SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58632 / September 24, 2008

Admin. Proc. File No. 3-12903

In the Matter of the Application of

MICHAEL SASSANO
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Suite 1000
Washington, D.C. 20036

For Review of Disciplinary Action Taken by

NYSE REGULATION, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY PROCEEDING

Failure to Provide Requested Testimony

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

APPEARANCES:

Graeme W. Bush and Shawn P. Naunton, of Zuckerman Spaeder LLP, for Michael Sassano.

Susan Light, Myles Orosco, and Jacqueline Davis, for Financial Industry Regulatory Authority, Inc., Department of Enforcement, on behalf of NYSE Regulation, Inc.

Appeal filed: December 3, 2007
Last brief received: March 11, 2008

I.

Michael Sassano, a former registered representative of Oppenheimer & Co., Inc. ("Oppenheimer"), a member firm of the New York Stock Exchange, LLC ("NYSE" or the "Exchange"), appeals from NYSE disciplinary action. 1/ The NYSE found that Sassano failed to comply with NYSE requests to provide testimony in connection with NYSE market timing investigations, and thereby violated NYSE Rule 477. 2/ The NYSE censured Sassano and barred him from membership, allied membership, approved person status, and from employment or association in any capacity with any NYSE member or member organization. 3/ We base our findings on an independent review of the record.

II.

a. Initial Failure to Testify. On December 8, 2003, the NYSE's Division of Enforcement ("NYSE Enforcement") notified Sassano that it was investigating allegations that he had "engaged in a trading strategy in which [he] frequently purchased and sold mutual fund shares to capitalize on price discrepancies in different markets commonly known as 'market timing.'" Oppenheimer had previously received a subpoena from the Attorney General of the State of New York ("NYAG") on October 31, 2003 regarding a market timing investigation by the NYAG.

Our Division of Enforcement ("SEC Enforcement") also sent subpoenas throughout late 2003 and 2004 to both Oppenheimer and Sassano in connection with its investigations into

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1/ On July 26, 2007, the Commission approved proposed rule changes 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. Pursuant to this consolidation, the member firm regulatory and enforcement functions and employees of NYSE Regulation, Inc. were transferred to NASD, and the expanded NASD changed its name to Financial Industry Regulatory Authority, Inc. See Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522. Because the disciplinary action here was taken before the NYSE-NASD consolidation of regulatory operations, we continue to use the designation "NYSE" in this opinion.

2/ NYSE Rule 477 generally states that an NYSE member, or an associated person of an NYSE member, who has been terminated must comply, for up to a year after termination, with an NYSE request to provide testimony or be subject to disciplinary sanctions, including a bar.

3/ Under the NYSE decision, Sassano received a three-month period to testify before the bar would become permanent. The bar commenced on December 3, 2007, and became permanent on March 3, 2008 when he had not testified by that date.

mutual fund trading practices. 4/ On August 17, 2004, Sassano's counsel sent SEC Enforcement written confirmation of Sassano's intention to invoke the Fifth Amendment right against self-incrimination in response to an SEC Enforcement subpoena. 5/ On September 20, 2004, SEC Enforcement sent a letter rescheduling Sassano's testimony for October 8, 2004, and documenting its accommodation of three separate rescheduling requests by Sassano's counsel.

On September 24, 2004, NYSE Enforcement sent Sassano a request to appear for testimony in connection with the Exchange's market timing investigation. On September 29, 2004, Sassano's counsel requested an adjournment of the scheduled testimony. NYSE Enforcement granted the request, rescheduling the testimony for October 26, 2004. On October 25, 2004, Sassano's counsel requested another adjournment of Sassano's testimony, and NYSE Enforcement again accommodated the request, rescheduling the testimony for November 11, 2004. That same day, on October 25, 2004, Sassano's employment at Oppenheimer terminated.

On November 9, 2004, two days before the scheduled NYSE testimony, Sassano's counsel proposed a third extension. At this point, NYSE Enforcement stated that the testimony would not be rescheduled a third time. The next day, on November 10, 2004, Sassano's counsel

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4/ On July 20, 2005, the NYAG and the Commission settled market timing cases against Canadian Imperial Holdings Inc. and CIBC World Markets Corp. and related corporate entities ("CIBC"), which were the parent companies of Sassano's division at Oppenheimer prior to January 2003. The press release announcing the NYAG settlement noted that the settlement "was reached in conjunction with the Securities and Exchange Commission which announced a parallel settlement" the same day. On December 17, 2007, Oppenheimer executed an Acceptance, Waiver and Consent ("AWC") settling the Exchange's enforcement action against Oppenheimer.

NYSE Enforcement has submitted an unopposed motion for leave to adduce the AWC pursuant to Commission Rule of Practice 452. See 17 C.F.R. § 201.452 (stating that a motion for leave to adduce additional evidence "shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously"). We have determined to grant NYSE Enforcement's motion.

5/ The Fifth Amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. U.S. CONST. amend. V.

Unless otherwise indicated, references herein to Sassano's "counsel" refer to Sassano's attorneys during the period in which the NYSE issued its requests for testimony. Several weeks before the issuance of the NYSE Hearing Board decision, Sassano's then-counsel withdrew from their representation of Sassano before the NYSE. Sassano subsequently retained new counsel.

called again to request an adjournment of the on-the-record testimony and settlement talks in lieu of such testimony. Although NYSE Enforcement staff left voicemail messages with Sassano's counsel that day to discuss the request, their calls were not returned prior to the scheduled start of Sassano's testimony. Sassano did not appear for his still-scheduled testimony on November 11, 2004.

b. Attorney Proffer. Beginning on November 12, and November 29, 2004, after Sassano had failed to appear for his November 11 testimony, his counsel and NYSE Enforcement discussed Sassano's cooperation with the investigation and the possibility that he would supply information through his counsel instead of by on-the-record sworn testimony.

