

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 59325 / January 30, 2009

Admin. Proc. File No. 3-12994

In the Matter of the Application of
CMG INSTITUTIONAL TRADING, LLC
and
SHAWN D. BALDWIN
c/o Nicole C. Patton, Esq.
The Law Offices of Nicole C. Patton
P.O. Box 934
Matteson, IL 60443

For Review of Disciplinary Action Taken by
NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDINGS

Violation of Conduct Rules

Failure to Provide Requested Information

Member of registered securities association and its president failed to provide complete and timely responses to requests for information. Held, association's findings of violation and sanction imposed are sustained.

APPEARANCES:

Nicole C. Patton, of the Law Offices of Nicole C. Patton, for CMG Institutional Trading, LLC, and Shawn D. Baldwin.

Marc Menchel, Alan Lawhead, and Andrew J. Love, for Financial Industry Regulatory Authority, Inc.

Appeal filed: March 19, 2008
Last brief received: June 23, 2008

I.

CMG Institutional Trading, LLC (“CMG”), a former NASD member firm, 1/ and Shawn D. Baldwin (collectively, the “Applicants”), the firm’s president and chief executive officer, seek review of NASD disciplinary action. 2/ NASD found that Applicants violated NASD Procedural Rule 8210 and Conduct Rule 2110 by failing to respond completely to NASD requests for information. 3/ NASD suspended Applicants for two years and fined them \$25,000 jointly and severally. We base our findings on an independent review of the record.

II.

A. Commission Inquiries

At all relevant times, CMG operated as a \$5,000 introducing broker-dealer. 4/ In September 2005, Commission staff informed Baldwin that CMG had insufficient net capital under Rule 15c3-1 of the Securities Exchange Act of 1934 (the “Net Capital Rule”), by an estimated \$44,025. 5/ In response, Baldwin promised to contribute \$75,000 to cure the alleged net capital deficiency. In a letter dated October 13, 2005, Commission staff notified Baldwin that

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- 1/ On April 2, 2008, CMG’s membership with NASD was canceled for failure to pay membership fees.
- 2/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD’s Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc. (“FINRA”), in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 72 FR 42,190 (Aug. 1, 2007) (SR-NASD-2007-053). Because the disciplinary action here was initiated before that date, we continue to use the designation NASD.
- 3/ FINRA recently revised and renumbered its Rules. See Exchange Act Rel. No. 58643 (Sept. 25, 2008), 73 FR 57,174 (Oct. 1, 2008). No substantive changes were made to either NASD Rule 8210 [new FINRA 8210] or NASD Rule 2110 [new FINRA Rule 2010] that are at issue here, discussed infra at III.
- 4/ “An introducing broker deals directly with the public and originates customer accounts.” Paul Joseph Benz, Exchange Act Rel. No. 57046 (Jan. 14, 2005), 84 SEC Docket 2631, 2632 n.6 (citation omitted).
- 5/ 17 C.F.R. § 240.15c3-1 (requiring broker-dealers to maintain minimum levels of liquid assets, or net capital, at all times). Broker-dealers that never receive or hold customer funds or securities, or owe any customer funds or securities, may operate under a \$5,000 net capital requirement. 17 C.F.R. § 240.15c3-1(a)(4)(vi).

they had not received confirmation of the promised deposit and asked Baldwin to provide “a deposit ticket or bank statement” and confirm that “any funds so contributed [were] . . . permanent capital of the firm.” 6/

Beginning about October 17, 2005, CMG represented to Commission staff that the firm had received a \$3 million contribution to CMG’s net capital, an amount the staff found “unusually large . . . for a \$5K broker-dealer.” CMG listed on its balance sheet a \$3 million asset “due from” FX Trading LLC (“FX Trading”), a foreign exchange dealer registered with the National Futures Association (“NFA”) and the Commodity Futures Trading Commission (“CFTC”). CMG produced a corporate resolution designating the \$3 million as permanent capital of the firm and a proprietary account of introducing broker agreement (or “PAIB Agreement”) with FX Trading, which stated that CMG’s assets in its FX Trading account would be used to meet CMG’s net capital requirements.

At a meeting on October 20, 2005, Baldwin gave Commission staff a printout of an “account snapshot” from FX Trading’s Web site showing \$3 million in a CMG account at FX Trading identified as “Acct. ID: 140.” Baldwin stated that the \$3 million originated from his own funds. However, Commission staff was concerned that the account snapshot “appeared altered”: the digits “didn’t line up”; “it looked like they had an excessive digit in the 3 million equity figure”; and Chicago was misspelled in CMG’s address. The staff also noted that the snapshot covered one day, October 5 to October 6, not the entire month, as requested; and the Internet identification located in the snapshot’s footer differed from the Internet identification on other documents the staff obtained from FX Trading’s Web site. The staff determined that there was insufficient evidence that the \$3 million existed or that it was permanent capital of CMG.

On November 18, 2005, after Commission staff was unable to contact FX Trading to verify the existence of and balance in CMG’s account, they sent Baldwin a second letter requesting that he substantiate the \$3 million contribution by “a deposit ticket and bank statement.” The letter stated that the staff had made several attempts to reach Baldwin, but Baldwin had not returned their phone calls. Commission staff also notified NFA about their difficulties contacting FX Trading. NFA suspended FX Trading’s membership on November 21, 2005. 7/ On December 8, 2005, the United States District Court for the District of New Jersey ordered FX Trading’s assets frozen at the CFTC’s request. 8/

6/ See Net Capital Rule, Exchange Act Rel. No. 28927 (Feb. 28, 1991), 48 SEC Docket 493, 496 (emphasizing that “net capital . . . should be permanent capital and not merely a temporary infusion of funds from an affiliate or other sources”).

7/ FX Trading, LLC, NFA Case No. 05-MRA-022 (Nov. 21, 2005).

8/ CFTC v. FX Trading, LLC, Civil Action No. 5-5-722 (JLL), 2005 U.S. Dist. LEXIS 40855 (D.N.J. Dec. 8, 2005).

B. NASD's 8210 Requests

NASD staff reviewed the documents Baldwin submitted to the Commission staff and had similar concerns with respect to Baldwin's claim that \$3 million was properly included in CMG's permanent capital. On November 29, 2005, NASD sent Applicants a written request, pursuant to NASD Rule 8210, requiring them to provide:

1. Copies of bank statements or account statements evidencing the source of funds for the \$3 million balance held at FX Trading in the name of [CMG]. The statements requested should encompass the period July through October 2005.
2. Copies of all statements for [CMG's] account 140 [at FX Trading] . . . for the period July through October 2005.
3. Copies of all agreements, resolutions, minutes, etc., characterizing the funds as a loan or contribution to [CMG].

NASD required a response by December 7, 2005, stating that "[f]ailure to respond to th[e] request with the documentation or information requested may result in a disciplinary action."

NASD did not receive a response by the deadline. On December 7, it ordered CMG to cease conducting its securities business for failure to "verif[y] purported capital infusions . . . demonstrat[ing] it is currently in net capital compliance."

The following day, NASD staff made an unannounced visit to CMG's office, hand-delivering a second written request for information with respect to the \$3 million contribution. Kila Weaver, a registered principal of CMG, told NASD staff that Baldwin was out of town and that she was not authorized to access the requested documents because they were locked in Baldwin's office. Weaver told NASD staff she would speak with Baldwin and fax the documents to them later in the day. Also on that day, Phillip Harris, an NASD supervisor of examiners, sent a facsimile to Weaver stating that NASD's initial "[Rule] 8210 request remain[ed] in effect" and that "if an extension is needed to provide a complete response, contact to [sic] me to arrange a reasonable production date." NASD did not receive any documents that day.

C. Applicants' Response to NASD's 8210 Requests

Within a short period, Baldwin left a total of eight voice mail messages with Harris and another member of NASD's examination staff. In the messages, Baldwin voiced frustration with NASD's inquiry into CMG's compliance with the net capital requirements, NASD's inquiry into the source of \$3 million capital contribution, and NASD's suspension of CMG's broker-dealer operations. With respect to the \$3 million capital contribution, Baldwin stated in one message:

[T]he \$3 million came from an account from me. That's at FX. Prior to . . . that is, quite frankly, none of your business. It came from another account from me, but I'm not going to share that with you because I don't think you've been the most scrupulous of people. So I'll send you the account information that I have at FX, and I will send you the account information for [CMG] and you'll see that it comes from the Shawn Baldwin account to CMG.

In a letter to NASD dated December 13, 2005, Baldwin represented that CMG had “complied completed [sic] with every request” and had “demonstrated [CMG] exceed[ed its] net capital requirement.” Baldwin stated: “We have established that the \$3 million capital contribution made by me on October 6 to CMG . . . [was] immaterial to the firm's compliance with the net capital rule,” and that CMG had “submitted all supporting documents for [the] net capital computation including bank statements, check detail, commission reports, escrow account statements, etc.” Baldwin attached no documents to the December 13 letter, gave no further explanation of the source of the \$3 million capital contribution or why he believed it was now immaterial, and concluded in the letter that “[i]f there are no further requests, I require that you give us written confirmation and contact our clearing firm to confirm that we are in net capital compliance and are free to conduct securities business.”

On December 15, 2005, Baldwin and his attorneys met with Commission and NASD staff to discuss the status of the \$3 million capital contribution and of CMG's FX Trading account. During the meeting, Baldwin represented for the first time that the \$3 million contribution came from an unidentified “foundation,” which he refused to name, asserting it was confidential. Baldwin explained that FX Trading account documents were unavailable and that he would have the documents delivered at a later date. Baldwin also informed Commission and NASD staff that CMG had removed an earlier deposit of \$100,000 from its net capital account based on concerns from Commission staff that those funds also lacked documentation.

On December 21, 2005, CMG, through its attorneys, sent Commission staff a memorandum regarding CMG's net capital and the \$3 million. CMG attached to the December 21 memorandum: (1) a demand note for \$3 million payable to Amaranth Holdings (the foundation Baldwin previously refused to name) from Capital Management Group Securities, Inc. (“CMG Securities”), a separate entity from CMG; ^{9/} (2) a written guaranty signed by Baldwin, in his capacity as chief executive officer (“CEO”) and president of CMG Securities, guaranteeing repayment of the loan from Amaranth Holdings; and (3) the identical one-page account snapshot from FX Trading's Web site that Baldwin provided the Commission staff in October 2005. The memorandum stated that Baldwin had been unsuccessful in obtaining “additional information from Amaranth Holdings regarding the transfer of the \$3,000,000 from Amaranth Holdings ultimately to CMG's account at FX Trading.” The memorandum stated that “it appears that FX Trading has suspended CMG's access to its online account. As such, CMG has been unable to access its online account information” to demonstrate the balance in the FX Trading account.

^{9/} CMG Securities is not an NASD member.

CMG did not send the memorandum and the attached documents to NASD, but Commission staff forwarded a copy to NASD.

C. NASD Proceedings

On April 17, 2006, NASD brought disciplinary action against CMG and Baldwin for their failure to provide information to NASD staff. In testimony before NASD's Hearing Panel, Baldwin admitted that Applicants never provided documents responsive to the first two items listed in NASD's November 29 letter:

Q: [I]t says the request . . . [is] asking you to provide copies of the bank statements evidencing the source for the \$3 million balance held at FX Trading in the name of CMG Institutional Trading, LLC, and that the statements requested should encompass the period July through October, 2005. . . . Were any of those statements provided, sir?

A [Baldwin]: No, they were not.

Q: It also asks for copies of all statements for account 140 referenced for the same period Did you provide any copies of those statements?

A [Baldwin]: No, we did not.

Baldwin explained he was unable to obtain the account statements from FX Trading because FX Trading "never mailed [him] a statement [and] no one answered their phone." Baldwin testified that he was unsure whether he or CMG's attorneys notified NASD of this problem at the time of its information request.

Contrary to his first assertion to NASD that the \$3 million came from his funds, Baldwin initially testified that Amaranth Holdings loaned the money to CMG Securities. In turn, CMG Securities deposited the funds into Baldwin's personal FX Trading account and Baldwin then transferred those funds to CMG's FX Trading account. However, later, in response to questions from the Hearing Panel, Baldwin testified that he never had a personal account at FX Trading and that CMG Securities transferred the money directly to CMG. Baldwin also suggested that FX Trading, not Amaranth Holdings, made the loan to CMG Securities. 10/

Baldwin also testified that CMG "oftentimes get[s] suspended for being out of net capital compliance" For example, NASD discovered a net capital deficiency during an on-site examination of CMG in July 2005.

10/ Although the relationship between Amaranth Holdings and FX Trading was not established, it appears from the record they had at least one principal in common.

The Hearing Panel found that Applicants violated NASD Rules 8210 and 2110 by failing to respond to NASD's requests for information with respect to the source and status of the claimed \$3 million capital contribution. The Hearing Panel expelled CMG from NASD membership and barred Baldwin from associating with any member firm. On appeal, the National Adjudicatory Council ("NAC") reduced the sanctions from bars to suspensions for two years because it found that Baldwin provided some information at the December 15 meeting and additional information a week later. The NAC also found that Baldwin "generally informed [NASD] that he was having difficulty obtaining documents." 11/

III.

Pursuant to Section 19(e)(1) of the Securities Exchange Act of 1934, we will sustain NASD's disciplinary action if the record shows that Applicants engaged in the violative conduct that NASD found and that NASD applied its rules in a manner consistent with the purposes of the Exchange Act. 12/ Based on our *de novo* review of the record, we find that a preponderance of the evidence supports NASD's finding of violations against Applicants.

NASD Rule 8210 requires member firms and their associated persons to provide information to NASD in the course of an investigation. 13/ We have stressed the importance of Rule 8210 in connection with NASD's "obligation to police the activities of its members and associated persons." 14/ Without subpoena power, NASD must rely on Rule 8210 to obtain information from its members necessary to carry out its investigations and fulfill its regulatory mandate. 15/ Member firms and associated persons violate Rule 8210 when they fail to provide full and prompt cooperation to NASD in response to an NASD request for information. 16/

11/ The NAC affirmed the Hearing Panel's dismissal of a separate charge under NASD Rule 8210 that Applicants failed to respond to NASD information requests in connection with NASD's exit conference following its on-site examination in July 2005.

12/ 15 U.S.C. § 78s(e)(1).

13/ NASD Procedural Rule 8210(a), NASD Manual at 7211 (2003 ed.).

14/ PAZ Sec., Inc., Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5127 (internal quotations omitted), appeal filed, No. 08-1188 (D.C. Cir. May 13, 2008).

15/ Perpetual Sec, Inc, Exchange Act Rel. No. 56613, 91 SEC Docket 2489, 2502-03 (quoting Rooney A. Sahai, Exchange Act Rel. No. 51549 (Apr. 15, 2005), 85 SEC Docket 862, 873 n.24) (internal quotations omitted).

16/ Ashton Noshir Gowadia, 53 S.E.C. 786, 793 (1998); see also Brian L. Gibbons, 52 S.E.C. 791, 794 (1996), aff'd, 112 F.3d 516 (9th Cir. 1997) (Table).

The Net Capital Rule serves as “the principal regulatory tool by which the Commission and [the self-regulatory organizations] monitor the financial health of brokerage firms and protect customers from the risks involved in leaving their cash and securities with broker-dealers.” ^{17/} Baldwin testified that CMG had on other occasions been suspended for net capital deficiencies. On November 29, 2005, NASD requested that Applicants verify both the amount and source of a capital contribution purportedly made to cure CMG’s net capital deficiency. ^{18/} The November 29 letter sought bank and account statements from July through October 2005 evidencing the source of the purported \$3 million capital contribution, and monthly statements for CMG’s “account 140” at FX Trading from July through October 2005. Baldwin admitted at hearing that Applicants never provided NASD with materials responsive to these requests.

Nonetheless, Applicants assert that they “fully and exhaustively complied” with NASD’s inquiries “by December 21, 2005.” Applicants cite three pieces of correspondence: a December 8 letter from Weaver requesting “clarification of the documentation that [NASD] was seeking”; a December 9 transmittal letter from Weaver “regarding whether the firm was in net capital compliance” and seeking an extension to NASD’s request; ^{19/} and a December 12 letter from Baldwin regarding a separate \$50,000 capital contribution to CMG. None of these documents were admitted before the Hearing Panel or the NAC. Applicants have not sought to admit the documents before us. ^{20/} Even if we determined to admit these letters, we would attach little weight. Both the December 9 and December 12 letters are unsigned, and Weaver, who purportedly authored two of the letters, did not testify before the Hearing Panel. Moreover, none of these letters provides the missing statements evidencing the source of the claimed \$3 million in funds or monthly account statements for the FX Trading account.

In their briefs, Applicants also claim to have “hand-delivered notarized documentation” at the December 15 meeting showing the “loan process for the \$3,000,000; sources of capital; and

^{17/} Touche Ross & Co. v. Redington, 442 U.S. 560, 570 (1979).

^{18/} NASD found that the staff received CMG’s corporate resolution from October 6, 2005, as evidence that the funds were a capital contribution.

^{19/} The December 9 letter purports to transmit CMG’s net capital computations for October and November and the resolution confirming the capital contribution. None of the attachments are included in Applicants’ submission. As noted above, NASD found that Applicants provided the corporate resolution.

^{20/} See 17 C.F.R. § 201.460(c) (providing that documents not admitted at hearing “shall not be considered a part of the record before the Commission”). We may admit additional evidence on a party’s motion pursuant to Rule of Practice 452, but the movant “must show with particularity that the evidence is material and that there were reasonable grounds for the failure to adduce such evidence previously.” 17 C.F.R. § 201.452. Applicants have not made such a motion.

entities involved in the transaction.” Again, the documents that Applicants cite were not admitted in the NASD proceeding. Both documents are dated December 15, 2005, and represent that the \$3 million originated from Baldwin’s personal account at FX Trading. This assertion is inconsistent with both Baldwin’s statement at the December 15 meeting that the funds came from an unnamed “foundation” and his subsequent hearing testimony. 21/

At the hearing, Baldwin provided additional details about the \$3 million capital contribution, including the movement of the funds to CMG’s account at FX Trading and the problems he experienced in obtaining the materials requested. However, even at this stage, Baldwin’s response was incomplete and inconsistent. The NAC found his hearing testimony “raised even more questions,” and that had he responded this way in a timely manner, NASD “would have likely sought additional information.” In any event, we have emphasized repeatedly that NASD should not have to initiate a disciplinary action to elicit a response to its information requests made pursuant to Rule 8210. 22/

