

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 56770 / November 8, 2007

Admin. Proc. File No. 3-12566

**CORRECTED**

In the Matter of the Application of

CHARLES C. FAWCETT, IV  
c/o Thomas P. Puccio, Esq.  
Law Offices of Thomas P. Puccio  
230 Park Avenue, Suite 301  
New York, NY 10169

For Review of Disciplinary Action Taken by  
  
NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY  
PROCEEDING

Failure to Provide Requested Testimony

Former associated person of member firm of registered securities association asserted the privilege against self-incrimination in response to association's request for information and testimony. Held, association's findings of violation and imposition of sanctions are sustained.

APPEARANCES:

Thomas P. Puccio, of the Law Offices of Thomas P. Puccio, for Charles C. Fawcett, IV.

Marc Menchel, Alan Lawhead, and Gary J. Dernelle, for NASD.

Appeal filed: February 9, 2007  
Last brief received: April 30, 2007

## I.

Charles C. Fawcett, IV, a former registered investment company and variable contracts representative and principal of Federated Securities Corporation (“Federated” or the “Firm”), an NASD member, 1/ appeals from NASD disciplinary action. 2/ NASD found that Fawcett failed to comply with requests to provide NASD staff with information and testimony in connection with an NASD investigation concerning Fawcett’s conduct while associated with Federated. NASD found that Fawcett thereby violated NASD Procedural Rule 8210 and Conduct Rule 2110, 3/ barred Fawcett from associating with any NASD member in any capacity, and ordered him to pay costs in the amount of \$1,522.15. We base our findings on an independent review of the record.

## II.

This case deals with the circumstances surrounding Fawcett’s failure to respond to requests for information and testimony made by NASD in January and February 2004. Those requests by NASD followed an earlier investigation by the Attorney General of the State of New York (“NYAG”) concerning possible misconduct involving improper “market timing” and “late trading.” 4/

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1/ Fawcett entered the securities industry in 1986 and was employed by Federated until the company terminated his employment on November 24, 2003. Fawcett is not presently associated with any NASD member.

2/ 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), 72 Fed. Reg. 42,190 (Aug. 1, 2007) (SR-NASD-2007-053). Because the disciplinary action here was taken before that date, we continue to use the designation NASD.

3/ NASD Procedural Rule 8210 requires members and associated persons to provide testimony in connection with any NASD investigation, complaint, examination, or proceeding. NASD Conduct Rule 2110 requires members to observe high standards of commercial honor and just and equitable principles of trade. General Rule 115 extends the applicability of NASD rules governing members to their associated persons.

4/ “Market timing” includes “frequent buying and selling of shares of the same fund” and “buying or selling fund shares in order to exploit inefficiencies in fund pricing.” Mut. Fund Redemption Fees, Investment Company Act Rel. No. 26782 (Mar. 11, 2005), 84 SEC Docket 4144, 4147 n.4. “Late trading” is the “illegal practice of permitting a

(continued...)

A. Fawcett's Actions While at Federated

On August 29, 2003, the NYAG issued a subpoena to Federated requiring the Firm to produce documents and information “concerning Late Trading and/or [Market] Timing Capacity,” including “communications with any Person relating directly or indirectly” to late trading or timing capacity, and “all agreements, understandings and/or arrangements (including drafts thereof)” relating to timing capacity or late trading. On September 8, 2003, Fawcett deleted nine e-mails from his computer and later admitted that he did so.

On September 9, 2003, the day after Fawcett deleted the e-mails, Federated distributed to its employees a memorandum advising them that the NYAG had “brought civil action against Canary Partners, LLC” and related entities, and that the “charges are part of a \$40 million settlement involving allegations of wrongdoing concerning late trading and market timing” in several mutual fund families. The memorandum further informed employees that Federated had “received a Subpoena as part of this investigation from the Attorney General’s office for information and numerous documents” and that the United States Attorney’s Office in New York and the Commission were planning their own parallel investigations. The memorandum instructed all employees to maintain all documents, including, but not limited to, “letters, e-mails, memoranda, notes . . . concerning any actual or proposed Late Trading and/or Timing Capacity” with any of a series of entities specified in the memorandum, or with “any other person not so identified.”

