SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56768 / November 8, 2007

Admin. Proc. File No. 3-12529

**CORRECTED**

In the Matter of the Application of

MORTON BRUCE ERENSTEIN
c/o John J. Phelan, III, Esq.
2385 NW Executive Center Drive, #100
Boca Raton, FL 33431

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDINGS

Violation of Conduct Rules

Failure to Cooperate

Conduct Inconsistent with Just and Equitable Principles

Registered representative of member firm of registered securities association who failed to respond to question during on-the-record interview and failed to timely respond to request for information appealed association's sanction. Held, association's findings of violations and sanctions are sustained.

APPEARANCES:

John J. Phelan, III, for Morton Bruce Erenstein.

Marc Menchel, Alan Lawhead, and Leavy Mathews III, for NASD.

Appeal filed: January 9, 2007
Last brief received: April 18, 2007

I.

Morton Bruce Erenstein, a registered representative associated with Cullum & Burks Securities, Inc., an NASD member firm, seeks review of NASD action. 1/ NASD found that Erenstein failed to answer a question about his tax returns during an on-the-record interview ("OTR") and failed to timely respond to a written request for information in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. 2/ As a result of his failure to respond, NASD suspended Erenstein from associating with any NASD member in any capacity for one year. We base our findings on an independent review of the record.

II.

In March 2003, NASD received a customer complaint letter about Erenstein. The letter accused Erenstein of misrepresenting investments, recommending unsuitable transactions, and converting $10,000 of the customer's money for Erenstein's personal use that had been given to Erenstein for the purpose of investing. In May 2003, NASD staff sent a letter to Erenstein requesting that he provide written responses to several questions regarding the accusations in the customer letter. Erenstein's counsel provided the requested information to NASD in June 2003.

In September 2003, NASD staff sent Erenstein a letter requesting that he appear for an OTR to answer questions about the customer complaint. In October 2003, Erenstein, represented by counsel, appeared at the OTR and provided testimony. During the OTR, Erenstein answered all of NASD's questions with one exception. In response to questions about the alleged conversion of customer funds, Erenstein stated that, by mutual agreement, he had received the

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1/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Because the disciplinary action here was taken before that date, we continue to use the designation NASD.

2/ NASD Procedural Rule 8210 requires members and associated persons to provide information if requested by NASD as part of an investigation, complaint, examination, or proceeding. Conduct Rule 2110 requires that "a member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." Violations of NASD rules such as NASD Procedural Rule 8210 constitute conduct inconsistent with the just and equitable principles of trade provisions of NASD Conduct Rule 2110. See, e.g., Justin F. Ficken, Exchange Act Rel. No. 54699 (Nov. 3, 2006), 89 SEC Docket 685, 686 n.1 (holding that a violation of NASD Procedural Rule 8210 constitutes conduct inconsistent with the just and equitable principles of trade provisions of NASD Conduct Rule 2110).

$10,000 as compensation for Erenstein's assistance in helping the customer liquidate a large number of old United States savings bonds. He claimed that he had orally disclosed this arrangement to his firm, but admitted he did not obtain written approval for this alleged outside business activity. NASD staff asked whether he had any documentation showing the amount of time he had spent and the specific work he had done to assist his customer with redeeming the bonds, specifying several sources of documents that might help verify Erenstein's assertion that he earned the money, rather than converted it. When Erenstein replied that he did not have any of these documents, the staff followed up by asking Erenstein whether he reported the $10,000 on his income tax return. Although Erenstein's counsel had not objected to the previous question, he objected to this question on grounds of relevance and Erenstein, accordingly, refused to answer. 3/

On the same date as the OTR, NASD staff sent Erenstein a written request for information pursuant to Procedural Rule 8210. Among other things, the letter requested copies of Erenstein's "complete State and Federal tax returns for calendar years 1998, 1999, and 2000."

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3/ This is the exchange at the OTR:

> Q: Do you have any documentation that would show the amount of time you spent on this, or any work you performed in cashing the bonds, like mailing envelopes, receipts, any sort of documentation, letters, anything that would show what you did, besides your testimony, confirming what you did for [Erenstein's customer] in terms of cashing of the bonds?
> A: No.
> Q: The $10,000 that you received from [Erenstein's customer] for this service, did you declare that money on your income tax returns?
> Erenstein's counsel (EC): Objection. Irrelevant. He won't answer that question.
> Q: I think it's relevant. Did you declare that money on your income tax return in 1998, 1999, or 2000?
> EC: Don't answer the question.
> Q: Are you refusing to answer the question?
> A: Yes.
> EC: On the grounds of relevance. Nothing to do with your case.
> Q: We would advise you -- Do you have the advisory for the 8210? I want to readvise you, Mr. Erenstein, that under 8210 the Association has the right to require a member, or person subject to the Association's jurisdiction to provide information orally, in writing or electronically at a location to be specified by the Association staff. Your failure to provide information as requested by the staff could result in a recommendation for disciplinary action against you. Do you understand that?
> A: Yes.
> Q: It's your position you will not answer that question?
> A: On advice of counsel, I will not answer it.

