

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

RICHARD F. O'LEARY,
(CRD No. 1096188)



Respondent.

Disciplinary Proceeding
No. C02040035

Hearing Officer – AWH

Default Decision

February 1, 2005

Formerly registered representative failed to respond completely to NASD Staff requests for information and failed to appear for on-the-record interviews, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. Respondent is barred from associating with any member firm in any capacity for the violations.

Appearances:

Cynthia A Kittle, Esq., for the Department of Enforcement.

No appearance for Richard F. O'Leary.

DECISION

Background

On August 25, 2004, Enforcement filed the Complaint in this proceeding, alleging that Richard F. O'Leary ("Respondent" or "O'Leary") failed to respond completely to Staff requests for information and failed to appear for on-the-record interviews ("OTRs"), in violation of NASD Conduct Rule 2110 and NASD Procedural Rule 8210. Respondent failed to answer the Complaint. He also failed to file an Answer to the Second Notice of Complaint and Complaint that Enforcement filed on September 24, 2004. As a result, on

December 2, 2004, Enforcement filed a Motion for Entry of Default Decision.

Respondent did not respond to that Motion. Pursuant to NASD Procedural Rules 9215(f) and 9269, the Motion will be granted, and the allegations in the Complaint, which is attached to this decision, will be deemed admitted.

Findings of Fact¹

The Respondent

From July 5, 1999, through December 14, 2002, O'Leary was registered with NASD as a General Securities Principal and as a General Securities Representative through member firm Wachovia Securities Financial Network, LLC ("WSF"). From December 19, 2002, through October 2, 2003, O'Leary was registered in those capacities through NASD member firm Sterling Financial Invest Group, Inc. ("Sterling"). He is not currently associated with any NASD member firm.

NASD Staff Requests for Information

On April 14, 2003, the Staff sent O'Leary a request for certain documents and information related to an investigation of his activities at Sterling. The investigation focused on his alleged unauthorized purchases for a customer of a private placement, known as Back Bay Income Investors, LLC ("Back Bay"), with which O'Leary was likely affiliated. The request for documents and information was issued pursuant to Procedural Rule 8210 and was mailed to O'Leary's Central Registration Depository ("CRD") residential address by first class mail. O'Leary failed to respond to the request for information.

¹ All findings of fact are based on the admitted allegations in the Complaint, the Declaration Supporting a Motion for Entry of Default Decision by Cynthia A. Kittle ("Declaration"), and the seven exhibits attached thereto.

On July 3, 2003, the Staff sent a follow-up request to O'Leary at his CRD address by first class and certified mail. The certified mailing's receipt was returned, bearing a signature appearing to be that of O'Leary. On August 20, 2003, O'Leary provided a materially incomplete response to the request for information. In particular, he failed to produce bank records and gave no information regarding customers who purchased Back Bay private placement interests.

NASD Staff Requests for an On-the-Record Interview

On September 4, 2003, the Staff mailed O'Leary at his CRD address a request that he appear for an OTR to be held on October 8, 2003, pursuant to Rule 8210. O'Leary's counsel contacted the Staff, and together they rescheduled the interview for October 9, 2003. Later, however, O'Leary's counsel informed the Staff that O'Leary would not appear to testify on that day in light of a pending grand jury investigation regarding Back Bay. O'Leary failed to appear at the October 9, 2003, interview.

On October 9, 2003, the Staff again requested that O'Leary appear for an OTR (the "Second OTR Request") to be held on October 16, 2003, pursuant to Rule 8210. The Second OTR Request was sent via first class mail and certified mail to O'Leary's CRD address. The return receipt for the certified mailing was returned, bearing a signature appearing to be that of O'Leary. Once again, O'Leary failed to appear at the scheduled interview.

Service of the Complaint

On August 25, 2004, Enforcement served the Complaint and Notice of Complaint on O'Leary via first class and certified mail at his CRD address and at an additional address discovered by the Staff (the "Second Address"). The certified mailing return

receipts from both mailings were returned to Enforcement, illegibly signed. On September 24, 2004, Enforcement served the Second Notice of Complaint and Complaint on O'Leary via first class and certified mail at his CRD address and Second Address. To date, O'Leary has not filed an Answer to the Complaint.