Thereafter, Federated retained outside counsel to conduct an internal investigation. Federated’s outside counsel interviewed Fawcett on October 3, 2003. Joseph Cobetto, one of the outside lawyers retained by Federated to investigate the matter, was present at this initial interview with Fawcett. According to Cobetto, Fawcett stated that he had “been involved in discussions with a particular firm” that was “interested in bringing some money to Federated . . . [that] might be moved in various ways” and was “interested in having discussions about what they would or wouldn’t be allowed to do with respect to trading” in Federated funds. <sup>5/</sup> Fawcett failed to disclose during the interview that he had deleted any e-mails.

Two weeks later, on October 16, 2003, Fawcett contacted Federated’s outside counsel and requested another meeting, noting that he had additional information “that he wasn’t sure . . . was relevant or not” to the investigation. According to Cobetto, Fawcett disclosed at this second

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<sup>4/</sup> (...continued)  
purchase or redemption order received after the 4:00 p.m. pricing time to receive the share price calculated as of 4:00 p.m. that day.” Amendments to Rules Governing Pricing of Mut. Fund Shares, Investment Co. Act Rel. No. 26288 (Dec. 11, 2003), 81 SEC Docket 3176, 3177.

<sup>5/</sup> According to the record in this case, the brokerage firm with whom Fawcett had these discussions did not ultimately invest any money in Federated funds.

meeting that he had deleted “a couple” of e-mails because he had “panicked when all this came about” and was “embarrassed about what they said.” Fawcett also apparently disclosed at this meeting that, three days before he deleted the e-mails in question, he learned from Tom Donahue, Federated’s chief financial officer and Fawcett’s superior, that “Federated [had] received a subpoena.” However, according to notes that Cobetto wrote during the interview, Fawcett told outside counsel that Donahue did not specify “what subpoena.” 6/ Cobetto testified that during the interview there was “never any discussion” by Fawcett or anyone else about the breadth or scope of the subpoena. 7/

The e-mails Fawcett deleted were ultimately recovered by the Firm and admitted into the record. Federated determined that three of the deleted e-mails were outside the scope of the NYAG’s subpoena. The remaining six relate to the preparation for another firm of a spreadsheet listing certain Federated equity and international mutual funds as “available,” the percentage of fund assets that could be “redeemed in 5 consecutive business days,” and the number of “round trips per annum” that could be permitted in the funds. Federated stated in correspondence with NASD that, in the course of the Firm’s internal investigation, Fawcett disclosed that he had deleted “several e-mails involving potential market timing arrangements.” On November 24, 2003, Federated terminated Fawcett and reported to NASD on a Form U5 that it had done so because Fawcett “intentionally delet[ed] e-mail correspondence relevant to a regulatory investigation.” 8/

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6/ In an affidavit offered by Respondent and accepted into evidence, Donahue averred that he recalled the conversation with Fawcett but stated, “I do not believe that I told Mr. Fawcett that Federated had received a subpoena.” In January 2004, Federated made the same representation to NASD investigators, noting in a written response to an NASD request for information that, “[a]ccording to Mr. Fawcett, . . . Donahue stated that Federated had received a subpoena from the NYAG. Mr. Donahue recalls the conversation but does not believe that he made such a statement.”

7/ Cobetto also testified that he “did not draw the connection that [Fawcett] was deleting e-mails because of a subpoena.” Cobetto said that he believed Fawcett panicked “in general,” because Fawcett was “embarrassed about a couple of e-mails in the files.”

8/ NASD Conduct Rule 3070 requires an NASD member to report to NASD when, among other things, an associated person has been the subject of any disciplinary action taken by the member involving suspension or termination.

