange Act requirements for self-regulatory organizations to provide members and associated persons with procedural fairness.[41] As we find below, Goldstein has not been denied the procedural protections of the Exchange Act.

Goldstein also contends that the issue of whether FINRA is a state actor is "unresolved." But the cases he cites—*Rooms v. SEC* and *Erenstein v. SEC*—are inapposite.[42] *Rooms* concerned whether *the Commission* violated the petitioner's due process rights; it did not involve whether NASD was a state actor or whether NASD violated the petitioner's due process rights.[43] And the court in *Erenstein* determined not to decide the issue of "whether the NASD is a state actor subject to due process requirements," choosing instead to "assume, for the limited purpose of deciding th[e] appeal, that the NASD could be a governmental actor."[44]

Even if FINRA were deemed to be a state actor, we find no merit to Goldstein's contention that Rule 8210 is impermissibly vague. A regulation is impermissibly vague only if it "'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so

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holding that the NASD is entitled to absolute immunity in the exercise of its quasi-public regulatory duties.") (internal quotations omitted), *aff'd on other grounds*, 218 F. App'x 46 (2d Cir. 2007).

[38] 346 F. Supp. 1256, 1259 (S.D.N.Y. 1972).

[39] *Desiderio*, 191 F.3d at 206. Goldstein's citation to *Bruan, Gordon & Co. v. Hellmers*, 502 F. Supp. 897, 902 (S.D.N.Y. 1980), in support of this point is unavailing for the same reason.

[40] S. Rep. No. 94-75, at 25 (1975).

[41] *See id.* at 24-26.

[42] *Rooms v. SEC*, 444 F.3d 1208 (10th Cir. 2006); *Erenstein v. SEC*, 316 F. App'x 865 (11th Cir. 2008).

[43] *Rooms*, 444 F.3d at 1213-14 ("Rooms argues that the SEC violated his due process rights by upholding the permanent bar after finding that he did not violate Rule 8210.").

[44] *Erenstein*, 316 F. App'x at 871-72.

standardless that it authorizes or encourages seriously discriminatory enforcement.'"[45] Goldstein contends that Rule 8210 is too broad because (i) the term "any matter involved in the investigation" "leaves open the possibility that the Rule governs everything in the world and thus has no limits";[46] and (ii) the term "of such member or person" is undefined and "leaves open for interpretation the extent to which it applies to the production of documents and information belonging to a non-member, non-associated person, third-party." But as discussed above, Rule 8210 has discernible parameters and the material requested from Goldstein fell squarely within the Rule's scope. Goldstein therefore had fair notice that his conduct was contrary to Rule 8210.[47]

3. Goldstein has not been denied the procedural protections required by the Exchange Act.

Although Constitutional due process is not applicable to FINRA, FINRA must nevertheless provide procedural protections for members and associated persons in its disciplinary proceedings pursuant to Exchange Act Sections 15A(B)(8) and 15A(H)(1).[48] Goldstein argues that the application of Rule 8210 violated the fairness principles embodied in these sections of the Exchange Act by leaving him unable to challenge FINRA's authority to issue the information requests without first submitting to a suspension or bar.

But 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.[49] Rather, requiring Goldstein to exhaust his administrative remedies before FINRA 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.[50] We have noted

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[45] *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

[46] In fact, Rule 8210 specifically limits this term to an investigation "authorized by the FINRA By-Laws or rules."

[47] *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."); *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

[48] Section 15A(B)(8) of the Exchange Act, 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) of the Exchange Act, 15 U.S.C. § 78*o*-3(h)(1), in relevant part, requires FINRA, in any proceeding to determine whether a person associated with a member should be disciplined, to bring specific charges, notify such person of, and give him an opportunity to defend against, such charges, and keep a record of such proceedings.

[49] *Berger v. SEC*, 347 F. App'x 692, 694-95 (2d Cir. 2009).