The request also stated that, if the $10,000 in question was reported on any other tax returns, Erenstein must provide copies of those returns to the staff. In a letter to Erenstein dated October 17, 2003, NASD staff advised Erenstein that "failure to provide the requested documents by the due date of October 31, 2003, may result in disciplinary action against [him]."

On October 31, 2003, Erenstein's counsel wrote to NASD advising it that Erenstein would not be furnishing the requested tax returns. In his letter, counsel again objected to the staff's request on the basis of relevance and argued that income tax returns are subject to a heightened standard of relevance. The letter "invite[d] [the staff] to make a showing of relevance" whereupon Erenstein would "reconsider" his position.

On November 3, 2003, an NASD staff investigator had a telephone conversation with Erenstein's counsel regarding the October 31, 2003 letter. During this conversation, the staff investigator told Erenstein's counsel that the staff "needed to see the tax return in order to make [its] determination as to whether or not this [payment] constituted a conversion of monies, which would be a felony, . . . or whether or not it was an outside activity in violation of NASD Conduct Rule 3030[; . . . [a]nd without that tax return, [the staff] couldn't make that determination." 4/ He explained that, if the 1998 tax return showed the $10,000 as declared, then the staff would not need to see the 1999 or 2000 tax returns, but that if the money was not declared in 1998, the staff would need the subsequent returns to see if any amendments had been filed. According to the

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4/ NASD Conduct Rule 3030 provides that no associated person "shall be employed by, or accept compensation from, any other person as a result of any business activity . . . outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member." This Conduct Rule was adopted "to address the securities industry's growing concern about preventing harm to the investing public or a firm's entanglement in legal difficulties based on an associated person's unmonitored outside business activities." Joseph Abbondante, Exchange Act Rel. No. 53066 (Jan. 6, 2006), 87 SEC Docket 203, 222-23, petition denied, 298 Fed. Appx. 6 (2d Cir. 2006) (unpublished). In approving NASD's enactment of this rule, we "agreed with NASD's conclusion that 'it was appropriate for member firms to receive prompt notification of all outside business activities so that [concerns] could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law.'" Id. (quoting Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Outside Business Activities of Associated Persons, Exchange Act Rel. No. 26063 (Sept. 6, 1988), 41 SEC Docket 1254, 1254).

investigator, Erenstein's counsel responded "we're not producing any tax documents, period, . . . you're not entitled to them and you're not going to get them." 5/

On that same day, NASD staff sent Erenstein a letter informing him that he was "currently in violation of NASD Procedural Rule 8210 for failure to produce the requested tax returns, which may subject [him] to disciplinary action." The letter noted that "the fact that either [Erenstein] and/or [his] attorney believes that the requested tax returns are not relevant is no defense for failure to respond to a request made pursuant to NASD Procedural Rule 8210 since staff determines the relevancy of any and all documents that are requested."

On June 2, 2004, NASD staff sent Erenstein a Wells notice informing him that the staff intended to recommend that NASD issue a complaint alleging that Erenstein violated Procedural Rule 8210 and Conduct Rule 2110, by refusing to answer the question during the OTR and failing to produce the tax returns requested by NASD staff. 6/ On June 21, 2004, Erenstein submitted his response to the Wells notice, and in addition produced a copy of his 1998 federal income tax return and an amendment to the 1998 return dated October 2003 that reflected additional income of $10,000 for 1998. In his cover letter, Erenstein noted that the production was being made "under protest" and that neither his 1999 nor his 2000 tax return contained any entries relating to the $10,000 in question. Erenstein explained that the 1998 return had been amended in 2003 because the $10,000 was "initially overlooked . . . since there was, naturally, no 1099 from [Erenstein's customer]."

On August 6, 2004, NASD Department of Enforcement ("Enforcement") filed a two-cause complaint against Erenstein. The first cause alleged that Erenstein violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to the tax question during his OTR. The second cause alleged that Erenstein violated Rules 8210 and 2110 by failing to timely respond to the staff's written request for copies of Erenstein's income tax returns. Erenstein filed an answer denying that he violated the NASD rules.

