

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of the Application of

Admin Proc. File No. 3-15183

GREGORY EVAN GOLDSTEIN

For Review of Action Taken by

FINRA

BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

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**BRIEF IN SUPPORT OF APPLICATION
FOR REVIEW**

Preliminary

The proceeding at bar seeks review of a FINRA Hearing Panel Decision, dated January 4, 2013 (R669-696)¹

The history of this matter is as follows:

Gregory E. Goldstein (“Goldstein”) refused to answer certain questions during a FINRA On-The-Record Interview (see page 3, *infra*) and refused to provide certain documents and information that FINRA’s Department of Enforcement subsequently requested (see pages 3-4, *infra*) purportedly pursuant to FINRA Rule 8210. Goldstein’s refusal to answer the questions and provide the documents and information demanded by FINRA resulted in a Notice of Suspension. Goldstein thereupon filed a Request for Hearing with the FINRA Office of Hearing Officers (R. 1-208). This Proceeding was heard on Stipulated Facts (R243-250). The Hearing Panel decision followed (the “Decision”) (R.669-696). The Decision ordered Goldstein to comply with all outstanding Rule 8210 requests or be suspended and subsequently barred and

¹ References to R in this brief refers to the record transmitted to the Office of General Counsel by Andrew H. Perkins, Deputy Chief Hearing Officer of FINRA’s Office of Hearing Officers on or about January 30, 2013.

fined \$50,000.00. Goldstein's Application for Review by the Securities and Exchange Commission (the "Commission") followed.²

Questions Presented

The issues presented for the Commission's review and decision are set forth in Goldstein's Application for Review filed with the Commission.

Facts

The facts were stipulated to and are set forth in the Stipulation (R243-250).

In short, the member firm with whom Goldstein was registered and its president, Marquis Financial Services ("Marquis"), was about 95% owned by Steven Gregory Securities, which itself was owned by Wall Street At Home.com Inc. ("Wall Street"). Goldstein was the president and sole officer of Steven Gregory Securities as well as the President and sole voting stockholder of Wall Street. Wall Street's only income was from consulting services it provided through Goldstein. Those consulting services included review of corporate structures, corporate due diligence and other services, depending on the assignment. Consulting fees were paid to Wall Street. Wall Street's income was used to pay its bills and, from time to time, Goldstein took distributions from Wall Street for the services he performed on its behalf. Marquis had acted as the placement agent for a private offering of Wall Street shares, dated July 7, 2003. About 20 to 30 investors bought Wall Street units in the private offering, some of whom were, at the time, in 2003, Marquis' customers.³

² Goldstein's Motion for Stay of the Suspension and Bar was denied. The Order Denying Stay contains statements not fully in accord with the law. For example, the Order Denying Stay gives credence to FINRA's claims that it is not a state actor. In fact, that issue is unresolved. Compare Rooms v. SEC, 444 F.3d 1208 (10th Cir. 2006) (finding due process applied to NASD) and Erenstein v. SEC, 2007 SEC Lexis 2596 (D.C. Cir. 2007) (assuming NASD is a state actor for the purpose of the appeal) with D'Alessio v. SEC, 380 F.3d 112, 120 F.3d 120 (2nd Cir. 2004) (NASD not state actor); see also Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001), see pp. 11-16, *infra*.

³ There was no evidence presented as to whether any of those shareholders were Marquis' customers during the period June 1, 2008 through December 31, 2011 (the "Relevant Period")

During Goldstein's On the Record testimony the following occurred:

Mr. Schlossman: Who are the customers of the consulting aspect of Wall Street at Home?

The Witness: Various Companies.

Mr. Schlossman: Can you give us any of the names of the top customers?

The Witness: No.

Mr. Schlossman: You can't because you don't remember.

Mr. Unger: I don't know that that is, you know, disclosable information?

...[discussion about issue of whether the information is disclosable]...

Mr. Schlossman: Are you directing him not to respond to the question who the customers are?

Q: At what firms were the account held?

Mr. Unger (Goldstein counsel) That is what I'm not going to let him answer

Mr. Schlossman (FINRA counsel) So you are directing Mr. Goldstein not to answer the question of what firms Wall Street at Home held investment accounts.

