

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 62891 / September 10, 2010

Admin. Proc. File No. 3-13727

In the Matter of the Application of

JOSEPH RICUPERO
c/o Marni Weiss, Esq.
Weiss Imbesi PLLC
462 Seventh Avenue, 12th Floor
New York, NY 10018

For Review of Disciplinary Action Taken by
Financial Industry Regulatory Authority, Inc.

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION - REVIEW OF DISCIPLINARY
PROCEEDINGS

Violations of Conduct, Procedural, and Membership and Registration Rules

Failure to Provide Requested Information

Failure to File FOCUS Reports

Failure to File Annual Audit Report

Failure to File Application for Approval to Transfer Firm Assets

Conduct Inconsistent with Just and Equitable Principles of Trade

General securities representative, general securities principal, financial and operations principal, limited representative-equity trader, chief executive officer, chief compliance officer, and sole director of former member of registered securities association failed to respond to requests for information, and failed to file three FOCUS reports, one annual audit report, and an application for approval to transfer member's assets. *Held*, association's findings of violations and sanction imposed are *sustained*.

APPEARANCES:

Marni Weiss, Esq., of Weiss Imbesi PLLC, for Joseph Ricupero.

Marc Menchel, Alan Lawhead, and Vickie R. Olafson, for Financial Industry Regulatory Authority, Inc.

Appeal filed: December 18, 2009
Last brief received: April 26, 2010

I.

Joseph Ricupero, formerly a general securities representative, general securities principal, financial and operations principal, limited representative-equity trader, chief executive officer, chief compliance officer, and sole director of America First Associates ("America First" or the "Firm"), a former NASD member firm, seeks review of disciplinary action taken by NASD.¹ NASD found that Ricupero violated NASD Procedural Rule 8210 and Conduct Rule 2110 by failing to respond to NASD's requests for information. NASD also found that Ricupero violated Conduct Rule 2110 by failing to file the Firm's Financial and Operational Combined Uniform Single ("FOCUS") reports for March, April, and May 2006 and the Firm's annual audit report for fiscal year 2005. NASD further found that Ricupero violated NASD Membership and Registration Rule 1017 and Conduct Rule 2110 by failing to file an application with NASD for approval to sell the Firm's customer accounts to a NYSE member firm.

For the Rule 8210 violation, NASD barred Ricupero from associating with any NASD member firm in all capacities. NASD declined to impose a sanction for the remaining violations. We base our findings on an independent review of the record.

II.

A. Background

In 1995, Ricupero founded America First, an introducing broker-dealer. He owned more than seventy-five percent of the Firm. On February 9, 2006, Ricupero sold the Firm's customer accounts. He terminated his NASD registration in December 2006 and is not presently associated with a member firm or working in the industry. In March 2006, Tracy Wood-Selem, the NASD staff examiner who reviewed the Firm's FOCUS reports, questioned the accuracy of two reports that the Firm filed for the months ending January and February 2006. Both reports contained identical dollar amounts of securities holdings. Wood-Selem testified at the hearing that the identical amounts were "highly unusual" given that the Firm's previously filed FOCUS reports contained slightly different amounts. She also testified that she was concerned about the

¹ On July 26, 2007, the Commission approved a proposed rule change filed by the National Association of Securities Dealers, Inc. ("NASD") to amend NASD's Restated Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of NASD and the member regulation, enforcement, and arbitration functions of the New York Stock Exchange ("NYSE"). *See* Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517 (SR-NASD-2077-053). Because the disciplinary action here was instituted before that date, we continue to use the designation NASD.

information in the two reports because they were identical in all other respects, except that the February 2006 FOCUS report included \$25,000 in "cash and earnings."

In a letter dated April 10, 2006, Wood-Selem asked Ricupero pursuant to Rule 8210 to provide by April 12, 2006 "a copy of the Firm's proprietary statements that correspond to the Firm's reporting of \$345,520" worth of securities holdings in the February 2006 FOCUS report, and copies of the Firm's trial balances for the months of January and February 2006. Wood-Selem did not receive a response and sent a second letter dated April 13, 2006 requesting the same information pursuant to Rule 8210 by April 18, 2006 and advising Ricupero that failure to comply with the request could subject the Firm to disciplinary action.