A hearing was held on December 14, 2004. On May 4, 2005, before the NASD Hearing Panel issued its decision, Erenstein notified the Panel that he had filed for bankruptcy protection and advised the Hearing Panel that, pursuant to the bankruptcy code, all proceedings against Erenstein were automatically stayed. On August 24, 2005, the Bankruptcy Court issued a discharge order prohibiting any attempt to collect debts from Erenstein. On November 7, 2005,

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5/ Erenstein challenges this version of the November 3 conversation on the basis that the investigator could not recall the conversation verbatim. Erenstein's counsel, who was informed by the Hearing Panel that he could testify as to his own recollection of the conversation if he so chose, did not do so.

6/ There is no evidence in the record of any communication between Erenstein (or his attorney) and NASD from November 3, 2003 through June 2, 2004, nor is there an explanation in the record for this extended period of non-communication.

Enforcement filed a motion informing the Hearing Panel of the discharge of Erenstein's bankruptcy and requesting that the Hearing Panel not impose monetary sanctions against Erenstein.

On December 8, 2005, the Hearing Panel issued its decision, finding that Erenstein had violated Procedural Rule 8210 and Conduct Rule 2110, and barring him from associating with an NASD member in any capacity. In its decision, the Hearing Panel erroneously stated that Enforcement "argues that a bar is the appropriate sanction in this case." In fact, Enforcement had consistently sought a one-year suspension. Upon being advised of this error by Erenstein's counsel, the Hearing Panel issued a "Corrected Hearing Panel Decision" on December 15, 2005. The corrected decision stated that "[a]fter Respondent's counsel brought this error to the Hearing Officer's attention, she consulted with the other Panelists in the proceeding[, and] [t]he Panel confirmed that a bar was the appropriate sanction in this proceeding, regardless of Enforcement's recommendation."

Erenstein appealed the decision to NASD's National Adjudicatory Council ("NAC"), which issued its decision on December 18, 2006. The NAC affirmed the Hearing Panel's finding that Erenstein violated Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to a question during an OTR and by failing to timely respond to a written request for information. For purposes of assessing the sanctions, the NAC aggregated the two counts of the complaint, reasoning that they related to the failure to provide the same information, i.e., whether Erenstein had reported the $10,000 as income for tax purposes. 7/ The NAC concluded that, because Erenstein eventually produced the requested tax return after receiving the Wells notice, and because Erenstein's initial refusal was based on his attorney's "apparently good-faith objection," it would reduce the Hearing Panel's sanction to a one-year suspension.

III.

Pursuant to Section 19(e) of the Exchange Act, 8/ we will sustain NASD's decision if the record shows that Erenstein engaged in conduct that NASD found to have violated its rules and that NASD applied its rules in a manner consistent with the purposes of the Act. The essential facts establishing the violation of NASD's Rule 8210 are not disputed: NASD sought Erenstein's on-the-record testimony and production of documents, including tax returns, pursuant to its authority under Rule 8210. Erenstein refused to answer one of the questions at the OTR, and to produce his tax return until more than seven months after it was initially requested.

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7/ The NASD Sanction Guidelines authorize the aggregation of violations for purposes of determining sanctions if, among other things, "the violations resulted from a single systemic problem or cause that has been corrected." NASD Sanction Guidelines 6 (General Principles Applicable To All Sanction Determinations, No. 4) (2006).

8/ 15 U.S.C. § 78s(e).

NASD Rule 8210(a) grants NASD the authority to "require a member, person associated with a member, or person subject to [NASD's] jurisdiction to provide information . . . if requested" and to "inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in [an NASD] investigation, complaint, examination, or proceeding." NASD has consistently interpreted the term "books, records, and accounts" to include records such as tax returns. 9/ Whether a requested record is "with respect to any matter involved in" an NASD investigation, is a determination made by the NASD staff. The rule does not require that NASD explain its reasons for making the information request or justify the relevance of any particular request. 10/ We note that the Hearing Panel below responded to Erenstein's contention that NASD staff refused to provide Erenstein any guidance on the issue of relevance by saying that staff should be forthright and cooperative in its interactions with counsel, and we endorse that view. However, it is well established that a member or an associated person may not "second guess[]" an NASD information request 11/ or "set conditions on their compliance." 12/ A belief that NASD does not need the requested information "provides no excuse for a failure to provide it." 13/ As we have held, a member or an associated person has "an obligation to respond to an NASD request even if his response [is] a statement that he believed he had already provided the NASD with the information it had requested." 14/

While Rule 8210 does not require that NASD establish the relevancy of its request, we agree with NASD that Erenstein's treatment on his tax return of the $10,000 he received from his customer is relevant. As a result of its inquiries, NASD had a reasonable basis to investigate further whether Erenstein had, as his customer claimed, not invested the customer's money for her benefit but rather taken it as his own or had engaged in outside business activities. Erenstein

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9/ See, e.g., Dennis Sturm, Complaint No. CAF000033 (N.A.S.D.R. Mar. 21, 2002), 2002 WL 461468, at *4 (holding that Rule 8210 request for documents encompasses tax returns and, as NASD is not a state actor, associated person's constitutional right to privacy is not implicated by NASD's request); Roger Harry Chlowitz, Complaint No. C02980025 (N.A.S.D.R. Nov. 4, 1999), 1999 WL 1489027, at *3 (finding that associated person's tax returns were within scope of Rule 8210 and rejecting his assertion of right to privacy as reason not to comply).