B. Fawcett's Response to NASD's Requests for Information

Between December 2003 and March 2004, NASD sent Fawcett three letters pursuant to Rule 8210 requesting information about the conduct disclosed by Federated. <sup>9/</sup> All the requests were properly served and received by Fawcett. The first letter, dated December 19, 2003, requested that Fawcett provide information and documents “relating to the allegations [Federated] made in a report filed with NASD that he had deleted e-mail transmissions that were relevant to a regulatory inquiry.” Fawcett did not provide the requested information by the deadline of January 2, 2004 but, in a letter dated January 7, 2004, Fawcett’s attorney asked for a ninety-day extension to comply with the request because Fawcett was “under investigation by the NYAG and the SEC relating to the alleged e-mail deletions.” On or about February 4, 2004, NASD staff informed Fawcett’s attorney telephonically that the extension would not be granted. On February 10, 2004, NASD sent its second request for information with a response deadline of February 24, 2004. Again Fawcett failed to provide the information, and again, on February 26, 2004, NASD received a letter from Fawcett’s attorney stating that Fawcett was “unable to respond at that time because he was under criminal investigation.” NASD informed Fawcett in a letter dated on or about March 1, 2004 that any pending criminal investigation would have no bearing upon Fawcett’s responsibility to provide information to NASD pursuant to Rule 8210. NASD sent its third request on March 4, 2004, in which NASD required Fawcett to appear to testify under oath and to produce certain documents. Fawcett did not appear to testify and did not provide – and has still not provided – any of the information requested by NASD.

On June 22, 2004, NASD’s Department of Enforcement filed a complaint against Fawcett, alleging that Fawcett “failed to appear to testify or provide NASD any of the requested information or documents.” <sup>10/</sup> NASD conducted a hearing at which only Cobetto testified. Fawcett, although present, declined to testify; his attorney stated, “[Fawcett] is not going to testify and he’s invoking his Fifth Amendment right at this time.” The NASD hearing panel

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<sup>9/</sup> Although copies of these letters, and Fawcett’s two replies thereto, were not introduced into the record, Fawcett admitted in his answer that NASD sent, and that he received, the NASD requests described in the complaint. Fawcett has not at any stage in the proceeding contested his receipt of the letters or the description of the content of either NASD’s letters or his replies. We therefore accept for purposes of this opinion the descriptions of the letters set out in NASD’s complaint.

<sup>10/</sup> The complaint also alleged that Fawcett deleted six e-mails when he knew, or had reason to know or believe, that they were within the scope of the NYAG’s subpoena. NASD’s hearing panel dismissed this portion of the complaint because it found that the e-mails were not clearly within the scope of the NYAG’s subpoena and that Enforcement did not present evidence that Fawcett knew when he deleted the e-mails that they were subject to subpoena. Because Enforcement did not appeal this determination to NASD’s National Adjudicatory Council (“NAC”), and the NAC did not call the matter for review on its own motion, this issue is not before the Commission.

found that Fawcett had failed to respond to NASD's requests for information and, based on that finding, barred Fawcett.

NASD's National Adjudicatory Council ("NAC") affirmed the hearing panel's decision, finding that there was no dispute over the facts that NASD sent Fawcett three requests for information, that Fawcett received each of these requests, and that Fawcett refused to comply with any of them. The NAC therefore held that Fawcett, who had a duty as an associated person to cooperate fully and completely with NASD's requests, violated Procedural Rule 8210 and Conduct Rule 2110 by failing to do so. The NAC rejected Fawcett's argument that the Fifth Amendment excused him from providing documents and testimony to NASD because NASD is inherently a state actor and concluded that Fawcett's argument was "directly contrary to well-settled law." The NAC barred Fawcett from association with any NASD member firm in any capacity. This appeal followed.

### III.

Fawcett has admitted throughout these proceedings that he failed to provide information and to appear for testimony as requested by NASD. Such failure establishes a prima facie violation of NASD Procedural Rule 8210. <sup>11/</sup> Violations of NASD rules, such as NASD Procedural Rule 8210, constitute conduct inconsistent with just and equitable principles of trade and therefore also establish a violation of NASD Conduct Rule 2110. <sup>12/</sup>