On April 17, 2006, Wood-Selem received a letter from Ricupero addressed to "Tracy Wood Selem" stating that he could not meet the April 12, 2006 deadline because he had scheduled a vacation for a religious holiday, but would "fulfill [NASD's] request" by May 1, 2006. At the hearing, however, Ricupero testified that he failed to timely respond to Wood-Selem's first request because the responsive documents were not "readily available" and "were all boxed up" in a "storage area."

On April 27, 2006, Wood-Selem and other NASD staff attempted to visit Ricupero at the Firm. Wood-Selem testified that "it looked like [the Firm] was abandoned" because "there were wrapped chairs," and "terminals pushed to the side." On April 28, 2006, an NASD examination staff supervisor sent Ricupero a letter reminding him that NASD had not received the information requested in Wood-Selem's two previous letters. The letter questioned whether the Firm was complying with net capital and recordkeeping rules and instructed Ricupero to provide NASD with certain information about the Firm's capital.

On June 13, 2006, Wood-Selem sent Ricupero a third letter pursuant to Rule 8210 asking for the previously requested financial information by June 20, 2006 and warning him that failure to comply with the request could subject the Firm "and or its registered representative" to disciplinary action. Ricupero does not dispute that NASD properly served the three requests made pursuant to Rule 8210.

As an NASD staff examiner, Wood-Selem reviewed other compliance matters regarding the Firm. She discovered that Ricupero did not file with NASD: (1) the Firm's March, April, and May 2006 FOCUS reports, (2) the Firm's annual audit report for the year ending December 31, 2005, and (3) an application requesting that NASD approve the Firm's February 9, 2006 sale of its customer accounts to a NYSE member firm.

B. NASD Initiates a Disciplinary Proceeding.

On June 20, 2007, NASD filed a complaint against Ricupero regarding the conduct at issue in this proceeding and scheduled a hearing for December 2007. In November 2007, Ricupero produced forty-one pages of the Firm's February 2006 bank statements and clearing

account statements and the Firm's January and February 2006 trial balances. In December 2007, a few days before the hearing, Ricupero produced a letter that he claimed he had sent to NASD on May 1, 2006 ("May 1, 2006 Letter"). The three-sentence letter addressed to "NASD Compliance" stated that "documents pertaining to the Focus Filing P/E 2/28/2006" are attached. The attachment contained seven of the forty-one pages that Ricupero produced in November 2007.

Ricupero testified at the hearing that he sent the May 1, 2006 Letter to Wood-Selem on that date. NASD's Hearing Panel found this testimony to be not credible. At the hearing, NASD's Department of Enforcement staff introduced a correspondence log that covered April through August 2006 and contained no indication that NASD received the May 1, 2006 Letter. In a May 14, 2008 decision, the Hearing Panel credited Wood-Selem's testimony that NASD's mail department would have directed any correspondence it received from Ricupero to her and that she received the letter for the first time when Ricupero produced it in December 2007. Ricupero testified that he had no proof that he mailed the letter or that NASD received it. The Hearing Panel found that Ricupero failed to respond to requests for information and failed to make the various required filings for the Firm. The Hearing Panel barred Ricupero from associating with any NASD member firm in all capacities and declined to impose a sanction for the remaining violations.

Ricupero appealed the Hearing Panel's decision to NASD's National Adjudicatory Council ("NAC"). The NAC found that the record supported the Hearing Panel's determination not to credit Ricupero's testimony. If Ricupero truly had sent the letter, the NAC reasoned he would have referred to it at critical points before November 2007, such as when he received a "Wells" notice in March 2007, when NASD filed the complaint in this proceeding in June 2007, when Ricupero answered the complaint in July 2007, and during the initial pre-hearing conference in August 2007. The NAC concluded that Ricupero's claim of having sent the May 1, 2006 Letter was "untrue and constitute[d] a deliberate attempt to mislead."