Sassano's counsel also separately suggested the possibility of an "attorney proffer" with SEC Enforcement in connection with the market timing investigation by SEC Enforcement. Sassano's counsel asked SEC Enforcement staff "whether they had any objection to [NYSE] Enforcement attending the attorney proffer." SEC Enforcement staff did not raise any objections, and Sassano's counsel invited NYSE Enforcement to attend the SEC Enforcement proffer. In a written affirmation (the "Affirmation") submitted in connection with the NYSE proceedings, 6/ NYSE Enforcement represented that, between January 24, 2005 and March 15, 2005, NYSE Enforcement, SEC Enforcement, and the NYAG "discussed the logistics of scheduling and clarifying the scope of [counsel]'s proposed attorney proffer." The Affirmation further stated that these discussions were "a direct result of [counsel]'s request that the SEC and [NYSE] Enforcement jointly attend his proposed proffer." 7/

Sassano's counsel mandated that the proffer discussion "be based on and limited exclusively to those issues presented to counsel prior to the proffer." Accordingly, on March 8, 2005, SEC Enforcement sent Sassano's counsel a letter listing topics to be addressed at the proffer. On April 6, 2005, NYSE Enforcement informed Sassano's counsel that NYSE Enforcement representatives would be attending the proffer, and requested that the proffer address "market timing activity at Oppenheimer," but did not otherwise supplement the list of proffer topics provided by SEC Enforcement.

6/ A Senior Vice President of NYSE Enforcement signed and submitted the Affirmation, which represents that it was prepared based on a review of "[NYSE] Enforcement's confidential investigative file and discussions with Enforcement staff."

7/ Although an affidavit by Sassano's counsel represents that he had "engaged in discussions with representatives of" both SEC Enforcement and NYSE Enforcement "[i]n or about March and April 2005" regarding a joint proffer, the Affirmation submitted by the NYSE represents that the discussions between SEC Enforcement, NYSE Enforcement and the NYAG took place "during the period from January 24, 2005 to March 15, 2005" and "[a]s a direct result of [counsel]'s request that" SEC Enforcement and NYSE Enforcement both attend the proffer.

Representatives of SEC Enforcement and NYSE Enforcement attended the attorney proffer on April 12, 2005. The Affirmation represents that "[a]lthough [Sassano's counsel] discussed areas that [Sassano] could testify about, [counsel] did not offer any specific information" at the proffer. According to an affidavit executed by Sassano's counsel ("Counsel Affidavit") in connection with the appeal before us of the NYSE decision, NYSE Enforcement staff "did not ask any questions about mutual fund trading practices at Oppenheimer" during the proffer and "did not request any information relating to any specific subjects." The Counsel Affidavit also states that, at the end of the proffer, NYSE Enforcement staff asked "if Mr. Sassano would make himself available to the SEC at some point in the future for questioning" and if Sassano "would give truthful answers to the SEC were he to testify."

On April 19, 2005, NYSE Enforcement declined the proposal for cooperation outlined at the attorney proffer. The Affirmation represents that, in so doing, NYSE Enforcement "specifically indicated that [NYSE Enforcement staff] spoke for [NYSE] Enforcement only."

c. Subsequent Failure to Testify. Prior to the April 12 attorney proffer, on March 16, 2005, NYSE Enforcement had issued another request for Sassano's on-the-record testimony in connection with its Oppenheimer investigation. 8/ NYSE Enforcement's letter requested that Sassano appear for testimony on April 26, 2005. On April 20, 2005, after NYSE Enforcement had declined Sassano's proposal outlined at the proffer, Sassano's counsel sent written confirmation that Sassano would not appear for his scheduled testimony before NYSE Enforcement. On April 22, 2005, NYSE Enforcement sent a letter to Sassano's counsel memorializing its attempts to schedule Sassano's testimony (the "April 22 Letter"). The April 22 Letter noted that "[d]uring the period November 11, 2004 and March 2005, Enforcement, counsel and other regulatory entities engaged in several telephone conversations regarding Sassano's cooperation in this matter." The April 22 Letter did not provide further detail about these conversations. 9/ The April 22 Letter also observed that NYSE Enforcement had previously informed Sassano that failure to comply with the requests for testimony could result in formal disciplinary proceedings. Sassano did not appear for testimony before NYSE Enforcement on April 26, 2005, and to date has not testified before NYSE Enforcement.

8/ The initial NYSE Enforcement request for testimony issued on September 24, 2004 indicated that the request for testimony was related to an investigation of allegations that Sassano had himself engaged in market timing. The second NYSE Enforcement request for testimony issued on March 16, 2005 did not directly refer to NYSE Enforcement's investigation of Sassano's trading activities, but instead stated that NYSE Enforcement was investigating "allegations that [Oppenheimer] failed to supervise and control the activities of its employees with regard to its sale of mutual funds."

9/ But see supra notes 6-7 and accompanying text.

III.

On November 15, 2005, NYSE Enforcement charged Sassano with violating NYSE Rule 477 by "fail[ing] to provide testimony in connection with matters that occurred during the course of his employment with a member organization." Sassano did not file an answer with the NYSE Hearing Board. 10/ However, in a series of letters beginning on March 27, 2006 and citing our March 24, 2006 decision in Frank P. Quattrone, 11/ Sassano requested that the Hearing Officer stay the disciplinary action and conduct "a hearing to determine whether the NYSE was engaged in 'state action.'" On December 5, 2006, the NYSE Hearing Officer "direct[ed Sassano] to make an offer of proof . . . that provides the specific factual basis necessary to find 'state action' on the part of the NYSE."

By letter to the parties dated March 27, 2007, the Hearing Officer found, based on a review of submissions by Sassano and NYSE Enforcement, that Sassano had "not made out [his state action] claim but ha[d] alleged sufficient facts to require limited discovery to resolve the matter." The Hearing Officer ordered additional discovery regarding "how [NYSE] Enforcement came to be included in" the attorney proffer with SEC Enforcement; the statement in Sassano's December 19, 2006 submission to the Hearing Officer claiming that "[b]oth the SEC staff and the [NYSE Enforcement] staff advised that they would talk among themselves and make a decision on a joint attendance;" and the reference in the April 22 Letter to "conversations between Enforcement and other regulatory entities during the period November 11, 2004 and March 2005."

In response to the discovery issues identified by the Hearing Officer, on April 9, 2007 NYSE Enforcement submitted the Affirmation, 12/ which describes the period beginning with NYSE Enforcement's first written request for Sassano's testimony on September 24, 2004 through the issuance of the Charge Memorandum on November 15, 2005 in connection with Sasssano's failure to testify. The Affirmation states that Sassano's counsel had first suggested the provision of "'information' to [NYSE] Enforcement in lieu of his testifying" one day before his scheduled testimony on November 11, 2004. According to the Affirmation, the April 22 Letter's reference to "conversations between Enforcement and other regulatory entities during the period

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10/ On January 6, 2006, NYSE Enforcement filed a motion to deem the facts alleged in the November 15, 2005 charge memorandum (the "Charge Memorandum") admitted as true based on Sassano's failure to file an answer to the Charge Memorandum as required under NYSE Rule 476(d). On January 12, 2006, after the standard deadline for filing an answer, Sassano's counsel sent a letter to trial counsel for NYSE Enforcement disputing allegations in the Charge Memorandum and requesting that NYSE Enforcement "reconsider its commencement of an enforcement proceeding against" Sassano.