10/ Rooney A. Sahai, Exchange Act. Rel. No. 55046 (Jan. 5, 2007), 89 SEC Docket 2402, 2406.

11/ Dennis A. Pearson, Jr., Exchange Act Rel. No. 54913 (Dec. 11, 2006), 89 SEC Docket 1627, 1635 (citation omitted); Michael David Borth, 51 S.E.C. 178, 181 (1992).

12/ Sahai, 89 SEC Docket at 2406.

13/ Pearson, 89 SEC Docket at 1635; Borth, 51 S.E.C. at 181.

14/ Ashton Noshir Gowadia, 53 S.E.C. 786, 790 (1998).

had stated that he had no other documentary evidence that could support his contention that he earned the money, rather than converted it. If Erenstein omitted the $10,000 amount from his income declaration on his tax returns, the omission could have supported the inference that the money had been obtained improperly, such as by converting his customer's funds. On the other hand, if this amount had been reported, it would be evidence that the money was earned income from an outside business activity.

Erenstein argues that his conduct did not violate Rule 8210 because income tax returns are private communications between the Internal Revenue Service and the taxpayer not subject to disclosure under Rule 8210. Alternatively, Erenstein contends that NASD effectively denied him his right to counsel because when his counsel objected to NASD's request for his tax return, the "objection [was] treated [by NASD] as a violation of the obligation to cooperate and [Erenstein was] told repeatedly that reliance on the advice of his counsel is no defense to the charge," thus effectively making the right "illusory and non-existent." He also argues that he should be deemed to have satisfied NASD's request in a timely manner when he finally turned over the returns "because of the good faith objection [his attorney made to the request] and attempts to discuss and negotiate." 15/

In support of his contention that his tax returns were not subject to disclosure under Rule 8210, Erenstein cites our recent decision in Frank P. Quattrone 16/ for the proposition that "there are limits to the NASD's ability to compel information from members and registered persons." Erenstein also points to our statement in Jay Alan Ochanpaugh that "the scope of Rule 8210, while necessarily broad, does have limits." 17/ Erenstein extrapolates from Quattrone and Ochanpaugh that NASD's authority under Rule 8210 is circumscribed by "the uniform position of all courts . . . that tax returns are confidential communications between the taxpayer and the taxing authority," and accordingly their discoverability is permissible only if "they are clearly relevant to the matter under review and . . . if there is no other available source of the information requested." 18/ He argues that neither test is met here, noting that "[t]he NASD Staff are not tax

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15/ Erenstein also raises a number of non-substantive objections, such as NASD's misstatement in its brief of Erenstein's name (calling him "Bruce Erenstein," rather than "Morton Bruce Erenstein") and its incorrect statement of Erenstein's counsel as associated with a particular law firm. These are harmless errors.

16/ Exchange Act Rel. No. 53547 (Mar. 24, 2006), 87 SEC Docket 2155.

17/ Exchange Act Rel. No. 54363 (Aug. 25, 2006), 88 SEC Docket 2653, 2658-59.

18/ Erenstein cites Moore's Federal Practice, which notes that "[p]ublic policy disfavors disclosure of tax returns," that the policy articulated by courts in civil litigation "is founded in provisions of the Internal Revenue Code declaring that federal tax returns are confidential communications between the taxpayer and the government," and that,

(continued...)

auditors" and that the "extortionate effect" of such a request is to "terrorize one's adversary, perhaps into dropping a meritorious claim or defense out of fear of having some tax issue become the subject of IRS attention."

Neither Quattrone nor Ochanpaugh is applicable here. The issue in Quattrone was a narrow one -- whether NASD's grant of summary disposition on the issue of Quattrone's liability was appropriate and in accordance with NASD's rules. We concluded that summary disposition was not proper because Quattrone had alleged sufficient specific facts to raise a genuine issue of material fact on the question of whether NASD had acted in accordance with its rules in making its information request to Quattrone. We declined to rule on Quattrone's claim that he was not required to respond to NASD's information request because of his constitutional right against self-incrimination. In Ochanpaugh, we concluded that NASD had exceeded its authority under Rule 8210 because NASD had failed to show that the documents it had requested were "books, records, and accounts of" the associated person, as required by the rule. Here, in contrast, there is no question that the tax returns requested were Erenstein's or that the information was in his possession.