The NAC also found that Ricupero's disciplinary history was an aggravating factor and "demonstrates a pattern of disregard for regulatory requirements."² In 1999 and 2000, Ricupero consented to findings involving violations of free-riding and withholding provisions, as well as net capital violations and failure to provide prompt written notice regarding three principals' departure from the Firm, respectively. In 2008, NASD found that Ricupero failed to timely amend his Uniform Application for Securities Industry Registration or Transfer to disclose a federal court action filed against him alleging that he committed common-law fraud and violated federal securities laws, and that he and the Firm executed two settlement agreements with

² In 2003, Ricupero consented to findings that he permitted another individual to act in a capacity that required registration while such registration status was inactive due to the individual's failure to comply with continuing education requirements. The NAC did not refer to this event in its decision.

improper confidentiality provisions.³ The NAC affirmed the Hearing Panel's findings of violation and sanction imposed. This appeal followed.

III.

Pursuant to Section 19(e)(1) of the Securities Exchange Act of 1934, we will sustain NASD's disciplinary action if the record shows that Ricupero engaged in the violative conduct that NASD found and that NASD applied its rules in a manner consistent with the purposes of the Exchange Act.⁴ Based on our independent review of the record, we find that a preponderance of the evidence supports NASD's findings of violation against Ricupero.

A. Failure to Provide Requested Information

NASD Rule 8210(a)(1) requires an associated person to provide information upon NASD's request.⁵ From April to June 2006, NASD sent Ricupero three letters pursuant to Rule 8210 requesting information about the Firm's securities holdings and trial balances for January and February 2006. Ricupero terminated his NASD registration in December 2006 and was therefore an associated person when NASD requested information. NASD properly served and Ricupero received all three requests. The record supports NASD's findings that Ricupero failed to provide any of the requested information by the dates stated in NASD's three letters.

Ricupero argues that he responded to NASD's initial request by sending the May 1, 2006 Letter. The Hearing Panel discredited Ricupero's testimony on this point. The credibility determination of an initial fact finder is entitled to considerable weight and deference because it is based on hearing the witnesses' testimony and observing their demeanor.⁶ We find no basis to disturb the Hearing Panel's determination.

Moreover, the record corroborates the Hearing Panel's finding. NASD's correspondence log contained no indication that NASD received the May 1, 2006 Letter. Unlike the April 2006 letter that was addressed to "Tracy Wood Selem," the purported May 1, 2006 Letter was addressed to "NASD Compliance." The Hearing Panel credited Wood-Selem's testimony that NASD's mail department would have directed all of Ricupero's mail to her and that she saw the

³ NASD ordered Ricupero and the Firm to pay a \$7,500 fine and costs of \$3,540.14 jointly and severally. On February 6, 2009, NASD revoked Ricupero's registration for failure to pay the fines and costs associated with the 2008 proceeding.

⁴ 15 U.S.C. § 78s(e)(1).

⁵ NASD Manual at 7212 (2006 ed.).

⁶ *Kirlin Sec., Inc.*, Exchange Act Rel. No. 61135 (Dec. 10, 2009), 97 SEC Docket 23299, 23320 n.71.

letter for the first time in December 2007 – days before the hearing. Ricupero admitted at the hearing that he had no proof that he mailed the letter or that NASD received it. The Hearing Panel and the NAC questioned Ricupero's failure to mention the letter – potentially beneficial evidence for Ricupero – at several critical junctures before November 2007, including in response to a Wells notice, nearly eighteen months after it was allegedly sent.

Ricupero also argues that he responded to NASD's requests for information, "albeit late," by producing information in November 2007. As Ricupero admits, he did not provide the requested information by NASD's stated deadlines. Instead, Ricupero produced partial information five months after NASD filed a complaint against him. Although Ricupero was no longer associated with a member by the time NASD filed the complaint in June 2007, he remained subject to NASD's jurisdiction for two years after he terminated his registration in December 2006.⁷ We have emphasized repeatedly that NASD should not have to initiate a disciplinary action to elicit a response to its information requests made pursuant to Rule 8210.⁸ The cases Ricupero relies on are inapposite. In *CMG Institutional Trading, LLC*,⁹ *Morton Bruce Erenstein*,¹⁰ and *Perpetual Securities, Inc.*,¹¹ the applicant produced some documents in response to NASD's request *before* disciplinary action was instituted. Ricupero's failure to respond until after NASD filed a complaint constitutes a complete failure to respond in violation of Rules 8210 and 2110.¹²

⁷ NASD Bylaws, Article V, Section 4.