#### A. Applicability of the Fifth Amendment Privilege Against Self-Incrimination

Fawcett argues that "NASD's investigation into and subsequent disciplinary activity against Mr. Fawcett can be fairly attributed to the state," and that he was therefore "fully entitled to invoke his Fifth Amendment privilege[] without being penalized for his invocation by being expelled from his profession." According to Fawcett, three factors demonstrate that NASD is inherently a state actor, giving rise to a right against self-incrimination for respondents that

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<sup>11/</sup> See, e.g., Justin F. Ficken, Exchange Act Rel. No. 54699 (Nov. 3, 2006), 89 SEC Docket 685, 690-91; cf. Warren E. Turk, Exchange Act Rel. No. 55942 (June 22, 2007), 90 SEC Docket 2802, 2805 (stating that a failure to appear for testimony establishes a prima facie violation of analogous NYSE rule).

<sup>12/</sup> See, e.g., Elliot M. Hershberg, Exchange Act Rel. No. 53145 (Jan. 19, 2006), 87 SEC Docket 494, 495 n.1 (holding that the failure to provide information requested by NASD constitutes a failure to observe high standards of commercial honor and just and equitable principles of trade), aff'd, 210 Fed. Appx. 125 (2d Cir. 2006); E. Magnus Oppenheim & Co., Exchange Act Rel. No. 51479 (Apr. 6, 2005), 85 SEC Docket 475, 478 (holding that a violation of an NASD rule is also a violation of NASD Conduct Rule 2110); Chris Dinh Hartley, Exchange Act Rel. No. 50031 (July 16, 2004), 83 SEC Docket 1239, 1244 (same); Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999) (same).

should shield him from liability. First, in investigating Fawcett, NASD was “exercising a public function delegated to it by Congress,” *i.e.*, to enforce compliance with the securities laws and ethical standards. Next, Fawcett argues, NASD has “complete control over an individual’s right to practice in the securities field,” which stems from NASD’s “entwinement with federal law and policies.” Finally, Fawcett argues, “the government is inextricably entwined with the management and control of the NASD.”

Fawcett’s position, however, is directly contrary to established precedent, and we find no basis in this case for departing from that precedent. As the Second Circuit has held, “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.” <sup>13/</sup> Although Fawcett urges that NASD is a state actor because it exercises a “public function,” “has complete control over an individual’s right to practice in the securities field,” and is “closely supervised by the Commission,” courts have repeatedly considered and rejected similar arguments: although “NASD plays an important part in the highly regulated securities industry and is subject to SEC oversight[,] . . . ‘even extensive regulation by the government does not transform the actions of the regulated entity into those of the government.’” <sup>14/</sup> Moreover, the “existence of an effective private monopoly does not create

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<sup>13/</sup> D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 162 (2d Cir. 2002) (citing Desiderio v. NASD, 191 F.3d 198, 206 (2d Cir. 1999)); see also Perpetual Sec., Inc. v. Tang, 290 F.3d 132, 138 (2d Cir. 2002) (citing Desiderio and stating, “It is clear that NASD is not a state actor . . . .”); Graman v. NASD, Inc., No. 97-1556-JR, 1998 U.S. Dist. LEXIS 11624, at \*9 (D.D.C. Apr. 27, 1998) (“Every court that has considered the question has concluded that NASD is not a governmental actor.”) (citing First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 698, 699 n.5 (3d Cir. 1979); Shrader v. NASD, Inc., 855 F. Supp. 122, 124 (E.D.N.C. 1994), *aff’d*, 54 F.3d 774 (4th Cir. 1995); Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1468 (N.D. Ill. 1997); Datek Sec. Corp. v. NASD, Inc., 875 F. Supp. 230, 234 (S.D.N.Y. 1995); First Heritage Corp. v. NASD, Inc., 785 F. Supp. 1250, 1251 (E.D. Mich. 1992); Bahr v. NASD, Inc., 763 F. Supp. 584, 589 (S.D. Fla. 1991); United States v. Bloom, 450 F. Supp. 323, 330 (E.D. Pa. 1978)).