Mr. Unger: Right, because I believe that it is beyond FINRA's authority to get information regarding that business.

Subsequently FINRA requested the following information from Goldstein purportedly pursuant to FINRA Rule 8210.

35. Identify the owners of Wall Street at Home from June 1, 2008, through December 31, 2011 (the "Relevant Period");
36. Identify the customers to whom Goldstein provided services at Wall Street at Home for the relevant period;
37. Describe the business services provided to the customers identified in response to item 36;
38. Provide information and documents showing the compensation received by Wall Street at Home and/or Goldstein in connection with the services he provided

through Wall Street at Home to the previously identified customers;

39. Identify every person who initiated, reviewed, and/or authorized any financial transaction for Wall Street at Home – including distributions to owners – during the relevant period;
40. Identify bank and brokerage accounts in which Wall Street at Home had a beneficial ownership interest during the relevant period;
41. Provide monthly statements for each account identified in response to item 40; and
42. Provide federal and state tax income tax returns for Wall Street at Home for tax years 2008, 2009 and 2010.

Goldstein declined to provide the information and documents requested on the grounds that such requests were beyond FINRA's authority under Rule 8210. The Notice of Suspension followed (see Request for Hearing R1-208, Exhibit A).

ARGUMENT

A. GENERAL

FINRA is a non-governmental agency with no specific grant of authority from Congress or other “font of governmental power.” Sykes v. Escueta, 2010 WL 4942608 (ND Cal. 2010). However, FINRA does have authority to enforce the Federal Securities Laws as they apply to its members and associated persons. That power was granted to FINRA derivatively by Congress and through the Commission pursuant to the Securities Exchange Act of 1934. NASD, Inc. v. SEC, 431 F.3d 803 (D.C. Cir. 2005). FINRA is, therefore, a private but government regulated entity charged with the duty of enforcing federal law and, thus, can be recognized as a “state actor.” Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass’n, 531 U.S. 288, 296

(2001) (a private entity is treated as a “state actor” “when it is entwined with governmental policies”).

Article VII, Section 2(a), of the FINRA By-Laws provides, insofar as relevant, for suspension of an associated person if that associated person fails to submit any requested document or other information pursuant to the By-Laws or the “Rules of the Corporation”. Article XI of the FINRA By-Laws provides the FINRA Board with the authority to adopt rules for FINRA members and “persons associated with members.” Presumably, Rule 8210 was adopted in this manner.⁴ Nonetheless, Rule 8210 is unconscionably vague in its application to third-party information and documents and, therefore, unenforceable. Certainly, the FINRA by-laws do not encompass documents and information of third-parties. Moreover, the FINRA Board may not adopt rules that go beyond the jurisdiction and authority granted FINRA by the Commission pursuant to the Securities Exchange Act of 1934 (§§15A, 19(b)) and the rules and regulations thereunder. The mere fact that Goldstein is an associated person is insufficient under FINRA Rules to require Goldstein to provide to FINRA Enforcement confidential and private information and documents of a third-party, Wall Street, which is neither a member nor a person associated with a member.⁵ See generally Sykes v. Escueta, *supra*; Matter of Jay Alan Ochanpaugh, Securities Exchange Act of 1934 Release No. 54363/August 25, 2006 (R.1 -208, Exhibit E).

B. FINRA RULE 8210 IS, BY ITS TERMS, INAPPLICABLE TO DOCUMENTS AND INFORMATION OF A THIRD-PARTY

FINRA Rule 8210 in effect at the Relevant Period provided FINRA staff the “right” to require an associated person to provide information “with respect to any matter involved in the

⁴ Notably, in the FINRA proceeding, FINRA provided no discussion of the history of Rule 8210. Rule 8210 that is applicable at bar is the rule in effect prior to February 25, 2013.

⁵ Wall Street, a non-member indirect owner of Marquis Financial, is not a person associated with a member (FINRA By-Laws Article I(ff)).

investigation, complaint, examination, or proceeding” and to “inspect and copy the books, records, and accounts of such member or person involved in the investigation, complaint, examination of proceeding.” [Emphasis supplied]. The Commission had not during the Relevant Period granted FINRA jurisdiction or authority under Rule 8210 to reach third-party documents and information.