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

12/ See supra notes 6-7 and accompanying text.

November 11, 2004 and March 2005" identified by the Hearing Officer in ordering additional discovery "merely referenced that conversations were held among all of the parties involved in planning for [Sassano]'s proposed cooperation via the attorney proffer." The Affirmation also states that "there was no flow of information from [NYSE] Enforcement to the SEC regarding [Sassano]'s conduct." 13/

On April 25, 2007, the Hearing Board issued its decision, finding that "[NYSE] Enforcement's attendance at [the] attorney's proffer conducted by [Sassano]'s then counsel for the SEC and [NYSE] Enforcement was not initiated by the SEC or [NYSE] Enforcement" and concluding that "[a]fter reviewing and considering all of the submissions . . . [Sassano] had not made out his claim of 'State Action.'" The Hearing Board accordingly found that Sassano's failure to provide testimony constituted a violation of NYSE Rule 477, and censured and barred Sassano. The NYSE Board of Directors affirmed the Hearing Board decision on October 17, 2007. 14/ This appeal followed.

IV.

Sassano acknowledges that he failed to appear in response to the NYSE's requests for testimony as described above. Such failure establishes prima facie evidence of a violation of

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13/ The Affirmation also states that on March 16, 2005, NYSE Enforcement and SEC Enforcement "had a telephone conversation, during which the SEC advised [NYSE Enforcement] about its Wells process" but that NYSE Enforcement "was not invited to join in any proposed issuance of the SEC's Wells notice."

14/ The NYSE Hearing Board found that Sassano violated NYSE Rule 477. The NYSE Board of Directors on appeal stated that Sassano had "requested a review of a Hearing Officer's determination that he had violated NYSE Rule 476(a) by failing to testify as requested by" NYSE Enforcement. The Board of Directors stated that it affirmed the decision of the Hearing Board "in all respects."

NYSE Rule 476(a)(11) requires persons associated with member firms to respond to requests for information from the Exchange. NYSE Rule 477 extends this requirement to persons formerly associated with a member firm for up to one year after the Exchange receives notice of their termination. Although the initial request for Sassano's testimony was sent on September 24, 2004, before his employment terminated in October 2004, he was no longer employed at Oppenheimer at the time of either of the dates of his scheduled testimony on November 11, 2004 and April 26, 2005. Sassano does not raise as an issue, and we do not believe, that the reference to Rule 476(a) as the basis for Sassano's appeal changes the result here. The Board of Directors made clear that it was reviewing whether Sassano provided testimony as requested and affirmed the Hearing Board's decision in its totality.

NYSE Rule 477. 15/ Sassano argues, however, that he could not be forced to testify because he was entitled to invoke his Fifth Amendment right against self-incrimination. 16/ Sassano argues that NYSE Enforcement's investigation was "inextricably intertwined" with investigations by SEC Enforcement and the NYAG, and that the requests for testimony issued by NYSE Enforcement accordingly constituted "state action" entitling him to invoke his right against self-incrimination. On appeal, Sassano requests reversal of the NYSE decision or, alternatively, a remand of his case to the NYSE for further discovery regarding his state action claim.

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." 17/ The U.S. Supreme Court has held that a private party's actions may constitute state action only if 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.'" 18/ The factors considered by the Court as "bear[ing] on the fairness of such an attribution" include whether a challenged activity "results from the State's exercise of its 'coercive power;'" 19/ whether "the State has provided such significant encouragement, either overt or covert, that the [private] choice must in law be deemed to be that of the State;" 20/ or whether "a private actor operates as a 'willful participant in

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15/ See, e.g., 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 NYSE Rule 477); Louis F. Albanese, 53 S.E.C. 294, 297-98 (1997) (sustaining NYSE disciplinary action for violation of NYSE Rule 477 where applicant failed to cooperate immediately with NYSE investigation); Wallace E. Lin, 50 S.E.C. 196, 199 (1990)(sustaining NYSE disciplinary action for violation of Rule 477 where applicant refused to testify in Exchange investigation), aff'd, 933 F.2d 1014 (9th Cir. 1991)(Table); cf. Justin F. Ficken, Exchange Act Rel. No. 54699 (Nov. 3, 2006), 89 SEC Docket 685, 690-91 ("The failure to respond to NASD's requests for testimony demonstrates a prima facie violation of [analogous NASD Rule].").

16/ See supra note 5.

17/ D.L. Cromwell Inv., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 161 (2d Cir. 2002) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

18/ Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351(1974)).

19/ Id. at 296.

20/ Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (stating that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment").

joint activity with the State or its agents.'" 21/ Some courts have described this last fact pattern as the "joint action" test, 22/ and have focused on inquiries such as whether "the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity" 23/ or whether "the particular actions challenged are inextricably intertwined with those of the government." 24/

The "burden of demonstrating joint activities sufficient to render [a self-regulatory organization ("SRO")] a state actor is high, and that burden falls on the party asserting state action." 25/ In order to meet this burden, Sassano must demonstrate "a nexus between the state and the specific conduct of which plaintiff complains." 26/ Accordingly, in this case, Sassano must demonstrate a specific nexus between the government and the Exchange's requests for testimony triggering Sassano's invocation of the Fifth Amendment.

Sassano claims that NYSE Enforcement conducted its investigation jointly with investigations by SEC Enforcement and the NYAG, and that the NYSE requests for testimony thereby constituted "state action." In support, Sassano claims that NYSE Enforcement, SEC Enforcement, and the NYAG "shared information, attended meetings and worked together extensively" and that this cooperation continued "throughout a three-year period beginning in late 2003." We have explicitly said, however, that "cooperation and information sharing between the Commission and an SRO will rarely render the SRO a state actor, and the mere fact of such cooperation is generally insufficient, standing alone, to demonstrate state action." 27/

21/ Brentwood Acad., 531 U.S. at 296. See also Quattrone, 87 SEC Docket at 2164 n.25 ("NASD asserts correctly that no evidence existed that the Commission coerced, directed, or encouraged NASD to issue the [request pursuant to analogous NASD rule], but no hearing was held on this issue. Moreover, Quattrone did not need to show that NASD made the request solely at the Commission's behest, but only that NASD engaged in willful participation in joint action with the Commission.").