<sup>14/</sup> Graman, 1998 U.S. Dist. LEXIS 11624, at \*8 (citing San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 544 (1987)); see also Marchiano v. NASD, Inc., 134 F. Supp. 2d 90, 95 (D.D.C. 2001) (“[T]he court is aware of no case . . . in which NASD Defendants were found to be state actors either because of their regulatory responsibilities or because of any alleged collusion with criminal prosecutors.”); Vladislav Steven Zubkis, 53 S.E.C. 794, 797 n.2 (1998) (stating that privilege against self-incrimination does not apply in SRO disciplinary proceedings).

governmental action, even when the monopoly is powerful enough to influence decisions of government itself.” 15/

Fawcett argues that Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n, 16/ a Supreme Court case involving a private corporation organized to regulate interscholastic athletics among public and private schools, overturns the well-settled case law holding that NASD is generally not a state actor. Brentwood holds that a private party not otherwise subject to the Fifth Amendment may be deemed to have engaged in state action sufficient to give rise to Constitutional protections, as when there is such a “close nexus between the State and the challenged action” that the seemingly private behavior “may be fairly treated as that of the State itself.” 17/ Facts tending to “bear on the fairness of such an attribution” include whether a challenged activity “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.’” 18/

Fawcett, however, does not argue or present any facts tending to show that, in his case, there was the kind or degree of cooperation or interaction between NASD and the government that would justify a finding that NASD effectively engaged in state action. Nor does our review of the proceedings below suggest that NASD or a governmental authority engaged in any conduct that would cause NASD to be accorded something other than its usual private-actor status. Fawcett also cites three appellate court decisions in support of his argument that NASD is a state actor for purposes of applying the Fifth Amendment, but none of these cases establishes that

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15/ Graman, 1998 U.S. Dist. LEXIS 11624, at \*9 (citing Nat’l Collegiate Athletic Assoc. v. Tarkanian, 488 U.S. 179, 198-99 (1988)).

16/ 531 U.S. 288 (2001).

17/ Brentwood Acad., 531 U.S. at 295; see also Turk, 90 SEC Docket at 2807 (stating that SROs generally are not state actors but can be subject to the Fifth Amendment when, under the circumstances, they engage in “state action”); Frank P. Quattrone, Exchange Act Rel. No. 53547 (Mar. 24, 2006), 87 SEC Docket 2155, 2163 n.22 (noting that the Fifth Amendment restricts only governmental conduct, and will constrain a private entity only insofar as its actions are found to be “fairly attributable” to the government) (citing D.L. Cromwell Invs., Inc., 279 F.3d at 161 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982))).

18/ Brentwood Acad., 531 U.S. at 296 (citations omitted).



proposition. <sup>19/</sup> We therefore find no basis upon which to conclude that Fawcett was entitled to invoke the Fifth Amendment in answer to NASD's requests for information and testimony.

B. Relevance of the E-Mails to NASD's Investigation

Fawcett also argues that “[t]here is not a shred of evidence connecting the six e-mails to the NYAG subpoena, and thus Enforcement’s Rule 8210 letters requested information irrelevant to their inquiry.” Fawcett argues that he cannot, therefore, “be sanctioned for non-cooperation with a request for wholly irrelevant information.” <sup>20/</sup> We find Fawcett’s argument to be without merit. Whether or not the e-mails fell within the scope of the subpoena, the e-mails, and information and testimony about why Fawcett deleted them, were clearly relevant to Enforcement’s inquiry into the reasons for his termination by Federated. Moreover, even assuming that the e-mails were not within the scope of the subpoena – a finding we need not and do not make – it does not fall to the recipient of an NASD information request to decide for himself whether his compliance would assist NASD’s investigation. 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

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<sup>19/</sup> Blount v. SEC, 61 F.3d 938, 941 (D.C. Cir. 1995), noted that Municipal Securities Rulemaking Board (“MSRB”) Rule G-37, which restricts the ability of municipal securities professionals to contribute to political campaigns of state officials from whom they obtain business, is “governmental action of the purest sort”; however, Blount is inapposite: the court specifically declined to address the issue of whether the Congressionally-chartered MSRB is a state actor, and NASD’s status was not an issue before the court. Fawcett also cites Austin Mun. Sec., Inc. v. NASD, Inc., 757 F.2d 676 (5th Cir. 1985), and P’ship Exch. Sec. Co. v. NASD, Inc., 169 F.3d 606 (9th Cir. 1999). In both cases, the courts determined that NASD was entitled to immunity from civil suit; however, neither court based its decision on a finding that NASD is a state actor. These cases do not controvert the numerous decisions that squarely hold that NASD is a private actor. See supra notes 13-14.