Erenstein's reliance on the policy enunciated judicially with respect to the discovery of tax returns in civil litigation misperceives the nature of the relationship between NASD and its members, and the aegis under which Rule 8210 operates. As we noted in Ochanpaugh, "NASD's authority to request documents pursuant to Rule 8210 stems from the contractual relationship entered into voluntarily by NASD members and associated persons with NASD." Erenstein's contractual relationship with NASD, entered into when he became an associated person with an NASD member, included his agreement to abide by all its rules. Rule 8210, one of those rules, expressly permits NASD to inspect and copy "books, records and accounts of" associated persons, and associated persons are on notice that tax returns fall within this category. 19/

Moreover, nothing in NASD's request for Erenstein's tax returns here was inconsistent with the judicial policy cited by Erenstein. Courts have made clear that, consistent with a federal policy against indiscriminate disclosure of tax returns, production of tax returns may be compelled either where the taxpayer has waived his confidentiality by making an issue of his income or where they are relevant and the information contained therein is not readily available

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18/ (...continued)
therefore, the policy "is not a function of the definition of 'relevance' for discovery purposes." ¶ 26-41[8][b] (3d ed. 2007).

19/ See supra n.9, and accompanying text. In Ochanpaugh, we noted that the applicant's personal financial records, such as income tax returns, would have been a more appropriate source of the information sought by NASD. 88 SEC Docket at 2657 & 2662.

from another source. 20/ Erenstein's insistence that discovery of tax returns is impermissible unless they are "clearly relevant" and "if there is no other available source of the information requested" is not supported by the authorities he cites. 21/

As discussed above, the record shows that Erenstein made his income an issue by asserting as a defense to his customer's claim of conversion that the money he received from her was his legitimate income. Accordingly, the tax returns were relevant to assisting NASD in determining whether the money received by Erenstein constituted a conversion of the customer's funds, or whether it was income received by Erenstein. Given Erenstein's statement during the OTR that he had no other documentary evidence supporting his claim that he earned the money

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20/ United States v. Certain Real Prop. Known as and Located at 6469 Polo Pointe Way, Delray Beach, Fla., 444 F. Supp. 2d 1258, 1264-65 (S.D. Fla. 2006) (holding that tax returns are discoverable as they were found to be relevant to claimant's claim of lack of involvement with alleged fraudulent activities, the information contained therein was not otherwise readily available, and the claimant had placed his income at issue by testifying in the manner in which he did); United States v. Bonanno Organized Crime Family of La Costa Nostra, 119 F.R.D. 625, 627 (E.D.N.Y. 1988); SEC v. Cymaticolor Corp., 106 F.R.D. 545, 547 (S.D.N.Y. 1985). See also Johnson v. Kraft Foods N. Am., Inc., 236 F.R.D. 535, 539 (D. Kan. 2006) (holding that once party seeking discovery of tax return establishes its relevancy, the burden shifts to the party opposing production to show that other sources exist from which the information is readily obtainable).

21/ See Bonanno, 119 F.R.D. at 627-28 (permitting discovery of tax returns where court found "that the returns are relevant to the subject matter of the action . . . [and] that there is a compelling need for the returns because the information contained therein is not otherwise readily obtainable"); Premium Servs. Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975) (holding that tax returns do not enjoy absolute privilege from discovery, but public policy disfavors unnecessary public disclosure which would discourage taxpayers from filing accurate returns); Yancy v. Hooten, 180 F.R.D. 203, 215 (D. Conn. 1998) (holding that tax returns may be protected from discovery, even if they contain some relevant financial information, if the party seeking protection demonstrates good cause to uphold its expectation of confidentiality, as well as the availability of reliable financial information from other sources); Payne v. Howard, 75 F.R.D. 465, 470 (D.D.C. 1977) (holding that "access to defendant's tax returns . . . [was] not essential to discovering relevant information that [was] not obtainable by other means," but noting that they are discoverable where taxpayer waives his confidentiality by making an issue of his income).

by performing services for the customer, the information sought by NASD was not readily available from another source. 22/

With respect to Erenstein's alternative arguments concerning the impact of his counsel's objections on Erenstein's liability, although NASD procedural rules "permit the participation of counsel, 'there is no constitutional or statutory right to counsel in NASD disciplinary proceedings.'" 23/ Moreover, "reliance on counsel is immaterial to an associated person's obligation to supply requested information to the NASD." 24/ As discussed below, however, NASD appropriately considered counsel's good faith interposition of his objections in determining the appropriate sanction. We therefore reject Erenstein's assertions that NASD's requests for information and testimony denied him his right to counsel and that his counsel's objection to the request excused his initial failure to comply with the requests.