22/ Turk, 90 SEC Docket at 2807.

23/ Kirtley v. Rainey, 326 F.3d 1088, 1093 (9th Cir. 2003); see also Turk, 90 SEC Docket at 2807.

24/ Mathis v. PG&E, 75 F.3d 498, 503 (9th Cir. 1996); see also Turk, 90 SEC Docket at 2807.

25/ Turk, 90 SEC Docket at 2809.

26/ Desiderio v. NASD, 191 F.3d 198, 207 (2d Cir. 1999) (emphasis in original).

27/ Turk, 90 SEC Docket at 2809-10; see also Desiderio, 191 F.3d at 207; Scher v. NASD, 386 F. Supp. 2d 402, 408 (S.D.N.Y. 2005) (Mukasey, J.) (finding, where an NASD

(continued...)

In seeking to overcome this hurdle, Sassano cites: (i) the temporal proximity of events in the investigations by the NYAG, SEC Enforcement, and NYSE Enforcement; (ii) cooperation between SEC Enforcement and NYSE Enforcement in connection with the attorney proffer; (iii) the inclusion of transcripts of testimony taken by NYSE Enforcement in the document production made in connection with the SEC Enforcement investigation; and (iv) language in a Form U4 filed by Oppenheimer that seemed to characterize the various regulatory investigations of Sassano's trading as a single investigation. 28/ He highlights these circumstances in asserting that "the investigations of [NYSE Enforcement], the SEC and the NYAG were so interdependent and inextricably intertwined that" the investigations by the various regulators "were tantamount to one joint investigation."

Sassano notes that "all three investigations were opened within a span of six weeks," and asserts that "all three investigations proceeded together in coordinated lockstep fashion." Sassano also points out that NYSE Enforcement first requested Sassano's testimony on September 24, 2004, after Mr. Sassano's counsel confirmed on August 17, 2004 Sassano's intention to invoke the Fifth Amendment before SEC Enforcement, and several days after SEC Enforcement had confirmed on September 20, 2004 that Sassano's testimony before the Commission had again been rescheduled at the request of Sassano's counsel. According to Sassano, "the virtual coordination of these events strongly suggests that the SEC advised [NYSE Enforcement] that Mr. Sassano would invoke his Fifth Amendment privilege, and that as a result

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27/ (...continued)
investigator shared information with the district attorney's office with which he once worked approximately one year after plaintiff's on-the-record interview before NASD, that "such collaboration," which ultimately led to plaintiff's criminal prosecution, "does not in itself demonstrate that a 'close nexus' existed between the challenged conduct of the NASD and a state actor"), aff'd, 218 F. App'x 46 (2d Cir. 2007) (summary order). But see D.L. Cromwell, 279 F.3d at 163 (noting that NASD's Criminal Prosecution Assistance Unit "was in fact working with the government, and when it does it may well be a state actor," but that the actions of the unit "cannot fairly and automatically be imputed to the rest of" the NASD Department of Enforcement when it was "effectively 'walled off'" from the rest of the department).

28/ The Counsel Affidavit and other exhibits to Sassano's brief in support of his application for review by the Commission were not included in the record considered by the NYSE below. Sassano has submitted motions to adduce as additional evidence: the Counsel Affidavit, an excerpt of testimony by Peter Valverde, one of Sassano's colleagues at Oppenheimer, and a Form U4 filed by Oppenheimer in April 2004. As discussed, see supra note 4, such motions are governed by Commission Rule of Practice 452. We have determined to admit these documents pursuant to that rule.

[NYSE Enforcement] sought Mr. Sassano's testimony with the intent of launching this proceeding against him." 29/

In D.L. Cromwell Inv. Inc., v. NASD Regulation, Inc., however, the court declined to find that an NASD request for information constituted state action based on "the chronology of certain events" in simultaneous government and NASD investigations regarding the appellants' trading in shares of a particular company. 30/ The Cromwell appellants contended that NASD's requests for on-the-record interviews constituted state action triggering their right to invoke the privilege against self-incrimination, noting that NASD's requests for testimony "followed shortly after individual appellants contested grand jury subpoenas," and that NASD "refused to delay the [requested testimony] until after completion of the Eastern District's criminal investigation." 31/ The Second Circuit affirmed the district court's finding that this evidence showed only that NASD and the government "pursued similar evidentiary trails because their independent investigations were proceeding in the same direction." 32/ In reaching this conclusion, the Cromwell court credited consistent testimony by NASD staff indicating that NASD's requests for information "issued directly from [NASD] as a product of its private investigation" and that "none of the demands [for testimony] was generated by governmental persuasion or

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29/ Sassano also argues that the timing of NYSE Enforcement's settlement with Oppenheimer and a settlement in an SEC Enforcement administrative proceeding against another Oppenheimer employee a week later reflects joint action. As noted below, however, this similarity of timing in investigations into the same subject matter involving many defendants and several regulatory agencies is insufficient to substantiate Sassano's claim that NYSE Enforcement "was following the lead of then-New York Attorney General Eliot Spitzer, and was relying entirely upon the joint investigative efforts of the NYAG and the SEC."

30/ 279 F.3d at 162 (affirming district court's decision to deny appellants' request to enjoin an NASD request for an on-the record interview and rejecting appellants' claim that NASD was acting "as a willing tool of" federal prosecutors in a government investigation).

31/ Id.

32/ Id. at 162-63.

collusion." 33/ Similarly, in Turk, we concluded that evidence that SEC Enforcement and NYSE Enforcement requested an individual's testimony "within one month of each other" and "brought charges in connection with their respective investigations on the same day" were insufficient to establish state action. 34/

We thus agree with the Exchange that the timing of the actions in the simultaneous regulatory investigations is insufficient to prove a "causal connection between the requests for testimony" in the separate investigations, or that "the SEC guided [NYSE] Enforcement's investigation." The overlapping timing in the correspondence regarding the various investigations, particularly in light of Sassano's repeated requests for rescheduling of testimony, does not establish that these were other than parallel investigations of the same underlying activities, the same conclusion reached by the court in Cromwell.