<sup>20/</sup> In support of his conclusion that the e-mails are “irrelevant information,” Fawcett asserts that, in dismissing the charge of the complaint that alleged he had deleted e-mails subject to regulatory subpoena, see supra note 10, the NASD hearing panel concluded that “Enforcement failed to provide even an iota of evidence that the information it sought from Mr. Fawcett was relevant to the investigation.”

Fawcett mischaracterizes the hearing panel’s decision. The hearing panel concluded that Enforcement did not demonstrate that the e-mails fell within the scope of the NYAG’s subpoena or that Fawcett knew when he deleted them they were subject to that subpoena; nevertheless, the hearing panel found that “it is clear that the information [NASD sought from Fawcett] was directly relevant to the NASD staff’s investigation of possible rule violations by Respondent.”

conditions on their compliance, 21/ and NASD is not required to justify its information requests in order to obtain compliance from members and their associated persons. 22/

As explained above, it is undisputed that Fawcett failed to respond to the requests, and his proffered reason for refusal, as NASD advised Fawcett, was meritless. We therefore sustain NASD's finding that Fawcett violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

#### IV.

Exchange Act Section 19(e)(2) directs us to sustain NASD's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. 23/ We sustain the sanctions imposed by NASD because, as explained below, we conclude that Fawcett's complete failure, without mitigation, to respond to the NASD requests for testimony and other information in this case demonstrates that he poses too great a risk to the markets and investors protected by the self-regulatory system to be permitted to remain in the securities industry. We also conclude that the sanctions imposed on Fawcett will have the salutary effect of deterring others from engaging in the same serious misconduct.

We initially observe that NASD's determination to bar Fawcett was consistent with its Sanction Guidelines. 24/ The Sanction Guidelines provide that, for violations of Rule 8210, "[i]f

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21/ See Rooney A. Sahai, Exchange Act Rel. No. 55046 (Jan. 5, 2007), 89 SEC Docket 2402, 2406 n.11 (citing Michael David Borth, 51 S.E.C. 178, 182 (1992)); Robert Fitzpatrick, 55 S.E.C. 419, 424-25 & nn.11 & 16 (2001), aff'd, 63 Fed. Appx. 20 (2d Cir. 2003).

22/ See, e.g., Sahai, 89 SEC Docket at 2406 n.12 (citing Joseph Patrick Hannan, 53 S.E.C. 854, 860 (1998)); Fitzpatrick, 55 S.E.C. at 425 n.16 (citing Hannan).

23/ 15 U.S.C. § 78s(e)(2). Fawcett does not claim, and the record does not show, that NASD's action imposed an undue burden on competition.

24/ 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).

the individual did not respond in any manner, a bar should be standard.” 25/ The Guidelines further provide that “[w]here mitigation exists, or the person did not respond in a timely manner, [the Adjudicator should] consider suspending the individual in any or all capacities for up to two years.” 26/ This reflects the judgment that, in the absence of mitigating factors, 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 is properly remedied by a bar. 27/

We agree. 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. As we have repeatedly emphasized, it is vitally important to the self-regulatory system that NASD investigators be able to obtain information and testimony from NASD member firms and associated persons. 28/ Because NASD lacks subpoena power, however, it “must rely upon Procedural Rule 8210 in connection with its obligation to police the activities of its members and associated persons.” 29/ Vigorous enforcement of Rule 8210, therefore, helps ensure the continued strength of the self-regulatory system—and thereby enhances the integrity of the securities markets and protects investors—by making it more likely that members and their associated persons will provide prompt and full cooperation with NASD investigations. 30/ Although lesser sanctions may be a sufficient remedy for an incomplete or dilatory response to requests for information or a failure to respond

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25/ NASD Sanction Guidelines at 39.