[50] *MFS Secs. Corp. v. SEC*, 380 F.3d 611, 621-22 (2d Cir. 2004).

that "subjecting oneself to [FINRA's] disciplinary process and relying on [FINRA's] procedures is the appropriate route to challenge [FINRA] jurisdiction."[51]

In appealing FINRA's decision and seeking a stay of FINRA's sanctions pending appeal, Goldstein now has the opportunity to argue against FINRA's jurisdiction to issue the information requests. FINRA informed Goldstein at the beginning of his OTR that any failure to provide information could lead to disciplinary proceedings, and the Notice of Suspension provided Goldstein with notice of the specific charges being brought against him. Goldstein requested and obtained a hearing, where he fully defended himself with the assistance of counsel, before the imposition of discipline. Accordingly, we find no evidence that FINRA failed to provide Goldstein with the fair procedures required by Sections 15A(B)(8) and 15A(H)(1).

4. FINRA is not precluded from requesting confidential and private information.

Goldstein also asserts that compliance with FINRA's requests would result in the provision to FINRA of "confidential and private" information and documents that would, in turn, become available to competitors of Wall Street at Home and "any other person or entity that saw fit to subpoena them." Goldstein contends that these considerations raise a "question as to whether FINRA is conducting an unduly burdensome investigation or examination on a bad faith basis." That argument fails for several reasons.

Goldstein consented as an associated person to FINRA's ability under Rule 8210 to request business records such as those FINRA seeks here.[52] The possibility that a third party could subpoena non-public and confidential information provided to FINRA should not trump FINRA's ability to request it.[53] Because much of the information that FINRA needs to conduct

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[51] *Howard Brett Berger*, Exchange Act Release No. 55706, 2007 SEC LEXIS 895, at *21 (May 4, 2007), *reconsideration in part on other grounds*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141 (Nov. 14, 2008), *petition denied*, 347 F. App'x 692 (2d Cir. 2009); *see also Ochanpaugh*, 2006 SEC LEXIS 1926, at *21 (explaining that "the only recourse against possible overreaching by [FINRA] is for the person to whom the [Rule 8210] request is directed to refuse to comply, and to appeal any consequent disciplinary action to the Commission").

[52] *Ochanpaugh*, 2006 SEC LEXIS 1926, at *20-21 (FINRA's "authority to request documents pursuant to Rule 8210 stems from the contractual relationship entered into voluntarily by [FINRA] members and associated persons with [FINRA]."); *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *19 (Nov. 8, 2007) ("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."), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

[53] *See, e.g., Erenstein*, 2007 SEC LEXIS 2596, at *17-19 (rejecting associated person's argument that, because "tax returns are confidential communications between the taxpayer and the taxing authority," such documents are discoverable only if they are clearly relevant and there is no other available source of the information requested). Moreover, FINRA's guidance on its

(continued...)

its investigations is non-public and confidential, FINRA's ability to police the activities of its members and associated persons would be eviscerated if FINRA could not request such information under Rule 8210.[54]

Moreover, we find no basis in the record for Goldstein's assertion that FINRA is conducting its investigation in an unduly burdensome manner or in bad faith.

Accordingly, for the foregoing reasons, we find that Goldstein 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. Analysis of Sanctions

A. Standard of Review

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.[55] As part of this review, we must consider any aggravating or mitigating factors[56] and whether the sanctions imposed by FINRA are remedial in nature and not punitive.[57]

Although the Commission is not bound by FINRA's Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2).[58] Where, as here,

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(... continued)
enforcement process states that "FINRA investigations are non-public and confidential." FINRA Regulatory Notice 09-17, 2009 FINRA LEXIS 45, at *4 (Mar. 2009).

[54] *See CMG Institutional Trading*, 2009 SEC LEXIS 215, at *15 (stressing the importance of Rule 8210 in connection with FINRA's "obligation to police the activities of its members and associated persons") (quoting *Paz Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *12 (Apr. 11, 2008)).

[55] 15 U.S.C. § 78s(e)(2). Goldstein does not claim, and the record does not show, that FINRA's action imposed an unnecessary or inappropriate burden on competition.

[56] *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).