Despite recognizing that Wall Street is an indirect owner of Marquis through ownership of Steven Gregory Securities, the Decision concludes, without any factual support, that Wall Street’s information “belongs to Goldstein” and “concerns his [Goldstein’s] business activities.” Those critical but unsupported fact conclusions are not supported by the Stipulated Facts (R243-250). The record is quite clear that the documents and information sought are not those “of” Goldstein but, rather, “of” Wall Street, and that Goldstein performed consulting work for and on behalf of Wall Street for which Wall Street was paid. Because Rule 8210 by its very language is limited to “books, records and accounts of such member or person involved in the investigation,” (emphasis supplied) Wall Street’s documents and information are beyond doubt excluded from the purview of Rule 8210.

C. **COMPARISON OF AMENDED RULE 8210 WITH RULE 8210**

The Decision does not take notice of FINRA’s Regulatory Notice 13-06 (Exhibit “A” hereto) containing Amended Rule 8210 (approved December 7, 2012, effective February 25, 2013) and supplementary material. While Amended Rule 8210 could be read to include at least some of FINRA’s document and information requests that were challenged by Goldstein in the FINRA Proceeding, Rule 8210 does not cover those requests. Thus, Amended Rule 8210 gives FINRA the right to inspect and copy, books records and accounts with respect to any matter involved in its investigation “that is in such member’s or person’s possession, custody or

control.” According to the supplementary material to Amended Rule 8210, this “includes but is not limited to records relating to a FINRA investigation of outside business activities. . . .” Whether FINRA can request, for all practical purposes, all records of an outside business, as it has done at bar, remains an open issue. Certainly Rule 8210, as it existed at the Relevant Period, does not include the language quoted above or the supplementary material. Indeed, it is clear, that the possession and control element contained in Amended Rule 8210 was not part of the original rule. Thus, even were Rule 8210 applicable, as the Decision erroneously found⁶, Goldstein was not on notice that Rule 8210 applies to a third-party’s documents and information (see fn 9, infra).

D. THE INFORMATION AND DOCUMENTS SOUGHT DELVE INTO THE BUSINESS OF WALL STREET, NOT GOLDSTEIN, AND ARE BEYOND THE SCOPE OF RULE 8210

The questions objected to during FINRA’s On The Record Examination of Goldstein related to the names of customers for which Goldstein did consulting work on behalf of Wall Street, the industries in which those customers were involved, the names of the other shareholders of Wall Street (shareholders since 2003) and the investment and bank accounts of Wall Street.⁷ FINRA’s written request similarly required Goldstein to provide information and documents concerning, in essence, the entire business of Wall Street for a 3 and one-half (3½) year period. (See pages 3-4, supra). What FINRA is doing, is investigating Wall Street, a third party corporation whose only relationship at bar is that it is an indirect owner of Marquis and that Goldstein, who was registered with and the president of Marquis, also performed consulting services for Wall Street “from time to time.” How this translates into a requirement for

⁶ The Notice states that the Amended Rule “now specifies that “FINRA has “the right” to inspect and copy information in the “possession, custody and control” of the associated person” and the Supplementary Material addresses the “scope of books, records and accounts covered by the rule”, a matter not previously addressed.

⁷ It is beyond dispute that Goldstein provided his own personal investment and bank accounts, as well as tax returns, to FINRA

Goldstein to disclose and produce confidential and private business information and documents of Wall Street, including the names of its 20-30 other shareholders, who became shareholders in 2003, pursuant to FINRA Rule 8210, is unexplained in the Decision. Rather than finding facts to support its conclusion, the Decision, instead, makes only conclusions. For example:

(a) FINRA is seeking “information of an associated person”, Goldstein. It is beyond argument that the information is that of Wall Street, not Goldstein;

(b) “The information concerned Goldstein’s own business activities” -- the information requested concerned Wall Street’s business activities;

(c) Because Goldstein is the only person doing consulting for Wall Street, is the majority owner of Wall Street, its only voting shareholder and the only person generating revenues for Wall Street, therefore, “Goldstein owns the information.” This makes no sense whatsoever. As a matter of law Goldstein does not “own the information” – the information and documents are owned by Wall Street, an independent corporation which has 20-30 shareholders.