Accordingly, we find that Erenstein violated Rules 8210 and 2110 by failing to provide a timely response to requests concerning his tax returns.

IV.

A. Erenstein argues that the Hearing Panel violated Procedural Rule 9268(a) by failing to issue its decision within sixty days of Erenstein's last post-hearing filing on January 5, 2005. He charges that, as a result of this failure, it is "likely that . . . no Panelist looked at this matter from the hearing on December 14, 2004 until very near the December 8, 2005 decision date." Erenstein's reading of Rule 9268(a) is incorrect. Rule 9268(a) directs that the Hearing Officer "prepare" a written decision "[w]ithin 60 days after the final date allowed for filing proposed findings of fact, conclusions of law, and post-hearing briefs, or by a date established at the discretion of the Chief Hearing Officer." The rule does not require that the Hearing Panel issue its decision within sixty days. As we have observed, Rule 9268 "addresses the timing of the Hearing Officer's preparation of a decision (which must then be distributed to other members

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22/ We also note that, although Erenstein challenges the testimony of the NASD investigator that the relevance of the tax return was explained to his counsel in a November 3, 2003 telephone call, our review of the transcript of the OTR leading up to the request for the tax returns shows that the relevance of the request was patent from the context of the questions.

23/ Sundra Escott-Russell, 54 S.E.C. 867, 874 n.18 (quoting Falcon Trading Group, Ltd., 52 S.E.C. 554, 559 (1995), aff'd, 102 F.3d 579 (D.C. Cir. 1996)).

24/ Escott-Russell, 54 S.E.C. at 867, 872-73 (quoting Michael Markowski, 51 S.E.C. 553, 557 (1993), aff'd, 34 F.3d 99 (2d Cir. 1994)).

of the Hearing Panel), and not the issuance of the decision." 25/ There is no evidence in the record that the Hearing Officer failed to prepare the decision within the requisite time. There is also no evidence supporting Erenstein's surmise that the Hearing Panel did look at the decision until near the December 8, 2005 decision date.

B. Erenstein claims that he was prejudiced by the lengthy period that it took the Hearing Panel to decide this proceeding, and that this delay warrants dismissal of the case. In support, he argues that the delay affected the ability of the Panel to evaluate the credibility of witnesses. However, he does not challenge any credibility determinations made by the Panel affecting the NAC's analysis of the case.

Erenstein also asserts that the delay resulted in numerous erroneous factual findings in the Hearing Panel's decision. He argues that these findings in turn led the Hearing Panel, and then the NAC, to incorrectly find that he had violated Procedural Rule 8210 and to impose an excessive sanction. He points out, for example, that the Hearing Panel decision incorrectly stated that he had failed to provide the complete tax returns, and that NASD staff had been forced to bring charges and conduct a hearing when, in fact, he had provided his tax return prior to the filing of the complaint against him. Erenstein asserts that these factual errors "led the Panel to perceive Applicant wrongly as a 'bad guy' and to deal with him far more severely than the actual charges and evidence justify."

Erenstein also challenges numerous other aspects of the Hearing Panel's decision. Erenstein notes that the Hearing Panel erroneously stated that Erenstein had not objected to the admission of Enforcement's exhibits when, in fact, the record shows that he had objected to the admission of several exhibits. Next, he points to the statement in footnote 26 of the Hearing Panel decision that "there was an insufficient record to establish" Erenstein's contention that "Enforcement refused to respond to requests for clarification by [Erenstein's] counsel." Erenstein disputes the Hearing Panel decision's statements that he had failed "to respond to a written request for information until notified that disciplinary charges were going to be filed," and that "NASD should not have to initiate disciplinary proceedings to obtain a response to a request for information under Rule 8210." He asserts, first of all, that his October 31, 2003 letter to Enforcement was a "response," and that the Hearing Panel "demonstrate[d] a stunning lack of understanding" by characterizing the Wells notice as the commencement of the disciplinary proceeding. He further argues that the decision ignored the long delay between Enforcement's November 3, 2003 letter to Erenstein and its Wells notice letter of June 2004.

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25/ Daniel Richard Howard, 55 S.E.C. 1096, 1103-04 (2002), aff'd, 77 Fed. Appx. 2 (1st Cir. 2003) (unpublished). We also note that the Hearing Panel was required to stay its proceedings for several months because of Erenstein's bankruptcy filing.