Morever, despite Sassano's assertions that the investigations were conducted jointly over a three-year period, Sassano does not provide evidence that either of NYSE Enforcement's requests for testimony were "generated by governmental persuasion or collusion," 35/ or that SEC Enforcement "exercised significant control and influence over the [NYSE Enforcement] investigation." 36/ We similarly do not find that the timing of these requests for testimony indicates that the government "ha[d] so far insinuated itself into a position of interdependence with [NYSE Enforcement] that it must be recognized as a joint participant" 37/ in the requests

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33/ Id. at 163. The court credited the testimony of NASD staff members despite the appellants' attempts to buttress the state action claim by noting, among other things, "the statement of an unidentified FBI agent to an individual appellant that 'we are working with the NASD -- they know exactly what is going on' . . . questions posed by [NASD Enforcement] regarding two documents that Cromwell believes had been seized previously by the FBI; . . . [and NASD Enforcement]'s knowledge of certain government witnesses." Id. at 162.

34/ Turk, 90 SEC Docket at 2809. Sassano attempts to distinguish Turk by arguing that his case "involves extensive evidence of coordination between [NYSE Enforcement], the SEC and the NYAG over a time period spanning several years." We address this evidence below (see infra notes 40 and 43); however, this alleged coordination occurred after Sassano had already failed to testify at the NYSE.

35/ D.L. Cromwell, 279 F.3d at 163.

36/ Gregg Heinze, Exchange Act Rel. No. 56100 (July 19, 2007), 91 SEC Docket 303, 311.

37/ Turk, 90 SEC Docket at 2807 (citations omitted).

for testimony, or that the requests for testimony are "inextricably intertwined" 38/ with investigations by the government. We therefore reject Sassano's contention that the chronology of events in the investigations evidences state action.

Sassano also argues that the circumstances surrounding the joint attendance of SEC Enforcement and NYSE Enforcement at the attorney proffer, including NYSE Enforcement's deference to Commission staff at that proffer, demonstrates that it had engaged in willful joint action with government officials. Sassano highlights the fact that NYSE Enforcement, unlike SEC Enforcement, did not send a list of discussion topics prior to the proffer, despite notice that the discussion at the proffer "would be limited exclusively to issued raised beforehand." Additionally, Sassano's counsel represents, and NYSE Enforcement does not dispute, that during the proffer, NYSE Enforcement "did not ask any questions about mutual fund trading practices at Oppenheimer and did not request any information relating to any specific subjects." Sassano further notes that NYSE Enforcement's inquiries at the proffer were limited solely to whether "Mr. Sassano would make himself available to the SEC at some point in the future for additional questioning," and "if Mr. Sassano would give truthful answers to the SEC" in response to such additional questioning. The Counsel Affidavit also states that NYSE Enforcement did not seek "any additional information from" Sassano's counsel after the proffer despite counsel's offer "to make [him]self available . . . at some point in the future for further discussion on behalf of Mr. Sassano." Sassano argues that these actions at the proffer reveal NYSE Enforcement's "complete reliance on the SEC's inquiries," and that such reliance demonstrates that NYSE Enforcement was "working jointly with the SEC at the proffer." Sassano further contends that cooperation with SEC Enforcement at the proffer "rendered [NYSE Enforcement] a 'state actor' and its investigation 'state action,'" giving rise to Fifth Amendment protections. 39/

However, the relevant issue here is whether the NYSE's requests for Sassano's testimony -- not the NYSE's actions in connection with a proffer that occurred almost seven months after the Exchange's initial request for testimony -- may be fairly attributed to the state. 40/ Evidence

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38/ Id. (citations omitted).

39/ Sassano argues that NYSE Enforcement "was not acting independently at all, but instead was relying upon" the investigative efforts of SEC Enforcement and the NYAG. NYSE Enforcement's issuance of the requests for testimony giving rise to this proceeding undermines any inference that NYSE Enforcement investigation was simply passively relying on the investigative efforts of government agencies rather than pursuing a separate investigation.

40/ See D.L. Cromwell, 279 F.3d at 163 (finding no state action where NASD Enforcement issued requests for information "as a product of its private investigation" and "none of the demands [for information] was generated by governmental persuasion or collusion . . ."); see also Kirtley v. Rainey, 326 F.3d at 1093 (indicating that joint action inquiry focuses

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of cooperation between NYSE Enforcement and SEC Enforcement in connection with the proffer could standing alone suggest that such cooperation resulted from an integrated joint investigation by NYSE Enforcement and SEC Enforcement. Such evidence might be sufficient to support a respondent's request for an opportunity to develop evidence on the possibility of state-SRO joint action. 41/ However, unlike in Quattrone, the NYSE has already afforded Sassano the opportunity to develop further evidence regarding the degree of cooperation between NYSE and the Commission. Our consideration of the evidence produced by Sassano and the totality of all the evidence leads us to conclude that Sassano did not meet his burden of showing that the NYSE requests for Sassano's testimony were inextricably intertwined with the government investigations.

The evidence indicates that the joint participation at the proffer actually occurred at Sassano's counsel's suggestion, not as a result of any SEC Enforcement guidance of or control over the NYSE Enforcement investigation, nor as a result of interdependence between the investigations as a whole. The Affirmation expressly represents that "there was no flow of information from [NYSE] Enforcement to the SEC regarding [Sassano's] conduct" and that references in the record to conversations between NYSE Enforcement and "'other regulatory

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40/ (...continued)
on whether "the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity" (emphasis added)); Mathis v. PG&E, 75 F.3d at 503 (focusing the joint action test on whether "the particular actions challenged are inextricably intertwined with those of the government" (emphasis added)); Desiderio v. NASD, 191 F.3d at 207 (indicating that a theory based on the nexus between actions by a private actor and the state must be based on evidence of "a nexus between the state and the specific conduct of which plaintiff complains" (emphasis in original)).

41/ In Quattrone, we credited evidence indicating that investigations by an SRO and government agencies were conducted jointly, and accordingly held that the respondent had "earned the right to present evidence regarding whether NASD's role in the Joint Investigation rendered the [request for testimony] state action." Quattrone, 87 SEC Docket at 2164-65 & n.27 (finding that summary judgment was inappropriately granted in the NASD's favor when the respondent "introduced facts indicating that the request was part of the Joint Investigation or, at the least, that he could have believed reasonably that this was the case"). We note that Quattrone presented considerably stronger evidence that the government and SRO investigations, as a whole, were inextricably intertwined than is indicated in the present case. Evidence of a joint investigation in Quattrone included, among other things, written statements from the NASD that its investigation was part of a joint investigation with the Commission and that "any resolution of the matter will need to involve all three regulators" (i.e., NYSE, the NASD, and SEC Enforcement), and Congressional testimony by the then-Director of SEC Enforcement indicating that the investigations were conducted jointly. Id. at 2156-57 and 2159.