Discussion and Conclusions

NASD Jurisdiction Over Formerly Registered Persons

Article V, Section 4 of the NASD By-Laws provides for a two-year period of retained jurisdiction over a formerly registered person after the effective date of the individual's termination of registration. During this period of retained jurisdiction, NASD may file a complaint based upon conduct that occurred while the individual was registered with a member firm, or based upon such person's failure to provide information requested pursuant to Procedural Rule 8210, if the request was made, and the complaint is filed, during the foregoing period of retained jurisdiction.

The alleged misconduct occurred while O'Leary was registered, and his failure to respond to information requests and his failure to appear for OTRs occurred during the two-year period following termination of his registration with Sterling. Therefore, NASD has jurisdiction over this proceeding.

Respondent's Default

Enforcement properly served the Complaint on Respondent by sending it via first class and certified mail to his CRD address. Pursuant to NASD Procedural Rule 9134, the mailing sent to Respondent's most current CRD address establishes that he had valid constructive notice of the Complaint.² Because O'Leary failed to respond to the

² Furthermore, because one of the certified mailing receipts was signed, although illegibly, it is likely he also received actual notice of the Complaint.

Complaint, Procedural Rules 9215(f) and 9269 authorize entry of a default decision against him. Accordingly, the allegations in the Complaint against him are deemed admitted.

Failure to Respond to NASD Requests for Information and to Appear for OTRs

Procedural Rule 8210 authorizes NASD to require any person subject to its jurisdiction to provide information and testimony related to any matter under investigation. The Rule serves as a key element in NASD's oversight function and allows NASD to carry out its regulatory functions without subpoena power. *See Joseph G. Chiulli*, Exchange Act Release No. 42,359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for NASD effectively to conduct its investigations, and emphasizing that NASD members and associated persons must fully cooperate with requests for information); *Dep't of Enforcement v. Benz*, No. C01020014, 2003 NASD Discip. LEXIS 11, at *18 (OHO Mar. 4, 2003) ("Because NASD has no subpoena power, timely and full compliance with information requests is essential to NASD's self-regulatory function."). When an individual fails to respond to information requests, NASD's ability to perform its regulatory responsibilities is subverted. *Joseph P. Hannan*, Exchange Act Release No. 40,438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998). Further, a violation of Procedural Rule 8210 is also a violation of Conduct Rule 2110, contravening "high standards of commercial honor." *Dep't of Enforcement v. Baxter*, No. C07990016, 2000 NASD Discip. LEXIS 3, at *25 (NAC, Apr. 19, 2000).

Under Procedural Rule 8210, notice of a request for information is considered received if the request is mailed or otherwise transmitted to the person's last known CRD address. Because Enforcement mailed the requests for information to O'Leary's last

known CRD address, he received valid constructive notice of the requests. He also received actual notice, as evidenced by his signature on the certified mailing receipts, and his partial response to the follow-up request. O'Leary's failure to respond completely to the requests for information violated Procedural Rule 8210 and Conduct Rule 2110. Similarly, because Enforcement mailed the OTR requests to O'Leary's last known CRD address, he also received valid constructive notice of those requests. His attorney's contact with the Staff demonstrates that he also received actual notice. While O'Leary did not want to appear for the interviews in light of the grand jury investigation, the existence of a grand jury investigation is not a defense to his refusal to appear. NASD rules are "unequivocal with respect to the obligation to cooperate with the NASD." *Michael J. Markowski*, 51 S.E.C. 553, 557 (1993), *aff'd*, 34 F.3d 99 (2d Cir. 1994). Moreover, "[a] refusal to comply with an NASD request for information is tantamount to a complete failure to respond." *Dep't of Enforcement v. Steinhart*, Complaint No. FPI020002, 2003 NASD Discip. LEXIS 23 (NAC Aug. 11, 2003). Therefore, O'Leary's failure to appear for the two OTRs was a violation of Procedural Rule 8210 and Conduct Rule 2110.