Although Applicants claim full compliance, their actions exhibited an unwillingness to respond fully to NASD. Applicants never provided statements for the period requested. In Baldwin’s voice mail messages to Harris on or around December 7, Baldwin stated bluntly that the information requested was “none of your business” and that “I’m not going to share that with you because I don’t believe you’ve been the most scrupulous of people.” Applicants’ December 13 letter to NASD provided no documents and declared that the information NASD requested was “immaterial to the firm’s compliance with the net capital rule.” However, NASD member firms and their associated persons “may not ignore NASD inquiries; nor take it upon themselves to determine whether information is material to an NASD investigation of their conduct.” 23/ Rather, a member firm and its associated persons have an obligation to respond to NASD’s requests fully and promptly. 24/

21/ At various times in their briefs, Applicants obliquely refer to a January 4, 2006, memorandum from CMG to the Commission as responsive to NASD’s requests. While the January 4 memorandum appears to contain some additional FX Trading account information not provided earlier, none of the materials satisfies NASD’s request for “statements for the period July through October 2005.” It is unclear when NASD received this memorandum.

22/ E.g., Toni Valentino, 57 S.E.C. 330, 339 & n.14 (2004) (citing Robert A. Quiel, 53 S.E.C. 165, 168 (1997)).

23/ Gen. Bond & Share Co. v. SEC, 39 F.3d 1451, 1461 (10th Cir. 1994) (affirming Commission’s finding that member violated predecessor rule to NASD Rule 8210).

24/ Charles C. Fawcett, IV, Exchange Act Rel. No. 56770 (Nov. 8, 2007), 91 SEC Docket 3147, 3158 & n.33 (citing Joseph G. Chiulli, 54 S.E.C. 515, 524 (2000) (stating that, by
(continued...))

Applicants assert that, between November 29 and December 15, Baldwin “repeatedly informed” NASD that “he was attempting to get the documents from FX Trading.” However, the record reflects that Baldwin first informed NASD that FX Trading documents were unavailable to him at the December 15 meeting. He gave no further details of his efforts to obtain the information or the problems he encountered, only that he would send documents to NASD later. In the December 21 memorandum, Applicants merely stated that they could not access their online account with FX Trading. The memorandum did not explain their efforts to obtain the requested information or why, as account holders, they did not possess hard copies of the statements. While Applicants provided various loan documents with the December 21 memorandum, they failed to explain how the proceeds from the loan came into CMG’s possession, as NASD had requested. 25/

We have held that an NASD member or an associated person has an obligation beyond a mere statement that the records are unavailable: “if such a person cannot readily provide the information sought by NASD, such a person ha[s] an obligation to explain, as completely as possible, his efforts, and his inability to do so.” 26/ The information NASD requested on November 29 was the same information Commission staff had sought at various times from Applicants since October 2005. If they did not have the information, Applicants had a responsibility to provide a detailed explanation of their efforts to date to obtain the information requested and the problems they encountered. Applicants cannot fulfill their obligation to provide information by giving cursory and untimely explanations about the unavailability of

24/ (...continued)

registering with NASD, applicant “agreed to abide by its rules which are unequivocal with respect to an associated person’s duty to cooperate with NASD investigations”).

25/ The record reflects that NASD was not the intended recipient of the December 21 memorandum; rather it was directed to Commission staff. Baldwin explained that CMG addressed Commission staff first because the firm was receiving multiple requests for information from both the Commission and NASD. The Commission and NASD are separate and distinct entities; Applicants’ obligation to provide the Commission with records upon its request, pursuant to Exchange Act Section 17(a)(1), 15 U.S.C. § 78q(a)(1), is independent of their obligation to respond to NASD’s requests made pursuant to NASD Rule 8210.

26/ Perpetual, 91 SEC Docket at 2504 (internal quotations omitted); see also Rooney A. Sahai, Exchange Act Rel. No. 55046 (Jan. 5, 2007), 89 SEC Docket 2402, 2407 (“[W]e would have expected . . . Sahai to [have] detail[ed] his efforts to obtain the information requested. Sahai stated only that he had searched his files and found no further documents.”); Quiel, 53 S.E.C. at 168 (“[E]ven if Quiel could not access readily the information that the NASD requested, we find he failed to explain the deficiencies in his responses or answer as completely as he was able.”).

documents. 27/ Applicants suggest that the court-ordered freezing of FX Trading’s assets on December 8 impacted the availability of the requested documents. Applicants, however, do not explain why they could not obtain the materials before the December 8 freeze order or how the freeze of assets prevented access to the records. If Applicants had a problem meeting the deadline set by NASD, they should have “raised, discussed, and resolved [it] with the NASD staff in the cooperative spirit and prompt manner contemplated by the Rules.” 28/

Applicants contend that loan documents for the \$3 million and the FX Trading records that NASD requested were not in their possession or control, relying on Jay Alan Ochanpaugh. 29/ They argue that the loans were made to Baldwin and CMG Securities, not to CMG, and that the FX Trading account belonged to CMG Securities. As an initial matter, Applicants’ argument that the FX Trading account in question was set up in CMG Securities’ name is inaccurate. NASD’s request sought statements from “account 140” at FX Trading, which, according to the account snapshot Baldwin provided, was held in CMG’s name. Moreover, unlike in Ochanpaugh, Baldwin failed to establish that he did not have access to and control over responsive documents in possession of CMG Securities since he was that firm’s CEO and president. Further, as an associated person of a member firm, Baldwin was required to provide NASD with any documents that belonged to him personally. 30/