(d) Wall Street “is not entirely independent” from “Marquis with which Goldstein is registered.” Further, Wall Street “is practically a direct owner of Marquis” because it owns Steven Gregory Securities. The Record does not support that Wall Street is not an independent company which provides consulting services and also indirectly owns Marquis. Certainly, Wall Street, is not “practically a direct owner of Marquis,” whatever that means.

(e) “Goldstein’s business and financial affairs operated through [Wall Street] has a direct relationship to his customers in his securities business.” While there is absolutely no evidence in the Record to support this conclusion, it is presumably based upon the fact that some investors in 2003 were, at that time, Marquis’ customers. Significantly, there is absolutely no

evidence in the Record that any such shareholders were Marquis' customers during the Relevant Period.

(f) Finally, "the information sought from Goldstein regarding his business through [Wall Street] concerns activities closely related to his securities business, through Marquis. Goldstein testified that it was his experience in the securities industry that made it possible for him to provide the consulting services he performs under [Wall Street]. Even the name of the entity signifies a close connection to the securities business." There is a lack of evidence in the record support this absurd argument in the Decision. First, there is no evidence in the record support the Decision's conclusion that Goldstein conducted "his business through (Wall Street)." Rather, Goldstein conducted business for and on behalf of Wall Street. Second because Goldstein utilized experience and knowledge he obtained as a registered person to provide consulting services for and on behalf of Wall Street does not, in any sense, transform Goldstein's activities as a consultant for Wall Street into his activities in the securities business conducted through Marquis. Lastly, the conclusion that the name Wall Street At Home.com "signifies a close connection to the securities business," even if accurate, is wholly irrelevant and provides no support for any connection of Wall Street to Marquis other than as an indirect owner of Marquis.

The foregoing merely exemplifies how far the Decision had to go in what remains a futile attempt to make any viable connection between Wall Street and Goldstein's securities business sufficient to support a Rule 8210 request.

In short, there is a lack of evidence that the confidential and private business information and documents of Wall Street are "closely related to securities trading with a member or associated person." Matter of Ochanpaugh, *supra* at 9. Indeed, FINRA has not even attempted

In other words, FINRA is now investigating a non-member non-associated person third-party, Wall Street.

Not only are these requests well beyond any possible authority or jurisdiction of FINRA, but, further, they implicate confidentiality and privacy issues. For example, the names of Wall Street's shareholders, its customers and its brokerage and bank accounts as well as its tax returns are, beyond doubt, confidential and private information and documents.

Indeed, were any such documents or information provided to FINRA, they would be available to competitors of Wall Street or, for that matter, any other person or entity that saw fit to subpoena them. Moreover, FINRA could produce such information and documents without even advising Goldstein or Wall Street that it is doing so. None of the protections of the Federal Rules of Civil Procedure, the federal Freedom of Information Act, or any similar state law, is available to Wall Street. Indeed, FINRA Enforcement's action in these regards, raises the question as to whether FINRA is conducting an unduly burdensome investigation or examination on a bad faith basis.

F. THE APPLICATION OF RULE 8210 IN THE PROCEEDING AT BAR VIOLATES SECTIONS 15A(B)(8) AND 15A(H)(1) OF THE SECURITIES EXCHANGE ACT OF 1934 AS WELL AS BASIC PRINCIPLES OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS

The Due Process clause of the Fourteenth Amendment prohibits any government from depriving persons of certain inalienable rights without certain steps being taken to ensure fairness. Fairness must be achieved in both a procedural and a substantive sense. Procedural due process deals with the fairness of the proceeding undertaken to determine whether the subject person may be deprived of the rights in question. Substantive due process deals with the fairness of the mechanism being utilized by the government to determine whether to deprive a person of the subject rights. These Constitutional concepts were incorporated into the Securities Exchange

Act of 1934 which authorized the establishment of FINRA (then NASD). Although FINRA is a private, i.e. non-governmental, corporation, private entities have been deemed “state actors” subject to providing Constitutional protections when performing activities compelled by federal law. Brentwood, *supra.*; Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 614-616 (1989); Crimmins v. AMEX, 346 F.Supp. 1256, 1259 (S.D.N.Y. 1972) (holding, “When an exchange [SRO] conducts [disciplinary] proceedings under the self-regulatory power conferred upon it by the 1934 Act, it is engaged in governmental action”); Braun, Gordon & Co. v. Hellmers, 502 F.Supp. 897, 902 (S.D.N.Y. 1980).