entities' . . . merely referenced that conversations were held among all of the parties involved in planning for [Sassano]'s proposed cooperation via the attorney proffer." Notwithstanding Sassano's claim that the discovery ordered by the Hearing Officer was insufficient, the Affirmation covers the period starting from NYSE Enforcement's first written request for Sassano's testimony in September 2004 through the issuance of the NYSE Enforcement Charge Memorandum in November 2005. In this light, the evidence does not justify a finding that any cooperation at the proffer resulted from an overall joint investigation by NYSE Enforcement and the government agencies, nor does it justify a finding that the NYSE Enforcement investigation as a whole, or the specific NYSE Enforcement requests for testimony, were inextricably intertwined with the governmental investigations. 42/

Sassano's remaining claims are similarly insufficient to buttress his state action defense. Sassano notes that NYSE Enforcement "questioned Mr. Valverde [one of Sassano's coworkers] and subsequently forwarded his testimony to the SEC's Division of Enforcement." Although the Exchange does not dispute Sassano's claim that the transcript of testimony taken by NYSE was shared with SEC Enforcement, it is worth noting that the Valverde testimony was taken by the Exchange in December 2005 -- well after the Exchange's requests for Sassano's testimony issued in September 2004 and March 2005 and even after the issuance of the NYSE Enforcement Charge Memorandum giving rise to this case. In any event, NYSE Enforcement and SEC Enforcement both conducted investigations of market timing activities. Given the common subject matter of these investigations, it is hardly surprising that NYSE Enforcement took testimony that would be germane to SEC Enforcement's investigation. The fact that NYSE Enforcement pursued testimony from another CIBC employee after Sassano had twice failed to testify undermines Sassano's claim that NYSE Enforcement was simply relying on the investigative efforts of government agencies rather than pursuing a separate investigation. Moreover, courts have explicitly held that sharing of information and formal testimony between an SRO and the Commission is insufficient to establish state action. 43/ We do not find that the

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42/ Sassano's argument to the contrary notwithstanding, even joint action by SEC Enforcement and NYSE Enforcement at the proffer would not, under these facts, automatically transform the entire NYSE Enforcement investigation into a joint investigation with SEC Enforcement, nor would it retroactively convert the prior NYSE Enforcement requests for testimony into state action, if the two agencies had not been acting jointly when those requests were issued. See supra note 40 and infra note 43.

43/ Scher v. NASD, 386 F. Supp. 2d at 408 (finding, where an NASD investigator shared information with the district attorney's office with which he once worked approximately one year after plaintiff's testimony, that "such collaboration," which ultimately led to the plaintiff's criminal prosecution, "does not in itself demonstrate that a 'close' nexus' existed between the challenged conduct of the NASD and a state actor"); see also U.S. v. Finnerty, 411 F. Supp. 2d 428, 433 (S.D.N.Y. 2006) (stating that "[t]he mere fact that the

(continued...)

forwarding of Valverde's December 2005 NYSE Enforcement testimony to SEC Enforcement establishes that the NYSE's requests for Sassano testimony were issued in September 2004 and March 2005 as part of a single joint investigation by NYSE Enforcement and SEC Enforcement. 44/

Sassano also points to a statement in a Form U4 filed by Oppenheimer which characterizes the various investigations by "NASD, NYSE, USAO, SEC, MASS SEC COMMISSION, NYAG, ET AL." as "one investigation by all regulators." 45/ However, this cursory reference to the various investigations appears in a regulatory filing by Oppenheimer and not by any of the investigating regulators. Such a filing, particularly by an entity itself under investigation in connection with the same activities, does not in any way establish the nature of the relationship between NYSE Enforcement's investigation and the investigations of the Commission and the NYAG for purposes of the state action test.

In sum, Sassano has not presented evidence meeting the high standard required to establish a state action defense. Sassano's evidence does suggest possible coordination between the government agencies and NYSE personnel, particularly with respect to the preparation for, and participation in, the attorney proffer. The evidence indicates that Sassano himself initiated much of that coordination, which occurred after Sassano had already refused to appear for NYSE testimony. In addition, under the "joint action" test, Sassano is required to present evidence reflecting not just general collaboration or cooperation between the SRO and a government

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43/ (...continued)
Government may have requested and received documents from the NYSE in the course of its investigation does not convert the investigation into a joint one").

44/ Sassano states that SEC Enforcement produced the Valverde NYSE testimony in connection with the administrative proceeding against Sassano but did not include any other transcripts of testimony by NYSE Enforcement. On this basis, he concludes that the Valverde transcript "represents the only testimony taken by [NYSE Enforcement] in connection with its so-called independent investigation of Mr. Sassano and mutual fund trading practices at Oppenheimer" and uses this opportunity to request "focused discovery to probe whether [NYSE Enforcement] questioned any additional Oppenheimer and/or [CIBC] employees besides Mr. Valverde, or whether [NYSE Enforcement] simply relied upon the investigatory interviews conducted by the SEC and NYAG." The key question is whether the NYSE acted on behalf of SEC Enforcement in seeking Sassano's on the record testimony. See supra note 43. The possibility of the opposite -- NYSE reliance on testimony obtained by SEC Enforcement -- is only remotely probative on this key issue and is even less so considering, as we said, the NYSE and the SEC Enforcement staffs permissibly may share information and cooperate.

45/ Sassano indicates that the Form U4 was filed upon Sassano's suspension of employment from Oppenheimer.

agency, but evidence suggesting an "interdependence" between the government investigations and the SRO's requests for testimony triggering his invocation of his Fifth Amendment right. Sassano's evidence falls short of suggesting that NYSE's requests for his testimony were "inextricably intertwined" with the investigations by the NYAG or SEC Enforcement or that the government investigations were so "interdependent" with the requests for testimony that the government "must be recognized as a joint participant" in those requests. 46/

V.