Sanctions

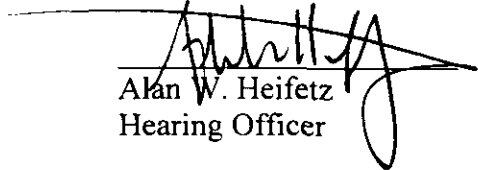
For failure to respond completely to oral, written, or documentary requests for information pursuant to Rule 8210, NASD Sanction Guidelines suggest suspending the individual in any or all capacities for up to two years. NASD SANCTION GUIDELINES, at p. 37 (2004 ed.). Where an individual fails to respond in any manner, the Guidelines provide that a bar is the standard sanction. *Id.* Here, O'Leary's partial response to the second request for information was materially incomplete, and he failed twice to appear

for scheduled testimony. His lack of cooperation thoroughly frustrated the Staff's attempts to conduct an investigation into his alleged misconduct. In light of the totality of the circumstances, and in the absence of any mitigating circumstances that would warrant a lesser sanction, O'Leary will be barred in all capacities for failing to respond completely and failure to respond in any manner to requests for information made pursuant to Rule 8210.

Conclusion

Richard F. O'Leary is barred from associating with any member firm in any capacity for failure to respond completely to requests for information and failure to appear for testimony, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. The bar shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.



Alan W. Heifetz
Hearing Officer

Copies to:
Via Overnight & First Class Mail
Richard F. O'Leary

Via Electronic & First Class Mail
Cynthia A. Kittle, Esq.
Rory C. Flynn, Esq.

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

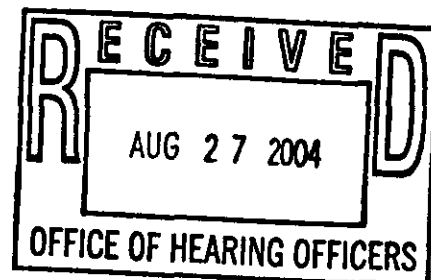
RICHARD F. O'LEARY,
General Securities Principal
(CRD No. 1096188)

Respondent.

Disciplinary Proceeding
No. C02040035

Hearing Officer –

COMPLAINT



Upon information and belief, the Complainant alleges as follows:

1. From on or about October 15, 1998, through December 13, 2002, respondent Richard F. O'Leary ("Respondent") was registered with NASD member Wachovia Securities Financial Network, Inc. ("WSF") as a General Securities Principal and General Securities Representative. From December 16, 2002 through October 2, 2003, Respondent was registered with another NASD member. On or about February 28, 2003, WSF filed an amended Uniform Termination Notice For Securities Industry Registration – Form U-5 regarding the *customer complaint alleged herein*. Respondent currently is not registered with an NASD member firm. Accordingly, pursuant to Article V, Section 4 of NASD By-Laws, NASD retains jurisdiction over Respondent for purposes of this Complaint.

CAUSE OF COMPLAINT

(Failure to Respond Completely and Failure to Appear for an

On-The-Record Interview)

(Violation of NASD Procedural Rule 8210 and Conduct Rule 2110)

2. Paragraph 1 is re-alleged and incorporated herein by reference.

3. NASD initiated an investigation of the facts and circumstances relating to a written complaint filed on or about February 28, 2003 by public customer D.Z. against Respondent. In her Complaint, D.Z. asserts that, among other things, Respondent effected an unauthorized transaction by purchasing an interest in a limited liability corporation without her authorization. In the course of its investigation, the staff of NASD District 2 ("Staff") became aware that Respondent likely was affiliated with a private placement offering known as Back Bay Income Investors, LLC ("Back Bay").

First Request for Information

4. Pursuant to Procedural Rule 8210, on April 14, 2003, the Staff sent a letter (the "First 8210 Letter"), via first class mail, to the Respondent at his address set forth in the NASD Central Registration Depository: [REDACTED] ("CRD Address"). The First 8210 Letter requested specific information and documentation regarding the foregoing investigation. The requested information and documents included information regarding Respondent's customers who purchased Back Bay, and a request for account statements for all bank accounts owned or controlled by Respondent during the period January through December 2002. The Staff requested that the Respondent provide his written response to the First 8210 Letter by April 28, 2003.