⁸ *CMG Inst'l Trading, LLC*, Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802, 13810; *Toni Valentino*, 57 S.E.C. 330, 339 & n.14 (2004); *Robert A. Quiel*, 53 S.E.C. 165, 168 (1997); *see also Paz Sec., Inc.*, Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5128 (finding that applicants' failure to respond until after NASD barred them following the institution of a disciplinary proceeding was tantamount to a complete failure to respond in violation of Rule 8210), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009); *Elliot M. Hershberg*, Exchange Act Rel. No. 53145 (Jan. 19, 2006), 87 SEC Docket 494, 498, 499 (agreeing with NASD's finding that Hershberg's refusal to testify until the institution of a proceeding constituted a complete failure to respond in violation of Rule 8210), *aff'd*, 210 Fed. Appx. 125 (2d Cir. 2006).

⁹ Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802.

¹⁰ Exchange Act Rel. No. 56768 (Nov. 8, 2007), 91 SEC Docket 3114.

¹¹ Exchange Act Rel. No. 56613 (Oct. 4, 2007), 91 SEC Docket 2489.

¹² A violation of Exchange Act and NASD rules constitutes conduct inconsistent with just and equitable principles of trade and therefore also establishes a violation of NASD

(continued...)

B. Filing Violations

The Firm was required to but did not file: (1) its March, April, and May 2006 FOCUS reports, (2) its annual audit report for the year ending December 31, 2005, and (3) an application requesting that NASD approve the Firm's February 9, 2006 sale of its customer accounts to an NYSE member firm.¹³ The Firm therefore violated Exchange Act Rules 17a-5(a) and 17a-5(d), and NASD Rule 1017(a)(3). Ricupero was the Firm's president and financial and operations principal. Ricupero does not dispute that he was responsible for making these filings and that he failed to do so.¹⁴ We find that Ricupero is responsible for the Firm's violations of NASD Rules 1017(a)(3) and 2110.

IV.

Pursuant to Exchange Act Section 19(e)(2), we will sustain NASD's sanction unless we find, having due regard for the public interest and the protection of investors, that the sanction is

¹² (...continued)

Conduct Rule 2110. *E. Magnus Oppenheim & Co.*, Exchange Act Rel. No. 51479 (Apr. 6, 2005), 85 SEC Docket 475, 478.

¹³ Exchange Act Rule 17a-5(a) requires broker-dealers to file FOCUS reports with NASD on a monthly basis. 17 C.F.R. § 240.17a-5(a). Exchange Act Rule 17a-5(d) requires broker-dealers to file annually a report that is audited by an independent public accountant. 17 C.F.R. § 240.17a-5(d). NASD Rule 1017(a)(3) requires a member to file an application for approval to transfer its customer accounts, unless both the seller and acquirer are NYSE members. NASD Manual at 3129. The Firm was not a NYSE member.

¹⁴ *See Sisung Sec. Corp.*, Exchange Act Rel. No. 56741 (Nov. 5, 2007), 91 SEC Docket 3050, 3060 (holding that the "president of a brokerage firm is responsible for the firm's compliance with all applicable requirements unless and until he reasonably delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his duties") (citing *Steven P. Sanders*, 53 S.E.C. 889, 904 (1998); *Kirk A. Knapp*, 50 S.E.C. 858, 862 (1992)); *see also Richard F. Kresge*, Exchange Act Rel. No. 55988 (June 29, 2007), 90 SEC Docket 3072, 3090-91 (finding firm's president, who was also its compliance officer, liable for Firm's violations of NASD and Exchange Act rules); *James Michael Brown*, 50 S.E.C. 1322, 1325-26 (1992) (finding firm's president responsible for firm's failure to comply with Exchange Act reporting and recordkeeping requirements), *aff'd*, 21 F.3d 1124 (11th Cir. 1994) (Table); *cf. Sisung*, 91 SEC Docket at 3060 (finding firm's president responsible for firm's violations of Municipal Securities Rulemaking Board Rules). The record establishes that Ricupero was the Firm's only officer and director and did not delegate his responsibility.

excessive or oppressive or imposes an unnecessary or inappropriate burden on competition.¹⁵ NASD barred Ricupero from associating with any NASD member firm in all capacities for his failure to respond in any manner to NASD's requests for information. NASD declined to impose a sanction for the remaining violations.