26/ *Id.*

27/ It bears emphasis that the sanction guideline for violations of Rule 8210 is one of only three (out of approximately eighty) that propose a bar as the standard sanction for the underlying rule violation. The other two are the sanction guidelines applicable to the conversion of customer funds (*see* Sanction Guidelines at 38) and cheating during broker-dealer qualification examinations (*see id.* at 43). In each case, the misconduct (absent mitigating factors) poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry, and a bar is therefore an appropriate remedy.

28/ *See, e.g., Hershberg*, 87 SEC Docket at 498; *Fitzpatrick*, 55 S.E.C. at 423-24; *Borth*, 51 S.E.C. at 180.

29/ *Hannan*, 53 S.E.C. at 858-59; *see also Michael 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”).

30/ *Hannan*, 53 S.E.C. at 859 (“Failure to comply is a serious violation justifying stringent sanctions because it subverts NASD’s ability to execute its regulatory functions.”).

where mitigating circumstances exist, we conclude that, in the absence of such factors, barring an individual who completely fails to respond is the appropriate remedy and not “excessive or oppressive” within the meaning of Section 19(e)(2). 31/

As noted previously, Fawcett has admitted throughout these proceedings that he did not respond to NASD’s requests for information and testimony. We also find, as did NASD, that no factors mitigate the severity of that violative conduct. 32/ Fawcett urges that he was “faced with a Hobson’s choice: either provide testimony that might incriminate him in then-pending proceedings before the [Commission] and [the NYAG], or be barred by [NASD] from practicing his profession.” As we have explained, however, Fawcett had no legitimate basis for refusing to provide that testimony. Instead, aware of the consequences, Fawcett refused to comply with NASD’s requests in contravention of his duty to cooperate fully and promptly with those requests. 33/ In these circumstances, we concur in NASD’s determination that Fawcett’s misconduct demonstrates that he poses too great a risk to the self-regulatory system – and the markets and investors it protects – to be permitted to remain in the securities industry. We conclude, therefore, that the sanctions imposed by NASD to redress that risk serve the public interest and are neither excessive nor oppressive. The bar NASD imposed 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. 34/ We

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31/ See PAZ Sec., Inc. v. SEC, 494 F.3d 1059, 1065 (D.C. Cir. 2007) (stating that Exchange Act Section 19(e)(2) authorizes “expulsion not as a penalty but as a means of protecting investors . . . . The purpose of the order is remedial, not penal”) (quoting Wright v. SEC, 112 F.2d 89, 94 (2d Cir. 1940)).

32/ Fawcett argues that he is deserving of a lesser sanction because “the information demanded by Enforcement was not reasonably related to their inquiry.” This argument fails because, as discussed above, NASD’s inquiries requested information that was relevant to its investigation and, in any event, Fawcett may not “second guess” NASD’s need for the requested information. See supra notes 20-22 and accompanying text.

33/ Joseph G. Chiulli, 54 S.E.C. 515, 524 (2000) (stating that, by registering with NASD, respondent “agreed to abide by its rules which are unequivocal with respect to an associated person’s duty to cooperate with NASD investigations”) (citing Barry C. Wilson, 52 S.E.C. 1070, 1073 (1996); Borth, 51 S.E.C. at 180).

34/ 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., 494 F.3d at 1066 (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir. 2005)).

sustain NASD's findings of violation and its order imposing on Fawcett a bar from association with any NASD member in any capacity and an assessment of hearing costs in the amount of \$1,522.15.

An appropriate order will issue. 35/

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

Nancy M. Morris  
Secretary

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35/ 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.

Admin. Proc. File No. 3-12566

In the Matter of the Application of

CHARLES C. FAWCETT, IV  
c/o Thomas P. Puccio, Esq.  
Law Offices of Thomas P. Puccio  
230 Park Avenue, Suite 301  
New York, NY 10169

For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES  
ASSOCIATION

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

ORDERED that the disciplinary action taken by NASD against Charles C. Fawcett, IV,  
and NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Nancy M. Morris  
Secretary