5. The First 8210 Letter sent via first class mail to the CRD Address was not returned by the U.S. Postal Service.

6. Respondent failed to provide any response to the First 8210 Letter.

Second Request for Information

7. Pursuant to Rule 8210, on July 3, 2003, the Staff mailed a follow-up letter to the First 8210 Letter (the "Second 8210 Letter"), via certified mail, return receipt requested, and via

first class mail, to the Respondent's CRD Address. The Second 8210 Letter enclosed a copy of the First 8210 Letter, and reiterated the request for information. The Staff requested that the Respondent provide his written response to the Second 8210 Letter by August 21, 2003.

8. The return receipt for the Second 8210 Letter sent via certified mail was returned, dated July 14, 2003, bearing a signature appearing to be that of the Respondent. The first class mailing sent to the CRD Address was not returned by the U.S. Postal Service.

9. Respondent responded to the Second 8210 Letter and provided some information but failed to respond completely to the Staff's requests. Specifically, Respondent provided no information regarding his customers who purchased Back Bay and failed to produce any bank records.

First Request for an Interview

10. By letter dated September 4, 2003, the Staff requested that Respondent appear for an on-the-record interview on October 8, 2003 (the "First Request for Testimony"), pursuant to Procedural Rule 8210. At Respondent's request through counsel, the staff rescheduled the on-the-record interview for October 9, 2003. The First Request for Testimony was sent via first class mail to the Respondent's CRD address and was not returned by the U.S. Postal Service.

11. On or about October 8, 2003, Respondent's counsel notified the Staff that Respondent would not appear and testify on October 9, 2003.

12. Respondent failed to appear at the October 9, 2003 interview.

Second Request for an Interview

13. By letter dated October 9, 2003, the Staff requested that Respondent appear for an on-the-record interview on October 16, 2003 (the "Second Request for Testimony"), pursuant

to Procedural Rule 8210. The Staff sent the Second Request for Testimony via certified mail, return receipt requested, and via first class mail to the Respondent's CRD Address.

14. The return receipt for the Second Request for Testimony sent via certified mail to the CRD Address was returned, dated October 10, 2003, bearing a signature appearing to be that of the Respondent. The first class mailing sent to the CRD Address was not returned by the U.S. Postal Service.

15. Respondent failed to appear at the October 16, 2003 interview.

16. The aforementioned acts, practices and conduct constitute separate and distinct violations of Procedural Rule 8210 and Conduct Rule 2110 by Respondent.

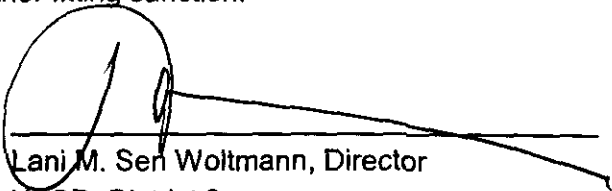
PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests for:

- A. Findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. An order imposing sanctions upon Respondent in accordance with NASD Rule 8310;
- C. An order imposing such costs of any proceedings as are deemed fair and appropriate under the circumstances in accordance with NASD Procedural Rule 8330; and

D. An order imposing any other fitting sanction.

Date: August 25, 2004



Lani M. Sen Woltmann, Director
NASD, District 2
300 South Grand Avenue, Suite 1600
Los Angeles, California 90071
(213) 229-2300; Fax No. (213) 617-3299

Date: August 25, 2004



Cynthia A. Kittle, Senior Regional Attorney
NASD, District 2
300 South Grand Avenue, Suite 1600
Los Angeles, California 90071
(213) 229-2300; Fax No. (213) 617-1570

Rory C. Flynn, Esq., Chief Litigation Counsel
Department of Enforcement
NASD
1801 K Street, N.W., Suite 800
Washington, D.C. 20006
(202) 974-2874; Fax No. (202) 974-2805