[57] *Paz Sec.*, 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); *see also* FINRA Sanction Guidelines at 2 ("Disciplinary sanctions are remedial in nature and should be designed to deter future misconduct and to improve overall business standards in the securities industry.").

[58] *John Joseph Plunkett,* Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *41 (June 14, 2013). We also acknowledge that the Sanction Guidelines "do not prescribe fixed sanctions for particular violations" and "are not intended to be absolute." FINRA Sanction Guidelines at 1.

an individual has provided a partial but incomplete response to requests made by FINRA pursuant to Rule 8210, the Sanction Guidelines state that a bar is standard "*unless* the person can demonstrate that the information provided substantially complied with all aspects of the request."[59] The Sanction Guidelines note further that an adjudicator should "consider suspending the individual in any or all capacities for up to two years" where mitigation exists.[60]

The Sanction Guidelines also identify three "principal considerations" for determining sanctions where an individual has provided a partial but incomplete response to Rule 8210 requests. They are (i) the "[i]mportance of the information requested that was not provided as viewed from FINRA's perspective, and whether the information provided was relevant and responsive to the request"; (ii) the "[n]umber of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response"; and (iii) "[w]hether the respondent thoroughly explains valid reason(s) for the deficiencies in the response."[61]

B. The panel's decision to bar Goldstein was neither excessive nor oppressive.

The panel's decision to bar Goldstein is supported by application of the above considerations. First, Goldstein has not attempted to demonstrate that the information he provided to FINRA "substantially complied with all aspects of" its Rule 8210 requests. To the contrary, Goldstein refuses to provide FINRA with the majority of the information and documents it has requested concerning Wall Street at Home. This includes the information and documents specified in all eight of the requests in FINRA's letter to Goldstein dated February 3, 2012.

Second, the requested information that Goldstein refuses to provide is important. It concerns the nature and scope of Goldstein's outside business activity at Wall Street at Home, as well as whether any conflicts exist between Goldstein, Marquis, and Marquis's customers, and potential issues such as selling away, buying away, spinning, front-running, market manipulation, fraud, and violation of AML rules.

Third, FINRA was required to exert significant regulatory pressure in seeking the requested material. After Goldstein refused to provide information and documents concerning Wall Street at Home at the OTR and in response to the subsequent Rule 8210 request, FINRA issued a Notice of Suspension and then held a hearing. The panel provided Goldstein with additional time to respond to FINRA's outstanding requests and then suspended him before

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[59] FINRA Sanction Guidelines at 33 (emphasis added). The Sanction Guidelines distinguish between complete and partial failures to respond. *See id.* Where an individual has failed to respond in any manner to Rule 8210 requests, the Sanction Guidelines state that a bar should be standard. *Id.*

[60] *Id.* The Sanction Guidelines include a list of non-exhaustive aggravating and mitigating factors. *See id.* at 6-7.

[61] *Id.* at 33.

imposing a bar. Despite its efforts and expenditure of resources, FINRA was still unable to obtain Goldstein's compliance.

Fourth, Goldstein has provided no valid reason for refusing to respond to FINRA's requests. As discussed above, Goldstein's arguments that FINRA's requests are outside the scope of Rule 8210 are without merit, as are his arguments concerning due process and the Exchange Act's procedural protections. Goldstein also has admitted that the requested materials are within his possession. He therefore has no excuse for failing to comply with FINRA's requests, especially considering the numerous opportunities FINRA afforded him to do so before imposing a bar.

Fifth, Goldstein has not asserted, and the record does not reflect, any mitigating factors. But there is at least one aggravating factor. The Sanction Guidelines include as an aggravating factor "whether the respondent attempted to . . . conceal information from FINRA, or to provide inaccurate or misleading testimony or documentary information to FINRA."[62] The panel found that Goldstein "was not credible" when he claimed during the OTR that he could not remember certain information sought by FINRA.[63] Specifically, Goldstein testified that he could not recall whether Wall Street at Home ever had an outside brokerage account. We agree that this statement lacks credibility considering that Goldstein was the president and sole officer of Wall Street at Home, and that Wall Street at Home had no employees.