However, as we recently emphasized, "it is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of NASD which is subject to Commission review." 26/ The NAC conducted a de novo review of the record and made its own independent findings from the record. Moreover, in its opinion, the NAC acknowledged and considered the errors identified by Erenstein. 27/ Regarding Erenstein's assertion that the Hearing Panel's errors may have prejudiced the NAC against him, Erenstein has not demonstrated that he was prejudiced by these errors. In fact, the NAC specifically determined to reduce the sanction significantly based in part on its recognition that the Hearing Panel erred in imposing a bar for an untimely response to a Rule 8210 request. In any event, the review of the Hearing Panel decision by the NAC and our review mitigate any harm that may have resulted. 28/

V.

Our review of NASD's sanction is governed by Section 19(e)(2) of the Exchange Act. 29/ Section 19(e)(2) provides that the Commission will sustain NASD's sanction unless it finds, 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. 30/

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26/ Philippe N. Keyes, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 800 n.17.

27/ In its opinion, the NAC stated:

> We owe "'no special deference' to hearing panel 'inferences and conclusions that do not hinge upon findings of credibility,'" and none of the purported errors Erenstein raises relate to credibility determinations by the Hearing Panel [citation omitted]. . . . While we find that Erenstein has identified language in the Hearing Panel's decision that is either erroneous or ambiguous, this is precisely why NASD's procedural rules provide for de novo appellate review.

28/ See Davrey Fin. Servs., Inc., Exchange Act Rel. No. 51780 (June 2, 2005), 85 SEC Docket 2057, 2067 n.26 (stating that even if NASD Hearing Panel had acted prejudicially against respondent, NAC's and Commission's subsequent reviews "attenuate any such prejudice"); Frank J. Custable, 51 S.E.C. 855, 862 (1993) (stating that de novo review by NASD appellate panel and Commission "dissipates any harm" that may have resulted from staff irregularities).

29/ 15 U.S.C. § 78s(e)(2).

30/ Erenstein does not claim, and we do not find, that NASD's action imposed an unnecessary or inappropriate burden on competition.

The appropriate sanctions depend on the facts and circumstances of each case. 31/ We sustain the sanction imposed by NASD here because we conclude that, on the facts of this case, the sanction appropriately remedies the risk of harm to the markets and investors posed by Erenstein and will help deter him and others from engaging in the same serious misconduct.

Erenstein claims that the sanction, even as reduced by the NAC, is excessive. 32/ He argues that, given that "all requests were met and . . . any issue of untimeliness is due to Applicant's counsel making good faith objections [to NASD's request for his tax return,] . . . the sanction here is, on its face, extreme, excessive and unreasonable." He argues that "[t]his is NOT a worst case" and points out that his objections "were made in a polite and respectful fashion . . . supported by legal authority."

We are not persuaded. Because of limited Commission resources, Congress has given NASD and other securities industry self-regulatory organizations significant front-line responsibility in ensuring that broker-dealers and their associated persons are complying with applicable statutes, rules, regulations, and ethical obligations. Rule 8210 is an essential tool for carrying out that responsibility. As we have repeatedly emphasized, it is critically important to the self-regulatory system that members and their associated persons cooperate with NASD investigations by complying with information requests. 33/ In this connection, we have observed that, "because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate." 34/

Under NASD's Sanction Guidelines, if a member or associated person fails to "respond in any manner" to a request pursuant to Rule 8210, the maximum recommended sanction is a bar or

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31/ Michael F. Flannigan, 56 S.E.C. 8, 21 (2003); Donald R. Gates, 54 S.E.C. 292, 300 (1999). Accordingly, we reject Erenstein's claim that his sanction is disparate from those in other cases.

32/ As argued by Erenstein, "[f]or this Applicant, a 76 year old man, it is almost the functional equivalent of a bar."

33/ See, e.g., Elliott M. Hershberg, Exchange Act Rel. No. 53145 (Jan. 19, 2006), 87 SEC Docket 494, 498 aff'd, No. 06-1086 (2d Cir. 2006); PAZ Sec., Inc., Exchange Act Rel. No. 52693 (Oct. 28, 2005), 86 SEC Docket 1880, 1889, rev'd on other grounds, 494 F.3d 1059 (D.C. Cir. 2007); Robert J. Langley, Exchange Act Rel. No. 50917 (Dec. 22, 2004), 84 SEC Docket 1959, 1963 n.15; Robert Fitzpatrick, 55 S.E.C. 419, 423-24 (2001); Borth, 51 S.E.C. at 180; see also Richard J. Rouse, 51 S.E.C. 581, 584 (1993) (finding rule requiring NASD members and associates to comply with its information requests to be "a key element in the NASD's effort to police its members").