Applicants assert that NASD abused its discretion in requesting information because neither NASD nor Commission staff “had any proof” that the FX Trading account snapshot “was altered or fake” or that the \$3 million “did not exist.” NASD Rule 8210(a) has no requirement that NASD explain its reasons for making the information request or justify its relevance. 31/ We

27/ Perpetual, 91 SEC Docket at 2504 & n.48 (citing Sahai, 85 SEC Docket at 872).

28/ Richard J. Rouse, 51 S.E.C. 581, 584 n.9 (1993).

29/ Exchange Act Rel. No. 54363 (Aug. 25, 2006), 88 SEC Docket 2653 (finding that associated person did not have control over documents sought by NASD pursuant to Rule 8210).

30/ NASD Rule 8210(a) (requiring associated persons to provide NASD with their “books, records, and accounts”). In Ochanpaugh, 88 SEC Docket at 2661, we further noted that “[t]here may be circumstances in which possession and control of documents . . . together with some other interest in the documents short of an ownership interest, may be sufficient [to extend Rule 8210 to documents that may belong to a third party] given the enforcement objectives of the NASD.”

31/ Morton Bruce Erenstein, Exchange Act Rel. No. 56768 (Nov. 8, 2007), 91 SEC Docket 3114, 3120 & n.10 (citing Sahai, 89 SEC Docket at 2406), petition denied, No. 07-15736 (11th Cir. 2008).

have held repeatedly that members and their associated persons may not “second guess” NASD’s requests for information or “set conditions on their compliance.” ^{32/} In any event, given CMG’s history of net capital deficiencies and apparent discrepancies in the account snapshot, NASD had ample reason to seek additional information. ^{33/}

Applicants claim that NASD examiners ignored evidence of a separate \$100,000 capital contribution that proved CMG was in compliance with its net capital requirements and that, in doing so, examiners exhibited “inherent bias against [] Baldwin.” Applicants are not charged with violating the Net Capital Rule. The relevant inquiry here is whether Applicants provided documents or information responsive to NASD’s requests at issue. With respect to Applicants’ charge that NASD’s actions were improperly motivated by an “inherent bias” against Baldwin, Applicants supplied no evidence to substantiate this claim and we find no support in the record. ^{34/}

Applicants argue that portions of the NAC’s decision further support a conclusion that they did not violate NASD Rules 8210 and 2110, stating that the NAC noted that NASD staff presented “confusing and contradictory” testimony and the NAC was “‘troubled’ by the testimony of the [NASD] staff and their ‘inability’ to recall when they were in receipt of the documents that may in fact have complied with their requests.” The portions of the NAC decision cited concern information requests that are no longer at issue. ^{35/} With respect to the requests at issue, there is ample evidence, including Baldwin’s testimony, that Applicants did not respond fully.

^{32/} E.g., Pearson, 89 SEC Docket at 1635; Hannan, 53 S.E.C. at 859.

^{33/} Applicants further assert that NASD has a “duty to support [its] members during their compliance activities” and that NASD failed this duty by providing Applicants with only a brief period of time, eight days, in which to respond to NASD’s information request. Applicants, however, “cannot shift their burden of compliance to NASD.” Hans N. Beerbaum, Exchange Act Rel. No. 55731 (May 9, 2007), 90 SEC 1863, 1871 n.22 (citing B.R. Stickle & Co., 51 S.E.C. 1022, 1025 (1994)).

^{34/} To the extent that Baldwin is making a claim of selective prosecution against NASD, he must establish that he was part of a protected class under the Equal Protection Clause, “that prosecutors acted with bad intent, [and] that similarly situated individuals outside the protected category were not prosecuted.” Fog Cutter Capital Group Inc. v. SEC, 474 F.3d 822, 826 (D.C. Cir. 2007) (internal punctuation omitted) (quoting United States v. Armstrong, 517 U.S. 456, 465 (1996)). Baldwin has not attempted to make such a showing.

^{35/} The portions of the NAC decision cited concern the second charge that the NAC dismissed and the receipt of the corporate resolution in response to the third category of information requested by NASD’s November 29 letter. See supra notes 11 and 18.

Accordingly, we find that Applicants violated NASD Rules 8210 and 2110 by failing to respond completely and in a timely manner to NASD's November 29 request for information. 36/

IV.