The sanction imposed by NASD is consistent with NASD's Sanction Guidelines. Although the Commission is not bound by the Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2).¹⁶ The Sanction Guidelines provide that, absent mitigating circumstances, a bar should be the standard sanction when an individual fails to respond in any manner in violation of Rule 8210.¹⁷ In reaching this determination, NASD applied the Sanction Guidelines's two "Principal Considerations" regarding a Rule 8210 violation, analyzing (1) the nature of the information requested; and (2) whether the requested information was provided, and, if so, the number of requests made, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response.¹⁸

The requested information was important. Wood-Selem testified that the identical amounts of securities holdings noted in the Firm's January and February 2006 FOCUS reports were "highly unusual," thus calling into question the accuracy and reliability of the Firm's disclosure. NASD found that the unusual similarities in the two reports "could have been concealing whether the firm was in compliance with its minimum net capital requirement." The net capital rule serves as "the principal regulatory tool by which the Commission and [the self-regulatory organizations] monitor the financial health of brokerage firms and protect customers from the risks involved in leaving their cash and securities with broker-dealers."¹⁹ As we have

¹⁵ 15 U.S.C. § 78s(e)(2). Ricupero does not claim, and the record does not show, that NASD's action imposes an unnecessary or inappropriate burden on competition.

¹⁶ *CMG*, 95 SEC Docket at 13814 n.38 (citing *Perpetual Sec., Inc.*, Exchange Act Rel. No. 56613 (Oct. 4, 2007), 91 SEC Docket 2489, 2506 n.56 (stating that NASD promulgated the Sanction Guidelines in an effort to achieve greater consistency, uniformity, and fairness in its sanctions)).

¹⁷ NASD Sanction Guidelines at 35 (2007 ed.). Out of approximately eighty sanction guidelines, the guideline for violations of Rule 8210 is one of only three that propose a bar as the standard sanction in the absence of mitigation. *Paz*, 93 SEC Docket at 5125-26.

¹⁸ Sanction Guidelines at 35.

¹⁹ *CMG*, 95 SEC Docket at 13809 & n.17 (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 570 (1979)); *see also Russo Sec., Inc.*, 55 S.E.C. 58, 83 & n.63 (citing *Blaise D'Antoni & Assocs. v. SEC*, 289 F.2d 276, 277 (5th Cir.) ("The net capital rule is one of the most important weapons in the Commission's arsenal to protect investors. By limiting the ratio of a

(continued...)

held, "[e]nsuring compliance with the net capital rule is important to protect investors from the possible financial collapse of a firm."²⁰ Such a collapse can expose investors to pecuniary loss, including leaving the Firm's customers "unable to liquidate their securities positions [with the Firm] or open new positions until their accounts are transferred to another broker-dealer."²¹ Here, the importance of the requested financial information became even clearer after NASD discovered in late April 2006 that the Firm appeared to have closed.

NASD found that Ricupero provided no information by the deadlines set in Wood-Selem's three written requests. Ricupero only produced partial information in November 2007, which was one and one-half years after Wood-Selem's first request and five months after NASD instituted this disciplinary action. NASD received the partial information only after it had followed up on the three requests with telephone calls, emails, a visit to the Firm, a letter questioning the Firm's potential net capital violations based on its apparent closure, and, finally, the institution of a disciplinary proceeding. NASD concluded that Ricupero's conduct over the extended period of time demonstrated a "pattern of total disregard for the Rule 8210 process." We agree that the record demonstrates that NASD exerted significant regulatory pressure in an attempt to elicit a response from Ricupero.

NASD found Ricupero's testimony that he sent the May 1, 2006 Letter and his varying explanations about why he could not timely access the information responsive to NASD's request to be dishonest. NASD considered Ricupero's dishonesty to be an aggravating factor:

Ricupero's eleventh-hour claim of compliance [by producing the May 1, 2006 Letter in November 2007] in addition to his various justifications for failing to provide the documents when requested demonstrate a troubling pattern of dishonesty. Throughout the investigative phase and disciplinary process relevant to this matter, Ricupero ignored staff's Rule 8210 requests. Neither his claim of being on vacation nor his claim of having to find the documents offers any valid reason to lessen the severity of Ricupero's complete disregard of his obligation to respond to [NASD]'s request for information.

NASD also found that "Ricupero has demonstrated a cavalier disregard for his duty to ensure that he responds to Rule 8210 requests for information" and that NASD "faces a 'great risk of being unable to obtain from [Ricupero] information necessary for the protection of investors.'" NASD

¹⁹ (...continued)

broker's indebtedness to his capital, the rule operates to assure confidence and safety to the investing public."), *cert. denied*, 368 U.S. 899 (1961)).

²⁰ *CMG*, 95 SEC Docket at 13815 & n.41 (citing *Paz*, 93 SEC Docket at 5130).

²¹ *CMG*, 95 SEC Docket at 13815 & n.43 (citing *Net Capital Rule*, Exchange Act Rel. No. 31512 (Nov. 24, 1992), 52 SEC Docket 4167, 4169-70).

concluded that a bar was "an appropriately remedial sanction given all of the facts and circumstances, including a lack of mitigating factors."

Ricupero claims that the bar imposed by NASD is punitive and not remedial. We have stressed the importance of Rule 8210 in connection with NASD's "obligation to police the activities of its members and associated persons."²² Without subpoena power, NASD must rely on Rule 8210 to obtain information from its members necessary to carry out its investigations and fulfill its regulatory mandate.²³ A failure to comply with Rule 8210 is a serious violation because it subverts NASD's ability to execute its regulatory responsibilities.²⁴ To impose a bar as the standard sanction for a complete failure to respond to NASD information requests "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."²⁵

NASD determined that there were no mitigating factors that would warrant a lesser sanction. Ricupero argues that we should consider the fact that his Firm "was winding down in the midst of Enforcement's requests for documentation" as a mitigating factor that warrants a lesser sanction, such as a suspension. Ricupero did not, however, raise with NASD the purported difficulties in obtaining documents resulting from the Firm's closure at any point during NASD's efforts to acquire information. Instead, Ricupero stated in a letter dated April 17, 2006 that he was unable to meet Wood-Selem's original deadline due to his vacation and religious holiday plans. Whatever difficulty Ricupero faced in responding to Wood-Selem's deadlines, he should have "raised, discussed, and resolved [it] with the NASD staff in the cooperative spirit and prompt manner contemplated by the Rules."²⁶

²² *CMG*, 95 SEC Docket at 13808 n.14 (citing *Paz*, 93 SEC Docket at 5127).

²³ *Id.* at 13808 n.15 (citing *Perpetual*, 91 SEC Docket at 2502-03).

²⁴ *See Hershberg*, 87 SEC Docket at 498 (stating that "[f]ailure to comply is a serious violation justifying stringent sanctions because it subverts NASD's ability to execute its regulatory functions") (citations omitted), *aff'd*, 210 Fed. Appx. 125 (2d Cir. 2006).

²⁵ *Paz*, 93 SEC Docket at 5126; *Howard Brett Berger*, Exchange Act Rel. No. 58950 (Nov. 14, 2008), 94 SEC Docket 11615, 11622, *petition denied*, 347 Fed. Appx. 692 (2d Cir. 2009) (unpublished); *Charles Fawcett*, Exchange Act Rel. No. 56770 (Nov. 8, 2007), 91 SEC Docket 3147, 3157.

²⁶ *CMG*, 95 SEC Docket at 13812 & n.28 (citing *Richard J. Rouse*, 51 S.E.C. 581, 584 n.9 (1993)).

We reject Ricupero's suggestion that the fact that he has not worked in the industry since March 2006 should further mitigate the sanction. Absent a bar, Ricupero could seek to re-enter the securities industry through an association with another member firm.²⁷ In addition, Ricupero has a prior disciplinary history that includes the imposition of significant monetary fines and censures. In 1999 and 2000, Ricupero consented to findings involving violations of free-riding and withholding provisions, as well as net capital violations and failure to provide prompt written notice regarding three principals' departure from the Firm, respectively. In 2003, Ricupero consented to findings that he permitted another individual to act in a capacity that required registration while such registration status was inactive due to the individual's failure to comply with continuing education requirements.²⁸ In 2008, NASD found that Ricupero failed to timely amend his Uniform Application for Securities Industry Registration or Transfer to disclose a federal court action filed against him alleging that he committed common-law fraud and violated federal securities laws, and that he and the Firm executed two settlement agreements with improper confidentiality provisions.²⁹ Ricupero's disciplinary history is further evidence that he poses a risk to the investing public should he re-enter the industry.

Ricupero asserts that the suspensions imposed in *CMG Institutional Trading, LLC*,³⁰ *Morton Bruce Erenstein*,³¹ and *Perpetual Securities, Inc.*³² demonstrate "that where a party responds to an 8210 request even after a complaint is filed, a party should not be barred from the industry." In each of those cases, the applicants had provided some information responsive to NASD's Rule 8210 requests before NASD filed a complaint.³³ Accordingly, NASD found that the applicants violated Rule 8210 by failing to provide complete and/or timely responses to requests for information. NASD imposed sanctions consistent with the Sanction Guidelines, which recommend a suspension when the applicant did not respond in timely manner. In contrast, Ricupero provided no information before NASD filed its complaint and therefore failed to respond in any manner. Such conduct warrants a bar in the absence of mitigating factors.

²⁷ *Justin F. Ficken*, Exchange Act Rel. No. 58802 (Oct. 17, 2008), 94 SEC Docket 10887, 10894.

²⁸ NASD did not consider this violation in its sanction determination.

²⁹ NASD ordered Ricupero and the Firm to pay a \$7,500 fine and costs of \$3,540.14 jointly and severally. On February 6, 2009, NASD revoked Ricupero's registration for failure to pay the fines and costs associated with the 2008 proceeding.

³⁰ Exchange Act Rel. No. 59325 (Jan. 30, 2009), 95 SEC Docket 13802.

³¹ Exchange Act Rel. No. 56768 (Nov. 8, 2007), 91 SEC Docket 3114.

³² Exchange Act Rel. No. 56613 (Oct. 4, 2007), 91 SEC Docket 2489.

³³ *CMG*, 95 SEC Docket at 13808; *Erenstein*, 91 SEC Docket at 3119; *Perpetual*, 91 SEC Docket at 2503.

We conclude that the bar is remedial because it will prevent Ricupero and deter others from failing to respond to NASD requests for information and protect the investing public by encouraging timely cooperation.³⁴ Accordingly, we find NASD's decision to bar Ricupero in all capacities neither excessive nor oppressive within the meaning of Exchange Act Section 19(e).

An appropriate order will issue.³⁵

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

Elizabeth M. Murphy
Secretary

³⁴ See *Morton Bruce Erenstein*, Exchange Act Rel. No. 56768 (Nov. 8, 2007), 91 SEC Docket 3114, 3129 (finding that a bar against respondent for a Rule 8210 violation served as a deterrent to others who might ignore NASD's information requests and protected the investing public by encouraging the timely cooperation essential to promptly discovering and remedying industry conduct), *petition denied*, 316 Fed. Appx. 865 (11th Cir. 2008) (unpublished).

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
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SECURITIES EXCHANGE ACT OF 1934
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For Review of Disciplinary Action Taken by
Financial Industry Regulatory Authority, Inc.

ORDER SUSTAINING DISCIPLINARY ACTION

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

ORDERED that the disciplinary action taken by Financial Industry Regulatory Authority, Inc. against Joseph Ricupero be, and it hereby is, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary