

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 55706 / May 4, 2007

Admin. Proc. File No. 3-12393

In the Matter of the Application of

HOWARD BRETT BERGER

c/o Andrew T. Solomon, Esq.
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1290 Avenue of the Americas
New York, New York 10104

For Review of Disciplinary Action Taken by
NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDING

Failure to Provide Requested Testimony

Former associated person of member firm of registered securities association failed to appear at two on-the-record interviews. Held, association's findings of violation and the sanction imposed are sustained.

APPEARANCES:

Andrew T. Solomon, of Sullivan & Worcester LLP, for Howard Brett Berger.

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

Appeal filed: August 15, 2006
Last brief received: November 14, 2006

I.

Howard Brett Berger, an individual who applied for registration with Millennium Brokerage, LLC ("Millennium" or the "Firm"), an NASD member firm, appeals from NASD disciplinary action. NASD found that Berger failed to appear at two on-the-record interviews ("OTRs"), in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. 1/

1/ NASD Procedural Rule 8210 requires members and associated persons to provide
(continued...)

NASD barred Berger from associating with any NASD member in any capacity. 2/ To the extent we make findings, we base them on an independent review of the record.

II.

Berger was registered with NASD from December 1, 1992 until April 19, 2001. During that period, he worked for several member firms in various capacities, including as a general securities representative and general securities principal, and also as an associate compliance director and compliance officer. 3/ Berger relinquished his registration on April 19, 2001 when his employer firm filed a withdrawal from membership. That firm filed a Uniform Termination Notice for Securities Industry Registration (“Form U5”) for Berger on May 2, 2001.

For nearly two years afterward, Berger remained unregistered and was not associated with any member firm. Since April 2001, Berger has been employed as the chief financial officer of Mat/Financial Systems Group (“FSG”) a financial-software company. He is also a fund manager at Professional Traders Fund, LLC (“PTF”), a hedge fund. Berger became acquainted with Millennium in 2002, when FSG entered into a licensing agreement with Millennium to provide the Firm with financial software. Soon thereafter, PTF became a Millennium client.

1/ (...continued)
testimony in connection with any NASD investigation, complaint, examination, or proceeding. NASD Conduct Rule 2110 requires members and associated persons to observe high standards of commercial honor and just and equitable principles of trade. Violations of NASD rules such as NASD Procedural Rule 8210 constitute conduct inconsistent with the just and equitable principles of trade provisions of NASD Conduct Rule 2110. See, e.g., Justin F. Ficken, Securities Exchange Act Rel. No. 54699 (Nov. 3, 2006), 89 SEC Docket 685 (holding that a violation of NASD Procedural Rule 8210 constitutes conduct inconsistent with the just and equitable principles of trade provisions of NASD Conduct Rule 2110); Elliot M. Hershberg, Exchange Act Rel. No. 53145 (Jan. 19, 2006), 87 SEC Docket 494, 497 (holding that the failure to provide information requested by NASD constitutes a failure to observe high standards of commercial honor and just and equitable principles of trade), aff’d, Hershberg v. SEC, No. 06-1086-og, 2006 U.S. App. LEXIS 32225 (2d Cir. 2006); Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999) (same).

2/ NASD also assessed costs.

3/ In his capacity as associate compliance director and compliance officer at two member firms, Berger was responsible for, among other things, filing applications for securities industry registration.

Berger Initiates the Registration Process with Millennium

In late March or early April 2003, Berger discussed registration with Lisa Esposito, the Millennium registered representative who serviced PTF's accounts at the Firm. Berger testified at the hearing that he informed Esposito that he was considering "relicensing [himself]" and "reestablishing" his "registration status" in order to "capture some of the commissions" that PTF was paying to Millennium. Berger also sought to renew his registration because he "knew . . . [he] was coming up on the anniversary" of the renewal deadline for his securities licenses and wanted to avoid retaking the licensing examinations. ^{4/} He asked Esposito "what, if anything, [he could] do to get some preliminary information going in case [he made] this decision prior to [his] license lapsing, because the last thing [he wanted] to do is make a decision to do it and have to reregister."

According to Berger, Esposito said that she would "speak to the powers that be" at Millennium regarding his inquiry. Berger testified that Esposito "came back to [him] shortly thereafter" and informed him that she would be sending him an e-mail instructing him "to fill out [his] preliminary personal instruction for a [Form] U-4" and "proceed from there." Esposito subsequently e-mailed him a blank "template request for some information" that contained a "preset box to put information in." Berger then filled in his "full name, [his] Social Security number, . . . [his] personal information, which was [his] residential history and [his] employment history" and e-mailed the template back to Esposito. ^{5/}

Millennium Files Berger's Initial Form U4 and Two Amendments Thereto

On April 15, 2003, four days before Berger's securities licenses were due to expire, Millennium filed Berger's initial application for securities industry registration (the "Initial Form U4") electronically with the Central Registration Depository ("CRD"). ^{6/} Christopher Ranni, at

^{4/} NASD Membership and Registration Rules 1021(c) and 1031(c) require any formerly registered person who has been unregistered for a period of at least two years immediately preceding the receipt by NASD of a new application for registration to pass an examination in order to renew his registration. Under these rules, securities licenses do not lapse until two years after registration has been terminated. After they lapse, an applicant would have to retake the licensing examinations. Berger's securities licenses were due to expire on April 19, 2003.

^{5/} There is no copy of the template in the record, but the parties seem to agree that the template was not the Form U4 itself.

^{6/} As relevant here, a Form U4, or "Uniform Application for Securities Industry Registration or Transfer," is the application by which an individual registers with NASD. The record contains copies of the Form U4 and its subsequent amendments that were
(continued...)

the time Millennium's chief compliance officer and the individual responsible for filing Forms U4 at the Firm, had initiated and filed Berger's application at the direction of Millennium's chief executive officer. 7/

Ranni testified that he did not have direct contact with Berger. However, at the hearing, he explained his usual procedure for processing Forms U4. Ranni stated at the hearing that his practice was to send "out an e-mail to the candidate" and that normally the applicant would "make changes to the form or basically just sign it and send it back" to him. 8/ Ranni described his usual business practice – one that he followed "[w]ithout exception" – of exchanging e-mails with an applicant in order to obtain information for input into the web-based CRD system. 9/ Describing the registration procedure, Ranni explained that he would first "obtain the Social Security number, date of birth and name [of the applicant]." Ranni would use that information to access the applicant's historical information on the CRD website. Ranni would then "set up the initial application" by incorporating the applicant's personal history into an electronic draft Form U4 before e-mailing a hyperlink for the draft form to the applicant. The applicant would be able to access and edit the draft form electronically via the hyperlink. During that time, CRD automatically denied Ranni access to the form until the applicant released the form by e-mailing it back to Ranni. When the hyperlink would reappear on Ranni's pending Form U4 "staging window" – signaling that the applicant had released the form back to him – Ranni would "check [the form] for accuracy" and then "submit it to the NASD for registration." 10/

Ranni explained that the only parts of the draft Form U4 that he would fill out after it was returned to him by the applicant were "jurisdictions and other information that you don't leave up

6/ (...continued)

filed electronically by Millennium on behalf of Berger. Both parties obtained their respective copies of those forms from CRD and submitted them as hearing exhibits.

7/ Millennium's chief executive officer ("CEO") had sent an e-mail to Ranni instructing him to initiate the registration process for Berger. At his OTR, the CEO testified that he had heard that Berger had filed a Form U4 with Millennium in March or April 2003. Millennium's president was also aware of Berger's interest in registration. At his OTR on February 6, 2004, Millennium's president testified that Millennium had attempted to register Berger and stated that he "believe[d] registration may have been – they – we might have started the process for registration" on Berger's behalf.

8/ At the hearing, Berger asserted that he did not "recall e-mail from Mr. Ranni."

9/ The record does not contain any e-mails between Ranni and Berger. However, Ranni testified at the hearing that he could "only assume" that the e-mail replies he received during his e-mail exchange with the applicant were from Berger.

10/ The Hearing Panel credited Ranni's testimony about his procedures. There is no explicit credibility finding with respect to Berger's testimony.

to the candidate to fill out themselves.” When the Hearing Panel asked Ranni whether he ever deviated from his usual business practice, he responded, “Never. The only way to file U4s is electronically.” Because he was the sole individual “handling the registrations for the [F]irm,” he “chose the easiest route possible and that was to let the candidate do it themselves.” Millennium did not produce manually-signed, paper copies of Berger’s Form U4 to NASD staff because the Firm claimed that it had created only electronic versions of the form.

Berger’s electronic signature was typed 11/ on the Initial Form U4 under the heading, “Signature of *Applicant*.” 12/ Ranni’s electronic signature followed under the heading, “Signature of *Appropriate Signatory*.” The Initial Form U4 included an initial disclosure reporting page (“DRP”) that reported a judgment entered against Berger on November 1, 2001, six months after his previous firm had filed a Form U5 terminating his registration. Because that judgment was identified as an “initial” disclosure, *i.e.*, it was being reported for the first time, it would not have appeared in Berger’s CRD record prior to the filing of the Initial Form U4. Ranni testified that he “never update[d] candidates’ DRP pages,” but instead, “[left] it up to the candidate” to do so.

11/ In his hearing testimony, Berger asserted that he did not recall signing a form electronically:

Q: When is the next time you saw any kind of document that had “U-4” on it?

A: I don’t think I received another copy.

Q: Did you ever electronically sign your name?

A: Not that I recall.

Berger insisted that he “didn’t see” the Form U4 application, but instead saw a “template document.” When the Hearing Officer asked Berger what he understood would happen after supplying his personal information to Esposito, Berger replied that it was his “understanding that Millennium would hold that information and that would hold any expiration date on [his] license pending [his] making a decision on what we wanted to do.”

12/ Italics in original. According to the “Signature Section” of the Form U4, a signature “includes a manual signature or an electronically transmitted equivalent” and “is effected by typing a name in the designated signature field” which constitutes a “legally binding signature.” The language preceding the applicant’s signature on the Form U4 also permits the “applicant’s agent” to type the applicant’s name in the form’s signature field. The applicant’s signature on the Form U4 indicates the applicant’s agreement to comply with, among other things, all provisions, including by-laws, rules, and regulations of the self-regulatory organizations selected on the application.

On April 17, 2003, CRD notified Ranni that there were deficiencies in Berger's DRPs. According to Ranni, a Form U4 filing would not be approved for registration "until the deficiencies [were] cleaned up." He asserted that, whenever he received deficiency notices, he "would send an additional e-mail to the candidate saying there were discrepancies or deficiencies. . .[a]nd that they needed to be corrected." Ranni testified that he would then go through the same e-mail process with the candidate in order to correct the deficiencies.

On April 23, 2003, Millennium filed an electronic amendment to the Initial Form U4 (the "First Amended Form U4"), with both Berger's and Ranni's electronic signatures. ^{13/} The First Amended Form U4 contained several changes from the Initial Form U4. Among other things, the text of one DRP response was amended, and the First Amended Form U4 included two additional DRPs. For example, the response to a disclosure question asking whether Berger was involved in a sales practice violation that contained a claim for compensatory damages of at least \$5,000 was changed from a "No" to a "Yes." The corresponding initial DRP disclosed an arbitration that concluded on October 4, 2001 with the explanation that "I was not employed at the firm at the time of the complaint." A second initial DRP disclosed a \$162,000 arbitration award, with the explanation that "I was named as the chief compliance officer for failure to supervise." Many of the narrative responses in the First Amended Form U4 appeared in the first-person singular, giving the impression that Berger had made the revisions himself.

On April 25, 2003, CRD generated a second notice informing Ranni that the DRPs in the First Amended Form U4 contained additional deficiencies. Ranni testified at the hearing that, in response to the deficiency notice, he went through the same e-mail process to correct those deficiencies. Thereafter, on May 12, 2003, Millennium filed another electronic amendment to the Initial Form U4 (the "Second Amended Form U4") that included additional revisions. Both Berger's and Ranni's electronic signatures appeared on the Second Amended Form U4.

On May 13, 2003, CRD generated a third notice flagging deficiencies in the Second Amended Form U4. Those deficiencies were never resolved.

Millennium Files a Form U5 to Remove Berger from the Firm's Books

On August 13, 2003, Millennium filed a Form U5 terminating Berger's association with Millennium without registration. At the hearing, Ranni testified that once the deficiencies in an applicant's Form U4 "were over 90 days old, [he] U-5'd the candidate" because it was "the only way to get him off the [Firm's] books." The Form U5 listed Berger's withdrawal as "voluntary." There was no suggestion in the Form U5 that the Initial Form U4 was filed improperly.

^{13/} The "temporary registration" section of the First Amended Form U4 was completed. Berger's electronic signature was typed in the temporary registration signatory section. The temporary registration section of the Initial Form U4 had not been completed.

Berger Fails to Appear at Two OTRs

On January 14, 2004, NASD sent a letter to Berger requesting his appearance, pursuant to NASD Procedural Rule 8210, at an OTR scheduled for January 27, 2004 in connection with an NASD investigation into potential day trading violations at Millennium. ^{14/} Berger failed to appear at the January 27, 2004 OTR. Later that day, following Berger's failure to appear, Berger's counsel informed NASD staff that his failure to notify staff of Berger's unavailability for the scheduled OTR was "inadvertent" and requested that the OTR be rescheduled. Berger retained new counsel thereafter.

On January 30, 2004, after consultation with Berger's new counsel, NASD scheduled a second OTR for February 12, 2004. Also on January 30, 2004, Berger's new counsel sent NASD staff a letter confirming the second OTR and stating that, prior to the scheduled date, "we will determine whether the NASD has jurisdiction over Mr. Berger and will notify you of our intention as to whether or not Mr. Berger will testify on that date."

On February 2, 2004, NASD sent a letter to Berger requesting his appearance, pursuant to NASD Procedural Rule 8210, at the second OTR scheduled for February 12, 2004. On February 11, 2004, the day before the second OTR, NASD staff contacted Berger's new counsel to confirm Berger's appearance at the scheduled OTR. Berger's new counsel informed NASD staff that Berger would not appear at that OTR and challenged NASD's jurisdiction over Berger. Berger failed to appear at the February 12, 2004 OTR.

NASD Proceedings

On July 15, 2004, NASD filed a complaint against Berger alleging that he failed to appear at the two OTRs. In his answer to the complaint, Berger admitted to not appearing at the OTRs but asserted that NASD lacked jurisdiction over him. Following a hearing, the Hearing Panel barred Berger in all capacities.

Berger appealed the Hearing Panel's decision to NASD's National Adjudicatory Council (the "NAC"). On July 28, 2006, the NAC affirmed the Hearing Panel's findings and sanction. The NAC determined, among other things, that, by applying for registration with NASD, Berger became an associated person of Millennium subject to NASD jurisdiction. The NAC concluded

^{14/} At the hearing, Gregory Marro, an NASD staff supervisor, testified that, while conducting a routine examination of Millennium, NASD staff detected the potential circumvention of day trading rules and noncompliance with certain regulations by the Firm's day trading clients, with the possible involvement and awareness of Millennium principals and personnel. Marro indicated that Millennium's filing of Berger's Forms U4 coincided with the suspected activities at the Firm, and that NASD staff had been inquiring into PTF's role in day trading at Millennium at that time.

that Berger violated NASD rules by failing to appear for the OTRs. The NAC affirmed the imposition of a bar against Berger. This appeal followed.

III.

We must determine whether Berger engaged in the conduct found by NASD, whether the conduct violated the NASD rules he was found to have violated, and whether those rules were applied in a manner consistent with the purposes of the Securities Exchange Act of 1934. ^{15/} NASD Procedural Rule 8210 requires that associated persons provide information requested by NASD. Berger does not dispute that he did not appear at the scheduled OTRs, nor does he dispute that he received notice of the OTRs. We have held previously that the failure to respond to NASD's requests for testimony demonstrates a prima facie violation of NASD Procedural Rule 8210. ^{16/}

Berger argues that NASD lacked jurisdiction over him because he had been unregistered and not associated with any member firm for more than two years at the time that NASD sought his testimony. ^{17/} Both Berger and NASD agree that he never became registered through Millennium and that he neither was employed by nor acted for the Firm.

However, NASD By-Law Article I(dd)(1) defines a "person associated with a member" as "a natural person who is registered or has applied for registration." NASD Notice to Members 99-95 states that "any person who signs and submits a Form U4 is an associated person." ^{18/} NASD found that Berger filled in his personal information and executed an electronic signature on an application for registration with Millennium on April 15, 2003, a few days before the expiration of NASD's two-year period of retained jurisdiction over him.

Berger argues that he never signed the initial and amended Forms U4 (collectively, the "Forms U4") that Millennium submitted on his behalf, and therefore, was not an associated person of Millennium. Based on the preponderance of the evidence, we find that: (1) Berger signed and submitted the Initial Form U4, the First Amended Form U4, and the Second Amended Form U4 before the 2004 OTR requests; (2) Berger was "a person associated with" Millennium

^{15/} See Exchange Act Section 19(e)(1), 15 U.S.C. § 78s(e)(1).

^{16/} Ficken, 89 SEC Docket at 690-91.

^{17/} NASD asserts jurisdiction over, and has the ability to obtain information from, a person whose association with a member has been terminated or whose registration has been canceled, for two years following the date of that person's termination of registration. NASD By-Laws, Article V, Section 4.

^{18/} NASD Notice to Members 99-95 (Dec. 1, 1999).

because he “applied for registration” under NASD rules; and (3) as an associated person of Millennium, Berger was subject to NASD disciplinary jurisdiction during the relevant period. ^{19/}

In weighing the evidence, we look at the totality of the record and consider the full panoply of available evidence, instead of reviewing each piece of evidence in isolation. ^{20/} It is undisputed that Berger initiated discussions with Millennium regarding the renewal of his registration status. Berger had strong incentives to seek registration in April 2003. He testified at the hearing that he wanted to avoid retaking the licensing examinations that he would have to take if his securities licenses were to expire. He also sought to capture commission income that PTF was paying to Millennium. Berger progressed swiftly from the discussion stage to taking concrete steps to renew his registration. Within days of his conversation with Esposito, for example, Berger completed a “template” that Esposito sent him to initiate the registration process. Berger admits inputting his name, Social Security number, and other personal information into the template and e-mailing it back to Esposito for processing.

Berger asserts that it is irrelevant that he supplied information to Esposito in a “template” and that Ranni may have relied on such information to prepare the Forms U4. Berger also does not dispute that an electronic signature, purporting to be his, appears on the Initial Form U4 and its two subsequent amendments. Rather, Berger argues that, without evidence that he signed the forms or a witness to the signing, there is no way to prove that he “signed and submitted” the Forms U4. Berger asserts that this absence of proof of the “mechanical” process of “actually signing the document” destroys NASD jurisdictional claims.

^{19/} See, e.g., Kirk A. Knapp, 51 S.E.C. 115, 130 n.65 (1992) (stating that the “correct standard is preponderance of the evidence”); Roy Ray Seaton v. SEC, 670 F.2d 309, 311 (D.C. Cir. 1982) (same) (internal citations omitted). Cf. Sandra K. Simpson, 55 S.E.C. 766, 798 (applying preponderance of the evidence standard in administrative proceeding). See also United States v. Gumesindo Montano, 250 F.3d 709, 713 (9th Cir. 2001) (explaining that under the preponderance of the evidence standard, the relevant facts must be shown to be more likely than not).

^{20/} Cf. Terrance Yoshikawa, Exchange Act Rel. No. 53731 (Apr. 26, 2006), 87 SEC Docket 2924, 2933-34 (stating that “isolated instances of seemingly innocent conduct can, when viewed as a whole, constitute circumstantial evidence”); Laurie Jones Canady, 54 S.E.C. 65, 79 (1999) (noting that law judge’s credibility determination was based on the totality of the record), petition denied, 230 F.3d 362 (D.C. Cir. 2000).

Berger points out that NASD Electronic Filing Rule 1140(c) requires that a member firm retain a signed, paper original of any Form U4 submitted to CRD. 21/ The representations and signature in an electronic Form U4 are to be “based” on the paper copy. Millennium stated that it had no paper copy of any of Berger’s Forms U4. 22/ There were no witnesses to the signing of the Forms U4: nobody saw Berger complete or sign the forms. As a result, Berger asserts, there is no probative evidence that he signed a Form U4. Berger contends that, without proof of his signature, the circumstantial evidence of his association with Millennium is weak.

However, the Supreme Court has stated that “circumstantial evidence can be more than sufficient” in civil actions, 23/ and we have previously considered circumstantial evidence to be persuasive. 24/ We agree with NASD that the record demonstrates that Berger played an “active role in completing” the Initial Form U4 and the First and Second Amended Forms U4. In addition to initiating the registration process with Esposito and filling out the template, Berger appears to have supplied detailed information that was previously unavailable in CRD, particularly in response to the deficiency notices that followed the Initial and First Amended Forms U4. The information in those subsequent filings added data to Berger’s CRD record that

21/ NASD Electronic Filing Rule 1140(c) provides that, “[a]s part of the member’s recordkeeping requirements, it shall retain the [applicant’s] signed Form U4 and make it available promptly upon regulatory request.” Approximately five months after the events at issue in this case, NASD published NASD Notice 03-56 (Sept. 29, 2003), which accompanied the announcement of amendments (effective October 2003) to NASD Rule 1140(c) and contains the following colloquy:

Q: Is the electronic Form U4 based on a signed, paper Form U4?

A: Yes, the electronic Form U4 is based on a signed, paper Form U4.

Rule 1140(c) clarifies that all Forms U4 filed electronically must be based on a signed Form U4 that is provided to the member or applicant for membership by the person.

Q: Who will retain the signed Form U4 and how will NASD obtain a copy if it needs it?

A: NASD Rule 1140 requires the member to retain the signed Form U4 and make it available promptly upon regulatory request.

22/ Millennium was being investigated for other recordkeeping and reporting violations at this time.

23/ Herman & MacLean v. Huddleston, 459 U.S. 375, 390 and n.30 (1983) (declining to depart from preponderance of the evidence standard in civil actions and noting sufficiency of circumstantial evidence, particularly in fraud cases).

24/ See Donald M. Bickerstaff, 52 S.E.C. 232, 238 (1995) (finding witness’s testimony to be persuasive even though it was “circumstantial”).

were highly likely to have been provided by Berger, and the revisions made were, as NASD found, “expressed in first person language, demonstrating that Berger supplied all such information and statements himself.” For example, the Initial Form U4 contains an initial DRP disclosing a November 1, 2001 judgment against Berger, information that was not previously available in CRD. Berger almost certainly supplied this data, as it is unlikely that Millennium personnel would have possessed such information. Similarly, the responses to the deficiency notices in the form of additional DRPs and amendments to an existing DRP contained information that would have been inaccessible to Millennium personnel. We note, moreover, that the DRPs contain first person language such as “I was not employed at the firm at the time of the complaint” and “I was named as the chief compliance officer for failure to supervise.” 25/

This conclusion is augmented by Ranni’s hearing testimony regarding the registration process. The Hearing Panel found that Ranni “testified credibly” that he likely followed his “usual business practice” of e-mailing to Berger a link to the CRD website, which prompted Berger to review his draft Form U4 and release it to the Firm when the form had been completed. The Hearing Panel also credited Ranni’s “description of his customary procedure for submitting a Form U4,” based on his “demeanor, the consistency of his testimony, and the lack of any motive to testify less than fully and truthfully.” 26/

Berger claims that, to the extent that Ranni was “credible,” it was about his standard practices, not Berger’s application specifically. Berger argues that Ranni’s testimony about his normal business practices therefore is irrelevant. As Berger states, Ranni admitted that he never

25/ Berger states that, when he telephoned CRD shortly before the hearing to determine his status, he was informed by a telephone representative that the two-year window on his association had closed in April 2003. While the Hearing Panel excluded the recording of this telephone call, it permitted Berger to testify about the conversation at the hearing. Berger does not seek to adduce the recording into evidence before us.

In any event, Berger’s hearsay evidence regarding what the CRD telephone representative told him is not dispositive. The telephone representative’s statement that Berger’s two-year “window” had closed is correct as far as it goes. If Berger sought registration after April 2003, he would have had to take the relevant licensing examinations. Berger’s conversation with the telephone representative does not, however, go to the issue of whether he applied unsuccessfully for registration.

26/ The credibility determination of an initial fact finder is entitled to considerable weight and deference because it is based on hearing the witnesses’ testimony and observing their demeanor. See Rita J. McConville, Exchange Act Rel. No. 51950 (June 30, 2005), 85 SEC Docket 3127, 3136 n.21, reh’g denied, 2007 U.S. App. LEXIS 926 (7th Cir. 2007), petition denied, 465 F.3d 780 (7th Cir. 2006); Daniel Joseph Alderman, 52 S.E.C. 366, 368 n.6 (1995), aff’d, 104 F.3d 285 (9th Cir. 1997); Jonathan Garrett Ornstein, 51 S.E.C. 135, 137 (1992).

spoke to Berger and never met him until the day of the hearing. Ranni assumed instead that he received responses from Berger, but has no specific memory of any dealings with Berger. Ranni also admitted that it was a superior at Millennium, and not Berger, who directed him to initiate the registration process for Berger. Ranni did not produce any e-mails showing that the Forms U4 were sent to Berger or to anybody else for review and completion, nor did he recall sending a draft form U4 to Berger to complete.

We have relied previously on standard business practices where a witness did not recall specific details. 27/ Here, Ranni testified that it was his practice to obtain the applicant's Social Security number, name, and other personal information in order to access the applicant's historical information on CRD. Ranni's account is consistent with Berger's testimony concerning the personal information that Berger provided to Millennium and with the information provided to Berger by CRD's telephone representative. Moreover, the Hearing Panel found specifically that "Ranni credibly testified that he did not update DRPs." Instead, Ranni sent the DRPs to the applicant to update. As discussed above, the First Amended Form U4 contained detailed changes, in the form of an amendment to an existing DRP page and the addition of two DRPs, largely expressed in the first person singular, with a level of detail suggesting that whoever made those changes was intimately familiar with Berger's disciplinary history. 28/ Nothing in the record suggests that Berger communicated any DRP information to Millennium personnel, nor does Berger assert that he shared such information with them. 29/

27/ See Micah C. Douglas, 52 S.E.C. 1055, 1057 (1996) (relying on business practice and standard firm procedure where witness did not have specific recollection regarding the matter at issue).

28/ Berger notes that the various Forms U4 contained errors such as incorrect addresses for his previous places of residence and business. The presence of such errors, asserts Berger, suggests that he never saw, much less executed, the Forms U4. We reject this argument. The errors in the addresses were de minimis: an old residential address was listed as a current address, while a former work address was listed as a residential address.

29/ For this reason, we reject Berger's claim that Esposito or "anyone" could have typed his name on the Forms U4.

The evidence describes an applicant so actively engaged in the registration process that he not only supplied information for the preparation of an initial Form U4, but also responded promptly to CRD requests for further information that resulted in the filing of two amended Forms U4. 30/ We find, therefore, that NASD had jurisdiction over Berger during the relevant period.

Having established that NASD had jurisdiction over Berger during the relevant period, we find that Berger violated NASD Rules 8210 and 2110 when he failed to appear at the two OTRs. Berger asserts that his failure to appear at the first OTR was “inadvertent – *i.e.*, neither intentional nor reckless, and no worse than excusably negligent.” We note that Berger did not respond in any manner to that OTR request until the day of the scheduled OTR, and then only after the time for the scheduled OTR had elapsed. The timing of that response demonstrates that Berger was aware of the date of the scheduled OTR and that a response was required. We also note that, even after NASD accommodated Berger by scheduling a second OTR after consultation with Berger’s new counsel, Berger failed to appear. 31/ While Berger’s failure to appear at the first OTR may have been inadvertent, his failure to appear at the second OTR was, under the circumstances, inexcusable.

IV.

Berger contends that he should have the ability to challenge NASD’s jurisdiction without first appearing at an OTR, and that he should be entitled to do this without the risk that NASD will find that he refused to provide the information and bar him from association. Berger argues that, in order to meet Exchange Act requirements of fundamental fairness, NASD must provide an avenue to challenge jurisdiction before the OTR date (akin to a motion to quash a subpoena in federal court). 32/ He asserts that every state, the federal courts, and the New York Stock

30/ In the alternative, Berger argues that even if he had signed the Form U4, he would not have been subject to NASD’s jurisdiction because it was investigating Millennium’s margin practices and not his conduct in connection with the completion of the application for registration. We disagree with Berger’s selective interpretation of the scope of NASD’s jurisdiction and remind him that NASD sought his testimony in connection with its investigation of Millennium.

31/ See Toni Valentino, Exchange Act Rel. No. 49255 (Feb. 13, 2004), 82 SEC Docket 711, 717 (noting that NASD made every effort to accommodate respondent by rescheduling the OTR on three occasions and by agreeing to date recommended by respondent’s counsel).

32/ NASD suggests that Berger has waived his fairness argument because he did not raise the issue before the NAC. Nonetheless, we consider Berger’s argument under our obligation of *de novo* review. See Schellenbach v. SEC, 989 F.2d 907, 909 (7th Cir. 1993) (noting our obligation to conduct an “independent review of facts and law”).

Exchange (“NYSE”) permit jurisdictional challenges without punishment. In support of his argument, Berger cites the Federal Rules of Civil Procedure and Exchange Act Section 21(c). 33/

NASD counters that the Federal Rules of Civil Procedure do not apply to NASD procedures. NASD also points out that the Commission’s Rules Relating to Investigations do not afford any procedure for challenging Commission requests for compelled investigative testimony. NASD notes that “[t]echnically,” Exchange Act Section 21(c), which authorizes the Commission to enforce its subpoenas in district court in the event of “contumacy by, or refusal to obey” a Commission subpoena, does not provide a procedure by which the recipient of a Commission subpoena may affirmatively challenge the subpoena. 34/ Rather, NASD argues, Exchange Act Section 21(c) is a means by which the Commission may enforce a subpoena. Exchange Act Section 21(c) provides that the failure to abide by a legitimate subpoena is a misdemeanor. 35/

We believe that NASD is correct. Unlike the NYSE, NASD does not have a mechanism for resolving questions of jurisdiction prior to the time of a respondent’s scheduled appearance at an OTR. 36/ NASD followed its rules in this proceeding. Its procedures were in accordance

33/ 15 U.S.C. § 78u(c).

34/ Generally, courts have held that a recipient of a Commission administrative subpoena is not permitted to challenge the subpoena in court before the Commission commences a subpoena enforcement action and instead must wait for the enforcement action. Bird v. SEC, 1980 U.S. Dist. LEXIS 11799, at *4 nn.5 and 7 (D.P.R. May 19, 1980) (noting that the Commission’s “administrative subpoenas are not self-executing,” that Commission rules “do not provide a procedure by which recipients of an administrative subpoena can move to quash it,” and that “any person who is subpoenaed may refuse to comply for just cause and await the Commission’s institution of a subpoena enforcement action. At that time, he has the right to contest the enforcement of the subpoena”). Some authority to the contrary exists. See, e.g., Ayers v. SEC, 482 F. Supp. 747 (D. Montana 1980) (finding that court had jurisdiction to stay Commission investigation pending evidentiary hearing in action by plaintiffs to enjoin investigation or quash subpoenas issued by Commission, prior to subpoena enforcement action, where plaintiffs alleged “irreparable harm” as a result of, among other things, Commission investigators implying to third parties that plaintiffs were guilty of fraud and wrongdoing).

35/ 15 U.S.C. § 78u(c).

36/ We disagree that the NYSE Hearing Panel Decisions which Berger cites in support of his conditional sanction argument are “directly analogous” to this proceeding. In fact, those NYSE decisions are not a proper basis for comparison and, moreover, would similarly have no precedential effect in a Commission review proceeding of NYSE disciplinary
(continued...)

with the “fair procedure[s]” contemplated by Exchange Act Section 15A(b)(8). 37/ We have held, as we did in Jay Alan Ochanpaugh, that subjecting oneself to NASD’s disciplinary process and relying on NASD’s procedures is the appropriate route to challenge NASD jurisdiction. 38/

In the alternative, Berger urges that NASD be required to make its sanctions conditional, giving Berger an opportunity to testify in the event that the jurisdictional challenge is resolved against him and it is determined that he was in fact subject to NASD jurisdiction at the time of the OTR request, a practice employed by the NYSE. Berger asserts that, throughout the proceedings below, he assumed that (as his attorney argued), should any sanction be assessed against him, it would be conditional. NASD’s procedures are no less “fair procedure[s]” under the Exchange Act even though the NYSE has different procedures. The fact that the NYSE permits persons from whom it seeks information to lift their bars by testifying does not compel the conclusion that NASD’s practice is unfair. Moreover, we have recognized the importance of NASD’s need for timely information. 39/

36/ (...continued)
action.

37/ 15 U.S.C. § 78o-3(b)(8).

38/ See Jay Alan Ochanpaugh, Exchange Act Rel. No. 54363 (Aug. 25, 2006), 88 SEC Docket 2653, 2662 (explaining that “the only recourse against possible overreaching by NASD is for the person to whom the [Rule 8210] request is directed to refuse to comply, and to appeal any consequent disciplinary action to the Commission”). See also Allen Douglas Secs., Inc., Exchange Act Rel. No. 50513 (Oct. 12, 2004), 83 SEC Docket 3570, 3579-80 (observing that if member firm had subjected itself deliberately to NASD disciplinary sanction by engaging in the conduct warned against in an NASD staff interpretative letter to the firm, NASD’s disciplinary action would have been reviewable by the Commission).

39/ See, e.g., PAZ Secs., Inc., Exchange Act Rel. No. 52693 (Oct. 28, 2005), 86 SEC Docket 1880, 1889 (stating that “[w]hen members and associated persons delay their responses to requests for information, they impede the ability of NASD to conduct its investigations fully and expeditiously”), appeal filed, No. 05-1467 (D.C. Cir.).

We may cancel, reduce, or require remission of a sanction imposed by NASD if we find, having due regard for the public interest and the protection of investors, that NASD's sanction is excessive or oppressive or imposes an unnecessary burden on competition. 40/ We make no such finding here.

NASD Sanction Guidelines provide that a bar is the standard sanction for an NASD Procedural Rule 8210 violation where an individual fails to respond in "any" manner; where mitigation exists, or where the individual did not respond in a timely manner, the recommended sanction is a two-year suspension. 41/ Berger contends that NASD erred in rejecting his reliance-on-advice-of-counsel defense as a mitigating factor. Berger states that, while we have held repeatedly that reliance on counsel's advice does not excuse an associated person's obligation to testify or cooperate with NASD investigations, 42/ our precedent "cannot possibly apply when the advice pertains to jurisdiction." Berger argues that, at the very least, his reliance on the advice of his counsel was a mitigating factor, and consequently, the sanction imposed against him should be a suspension of no more than two years. 43/

While we recognize that a valid claim of reliance upon counsel may have a mitigating effect on sanctions, we have held that, in order to establish such a defense, a respondent must show that he made complete disclosure to counsel, sought advice on the legality of the intended conduct, received advice that the intended conduct was legal, and relied in good faith on counsel's advice. 44/ We find no such showing here. Berger does not claim that his counsel

40/ See Exchange Act Section 19(e)(2), 15 U.S.C. § 78s(e)(2). Berger does not claim, nor does the record show, that NASD's sanctions impose an unnecessary or inappropriate burden on competition.

41/ NASD Sanction Guidelines (2001 ed.) at 39. See also Ficken, 89 SEC Docket at 696 n.38; Hershberg, 87 SEC Docket at 498.

42/ Valentino, 82 SEC Docket at 718 and n.10. See also Joseph G. Chiulli, 54 S.E.C. 515, 524 (2000) (finding reliance on counsel no excuse from obligation to supply information to NASD); Sundra Escott-Russell, 54 S.E.C. 867, 874-75 (2000) (finding that respondent was not relieved from obligation to respond to NASD's requests by her lawyer's advice). Berger attempts to distinguish Valentino on the ground that her noncompliance was not based on jurisdiction, but on an unrelated issue. We reject this contrast; there are many reasons for noncompliance, and Berger's excuse is no more compelling than Valentino's.

43/ Berger claims that his reliance on the advice of counsel was reasonable because he knew that he did not sign and submit a Form U4.

44/ See, e.g., Valentino, 82 SEC Docket at 718 n.11 (citing SEC v. Savoy Indus. Inc., 665

advised him that noncompliance with an NASD request for information while contesting jurisdiction was legal. Moreover, Berger does not assert that his “inadvertent” failure to comply with the first OTR was based on reliance on the advice of counsel.

Berger’s failure to appear at two OTRs is particularly troubling in light of the importance of NASD Procedural Rule 8210. Compliance with NASD’s rules requiring cooperation in investigations is imperative if NASD is to perform its self-regulatory functions effectively. As we have stated previously, “NASD should not have to bring disciplinary proceedings, as it was required to do here, in order to obtain compliance with its rules governing its investigations.” 45/ Accordingly, we find that the standard sanction of a bar is warranted.

An appropriate order will issue. 46/

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

Nancy M. Morris
Secretary

44/ (...continued)
F.2d 1310, 1314 n.28 (D.C. Cir. 1981)); Hal S. Herman, 55 S.E.C. 395, 403 (2001)
(enumerating the same factors).

45/ Valentino, 82 SEC Docket at 719.

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 55706 / May 4, 2007

Admin. Proc. File No. 3-12393

In the Matter of the Application of

HOWARD BRETT BERGER

c/o Andrew T. Solomon, Esq.
Sullivan & Worcester LLP
1290 Avenue of the Americas
New York, New York 10104

For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES
ASSOCIATION

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

ORDERED that the disciplinary action taken by NASD against Howard Brett Berger, and
NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Nancy M. Morris
Secretary