

SECURITIES AND EXCHANGE COMMISSION
Washington D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 53957 / June 8, 2006

Admin. Proc. File No. 3-12072

In the Matter of the Application of

RYAN R. HENRY
10450 Billings Street
Commerce City, CO 80022

For Review of Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION - - REVIEW OF NASD ACTION

Failure to Provide Requested Information

Former registered representative of a member firm of registered securities association who failed to respond to requests for information appealed association's imposition of a bar. Held, proceedings are remanded for further consideration.

APPEARANCES

Ryan R. Henry, pro se.

Marc Menchel, Alan Lawhead, and Michael J. Garawski, for NASD.

Appeal filed: October 4, 2005
Last brief received: December 30, 2005

I.

Ryan R. Henry, formerly a registered representative associated with 1st Discount Brokerage, Inc. ("Discount"), an NASD member firm, seeks review of NASD action. NASD found that Henry failed to provide information that it requested pursuant to NASD Investigations Rule 8210. 1/ As a result of his failure to respond, NASD barred Henry from association with any member firm in any capacity. We base our findings on an independent review of the record.

II.

By letter dated March 17, 2004, NASD staff requested that Henry provide information about allegations contained in an arbitration complaint filed with NASD. The arbitration complaint alleged that Henry had defrauded and breached his fiduciary duty to one of his customers by his conduct with respect to the customer's account. 2/

The NASD staff letter asked that Henry provide a written statement addressing these allegations by March 31, 2004. This letter was sent to the residential address listed in the Central Registration Depository ("CRD") for Henry ("Henry CRD Address"). 3/ The NASD staff sent the letter to the Henry CRD Address by certified mail, return receipt requested, and by first-class mail. The certified mail receipt was signed by Henry's grandmother, Evelyn Linsenmaier, on March 18, 2004 and returned to NASD the following day.

On April 6, 2004, NASD staff sent a second letter to the Henry CRD Address, reiterating the request for information and requiring a written response by April 20, 2004. This letter warned Henry that failure to comply with this request could subject him to disciplinary action. This letter was sent to the Henry CRD Address by certified mail, return receipt requested, and by first-class mail. The certified mail receipt was signed for on April 7, 2004. The signature is not legible, and the signatory did not print his or her name as requested by the form in the line below the signature block. The signer checked the box "agent," rather than "addressee." Henry did not respond to either the March 17 or April 6 letter.

On August 23, 2004, NASD staff sent a "Notice of Intent to Suspend" to Henry, noting that Henry had failed to respond to the staff's March 17 and April 6, 2004 letters and informing

1/ NASD Investigations Rule 8210 requires members and associated persons to provide information if requested by NASD as part of an investigation, complaint, examination, or proceeding.

2/ Henry states that the arbitration complaint was subsequently dismissed.

3/ The Henry CRD Address appears to have been the residence of Henry's mother.

Henry that, pursuant to NASD Procedural Rule 9552, 4/ if Henry did not take corrective action by providing the information NASD had requested by September 17, 2004, NASD would suspend him from association in all capacities with any member. 5/

The Notice of Intent stated that it was sent to the Henry CRD Address by Federal Express and by first-class mail. The record does not contain a receipt that the notice was delivered to the Henry CRD Address. NASD submitted a declaration of the person responsible for sending the Notice of Intent. She avers that she was familiar with NASD's August 23, 2004 Notice of Intent and that, at the direction of NASD Regional Counsel, she mailed the Notice of Intent to the Henry CRD Address by first-class mail and by an overnight delivery service. She further attests that, in the ordinary course of business, NASD places correspondence that is returned to NASD as undeliverable in the official file for that proceeding. The declarant states that she reviewed NASD's records and determined that "it does not contain anything indicating that the Notice of Intent to Suspend was returned to NASD as undeliverable."

On September 23, 2004, NASD sent Henry, at the Henry CRD Address, a Notice of Suspension From Association With Any NASD Member ("Initial Suspension Notice"). The Initial Suspension Notice stated that because Henry failed to provide requested information or take corrective action, he was suspended from association with any NASD member. But the Initial Suspension Notice incorrectly stated that Henry had been suspended on August 18, 2004, instead of September 18, 2004. NASD sent this Notice to the Henry CRD Address by an overnight delivery service and by first-class mail. The record does not contain any documentation concerning delivery information for the overnight delivery service. The first-class envelope was returned marked in unidentified handwriting "Not At This Address" and "Return to Sender" and stamped "Returned to Sender - Attempted Not Known."

On September 28, 2004, NASD sent Henry, at the Henry CRD Address, an Amended Notice of Suspension From Association With Any NASD Member ("Amended Suspension Notice"). This Notice corrected the Initial Suspension Notice by stating that, because Henry failed to provide requested information or take corrective action, he was suspended effective September 18, 2004 from association with any NASD member. NASD sent the Amended Suspension Notice to the Henry CRD Address by an overnight delivery service and by first-class

4/ NASD Procedural Rule 9552(a) provides that, if an associated person fails to furnish to NASD requested information, NASD may provide written notice specifying the nature of that associated person's failure and stating that the failure to take corrective action within twenty-one days after service of such written notice will result in the suspension of that person's association.

5/ The notice further stated that Henry could request a hearing pursuant to NASD Procedural Rule 9552(e), which would operate as a stay. NASD Procedural Rule 9552(e) provides that a person requesting a hearing must do so in writing before the effective date of the suspension.

mail. The record does not contain any documentation concerning delivery information for the overnight delivery service. The first-class envelope was returned stamped "Return to Sender" and "Returned to Sender - Not Deliverable As Addressed Unable to Forward," with a notation in unidentified handwriting of "FOE – Not Accepted here."

Both the Initial and Amended Suspension Notices stated that Henry could file a written request for termination of the suspension under NASD Procedural Rule 9522(f) on the grounds of full compliance with the Notice of Intent. Both Suspension Notices further stated that, pursuant to NASD Procedural Rule 9522(h), if Henry failed to request termination of the suspension within six months of the date of the Notice of Intent, he would automatically be barred from associating with any member in any capacity. ^{6/} NASD included copies of the Notice of Intent and its prior information requests with both the Initial and Amended Suspension Notices. Henry failed to file a written request for termination of the suspension within six months of the date of the Notice of Intent.

On March 1, 2005, NASD advised Henry that, effective immediately, he was barred from associating with any NASD member firm in any capacity (the "Bar Notice"). The Bar Notice informed Henry that he could appeal the bar to the Commission and that, "[t]o comply with the SEC's rule regarding timeliness, [Henry] must file an application for review within thirty days of [his] receipt of this letter." The Bar Notice was sent to the Henry CRD Address by an overnight delivery service and by first-class mail. The overnight delivery receipt shows that the Bar Notice was delivered to the Henry CRD Address on March 2, 2005 by leaving it at the front door.

On October 4, 2005, Henry appealed the NASD action to the Commission.

III.

Section 19(f) of the Securities Exchange Act of 1934 provides the standard for our review. ^{7/} We review these proceedings to determine whether "the specific grounds" on which NASD based its action "exist in fact," whether NASD's determination not to permit Henry's association is in accordance with its rules, and whether the rules were applied in a manner consistent with the purposes of the Exchange Act. ^{8/}

^{6/} NASD Procedural Rule 9552(f) provides that a person subject to a suspension pursuant to Procedural Rule 9552 may file a written request for termination of the suspension on the ground of full compliance with the notice or decision. NASD Procedural Rule 9552(h) provides that a person who is suspended under Rule 9552 and fails to request termination of the suspension within six months of issuance of the original notice of suspension will be barred automatically.

^{7/} 15 U.S.C. § 78s(f).

^{8/} We also consider whether NASD's action imposes an undue burden on competition.

(continued...)

Henry did not respond to any of NASD's communications. Henry asserts that during the period when NASD was attempting to contact him, he had moved to a new address and, consequently "was unaware that the NASD was sending correspondence to [his] previous address." Henry cites his mother's notarized letter affirming that he had moved from the Henry CRD Address and a copy of his February 2004 telephone bill to demonstrate that he was residing at a different address.

However, Henry's change of address does not excuse his failure to respond. We have emphasized the importance of associated persons, such as Henry, keeping their records current. ^{9/} Henry remained subject to NASD's disciplinary jurisdiction for two years after the effective date of the termination of his registration. ^{10/} We have previously stated that associated persons have "a continuing duty to notify the Association . . . of [their] current address, and to receive and read mail sent to [them] at that address." ^{11/} As we have held, Henry "cannot shift the burden of keeping information current to the NASD" because "NASD must be able to rely on its records." ^{12/} Otherwise, "an applicant could thwart an NASD investigation" by changing his address without notifying NASD or making arrangements to forward his

^{8/} (...continued)

Robert J. Langley, Securities Exchange Act Rel. No. 50917 (Dec. 22, 2004), 84 SEC Docket 1959, 1963. Henry does not claim, and the record does not show, that NASD's action has imposed an undue burden on competition.

^{9/} See David I. Cassuto, Exchange Act Rel. 48087 (June 25, 2003), 80 SEC Docket 1775, 1779 (former registered representative who failed to comply with NASD information requests had a "responsibility to maintain a current address in the CRD . . .").

^{10/} NASD Bylaws, Article V, Section 4.

^{11/} Warren B. Minton, Jr., Exchange Act Rel. No. 46709 (Oct. 23, 2002), 78 SEC Docket 2369, 2375 n.15 (quoting William T. Banning, 50 S.E.C. 415, 416 (1990)). Moreover, all registered representatives are required to sign and file a Form U-4 application for registration, which, among other duties, "obligates them to keep a current address on file with the NASD at all times)). Nazmi C. Hassanieh, 52 S.E.C. 87, 90 (1994). NASD By-Laws, Art. V, Sec. 2(c) requires that Form U-4 applications be "kept current at all times by supplementary amendments."

^{12/} Hassanieh, 52 S.E.C. at 90-91 n.13 (rejecting defense, in failure-to-cooperate proceeding, that "NASD failed to take reasonable steps to locate" respondent by contacting his former attorney).

NASD Procedural Rule 8210(d) requires that notice to an associated person of a member be given to the address listed for that person in CRD unless there is a "more current address . . . known" to the staff. Langley, 84 SEC Docket at 1984.

mail. 13/

Nevertheless, we have determined that, under the circumstances of this case, a remand of this proceeding to NASD is warranted. As indicated above, certain factual aspects of this case are unclear from the record. For example, Henry maintains that "the Notice of Bar was sent to [his] parent's home and was signed by [his] grandmother Evelyn Linsenmaier who passed away shortly thereafter." In support of this assertion, Henry submitted a notarized letter from his mother that states that Linsenmaier had "apparently signed for a number of communications" from NASD that were "discovered . . . while going through [Linsenmaier's] things after her death." Henry has also submitted a copy of Linsenmaier's death certificate. NASD notes that it sent the Bar Notice to the Henry CRD Address on March 1, 2005 -- four months after Ms. Linsenmaier's death on October 27, 2004. The initial March 31, 2004 request for information clearly is signed for by Linsenmaier. The signature on the receipt acknowledging NASD's April 6 letter is illegible. The first-class envelopes transmitting the September 23 and 28 Suspension Notices were returned as undeliverable, and the Notice of Bar was left at the front door.

We believe that a remand is appropriate to give NASD an opportunity to determine whether a bar is the appropriate sanction. 14/ Henry was barred based on NASD's expedited procedures, without any hearing or review by any NASD adjudicatory panel. On remand, we ask the parties to determine whether, under the circumstances of this case, barring Henry is

13/ Cassuto, 80 SEC Docket at 1779. See also Ashton Noshir Gowadia, 53 S.E.C. 786, 790 (1998); Hassanieh, 52 S.E.C. at 91; Alan Howard Gold, 51 S.E.C. 998, 1001 (1994).

Even if Henry were unaware of NASD's requirement to maintain a current address, his ignorance is not an excuse. Warren B. Minton, Jr., 78 SEC Docket at 2375 n.16 (rejecting claim that former registered representative was unaware of obligation to keep his address current after he left the securities industry); Richard J. Lanigan, 52 S.E.C. 375, 377 (1995) (rejecting claim that applicant was unaware of duty to keep current Form U-4 on file with NASD). Cf. Carter v. SEC, 726 F.2d 472, 473-74 (9th Cir. 1983) (rejecting claim that applicant was unaware of NASD prohibition against private securities sales).

A registered representative is "assumed as a matter of law to have read and have knowledge of these rules and requirements." Carter v. S.E.C., 726 F.2d at 473-474. See also Walter T. Black, 50 S.E.C. 424, 426 (1990) ("lack of familiarity with the NASD's rules cannot excuse [registered representative's] conduct").

14/ NASD Sanction Guidelines with respect to violation of NASD Rule 8210 suggest a bar in the event the individual did not respond in any manner, but state that, where mitigation exists a suspension for up to two years may be appropriate.

consistent with the purposes of the Exchange Act. In remanding, we do not intend to suggest any view as to a particular outcome.

An appropriate order will issue. 15/

By the Commission (Chairman COX and Commissioners GLASSMAN, ATKINS, CAMPOS, and NAZARETH).

Nancy M. Morris
Secretary

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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ORDER REMANDING PROCEEDING TO REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the proceedings with respect to Ryan R. Henry be, and they hereby are, remanded to NASD for further consideration.

By the Commission.

Nancy M. Morris
Secretary