Sassano has requested further discovery to substantiate his theory that the NYSE engaged in state action. Unlike previous cases remanded on this basis, however, we believe that the NYSE has already afforded Sassano sufficient opportunity to present and develop his state action claim. We have previously remanded cases in which the applicants had been limited in their ability to introduce evidence on the state action question in the SRO proceedings below, for instance when an SRO had not made its employees "available for testimony at a respondent's request or produced affidavits responding to" reasonable and credible evidence suggesting state action. 47/ We have also provided for an opportunity to develop further evidence regarding state action claims in cases in which the SRO's initial consideration of such claims had not been able to take into account significant developments in the law regarding the state action defense. 48/

46/ See generally Mathis v. PG&E, 75 F.3d at 503; Kirtley v. Rainey, 326 F.3d at 1093. Sassano also alleges statements suggesting cooperation between the NYAG and SEC Enforcement, e.g., requests by the SEC that "representative of the NYAG's office . . . attend Mr. Sassano's deposition," and a statement by SEC Enforcement to Sassano's counsel that "the SEC and NYAG were working together in investigating Mr. Sassano." Sassano also argues that "it was a matter of public record . . . that the NYAG was working hand-in-hand with the SEC to jointly investigate" one of Sassano's colleagues. Although these allegations may suggest cooperation between the two government agencies, they are not indicative of cooperation between NYSE Enforcement and either government agency.

Additionally, Sassano alleges that "counsel for CIBC and Oppenheimer, respectively, were sharing documents and information regarding alleged market timing activities obtained during the course of employee interviews . . . with the SEC, the NYAG and [NYSE Enforcement]." However, any such cooperation by counsel for CIBC and Oppenheimer would not indicate a joint investigation by NYSE Enforcement and either government agency.

47/ Ficken, 89 SEC Docket at 695.

48/ Id. at 694 (noting that "NASD did not have the opportunity to evaluate [the Commission's Quattrone decision] before ruling on Ficken's claims"); Turk, 90 SEC Docket at 2810

(continued...)

Sassano claims that he has presented "specific evidence" supporting his state action claim that "entitles [him] to additional discovery to make out this claim" despite the NYSE's express consideration of his state action claim during the hearing below. There are, however, limitations on the opportunity for discovery on the question of state action. We have specifically cautioned that applicants "may not use the discovery process to go on a fishing expedition in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory" of state action. 49/ We have also noted that an appeal based solely on a state action defense is subject to dismissal if the applicant "fail[s] to introduce sufficient evidence" to justify his state action claim. 50/ Moreover, such evidence must be presented at the "initial evidentiary hearing, so that the record is fully developed in the first instance when the case is before the SRO." 51/ We further stated that "[n]ot every defense of state action deserves discovery and a hearing" and that discovery must be based on "a reasonable and credible basis to conclude that the SRO's . . . seemingly private behavior 'may be fairly treated as that of the state itself.'" 52/

The proceedings below afforded Sassano the opportunity to present and develop evidence supporting his state action claim. 53/ The Exchange specifically considered Sassano's state

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48/ (...continued)
n.27 (specifically noting the "unusual posture of the appeal" and indicating that "the evidence presented to date might be the result of more than cooperation and . . . Turk's NYSE evidentiary hearing occurred before the issuance of our decisions in Quattrone and Ficken"); Heinze, 91 SEC Docket at 311 (granting remand where the respondent had "identified specific evidence that warrants a further opportunity to develop and present his state action claim" and "the NYSE considered Heinze's case without the full benefit of all our recent decisions on this issue").

49/ Ficken, 89 SEC Docket at 695 n.36 (citing G.K. Scott & Co., 51 S.E.C. 961, 973 (1994)).

50/ Turk, 90 SEC Docket at 2810 n.27.

51/ Id.

52/ Id. at 2807 n.15 (citing Brentwood Acad., 531 U.S. at 295).

53/ Compare Heinze, 91 SEC Docket at 311 (finding that "Heinze had identified specific evidence that warrant[ed] a further opportunity to develop and present his state action claim" when Heinze's contentions, including an assertion that an NYSE attorney informed Heinze that SEC Enforcement "had instructed the NYSE to limit the amount of information about his investigation that the Exchange provided to Heinze," raised "the possibility that [SEC Enforcement] exercised significant control over the NYSE's investigation of Heinze").

action claims in light of the criteria set forth in Quattrone and its progeny. 54/ Moreover, the Hearing Officer, after allowing Sassano to make an offer of proof on his state action claim, ordered further "limited discovery" regarding evidence of cooperation between NYSE Enforcement and SEC Enforcement in connection with the attorney proffer, which was Sassano's most credible evidence in support of his joint action argument. That additional discovery did not ultimately substantiate his state action claim.

We have indicated that, in order to obtain further discovery, an applicant is required "to state the precise manner in which [the facts he does possess] support[] his claims," to explain "why he needs additional discovery," to "state with some precision the materials he hope[s] to obtain with further discovery," and to explain "exactly how" the further information would support his claims. 55/ Sassano has not made any such attempt to focus the scope of his requested further discovery. For instance, although the Affirmation addressed communications between the various regulatory entities, he requests further discovery regarding, among other things, "the scope and extent of any cooperation, communication and/or sharing of information between [NYSE Enforcement], the SEC and the NYAG regarding their investigations of Mr. Sassano, CIBC and Oppenheimer" without indicating how such further discovery would elaborate or expand the evidence included in the Affirmation. 56/ Nor has Sassano identified the actual materials he hopes to obtain upon further discovery, or how such materials would support his claim. His discovery requests are broad and general, suggesting the forbidden fishing expedition. In this light, Sassano has not established a reasonable and credible basis to support his request on appeal to reopen the discovery process.

54/ The Hearing Officer found that Sassano "had not made out his claim of 'State Action'" on April 25, 2007, after our decisions in Quattrone and Ficken. In addition, in denying Sassano's request for additional discovery on appeal, the NYSE Board of Directors expressly stated that it had considered "the relevant decisional law (including the SEC's decisions in Quattrone, Ficken, Turk and Heinze)."

55/ Ficken, 89 SEC Docket at 695-96 n.37 (citing Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1442-43 (5th Cir. 1993)).

56/ Sassano also argues, "merely by way of example," that he is entitled to additional discovery regarding "the circumstances surrounding [NYSE Enforcement's] complete reliance upon the investigatory efforts of the SEC at the attorney proffer, and [NYSE Enforcement's] determination not to pose any questions of its own at the proffer; the extent of the [NYSE Enforcement's] joint participation with the SEC and NYAG in investigatory interviews of CIBC and/or Oppenheimer employees;" and whether NYSE Enforcement questioned any other CIBC or Oppenheimer employees. See supra note 44.

VI.