FINRA (at the time NASD) can also be considered a “state actor” on the basis of the rights and protections afforded its personnel when conducting their federally mandated roles. Weissman v. NASD, 468 F.3d 1306, 1313 (11th Cir. 2006). The Fifth Circuit, in Austin Mun. Sec. Inc. v. NASD, 757 F.2d 676, 690-691 (5th Cir. 1985) afforded NASD disciplinary officers immunity because they “serve as surrogates for the SEC.” The Court in Austin reasoned that since other private individuals can receive the equivalent of absolute immunity from prosecution for the lawful and proper execution of their duties in their quasi-governmental role, the same logic applied to NASD officers. Therefore, if NASD (now FINRA) officers possess the protections of governmental officers when discharging their prosecutorial duties because they are deemed the equivalent of “state actors,” they must also be deemed “state actors” when they are discharging their enforcement duties in depriving persons of their rights. As such, when FINRA is executing its federal mandate to enforce the federal securities laws through its Enforcement Division, it is a state actor and must provide the protections of the Fourteenth Amendment.

(1) Procedural Due Process

Section 15A(b)(8) of the Exchange Act requires that FINRA Rules “provide a fair procedure for the disciplining of members and persons associated with members . . . the barring of any person from being associated with a member thereof” and Section 15A(h)(1) provides that an SRO shall bring specific charges, notify the person of such charges and give the person an opportunity to defend against such charges. While Goldstein has been given the opportunity to contest the Notice of Suspension, that opportunity begs the question of whether it is fair. The real problem at bar, faced by Goldstein, is that Goldstein needs to be suspended and/or barred, even though FINRA is without authority to do so as discussed herein, before he can seek appeal review; and the fact is, such suspension or bar remains during the course of the Commission review. Thus, for all practical purposes, Goldstein must find himself removed from the securities business before his appeal is heard. This is the quandary and lack of procedural protections recognized by the Commission in Matter of Ochanpaugh, *supra* at 9-10. That Goldstein’s fundamental right to procedural due process and fairness has been violated should be clear.

(2) Substantive Due Process

A law which either forbids or requires the doing of an act in terms so vague that a reasonable person must necessarily guess at its meaning and may differ as to its application does not afford due process of law. U.S. Const. Amend. XIV. Sec. 1; Connally v. General Const. Co., 269 U.S. 385, 391 (1926). A law is also considered unenforceable due to vagueness if it authorizes or even encourages arbitrary and discriminatory enforcement. Hill v. Colorado, 530 US 703, 732 (2000). The legislative history of the amendments to the securities laws in 1975 shows that the US Senate appreciated this due process⁵⁷ issue as it applies to SROs enforcing the

securities laws. In fact the Senate Subcommittee stated, “[R]ecognizing that the self-regulatory organizations utilize governmental powers in carrying out their responsibilities under the Exchange Act highlights the fact that these organizations must be required to conform their activities to fundamental standards of due process.” Securities Acts Amendments of 1975: Hearing Before the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, S. Rep. No. 94-75, 94th Cong., 1st Sess. 1 (1975) at 25. As such, FINRA is limited in its enforcement of its Rules to the extent that the application of said Rules complies with “fundamental standards of due process.” In order to comply with fundamental standards of due process, the Rule (or its application) must not be vague.

Rule 8210, as applied in the Decision, is too broad and non-specific, *i.e.* vague, for a person associated with a member to understand its limits as well as the compliance it requires. A rule whose limits cannot be ascertained, the sanction for violation of which is suspension and bar, is anything but fair and indisputably does not meet due process standards. Connally Construction Co., supra. The Proceeding at bar is a prime example of the problem. As described more fully herein, FINRA Rule 8210 provides that FINRA has a right (a) to request, and a member or person associated with a member has the obligation to, produce information “with respect to any matter involved in the investigation, complaint, examination, or proceeding” and (b) to “inspect and copy the books, records, and accounts of such member or person involved in the investigation, complaint, examination of proceeding.” The Rule in and of itself is fatally flawed due to its reliance on the terms “any matter involved” and “of such member or person involved.”