Finally, the bar is remedial and not punitive. We have stressed the importance of Rule 8210 in connection with FINRA's "obligation to police the activities of its members and associated persons."[64] Without subpoena power, FINRA "must rely on Rule 8210 to obtain information from its members necessary to carry out its investigations and fulfill its regulatory mandate."[65] It is therefore "critically important to the self-regulatory system that members and associated persons cooperate with [FINRA] investigations."[66] Failure to respond to Rule 8210 requests "impedes [FINRA's] ability to detect misconduct that threatens investors and

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[62] FINRA Sanction Guidelines at 7.

[63] Hearing Panel Decision at 14.

[64] *CMG Institutional Trading*, 2009 SEC LEXIS 215, at *15 (quoting *Paz Sec.*, 2008 SEC LEXIS 820, at *12).

[65] *Id.* at *15.

[66] *Erenstein*, 316 F. App'x at 871.

markets."[67] Goldstein's misconduct was therefore serious, and a bar will protect the public by encouraging others to respond to Rule 8210 requests completely and in a timely manner.[68]

Moreover, as noted, the panel did not immediately impose a bar, and instead provided Goldstein with additional time to comply with FINRA's outstanding requests. It first gave Goldstein twenty-one days to comply before imposing a suspension and then another three months to terminate the suspension through compliance before imposing the bar.

In light of Goldstein's persistent refusal to comply with FINRA's outstanding requests even after being ordered to do so by the hearing panel, we find that the bar serves the additional remedial purpose of protecting the public by removing Goldstein from the industry. Goldstein's willingness to defy the regulatory process and impede FINRA's investigation into potentially serious misconduct indicates that Goldstein poses a continuing danger to the investing public that is appropriately remedied by a bar.

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

C. The $50,000 fine imposed is inconsistent with the Sanction Guidelines.

Where an individual has provided a partial but incomplete response to Rule 8210 requests, the Sanction Guidelines state that a fine of $10,000 to $50,000 is standard.[69] But the Sanction Guidelines further provide that "[a]djudicators generally should not impose a fine if an individual is barred and there is no customer loss in cases involving . . . failure to respond under FINRA Rule 8210."[70] The panel did not consider this latter provision.

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[67] *Berger*, 2008 SEC LEXIS 3141, at *13-14; *see also Joseph Patrick Hannan,* Exchange Act Release No. 40438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998) ("We have repeatedly stressed the importance of cooperation in [FINRA] investigations . . . . Failures to comply [with Rule 8210 requests] are serious violations because they subvert [FINRA's] ability to carry out its regulatory responsibilities.").

[68] *See Siegel*, 592 F.3d at 158 (noting that deterrence may be considered as part of the overall remedial inquiry in determining sanctions); *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005) (same).

[69] FINRA Sanction Guidelines at 33. The three "principal considerations" discussed above are also applied to the determination of whether to impose a fine. *Id.*

[70] *Id.* at 10.

Accordingly, as Goldstein has been barred and as no customer loss has been shown, we set aside the fine imposed by the panel.

An appropriate order will issue.[71]

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, and STEIN; Commissioner PIWOWAR not participating).

Jill M. Peterson
Assistant Secretary

[71] 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. 71970 / April 17, 2014

Admin. Proc. File No. 3-15183

In the Matter of the Application of

GREGORY EVAN GOLDSTEIN
c/o Martin P. Unger
Wexler Burkhart Hirschberg & Unger, LLP
377 Oak Street, Concourse 2
Garden City, NY 11530

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING IN PART DISCIPLINARY ACTION TAKEN BY FINRA

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

ORDERED that the findings by FINRA that Gregory Evan Goldstein violated FINRA Rule 8210 be, and they hereby are, SUSTAINED; and it is further

ORDERED that the sanctions imposed by FINRA against Gregory Evan Goldstein are SUSTAINED, except that the fine is SET ASIDE.

By the Commission.

Jill M. Peterson
Assistant Secretary