Section 19(e)(2) of the Securities Exchange Act of 1934 directs us to sustain the NYSE'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. 57/ Sassano asks that we modify the penalty imposed by the NYSE to "provide Mr. Sassano with twelve months within which to comply with [NYSE Enforcement]'s request for testimony (instead of the three months provided in the NYSE Decision), and to impose a bar of limited duration rather than a permanent bar." Sassano urges that "in the event [he] ultimately complies with [NYSE Enforcement's] request for testimony . . . a bar of limited duration not exceeding two years would be appropriate." 58/

We sustain the sanctions imposed by the NYSE because, as explained below, we conclude that Sassano's failure to appear for on-the-record testimony 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 Sassano will have the salutary effect of deterring others from engaging in the same serious misconduct.

NYSE Rule 477(c) expressly contemplates that the failure to testify may result in a permanent bar. 59/ "Because of limited Commission resources, Congress has given [SROs] significant front-line responsibility in ensuring that broker-dealers and their associated persons are complying with applicable statutes, rules, regulations, and ethical obligations." 60/ As we have repeatedly emphasized, it is vitally important to the self-regulatory system that SRO investigators be able to obtain information and testimony from member firms and associated

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57/ 15 U.S.C. § 78s(e)(2). Sassano does not claim, and the record does not show, that NYSE's action imposed an undue burden on competition.

58/ See supra note 3.

59/ Under NYSE Rule 477(c), a former employee of a member organization that "is adjudged guilty in a proceeding under Rule 476 of having refused or failed to comply" with any requirement to appear or testify "may be barred from being a member, member organization, allied member, approved person, or registered or non-registered employee of a member or member organization permanently, or for such period of time as may be determined . . . ."

60/ PAZ Sec., Inc., Exchange Act Rel. No. 54656 (Apr. 11, 2008) __ SEC Docket __, __ (quoting Charles C. Fawcett, IV, Exchange Act Rel. No. 56770 (Nov. 8, 2007) 91 SEC Docket 3147, 3157), appeal docketed, No. 08-1188 (D.C. Cir. May 13, 2008).

persons promptly and without conditions. 61/ Because the SROs lack subpoena power, they "necessarily rel[y] upon the full and prompt cooperation of [their] members and associated persons in conducting an investigation." 62/ Vigorous enforcement of Rule 477, therefore, helps ensure the continued strength of the self-regulatory system -- and thereby enhances the integrity of the securities markets and protects investors -- by "barring individuals and firms who have already demonstrated a refusal to be investigated." 63/ We have recently held that "[a] complete failure to respond to a request for information . . . renders the violator presumptively unfit for employment in the securities industry." 64/

Sassano has admitted throughout these proceedings that he has not appeared for on-the-record NYSE testimony. The Exchange's original request for such testimony has been outstanding since September 2004. Nevertheless, Sassano failed to appear for an interview even after the Exchange twice rescheduled his testimony at the request of his counsel, and after two separate requests for testimony by the Exchange. We have previously observed that a failure to respond until after the imposition of disciplinary sanctions "is tantamount to a complete failure to respond." 65/ Moreover, the NYSE's determination to bar Sassano was consistent with sanctions we have expressly affirmed in other SRO proceedings involving a failure to testify. 66/

61/ Albanese, 53 S.E.C. at 298.

62/ Id. at 297-98; 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").

63/ PAZ Sec., Inc., __ SEC Docket at __.

64/ Id. at __.

65/ Id. at __.

66/ See, e.g., Fawcett, 91 SEC Docket at 3158 (upholding bar for violation of analogous NASD rule).

We find that no factors mitigate the severity of Sassano's violative conduct. 67/ Sassano had no legitimate basis for refusing to testify before the NYSE. Instead, aware of the consequences, Sassano refused to comply with NYSE Enforcement's requests in contravention of his duty to cooperate fully and promptly with those requests. 68/ Lesser sanctions may, in certain circumstances, be appropriate for an incomplete or dilatory response to requests for information or a failure to respond where mitigating circumstances exist. However, in light of Sassano's complete failure, without mitigation, to respond to the Exchange's repeated requests for testimony, we conclude that the bar is not "excessive or oppressive" within the meaning of Exchange Act Section 19(e)(2). 69/

We concur in the NYSE's determination that Sassano'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 the NYSE to redress that risk serve the public interest and are neither excessive nor

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67/ Sassano has argued that "compelling [him] to testify before the [NYSE] while the SEC proceeding is pending would be highly prejudicial to [him] in the [SEC] enforcement proceeding" and "would enable the SEC's Division of Enforcement to effectively end run the provisions of Rule 230(g) of the SEC's own Rules of Practice . . . preclud[ing] the issuance of investigatory subpoenas for the purpose of obtaining evidence relevant to the proceeding 'after the institution of proceedings.'" On July 18, 2008, the SEC Enforcement proceeding against Sassano was settled. See Michael Sassano, Exchange Act Rel. No. 58193 (July 18, 2008), __ SEC Docket __. Given the settlement of the SEC Enforcement proceeding, Sassano's prejudice argument is moot.

Moreover, we are not aware of any offer by Sassano to comply with the NYSE Enforcement requests for testimony now that any threat that such testimony would be used in the SEC Enforcement investigation has subsided. In any event, the existence of a parallel ongoing SEC Enforcement investigation did not justify Sassano's refusal to testify before the NYSE. See Fawcett, 91 SEC Docket at 3158 (sustaining bar for failing to provide information despite applicant's claim 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").

68/ Cf. 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"). As we have previously noted, "even if the failure to respond does not result in direct improper financial benefit to respondents or harm to investors, it is serious because it impedes detection of such violative conduct." PAZ Sec., Inc., __ SEC Docket at __.

69/ Fawcett, 91 SEC Docket at 3157-58.

oppressive. The bar is also an appropriate remedy because it will serve as a deterrent to others who may be inclined to ignore NYSE requests for testimony, thereby protecting the investing public by encouraging the timely cooperation that is essential to the prompt discovery and remediation of misconduct. 70/

An appropriate order will issue. 71/

By the Commission (Chairman COX and Commissioners CASEY, AGUILAR, and PAREDES); Commissioner WALTER not participating.

Florence E. Harmon
Acting Secretary

70/ 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. v. SEC, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir. 2005)).

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58632 / September 24, 2008

Admin. Proc. File No. 3-12903

In the Matter of the Application of

MICHAEL SASSANO
c/o Graeme W. Bush, Esq.
Zuckerman Spaeder LLP
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036

For Review of Disciplinary Action Taken by

NYSE REGULATION, INC.

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY NATIONAL SECURITIES EXCHANGE

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

ORDERED that the disciplinary action taken by NYSE Regulation, Inc. against Michael Sassano, be, and it hereby is, sustained.

By the Commission.

Florence E. Harmon
Acting Secretary