“Any matter involved” leaves open the possibility that the Rule governs everything in the world and thus has no limits. However, the Commission has already recognized that Rule 8210

does have limits. Matter of Ochanpaugh, supra at 7. Therefore, if the Rule does in fact have limits, it cannot apply to “any matter involved...” The issue is compounded when the person of whom information or documents is requested, is unable to challenge any such request because the Rule does not, by its terms, require FINRA to set forth the basis and materiality of the request. This dichotomy exposes the undeniable fact pertaining to Rule 8210 as applied at bar, that it is impermissibly vague and, thus, violative of Goldstein’s fundamental substantive due process rights.

The other reason the Rule is fatally flawed is its failure to define the scope of “of such member or person involved.” This was the issue in Matter of Ochanpaugh, supra and is in issue at bar.⁸ The documents requested by FINRA belong to a non-member, non-associated person third party, not Goldstein. Goldstein has no right to produce the confidential and private business information and documents requested to anyone. Indeed, he could be subject to Court or other actions were he to do so. While FINRA may desire to expand its jurisdiction when conducting its federally mandated role of enforcing the securities laws, it is not permitted to do so in the abusive fashion at bar. The Commission recognized in Matter of Ochanpaugh, supra, that the limits of Rule 8210 were undefined as it applies to the production of documents belonging to third parties.⁹ Rule 8210, as applied to the matter at bar, leaves open for interpretation the extent to which it applies to the production of documents and information belonging to a non-member, non-associated person, third-party. As the U.S. Supreme Court stated in the Connally case, supra,

⁸ “Rule 8210 itself does not explain how to determine if requested materials are ‘of such member or [associated] person.’” Matter of Ochanpaugh, supra at 9.

⁹ “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.” (Emphasis added) Matter of Ochanpaugh, supra at 9. There is no evidence in the Record that Wall Street’s confidential information sought by FINRA is “closely related to securities trading with a member or associated person.” (See pages 9-10, supra)

a law which requires the doing of an act in terms so vague that a reasonable person must necessarily guess at its meaning and may differ as to its application does not afford due process of law.

Due to the ambiguous and vague language of Rule 8210, Goldstein was required to guess (1) whether FINRA Enforcement had the jurisdiction and authority to request the provision of information and production of documents of a non-member non-associated person third-party by an associated person; (2) whether there are limits to what an associated person must produce pursuant to the Rule 8210 requests made in the Proceeding at bar; and (3) what the limits are as they may apply to the provision of information and production of documents belonging to Wall Street, i.e., the non-member, non-associated person, third-party. In short, an associated person cannot comply with Rule 8210, as it applies at bar, because its terms fail to adequately define its scope.¹⁰

CONCLUSION

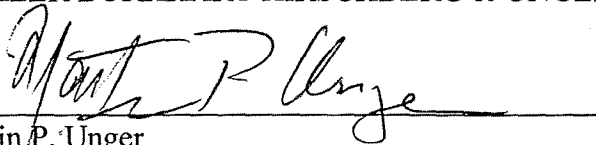
For all of the foregoing reasons, the information and document requests challenged by Goldstein at bar, purportedly pursuant to Rule 8210, are outside of FINRA's jurisdiction and authority. Accordingly, the Commission should issue an order that the suspension and subsequent bar from association with any FINRA member in any capacity imposed by FINRA against Goldstein be set aside and the imposition of the \$50,000.00 fine imposed on Goldstein

¹⁰ That "Goldstein could end the suspension -- and asserted harm . . . by complying with FINRA's requests" begs the question whether the Decision is correct and Rule 8210 applies. The Order Denying Stay basically asserts that Goldstein can end this by complying with the FINRA requests he challenges, and, in essence, give up his right to Commission Review. This approach, itself, raises substantial constitutional issues. Goldstein's Application for Review questions the accuracy and conclusions of the Decision.

also be vacated and set aside; and for such other relief in favor of Goldstein as the Commission deems appropriate.

Dated: April 10, 2013
Garden City, New York

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FINRA's Information and Testimony Requests

SEC Approves Amendments to Rule 8210

Effective Date: February 25, 2013

Executive Summary

The SEC approved amendments to FINRA Rule 8210¹ to:

- ▶ clarify the scope of FINRA's authority under Rule 8210 to inspect and copy the books, records and accounts of member firms, associated persons and persons subject to FINRA's jurisdiction;
- ▶ specify the method of service for certain unregistered persons under the rule; and
- ▶ authorize service of requests under the rule on attorneys who are representing firms, associated persons or persons subject to FINRA's jurisdiction.

The text of the amended rule, including Supplementary Material, is set forth in Attachment A. The amendments are effective on February 25, 2013.

Questions concerning this *Notice* should be directed to:

- ▶ Alan Lawhead, Vice President and Director, Appellate Group, at (202) 728-8853; or
- ▶ Matthew E. Vitek, Assistant General Counsel, Office of General Counsel, at (202) 728-8156.

January 2013

Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Senior Management

Key Topics

- ▶ Information and Testimony
- ▶ Inspection and Copying of Books and Records

Referenced Rules & Notices

- ▶ FINRA Rule 8210
- ▶ NTM 99-77

Background & Discussion

FINRA Rule 8210 grants FINRA staff and adjudicators authority to inspect and copy the books, records and accounts of member firms, associated persons and other persons over whom FINRA has jurisdiction. The SEC's approval of FINRA's proposed rule change means the amended rule now specifies that FINRA staff and adjudicators have the right to inspect and copy information in the "possession, custody or control" of the member firm, associated person or person over whom FINRA has jurisdiction. FINRA added the phrase "possession, custody or control" to link this concept to the existing body of case law that has defined possession, custody or control as used in Rule 34 of the Federal Rules of Civil Procedure. For example, in using the word "control," the amended rule requires firms, associated persons and other persons over whom FINRA has jurisdiction to provide records that they have the legal right, authority or ability to obtain upon demand.² FINRA also added Supplementary Material .01 to address what books, records and accounts are covered by the rule. The broad scope of books, records and accounts covered by the rule includes records relating to a FINRA investigation of outside business activities, private securities transactions, and possible violations of just and equitable principles of trade, other FINRA rules, MSRB rules and the federal securities laws.³ The Supplementary Material further indicates that all aspects of the relationship between a broker-dealer and its associated persons are potentially the subject of a Rule 8210 request.

The amended rule addresses how FINRA staff or an adjudicator serves a Rule 8210 request on an associated but unregistered person.⁴ The Central Registration Depository (CRD[®]) generally does not contain addresses for unregistered persons.⁵ The amended rule therefore allows service at a business address or a home address. FINRA will send a Rule 8210 request to a firm's business address when an unregistered person is associated with the firm. FINRA will personally serve an unregistered person who is not currently associated with a firm.⁶

The amended rule allows FINRA to serve a Rule 8210 request on the attorney for a member firm, associated person or person subject to FINRA's jurisdiction. The amended rule provides that, if FINRA staff or an adjudicator knows that a firm, associated person or person subject to FINRA's jurisdiction is represented by counsel regarding the matter in question, notice of a Rule 8210 request will be provided to counsel rather than to the client. It is accordingly the responsibility of a firm, associated person or person subject to FINRA's jurisdiction to communicate clearly to FINRA staff when they are being represented by an attorney in responding to a Rule 8210 request. When FINRA sends a Rule 8210 request to counsel, counsel receives it as the authorized agent for the firm, associated person or person subject to FINRA's jurisdiction. In this situation, service of the request on counsel is treated the same as service on the client.

Endnotes

1. See Securities Exchange Act Release No. 68386 (Dec. 7, 2012), 77 FR 74253 (Dec. 13, 2012) (Order Approving Proposed Rule Change; File No. SR-FINRA-2009-060).
2. See *Camden Iron & Metal v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441 (D.N.J. 1991) ("Federal courts construe 'control' very broadly").
3. In a 2006 opinion, the SEC expressed skepticism regarding FINRA's argument that an associated person was required to provide documents because they were in his possession and control. See *Jay Alan Ochanpaugh*, Exchange Act Release No. 54363, 2006 SEC LEXIS 1926, at *19 (Aug. 25, 2006). The SEC accepted, for the purpose of its decision, that a "possession and control" standard applied, but concluded that "[FINRA] has not met its burden of proof to meet even that standard." *Id.* 2006 SEC LEXIS 1926, at *22. By adding the phrase "possession, custody or control," the amended rule removes this uncertainty identified in the *Ochanpaugh* opinion.
4. All associated persons are not necessarily registered persons. FINRA's By-Laws define "associated person of a member" or "person associated with a member" as: "(1) a natural person who is registered or has applied for registration under the Rules of the Corporation; (2) a sole proprietor, partner, officer, director, or branch manager of a member, or other natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with the Corporation under these By-Laws or the Rules of the Corporation; and (3) for purposes of Rule 8210, any other person listed in Schedule A of Form BD of a member". See FINRA By-Laws, Art. I (rr).
5. The amended rule therefore does not rely on an unregistered person to update CRD with his or her current address. Firms and registered persons, in contrast, have an affirmative duty to update CRD with their current address for at least two years after they have had their registration terminated. See *Notice to Members 99-77* (Sept. 1999).
6. The amended rule provides that notice will be deemed received by the associated person upon personal service, as specified in FINRA Rule 91.34(a)(1).

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Attachment A

Below is the text of the amended FINRA Rule 8210. New language is underlined.

8200. INVESTIGATIONS

8210. Provision of Information and Testimony and Inspection and Copying of Books

(a) Authority of Adjudicator and FINRA Staff

For the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an Adjudicator or FINRA staff shall have the right to:

(1) require a member, person associated with a member, or any other person subject to FINRA's jurisdiction to provide information orally, in writing, or electronically (if the requested information is, or is required to be, maintained in electronic form) and to testify at a location specified by FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested, 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 that is in such member's or person's possession, custody or control.

(b) through (c) No Change.

(d) Notice

A notice under this Rule shall be deemed received by the member or currently or formerly registered person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository. With respect to a person who is currently associated with a member in an unregistered capacity, a notice under this Rule shall be deemed received by the person by mailing or otherwise transmitting the notice to the last known business address of the member as reflected in the Central Registration Depository. With respect to a person subject to FINRA's jurisdiction who was formerly associated with a member in an unregistered capacity, a notice under this Rule shall be deemed received by the person upon personal service, as set forth in Rule 9134(a)(1). If the Adjudicator or FINRA staff responsible for mailing or otherwise transmitting the notice to the member or person has actual knowledge that the address in the Central Registration Depository is out of date or inaccurate, then a copy of the notice shall be mailed or otherwise transmitted to:

(1) the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository; and

(2) any other more current address of the member or the person known to the Adjudicator or FINRA staff who is responsible for mailing or otherwise transmitting the notice.

If the Adjudicator or FINRA staff responsible for mailing or otherwise transmitting the notice to the member or person knows that the member or person is represented by counsel regarding the investigation, complaint, examination, or proceeding that is the subject of the notice, then the notice shall be served upon counsel by mailing or otherwise transmitting the notice to the counsel in lieu of the member or person, and any notice served upon counsel shall be deemed received by the member or person.

(e) through (g) No Change.

• • • Supplementary Material: -----

.01 Books and Records Relating to Investigations. This rule requires FINRA members, associated persons and persons subject to FINRA's jurisdiction to provide FINRA staff and adjudicators with requested books, records and accounts. In specifying the books, records and accounts "of such member or person," paragraph (a) of the rule refers to books, records and accounts that the broker-dealer or its associated persons make or keep relating to its operation as a broker-dealer or relating to the person's association with the member. This includes but is not limited to records relating to a FINRA investigation of outside business activities, private securities transactions or possible violations of just and equitable principles of trade, as well as other FINRA rules, MSRB rules, and the federal securities laws. It does not ordinarily include books and records that are in the possession, custody or control of a member or associated person, but whose bona fide ownership is held by an independent third party and the records are unrelated to the business of the member. The rule requires, however, that a FINRA member, associated person, or person subject to FINRA's jurisdiction must make available its books, records or accounts when these books, records or accounts are in the possession of another person or entity, such as a professional service provider, but the FINRA member, associated person or person subject to FINRA's jurisdiction controls or has a right to demand them.