Pursuant to Exchange Act Section 19(e)(2), we sustain NASD's sanction unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition. 37/ Finding Applicants' misconduct to be serious violations of NASD rules, NASD suspended Applicants for two years and fined them jointly and severally \$25,000. We sustain NASD sanctions because they are neither excessive nor oppressive in light of Applicants' misconduct and they will serve the public interest and the protection of investors.

We observe that the sanctions imposed by NASD are consistent with NASD's Sanction Guidelines. 38/ The Sanction Guidelines provide, for violations of NASD Rules 2110 and 8210 involving failure to respond completely to an information request, that NASD should consider suspending an individual in any or all capacities, or the firm in any or all activities or functions, for up to two years and fining the individual or firm up to \$25,000. The Guideline provides two "Principal Considerations" when determining the appropriate sanction: (1) the nature of the information requested; and (2) whether the requested information has been provided and, if so, the number of requests made, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response. 39/ Application of these considerations suggests that Applicants should be sanctioned at the high end of the sanction recommendation.

The information NASD requested was important. The Net Capital Rule is a fundamental rule governing the operations of broker-dealers. The principle purposes of the rule "are to protect customers and other market participants from broker-dealer failures and to enable those firms that fall below the minimum net capital requirements to liquidate in an orderly fashion without the

36/ NASD Conduct Rule 2110 requires members and their associated persons to "observe high standards of commercial honor and just and equitable principles of trade." NASD Manual at 4111, 7211 (2003 ed.). A violation of NASD Rule 8210 is also a violation of NASD Rule 2110. Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999).

37/ 15 U.S.C. § 78s(e)(2). Applicants do not claim, nor does the record show, that NASD's action imposed an unnecessary or inappropriate burden on competition.

38/ Although the Commission is not bound by the Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). Perpetual, 91 SEC Docket at 2506 n.56 (stating that NASD promulgated the Sanction Guidelines in an effort to achieve greater consistency, uniformity, and fairness in its sanctions).

39/ NASD Sanction Guidelines at 35 (2006 ed.).

need for a formal proceeding or financial assistance from the Securities Investor Protection Corporation.” ^{40/} As we have held, “[e]nsuring compliance with the net capital rule is important to protect investors from the possible financial collapse of a firm.” ^{41/} While a \$5,000 introducing broker-dealer, such as CMG, is precluded under the Net Capital Rule from holding or receiving customer funds or securities, ^{42/} its collapse can nonetheless expose investors to pecuniary loss, including leaving its customers “unable to liquidate their securities positions [with the clearing firm] or open new positions until their accounts are transferred to another broker-dealer.” ^{43/}

Prior to NASD’s information request, Commission staff notified Applicants of their concern with the adequacy of CMG’s capitalization. In requesting that Applicants verify an unusual capital contribution in light of CMG’s net capital deficiency, NASD sought to protect investors from possible financial loss and potentially injurious conduct. Rather than promptly responding to NASD’s request, Applicants cooperated minimally in the weeks that followed, raising further concern that CMG was undercapitalized and that CMG might not be entitled to the \$3 million.

Applicants’ failure to meet the December 7 deadline required NASD to order CMG to cease doing business and to make additional requests for the information, which included an on-site visit by NASD staff. Applicants eventually gave incomplete and inconsistent answers, and they admit to never having provided information responsive to two categories of information at

^{40/} Fox & Co. Invs., Inc., Exchange Act Rel. No. 52697 (Oct. 28, 2005), 86 SEC Docket 1895, 1903 & n.20 (citing Lowell H. Listrom, 50 S.E.C. 883, 886 (1992), aff’d, 975 F.2d 866 (8th Cir. 1992) (Table)); see also Blaise D’Antoni & Assocs., Inc. v. SEC, 289 F.2d 276, 277 (5th Cir. 1961) (“By limiting the ratio of a broker’s indebtedness to his capital, the rule operates to assure confidence and safety to the investing public.”).

^{41/} PAZ, 93 SEC Docket at 5130.

^{42/} 17 C.F.R. § 240.15c3-1(a)(4)(vi).

^{43/} Net Capital Rule, Exchange Act Rel. No. 31512 (Nov. 24, 1992), 52 SEC Docket 4167, 4169-70 (explaining that clearing firms generally will not accept orders from the introducing firm’s customers). Introducing firms also have indirect access to customer funds and securities, and can direct the movement of such assets by placing orders with clearing firms. By requiring introducing firms to maintain specific levels of liquid assets, the Net Capital Rule helps ensure the financial integrity of introducing firms and thereby protects investors. Id.; see also Self-Regulatory Organizations; Cincinnati Stock Exchange Inc., Order Granting Approval to Proposed Rule Change Increasing Net Capital Requirements, Exchange Act Rel. No. 39245 (Oct. 16, 1997), 65 SEC Docket 2227, 2227 (noting that an introducing “firm with sufficient net capital may be less likely to attempt to convert” customer assets it controls at the clearing firm to its own benefit).

issue here. Applicants' failure to give complete and timely responses prevented NASD from fully and expeditiously determining the firm's financial stability and whether misconduct had occurred. 44/

Applicants argue that the sanctions imposed by the NAC are excessive, suggesting that their lack of disciplinary history is mitigating. While the existence of a disciplinary history may serve to enhance the sanction imposed, the "[l]ack of disciplinary history is not a mitigating factor." 45/ As we have repeatedly held, member firms and their associated persons "should not be rewarded for acting in accordance with [their] duties." 46/

Applicants also argue as mitigating that "no investors were harmed nor was there any crime or fraud perpetrated on the public." We have stated, however, that "a Rule 8210 violation will rarely, in itself, result in direct harm to a customer." 47/ The purpose of the rule is to give NASD, in the absence of subpoena power, the ability to detect misconduct among its members and associated persons in the interest of protecting investors and the integrity of the markets. Even if no separate disciplinary action results from NASD's underlying investigation, a failure to cooperate during that investigation threatens the self-regulatory system and, in turn, investors by impeding NASD's detection of violative conduct. 48/

Applicants assert further in mitigation that they had no "retail clients, only institutions and qualified institutional buyers." NASD Rule 8210 does not lessen one's obligation to cooperate with an investigation based on the type of client served, nor are sophisticated or institutional investors without the need for protection against potential financial instability. 49/

44/ See Mark Allen Elliot, 51 S.E.C. 1148, 1151 (1994) (stating that a failure to provide requested information fully and promptly "subverts NASD's ability to carry out its regulatory responsibilities"); John A. Malach, 51 S.E.C. 618, 621 (1993) (same).

45/ Rooms v. SEC, 444 F.3d 1208, 1214 (10th Cir. 2006); see also General Principle No. 2, NASD Sanction Guidelines at 2 (2006 ed.) (permitting consideration of relevant disciplinary history for imposing sanctions "beyond those outlined in the[] guidelines" but not recommending mitigation when there is an absence of disciplinary history).

46/ E.g., Philippe N. Keyes, Exchange Act Rel. No. 54723 (Nov. 8, 2006), 89 SEC Docket 792, 801 (citing Daniel D. Manoff, 55 S.E.C. 1155, 1165-66 & n.15 (2002) (collecting cases)).

47/ PAZ, 93 SEC Docket at 5129.

48/ Id.

49/ Cf., e.g., Dolphin and Bradbury, Inc., Exchange Act Rel. No. 54143 (July 13, 2006), 88 SEC Docket 1298, 1314 (stating that "the protection of the antifraud provisions of the

(continued...)

We find that the sanctions NASD imposed are appropriate in the public interest and are remedial. As NASD concluded in its sanction determination, Applicants' misconduct was serious because "it subverted [NASD]'s ability to carry out its self-regulatory functions, including its ability to protect investors by ensuring that member firms comply with net capital requirements." 50/ Applicants' untimely and incomplete responses to NASD's inquiry regarding the sufficiency of its net capital put investors at risk because NASD was unable to determine timely if CMG had adequate capital to protect investors from the possibility of the firm's failure. 51/ The sanctions NASD imposed will encourage Applicants, upon the lifting of their suspensions, as well as encourage others already in the industry, to respond to NASD information requests completely and in a timely manner. 52/

Accordingly, we find NASD's decision to suspend Applicants in all capacities for two years and impose a \$25,000 joint-and-several fine neither "excessive or oppressive" within the meaning of Exchange Act Section 19(e).

An appropriate order will issue. 53/

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

Elizabeth M. Murphy
Secretary

49/ (...continued)

securities laws extends to sophisticated investors as well as those less sophisticated"), aff'd, 512 F.3d 634 (D.C. Cir. 2008).

50/ See also Barry C. Wilson, 52 S.E.C. 1070, 1075 (1996) ("Delay and neglect on the part of members and their associated persons [in responding to 8210 requests] undermine the ability of the NASD to conduct investigations and thereby protect the public interest.").

51/ See supra note 43 and accompanying text.

52/ Although "general deterrence is not, by itself, sufficient justification for expulsion or suspension[,] . . . it may be considered as part of the overall remedial inquiry." PAZ Sec., Inc., 494 F.3d 1059, 1066 (D.C. Cir. 2007) (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir. 2005)).

53/ 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. 59325 / January 30, 2009

Admin. Proc. File No. 3-12994

In the Matter of the Application of
CMG INSTITUTIONAL TRADING, LLC
and
SHAWN D. BALDWIN
c/o Nicole C. Patton, Esq.
The Law Offices of Nicole C. Patton
P.O. Box 934
Matteson, IL 60443

For Review of Disciplinary Action Taken by
NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY NASD

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

ORDERED that the disciplinary action taken by NASD against CMG Institutional Trading, LLC, and Shawn D. Baldwin, be, and it hereby is, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary