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November 12, 2009

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549-1000

Dear Ms. Murphy:

Charles Schwab & Co. Inc. ("Schwab") appreciates the opportunity to comment on FINRA's "Proposed Rule Change to Amend FINRA Rule 8210 (Provision of Information and Testimony and Inspection and Copying of Books)." Schwab commends FINRA's efforts to clarify its rules when appropriate and necessary and agrees it is important that FINRA have the authority and ability to request documents relevant to an investigation, examination or complaint regarding a matter over which FINRA has jurisdiction. However, Schwab is concerned that FINRA's intent to "...clarify the scope of its authority regarding requests pursuant to FINRA Rule 8210..." represents a significant expansion of current FINRA Rule 8210¹ without a meaningful discussion or consideration of the possible legal and practical implications for member firms, associated persons and persons over which FINRA has jurisdiction.

Specifically, Schwab believes that the proposed change to expand Rule 8210(a)(2) to information "...that is in such member's or person's possession, custody or control" and the associated footnote regarding the intent of word "control" raises due process, jurisdiction, conflicts and confidentiality issues not contemplated or considered in the proposed rule filing. FINRA asserts its intentions in expanding the rule in the following footnote, which states:

In using the word "control," in addition to possession and custody, *FINRA intends to* require members or persons covered by the rule to provide, for example, records that they have the legal right, authority, or ability to obtain upon demand. See *Camden Iron & Metal v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441 (D.N.J. 1991) ("Federal courts construe 'control' very broadly under [Federal] Rule [of Civil Procedure] 34."). Moreover, the proposed addition of "possession, custody or control" will address questions that have arisen in litigation regarding the scope of the rule. See, e.g., *In re: Jay Alan Ochanpaugh*, Securities Exchange Act Release No. 54363 (August 25, 2006).

¹ FINRA Rule 8210 was adopted with no changes from NASD Rule 8210, effective December 15, 2008.

(Proposed Rule Change by FINRA, p. 5, footnote 3, *emphasis added*).

There are several significant legal and practical implications raised by FINRA's rule proposal.

Proposal Does Not Address SEC Concerns Raised in Ochanpaugh

The Commission decision in the Ochanpaugh proceeding referenced in the footnote above specifically considered the scope of the NASD's authority in connection with Rule 8210 and found that a "fuller exploration" of the issues was required and expressly noted that the "NASD's decision [which had been appealed to the Commission] provides no citation to authority, analysis or interpretation of the language of the Rule or discussion of the history of the Rule in support of its 'possession and control' theory of the scope of Rule 8210. Our research yields neither any adjudicatory instance where we have been faced with this precise issue nor any discussion of it in any Commission release." (See attached: Ochanpaugh decision at p. 9). In its decision, the Commission identified issues that should be considered in the further analysis of the scope of the NASD's authority. Consistent with the Commission decision, Schwab believes the proposed rule filing fails to "clarify" the appropriate scope of Rule 8210, lacks the exploration and analysis of the key elements expressly noted by the Commission and, therefore, presents member firms with undeterminable risks and challenges.

Lack of Procedural Protections

It is perhaps most significant to note that the Commission's Ochanpaugh decision specifically pointed out that the language in the Federal Rules of Civil Procedure that FINRA is now seeking to adopt stems from the Supreme Court's power to prescribe general rules of practice and procedure for cases in the United States district courts, while the NASD's authority to request documents pursuant to Rule 8210 stems from the contractual relationship entered into voluntarily by NASD member firms and associated persons with the NASD. In its discussion of this scope of authority issue, the Commission states that the potential breadth of requests for documents under the Federal Rules is "circumscribed by the full panoply of procedural protections afforded as part of the discovery process, including the right to object to the production of requested documents, and the right to have such objection heard by a court, an entity independent of the party requesting the documents." None of these basic protections are available when FINRA makes a Rule 8210 request. The Commission further stated in its decision that the only recourse against possible overreaching by the NASD is for the person to whom the request is directed to refuse to comply, and to appeal any consequent disciplinary action to the Commission.

A discussion of the issues noted by the Commission is not addressed by FINRA in its filing with the Commission and the proposed rule makes no provision for comparable

procedural protections in cases of possible overreaching by FINRA. The scope of the proposed rule appears to be limited only by the discretion or judgment of FINRA's staff.

Confidentiality of Third Party Records Produced Pursuant to Proposed Rule 8210

Once documents are provided to FINRA pursuant to a Rule 8210 request, FINRA is not required to maintain their confidentiality, and has specifically informed member firms that material provided in connection with such requests may be provided by FINRA to other third parties in response to subpoenas, who can then attach them to pleadings filed in court which are public records for anyone to review. FINRA has further informed member firms it will not give notice to the person or entity whose records are sought when another party subpoenas FINRA for such records.

There is no Freedom of Information Act ("FOIA") type of protection afforded member firms, associated persons or others over which FINRA has jurisdiction for documents required to be produced under the proposed rule. Pursuant to applicable federal laws and regulations entities and individuals can submit confidential material requested by the Commission with a request that the information be kept in confidence. Should the Commission receive any request for these documents, pursuant to the FOIA or otherwise, by regulation the Commission must promptly notify the party requesting confidential treatment of the request for the documents. This notification gives the entity or individual an opportunity to object to such disclosure. If the Commission is inclined to grant a FOIA request, procedures required by federal regulation and normal Commission practice provide for ten business days' advance notice of any such preliminary decision to enable the firm or individual to pursue any remedies that may be available, including submitting additional arguments. Parties seeking confidential treatment are given an additional 10 days from the date of the final decision to appeal an adverse decision to the Commission's General Counsel; they may then seek relief in federal court.

The proposed expansion of Rule 8210 raises broader issues regarding the production of documents owned by a third party over which FINRA does not have jurisdiction. If a member firm is required to produce confidential or proprietary third party documents to FINRA and those documents are subsequently provided by FINRA to a third party in response to a subpoena, the owner of the documents may suffer material harm and seek damages or other recourse from the member firm or FINRA. Producing confidential material without any due process protections exposes the member firm and FINRA to potential claims by the owner of the documents resulting in costly and time consuming litigation or arbitration proceedings.

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The proposed rule does not address ownership of records sought

FINRA's proposed rule filing does not analyze or address issues relating to the ownership of records where FINRA is seeking records of a third party not within its jurisdiction pursuant to a request under Rule 8210. FINRA seeks the authority to require those under its jurisdiction to provide material to which they have the legal right, authority, or ability to obtain upon demand. However, in many cases, an unrelated third party may own and have absolute control over the material requested, while the person or entity over which FINRA has jurisdiction may have limited access to the documents or only the right to request the documents from the third party for a specific purpose consistent with their role in the organization or relationship with the third party. In such circumstances, the production of these records to FINRA may result in the member firm breaching contractual obligations owed to the third party. The failure to produce the records to FINRA would result in a regulatory violation under proposed Rule 8210. The application of proposed Rule 8210 in such circumstances would put the member firm in an untenable position.

Industry Participation in Charities, Non-Profits and Board Service

A foreseeable unintended consequence of the proposed rule may inhibit qualified individuals in the industry from participating in charitable or non-profit organizations in their communities due to the potential for the third party organization to have to provide private or confidential documents owned by the organization to FINRA.

We believe that the proposed rule filing at issue here is more than an attempt to clarify an existing rule, and expands greatly the scope of FINRA's authority without providing any of the analysis of relevant issues specifically identified by the Commission in the Ochanpaugh decision and without any of the due process protections that are afforded under the Rules of Civil Procedure and other federal laws and regulations, such as the confidential treatment protections under FOIA. Schwab respectfully suggests that further analysis with respect to the scope of Rule 8210 and the process and protections afforded to members, associated persons and others over which FINRA has jurisdiction is warranted and necessary.

Schwab appreciates the opportunity to provide comments and we thank you for your consideration of the points we have raised in this letter. Please feel free to contact me at (415) 667-0866 to discuss them in more detail.

Sincerely,



Bari Havlik
Chief Compliance Officer
Charles Schwab & Co., Inc.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54363 / August 25, 2006

Admin. Proc. File No. 3-12147

In the Matter of the Application of

JAY ALAN OCHANPAUGH
c/o P.O. Box 2485
Ames, Iowa 50010

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDINGS

Violation of Conduct Rule

Failure to Allow Inspection and Copying of Requested Documents

Former associated person of member firm barred from association with any member in any capacity for failing to allow inspection and copying of records of non-member religious organization. Held, finding of violation and sanctions set aside.

APPEARANCES:

Jay Alan Ochanpaugh, pro se.

Marc Menchel, Alan Lawhead, Gary J. Demelle, and Carla Carloni, for NASD.

Appeal filed: January 11, 2006
Last brief received: April 26, 2006

I.

Jay Alan Ochanpaugh appeals from NASD disciplinary action. Ochanpaugh was an associated person with Northwestern Mutual Investment Services, LLC ("Northwestern"), an NASD member, where he was a registered representative for investment company/variable products from November 1994 until early 2004. NASD found that Ochanpaugh violated NASD Rule 8210 by failing to comply with NASD's request to produce copies of checks drawn on the account of a church with which Ochanpaugh was associated. 1/ NASD barred Ochanpaugh from association with any member in any capacity, and this appeal followed. 2/ We base our findings on an independent review of the record.

II.

Ochanpaugh sold insurance and annuity products for Northwestern in Ames, Iowa. This case arose when Northwestern began an investigation of Ochanpaugh because it suspected he was engaging in outside business activities in connection with a church, which Northwestern believed should have been disclosed to the firm.

In late 2003, Ochanpaugh and other individuals founded a church: "The Office of the First Presiding Patriarch (President) and his successors, a corporation sole, over/for Wisdom Mission (an Eleemosynary Society) a private Ecclesiastical Corporation Sole" ("Wisdom

1/ NASD Rule 8210 provides as follows:

(a) For the purpose of an investigation, complaint, examination, or proceeding authorized by the NASD By-Laws or the Rules of the Association, an Adjudicator or Association staff shall have the right to:

(1) require a member, person associated with a member, or person subject to the Association's jurisdiction to provide information orally, in writing, or electronically . . . and to testify at a location specified by Association staff, under oath or affirmation . . . with respect to any matter involved in the investigation, complaint, examination, or proceeding; and

(2) inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding.

* * *

(c) No member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule.

2/ NASD also assessed hearing costs of \$2,183.71 against Ochanpaugh.

Mission"), incorporated under the law of Utah as provided in Wisdom Mission's Articles of Corporation Sole ("Articles"). According to the Articles and Ochanpaugh's testimony, Wisdom Mission was founded to foster the spiritual and financial well-being of its members. Ochanpaugh is Wisdom Mission's president. 3/ Ochanpaugh described his role at Wisdom Mission as a senior pastor and counselor. Ochanpaugh claims that he orally advised his supervisor that he was involved in the founding of a church, but does not dispute that he did not provide written disclosure of his involvement in Wisdom Mission to Northwestern.

In December 2003, the leadership of Wisdom Mission developed a plan they thought would benefit its members. According to the plan, members would contribute to Wisdom Mission an amount equal to their monthly mortgage payment, or similar major indebtedness, plus a ten-percent "tithe" to Wisdom Mission. Wisdom Mission would pay the member's bill, keep the tithe as a contribution, and issue a letter to the member to support a tax deduction in the amount of the entire contribution. 4/ In early January 2004, after the bill-payment plan had been operating for about one month, Wisdom Mission's leaders learned that it was not permissible under federal tax law for members to deduct the portion of their contribution that Wisdom Mission used to pay the members' bills. 5/ Wisdom Mission, acting promptly on that knowledge, returned the tithed portions of the contributions to the contributing members and never issued any tax deduction receipts to them with respect to the bill-paying program.

Meanwhile, Ochanpaugh's supervisors learned of the program when a participant in the bill-payment program attempted to deliver a check to Ochanpaugh at Northwestern's office. Northwestern began to investigate Ochanpaugh's activities with Wisdom Mission as a possible undisclosed outside business activity in violation of NASD Rule 3030 and Northwestern's internal policies. 6/ Ochanpaugh maintained that his activity was exempt from Northwestern's

3/ The Articles give the President plenary authority over the operations of Wisdom Mission. That authority, although extensive, is not absolute: for example, all the leaders of Wisdom Mission are bound by the Articles to observe the "Covenant of Silence" ("Covenant") which forbids the disclosure of information regarding Wisdom Mission members or officers.