34/ Sahai, 89 SEC Docket at 2406 (citation omitted); Pearson, 89 SEC Docket at 1635, 1639-40.

a $50,000 fine. 35/ If the violation is one in which "mitigation exists, or the person did not respond in a timely manner" to a request pursuant to Rule 8210, the maximum recommended sanction is a two-year suspension and a $25,000 fine. 36/ In determining the appropriate sanction, the guideline directs that consideration be given to "[w]hether the requested information has been provided and, if so, . . . the number of requests made, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response." This guidance reflects the judgment that, while a complete failure to cooperate with NASD requests for information or testimony is so fundamentally incompatible with NASD's self-regulatory function that the risk to the markets and investors posed by such misconduct may only properly be remedied by a permanent bar, lesser sanctions may be a sufficient remedy when an incomplete or dilatory response to requests for information or mitigating circumstances exist.

We believe that, on the facts of this case, the sanction imposed by NASD strikes the proper balance between the seriousness of the conduct at issue and a sanction that will provide an appropriate remedy on the one hand, and the mitigating circumstances on the other. Although Erenstein did not fail to "respond in any manner" to NASD's request, his response was untimely. NASD was forced by Erenstein's initial refusal to make numerous requests for the information and then to send Erenstein a Wells notice. Erenstein's failure to respond in a timely manner frustrated NASD's ability to investigate the claim made by Erenstein's customer that Erenstein had converted funds for his personal use or had engaged in outside business activities. Erenstein was warned repeatedly that his failure to respond could have regulatory consequences, and that his attorney's belief that he should not be required to respond was not a defense for his conduct, and yet he ignored these warnings for a protracted period of time. This conduct indicates a risk to the regulatory system -- and the markets and investors it protects -- requiring a sanction that will impress upon Erenstein the seriousness of his conduct and deter him from similar future misconduct.

The NAC specifically considered in mitigation of the violation that Erenstein eventually produced the required information and that Erenstein's attorney's objections to NASD's requests

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35/ NASD Sanction Guidelines 39 (2001 ed.). The Sanction Guidelines have been promulgated by NASD in an effort to achieve greater consistency, uniformity, and fairness in the sanctions that are imposed for violations. NASD Sanction Guidelines 1 (2006 ed.). Since 1993, NASD has published and distributed the Sanction Guidelines so that members, associated persons, and their counsel will have notice of the types of disciplinary sanctions that may be applicable to various violations. Id. The Guidelines are not NASD rules that are approved by the Commission, but NASD-created guidance for NASD Adjudicators—which the Guidelines define as Hearing Panels and the National Adjudicatory Council. Id. Although the Commission is not bound by the Sanction Guidelines, it uses them as a benchmark in conducting its review under Exchange Act Section 19(e)(2).

36/ Id.

were made in good faith. Moreover, NASD found it appropriate to aggregate the two causes of action for purposes of determining sanctions. Accordingly, the NAC imposed a sanction significantly less than the permanent bar recommended by the Hearing Panel and significantly less than the maximum recommended by the Sanction Guidelines for a violation in which "mitigation exists, or the person did not respond in a timely manner" to a request pursuant to Rule 8210. 37/

In these circumstances, we concur in NASD's determination that a one-year suspension will serve to deter Erenstein from similar future misconduct and accordingly will serve the public interest without being excessive or oppressive. The sanction is also appropriate because it will serve as a deterrent to others who may be inclined to ignore NASD's information requests, thereby protecting the investing public by encouraging the timely cooperation that is essential to the prompt discovery and remediation of industry misconduct. 38/ We therefore sustain NASD's findings of violation and its order suspending Erenstein from associating with any NASD member in any capacity for one year.

An appropriate order will issue. 39/

By the Commission (Commissioners ATKINS, NAZARETH and CASEY); Chairman COX not participating.

Nancy M. Morris
Secretary

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37/ We reject any suggestion that Erenstein's age should mitigate the sanctions still further; Erenstein has not indicated that he no longer intends to participate in the industry due to his age, and the risk to the investing public posed by an individual who thwarts the regulatory process may be the same regardless of that individual's age.

38/ In making this determination, we are mindful that although "'general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry.'" PAZ Sec., Inc., 494 F.3d 1059, 1066 (D.C. Cir. 2007) (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir. 2005)).

39/ 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. 56768 / November 8, 2007

Admin. Proc. File No. 3-12529

In the Matter of the Application of

MORTON BRUCE ERENSTEIN
c/o John J. Phelan, III, Esq.
2385 NW Executive Center Drive, #100
Boca Raton, FL 33431

For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY NASD

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

ORDERED that the disciplinary action taken by NASD against Morton Bruce Erenstein be, and it hereby is, sustained.

By the Commission.

Nancy M. Morris
Secretary