4/ NASD characterized the bill-payment program as a motivation for founding Wisdom Mission. The Articles, however, are silent on the subject, and Ochanpaugh's testimony, the only other evidence on this point, denies that the program was a motivation for founding Wisdom Mission.

5/ One member's accountant alerted Wisdom Mission's leadership to this problem, and the leaders subsequently confirmed this with the Internal Revenue Service.

6/ NASD Rule 3030 provides that no associated person "shall be employed by, or accept compensation from, any other person as a result of any business activity . . . outside the
(continued...)

disclosure requirements because Wisdom Mission was a non-profit, tax-exempt church and his activity there was uncompensated and pastoral. Despite Ochanpaugh's representations, in the course of their investigation Northwestern supervisors asked that Ochanpaugh provide them with personal and contact information regarding Wisdom Mission's members. When Ochanpaugh refused to provide that information, Northwestern first suspended and then terminated him. Northwestern reported its disciplinary action to NASD, disclosing that Ochanpaugh was disciplined because he was suspected of violating NASD rules.

Upon receiving Northwestern's report, NASD began an investigation of Ochanpaugh to determine whether he had violated NASD Rule 3030. On March 31, 2004, NASD requested information from Ochanpaugh in connection with its investigation. Ochanpaugh responded on April 13, 2004. Thereafter, NASD issued, and Ochanpaugh responded to, four additional requests for information and documents. ^{7/} In response to these requests, Ochanpaugh provided NASD with a complete description of Wisdom Mission and its activities, a copy of the Articles (which identified Ochanpaugh as the President of Wisdom Mission), and with other requested information.

NASD's requests covered various financial documents of Wisdom Mission. Although the Articles grant the President authority over all aspects of Wisdom Mission's operations, the record reflects a practice according to which some aspects of church governance, most notably financial matters, are within the authority of other church leaders identified by Ochanpaugh as Elders, and Ochanpaugh is completely insulated from Wisdom Mission's financial operations. ^{8/} Acting

^{6/} (...continued)

scope of his relationship with his employer firm, unless he has provided prompt written notice to the member." Northwestern's policy on outside business activities, as it applied to charitable and related activities, provided that "[p]ermission may be assumed and no written disclosure is required for appropriate, non-compensated involvement in non-profit organizations." The firm's disclosure form further explained that "[i]t is not necessary to disclose non-investment-related activity that is exclusively charitable, civic, religious or fraternal and is recognized as tax exempt."

^{7/} NASD sent a second request on May 4, 2004, to which Ochanpaugh responded on May 19, 2004. NASD sent its third request on June 4, 2004, and Ochanpaugh responded to it on June 16, 2004. NASD sent its final two requests on August 25 and October 21, 2004, and Ochanpaugh responded to them on September 3 and October 28, 2004, respectively.

^{8/} The Articles include the "Affidavit of Wisdom Mission" ("Affidavit") executed March 12, 2004, by Ochanpaugh, which creates an exception to the Covenant by allowing the President to disclose limited information about Wisdom Mission as required to advance the interests of Wisdom Mission. The Affidavit requires confidential treatment

(continued...)

with permission of other Wisdom Mission leaders, Ochanpaugh produced Wisdom Mission banking records, including bank statements, a signature card, and a deposit slip. NASD requested, but Ochanpaugh did not provide, names and contact information for every person who had any involvement with Wisdom Mission. ^{9/} On August 20, 2004, Ochanpaugh traveled to Kansas City, Missouri for an on-the-record interview concerning his activities at Wisdom Mission.

In reviewing the Wisdom Mission bank statements provided by Ochanpaugh, NASD staff identified three checks written against the account, each in an amount approximately ten percent less than a contribution deposited to the account shortly before the check was written. NASD staff subsequently requested copies of these three checks "so the staff could determine whether [Ochanpaugh] had received any compensation from Wisdom Mission." Ochanpaugh was a signatory to the Wisdom Mission account and Wisdom Mission's bank statements were sent to his post office box. While NASD's investigation was pending, Ochanpaugh had his name removed from the Wisdom Mission account. Staff also requested a signed statement "explaining which transactions were part of the program to pay church members' bills." ^{10/} NASD has not identified what information it thought the requested checks would have provided with respect to the issue of compensation. Despite NASD's focus on Ochanpaugh's possible receipt of compensation from Wisdom Mission, the record does not reflect that NASD ever requested that Ochanpaugh produce his personal financial and tax records for inspection.

Ochanpaugh failed to provide copies of the requested checks. Instead, Ochanpaugh provided two letters from Wisdom Mission leaders responding to several questions NASD raised about Wisdom Mission that Ochanpaugh was unable to answer himself. These letters, uncontradicted in the record, state that Ochanpaugh was insulated from the financial operations of Wisdom Mission and was not allowed to, and did not, open mail addressed to Wisdom Mission at his post office box. The letter from Christina Grell, the Wisdom Mission Scribe and Treasurer at the time, states that Wisdom Mission would not release the checks out of concern for its members' privacy, but would provide other information to assist NASD. According to Grell, the checks were not related to the bill-paying program but were disbursements to Wisdom

^{8/} (...continued)
of any information about Wisdom Mission that the President discloses to non-members and requires non-members to receive permission from the President before they disclose that information. The Affidavit also authorizes the President to sign contracts on behalf of Wisdom Mission.

^{9/} NASD has not charged Ochanpaugh with failure to provide these documents.

^{10/} At the hearing, an NASD staff examiner testified that the investigation had reached a provisional conclusion that Wisdom Mission was not a business. Nonetheless, the examiner still needed to determine whether Ochanpaugh received compensation before he could close the investigation.

Mission members in financial need. According to Grell, none of the payees had been counseled by Ochanpaugh, nor were they known to him. Moreover, Grell's letter states that the names of the payees did not appear on a list Ochanpaugh provided to Grell of his customers while he was employed by Northwestern. The other letter, from Wisdom Mission Elder Nicholas Juergens, confirms the restrictions on Ochanpaugh's role with respect to Wisdom Mission's finances and that Ochanpaugh did not open mail addressed to Wisdom Mission that he picked up from his post office box.

Ochanpaugh gave several reasons for not providing the checks to NASD as requested: the checks were the property of Wisdom Mission, not an NASD member, and NASD had no right to them; Wisdom Mission leadership relied on their First Amendment rights and their obligations under the Covenant and refused to violate their members' privacy by producing the checks; 11/ and Ochanpaugh did not have the checks in his possession and could not compel the Wisdom Mission leadership to surrender them.

At an impasse regarding the checks, NASD suspended and then, after an evidentiary hearing, barred Ochanpaugh for failure to provide the checks in response to NASD's Rule 8210 request. NASD ruled that the requested checks were within the scope of Rule 8210 because Wisdom Mission was Ochanpaugh's alter ego and because Ochanpaugh had possession and control of the requested checks as a signatory to Wisdom Mission's bank account and as the addressee on the account statements. 12/

III.

Because NASD lacks subpoena power, its investigations of possible violations of its rules by members or their associated persons depend on the cooperation of such members and persons. 13/ When that cooperation is not forthcoming, NASD is authorized to impose disciplinary measures under Rule 8210. Our cases consistently support a broad interpretation of

11/ Ochanpaugh asked NASD whether documents provided pursuant to NASD's requests could be kept confidential. NASD responded that its rules do not provide for confidential treatment of information produced by its members and associated persons.

12/ Ochanpaugh attached numerous documents to his brief, most of which are in the record. With respect to those documents that are not in the record, Ochanpaugh does not explain, as required by our Rule of Practice 452, why they were not adduced before or why they are relevant. NASD objects to their inclusion in the record at this point. We have reviewed the documents and have determined that they do not meet the requirements of Rule 452. For example, the documents requesting Ochanpaugh's presence at an on-the-record interview are not relevant to any controverted point. Moreover, Ochanpaugh does not refer to any of the documents in support of the arguments in his brief.

13/ Robert A. Quiel, 53 S.E.C. 165, 168 (1997).

NASD's authority pursuant to Rule 8210. 14/ However, the scope of Rule 8210, while necessarily broad, does have limits. As relevant here, NASD's right to inspect and copy a member or associated person's documents under Rule 8210 extends to "books, records, and accounts of such member or person." 15/ This case therefore presents the question of whether the requested checks are books, records, or accounts of Ochanpaugh.

NASD presented only two reasons for concluding that the checks were within the scope of Rule 8210. NASD concluded first that "Wisdom Mission was under the control of, and served as the alter ego of [Ochanpaugh]." In support, NASD rejected Ochanpaugh's assertion that "documents affording him complete and autonomous authority for Wisdom Mission were mere templates that did not accurately reflect his role." Further, NASD found that "unsworn statements by Ochanpaugh's associates . . . do not outweigh the express terms of Wisdom Mission's organizational documents, which permitted [Ochanpaugh] to comply with the staff's request."

NASD does not identify any authority for using this analysis in construing Rule 8210, and its analysis falls short of what we have employed to disregard a corporation's separate identity and treat it as indistinguishable from its shareholders, or to "pierce the corporate veil." 16/ In determining whether, in a different context, to pierce the corporate veil, we have considered multiple factors. For example, we have looked to the practice of courts, which examine the capitalization of the corporation, maintenance of separate books, separation of corporate and individual finances, use of the corporation to support fraud or illegality, honoring of corporate formalities, and, over all, the good faith or sham nature of the corporation. 17/

14/ We have, for example, found that recipients of requests under Rule 8210 must respond to the requests or explain why they cannot, Robert Fitzpatrick, 55 S.E.C. 419, 424 (2001); may not set conditions on their compliance, id. at 425 n.16; and may not limit their compliance to what they determine is necessary for NASD's investigation, id. at 425.

15/ NASD Rule 8210(a)(2).

16/ See, e.g., Daniel R. Lehl, 55 S.E.C. 843, 878 n.69 (2002), aff'd, No. 02-1228 (D.C. Cir. 2003) (piercing corporate veil for purposes of disgorgement).

17/ Lehl, 55 S.E.C. at 878. Federal common law observes the same principles. A finding that the corporation has been used to support a fraud or illegality can be of particular importance. NLRB v. Greater Kansas City Roofing, 2 F.3d 1047, 1052 (10th Cir. 1993) ("We require an element of unfairness, injustice, fraud, or other inequitable conduct as a prerequisite to piercing the corporate veil It is only when the shareholders disregard the separateness of the corporate identity and when that act of disregard causes the injustice or inequity or constitutes the fraud that the corporate veil may be pierced.") (footnotes omitted). Applicable state law (the laws of Utah, the state of Wisdom

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NASD's decision does not address any of these factors, and the record does not contain adequate evidence on which to perform such an analysis. Wisdom Mission's corporate form, while unusual, is not inconsistent with the requirements for a corporation sole structure. A corporation sole consists of a single person and the person's successors in a particular station or office; the corporate form offers an ability for a person in that station or office to possess legal capacities, for example the ownership of property in perpetuity, that natural persons otherwise could not have, along with the other rights and duties of other corporations. 18/ This corporate structure does not, in and of itself, mean that the corporation sole is the alter ego of the person. 19/ Consequently, we are unable, on the basis of an alter ego theory, to make the required finding under Section 19(e) of the Securities Exchange Act of 1934 that Ochanpaugh's failure to produce the requested checks is a violation of Rule 8210. 20/

Second, NASD concluded that the checks were within Ochanpaugh's possession and control. It rejected his contention that the documents were not, noting that Ochanpaugh was a signatory on the bank account and was Wisdom Mission's president. NASD also concluded that his extensive powers over the operations of Wisdom Mission as its president entitled Ochanpaugh to treat the corporation's property as his own. From this analysis, NASD concluded that Ochanpaugh had possession and control over the checks, and NASD was therefore entitled to inspect or demand them.

In support, NASD relies primarily on our decision in Joseph G. Chiulli. 21/ There NASD sought records of a former NASD member firm. At issue was whether the request for the records had been properly addressed to Chiulli, the former Chief Executive Officer and Chairman of the Board of the member firm who had physical possession of the documents, or to the firm's trustee in bankruptcy who had legal control of them. In resolving this question, we stated that Chiulli "promised personally, independent of [the firm] . . . to provide the NASD with access to the records it requested. Moreover, as an associated person, Chiulli was responsible for responding

17/ (...continued)

Mission's incorporation, and the laws of Iowa, where it operates) is consistent with these principles of federal law articulated above. See, e.g., Brigham Young University v. Tremco Consultants, Inc., 110 P.3d 678, 689 (Utah 2005); In re Marriage of Ballstaedt, 606 N.W. 2d 345, 349 (Iowa 2000).

18/ 18 Am. Jur. 2d Corporations § 28.

19/ County of San Luis Obispo v. Ashurst, 194 Cal. Rptr. 5, 7 (3d Dist. 1983) ("There is also a clear distinction between the corporation sole and the individual who happens to be the current office holder.").

20/ 15 U.S.C. § 78s(e).

21/ 54 S.E.C. 515 (2000).

directly to the NASD's request for information. He had the [firm's] documents in his physical possession and he cannot shift responsibility to the firm for his own failure to provide" access to the documents. 22/ Our emphasis on Chiulli's possession of the documents and his responsibility for responding to NASD's requests served to distinguish him from the trustee in bankruptcy who had neither. However, because the documents were inarguably those of a member firm, there was no question as to NASD's right to inspect them pursuant to Rule 8210. Chiulli neither raises nor answers the question presented here of whether Rule 8210 gives NASD the authority to request Wisdom Mission's documents. 23/

Rule 8210 itself does not explain how to determine if requested materials are "of such member or [associated] person." NASD's decision provides no citation to authority, analysis or interpretation of the language of the Rule, or discussion of the history of the Rule in support of its "possession and control" theory of the scope of Rule 8210. Our research yields neither any adjudicatory instance where we have been faced with this precise issue nor any discussion of it in any Commission release. Before accepting NASD's delineation of the term "books, records, or accounts of such member or [associated] person," we believe a fuller exploration of the appropriate scope of Rule 8210 is required. Since the Rule was promulgated, and is applied and enforced, by NASD, we also believe NASD is in the best position to perform such an analysis in the first instance. We take this opportunity to identify some of the issues NASD should consider in engaging in this analysis.

Rule 8210 is an essential cornerstone of NASD's ability to police the securities markets and should be rigorously enforced. However, as noted above, the scope of the Rule does have limits. There may be circumstances in which possession and control of documents by an NASD member or associated person, together with some other interest in the documents short of an ownership interest, may be sufficient given the enforcement objectives of the NASD to trigger application of the Rule. In other circumstances, the NASD's authority under the Rule might not extend to documents that may belong to a third party, or that may contain a third party's confidential information not closely related to securities trading with a member or associated person, even if those documents were in the possession and control of a member or associated person. We note that under the Federal Rules of Civil Procedure, document requests or

22/ Id. at 523.

23/ The other cases cited by NASD are even less persuasive or relevant because they treat generally an associated person's obligations under Rule 8210 without addressing the issue of whether NASD has the authority under the rule to demand production of documents that are not those of a member or a person associated with a member. See Toni Valentino, Securities Exchange Act Rel. No. 49255 (Feb. 13, 2004), 82 SEC Docket 711; Paz Secs. Inc., Exchange Act Rel. No. 52693 (Oct. 28, 2005), 88 SEC Docket 1880, appeal filed, 05-1467 (D.C. Cir. Dec. 22, 2005); Charles R. Stedman, 51 S.E.C. 1228 (1994); Joseph Patrick Hannan, 53 S.E.C. 854 (1998); Michael David Borth, 51 S.E.C. 178 (1992).

subpoenas for documents expressly cover documents within the "possession, custody and control" of the person to whom the request or subpoena is directed. 24/ The authority for the Federal Rules, however, stems from the Supreme Court's power to prescribe general rules of practice and procedure for cases in the United States district courts, 25/ while NASD's authority to request documents pursuant to Rule 8210 stems from the contractual relationship entered into voluntarily by NASD members and associated persons with NASD. Moreover, the potential breadth of requests for documents under the Federal Rules is circumscribed by the full panoply of procedural protections afforded as part of the discovery process, including the right to object to the production of requested documents, and the right to have such objection heard by a court, an entity independent of the party requesting the documents. 26/ These protections are not available when NASD makes a Rule 8210 request; in such a case, the only recourse against possible overreaching by NASD is for the person to whom the request is directed to refuse to comply, and to appeal any consequent disciplinary action to the Commission. In light of these issues, in an outside business investigation such as this, NASD should consider first requesting the personal financial records of the associated person before seeking the documents of a third person.

Although we will leave it to NASD to develop further its analysis with respect to the scope of Rule 8210, we are not remanding this matter for further review in conjunction with that analysis. Even if we accepted the very broad scope of Rule 8210 suggested by NASD's "possession and control" standard, we find that, on this record, NASD has not met its burden of proof to meet even that standard. 27/ The Articles identify Ochanpaugh's authority, as president, to control all aspects of Wisdom Mission's operations, and the signature card suggests that Ochanpaugh may be a person with some control over Wisdom Mission's account. 28/ On the other hand, NASD had evidence that, as a matter of practice, Ochanpaugh did not in fact have absolute control over Wisdom Mission. He was not free to release confidential information

24/ Fed. R. Civ. P. 34 and 45. The Federal Rules of Civil Procedure do not apply in administrative proceedings. Matos v. Hove, 940 F. Supp. 67, 72 (S.D.N.Y. 1996) (citing Silverman v. CFTC, 549 F.2d 28, 33 (7th Cir. 1977)); cf. Russell Ponce, 54 S.E.C. 804, 824 n.54 (2000), aff'd, 345 F.3d 722 (9th Cir. 2003). Nonetheless, in certain circumstances we are guided by the principles of the Federal Rules. See Carl Shipley, 45 S.E.C. 589, 596 n.16 (1974).

25/ 28 U.S.C. § 2072.

26/ Fed. R. Civ. P. 26 and 45.

27/ David M. Levine, Exchange Act Rel. No. 48760 (Nov. 7, 2003), 81 SEC Docket 2303, 2321 n.42 (holding that preponderance of the evidence is the standard of proof in self-regulatory organization disciplinary proceedings).

28/ There is, however, no evidence in the record with respect to the rights account signatories have over accounts in general or over Wisdom Mission's account in particular.

about members on his own. Ochanpaugh testified without contradiction that he was a pastor and counselor who was insulated from any contact with Wisdom Mission's financial operations and who was not permitted to open bank correspondence delivered to his post office box. The letters from Grell and Juergens corroborate Ochanpaugh's testimony. 29/ Because NASD has not established that Ochanpaugh does possess and control the requested checks, we need not address whether possession and control suffice to make the requested checks "books, records, and accounts of" Ochanpaugh for purposes of Rule 8210.

Because we find that NASD did not establish that its request for copies of checks drawn against Wisdom Mission's checking account was within the scope of its authority pursuant to Rule 8210, we do not find that Ochanpaugh violated that Rule by failing to produce the checks, and we set aside this proceeding and NASD's order barring Ochanpaugh and assessing costs against him. 30/

An appropriate order will issue. 31/

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

Nancy M. Morris
Secretary

29/ NASD's decision discounts these letters' credibility because they were unsworn. The record does not reflect whether Ochanpaugh, representing himself, was informed that the letters he wanted to submit to NASD had to be sworn or in any particular form. Nonetheless they provide some corroborative evidence of Ochanpaugh's testimony and other record evidence. See Jesse Rosenblum, 47 S.E.C. 1065, 1072 (1984) ("The generally accepted view favors liberality in the admission of evidence in administrative proceedings, and all evidence that 'can conceivably throw any light upon the controversy' at hand should normally be admitted.").

30/ In light of our disposition above, we need not reach Ochanpaugh's additional arguments that Wisdom Mission was entitled to refuse to produce the requested documents under the First Amendment to the United States Constitution, and that he could not compel Wisdom Mission leadership to surrender them.

31/ We have considered all of the arguments advanced by the parties. 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. 54363 / August 25, 2006

Admin. Proc. File No. 3-12147

In the Matter of the Application of

JAY ALAN OCHANPAUGH
c/o P.O. Box 2485
Ames, Iowa 50010

For Review of Disciplinary Action Taken by

NASD

ORDER SETTING ASIDE DISCIPLINARY ACTION TAKEN BY REGISTERED
SECURITIES ASSOCIATION

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

ORDERED that the bar from association with any NASD member in any capacity imposed by NASD against Jay Alan Ochanpaugh be, and it hereby is, set aside; and it is further

ORDERED that the imposition of \$2,183.71 in hearing costs imposed on Jay Alan Ochanpaugh be, and it hereby is, set aside.

By the Commission.

Nancy M. Morris
Secretary