

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of District Business Conduct Committee For District No. 2, Complainant, vs. Roger Harry Chlowitz Northridge, CA, and Northridge, CA, Respondent.	DECISION Complaint No. C02980025 District No. 2 Dated: November 4, 1999
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Respondent failed to respond to Association requests for information. Held: findings of violation affirmed and sanctions modified.

Pursuant to Procedural Rule 9310, Roger Harry Chlowitz ("Chlowitz") has appealed a Hearing Panel Order and Decision Granting Department of Enforcement's Motion for Summary Disposition that was issued on November 17, 1998. After a review of the entire record, we affirm the Order and Decision and find that Chlowitz failed to respond to NASD Regulation, Inc. ("NASD Regulation") staff requests for information in violation of NASD Procedural Rule 8210(a)(1). We hereby impose a bar in all capacities.

Background. Chlowitz was associated with Columbus Financial, Inc. ("Columbus") as a general securities principal from August 5, 1992 through May 26, 1995. He was associated with Capital Markets Growth Corporation ("Capital Markets") as a general securities principal from May 20, 1996 through June 13, 1997.¹ Chlowitz is not presently associated with an NASD

¹ Chlowitz represented that he resigned from Capital Markets in February 1997. The June 13, 1997 date represents the date on which Capital Markets filed a Uniform Termination Notice for Securities Industry Registration ("Form U-5").

member firm. This complaint arose as the result of Chlowitz' failure to respond to NASD Regulation requests for information, as described below.

Facts

At issue in this case is Chlowitz' refusal to respond to two requests for information in connection with the NASD Regulation's investigation of Capital Markets. The first set of requests concerned NASD Regulation's investigation of certain private placements sold through Capital Markets. The second set of questions concerned arbitrations that were filed against Chlowitz concerning his conduct while registered with Capital Markets.

Capital Markets Investigation. The first NASD Regulation request for information on October 24, 1997 asked Chlowitz to provide the following information by November 3, 1997: (1) personal tax returns, including all schedules and tax forms (1099s and W-2s) for tax years 1994, 1995, and 1996, and all tax filings for 1997; (2) a list of investors solicited by Chlowitz for the private placements identified in the letter; (3) a complete list of all sales meetings that Chlowitz attended relating to the specified private placements; and (4) a breakdown of the amount and form of all compensation Chlowitz earned for the private placements. Chlowitz signed the return receipt on October 27, 1997, but failed to respond. A second request for this information was sent on November 11, 1997. Chlowitz received the request on November 13, 1997. When Chlowitz failed to respond by November 25, 1997, NASD Regulation staff telephoned him to remind him of his obligation. In that conversation, Chlowitz indicated that he had no intention of responding. On December 30, 1997, NASD Regulation staff sent Chlowitz a third letter summarizing the November 25 conversation and giving him additional time until January 6, 1998 to respond. He failed to respond by that date.

Arbitration Claims Investigation. Capital Markets filed an amended Form U-5 on October 8, 1997 that disclosed that more than 100 arbitration claims had been filed against Chlowitz. The amended Form U-5 filing triggered a second NASD Regulation investigation regarding the arbitration filings. According to Chlowitz, an attorney had solicited Capital Markets customers to file arbitration claims against Chlowitz and others, and most of these claims were eventually dismissed.

On November 11, 1997, NASD Regulation staff telephoned Chlowitz to discuss these claims and also sent a letter requesting the following information: (1) three examples of the arbitration statements that he had described as "cookie-cutter" (in that the statements of claim were worded identically); (2) any other arbitration statements naming him that were not "part of the 'cookie-cutter'" category; (3) documents showing the status of the arbitration claims against him, both dismissed and ongoing; and (4) a detailed written statement describing the circumstances leading up to the claims against him, his role in the activities described in the statement of claim, and other information that would assist NASD Regulation staff. Chlowitz received the request on November 12, but failed to respond by the November 28 due date. On December 4, 1997, NASD Regulation staff sent a letter labeled "FINAL REQUEST," which repeated the November 11 requests. Chlowitz failed to respond.

The NASD Regulation Department of Enforcement ("Enforcement") filed a complaint against Chlowitz on June 5, 1998, alleging that he had violated Conduct Rule 2110 and

Procedural Rule 8210 by failing to provide certain documents and information requested by NASD Regulation staff. Chlowitz filed an answer on July 29, 1998, in which he denied that he had any documents in his possession and indicated that he had previously advised the NASD of that fact. On October 23, 1998, Enforcement filed a Motion for Summary Disposition, and supplemented it on November 3, 1998. On November 6, 1998, Chlowitz filed a response to the Motion, in which he did not dispute the facts as set forth by Enforcement, but contended that the requests for information involved information that NASD Regulation already had and, therefore, that the requests constituted harassment. A Hearing Panel concluded that Chlowitz' defense was not reasonable as a matter of law, and on November 17, 1998, it granted Enforcement's Motion for Summary Disposition. The Hearing Panel imposed a censure, bar in any capacity, and a \$25,000 fine. This appeal followed.

Discussion

After a thorough review of the record, including the parties' submissions on appeal and oral argument, we affirm the findings set forth in the Hearing Panel's Order and Decision Granting Department of Enforcement's Motion for Summary Disposition. The facts as set forth above are undisputed, and there is no genuine issue with regard to any material fact. On appeal, Chlowitz does not deny the facts as alleged in the complaint, but he does contest the imposition of a bar. Although Chlowitz represented to the Hearing Panel that he "would rather give up [his] license and never be part of the NASD again" rather than respond to the requests at issue, he now seeks elimination of the bar that the Hearing Panel imposed. Chlowitz states that he is starting a new career and that he believes that a bar may hurt his chances of obtaining a license in his new field. The thrust of Chlowitz' argument in mitigation is that his refusal to respond with respect to both investigations was justified by the unreasonableness of the staff's requests for information.

It is well settled that Procedural Rule 8210 (formerly Article IV, Section 5 of the NASD Rules of Fair Practice) requires NASD members and persons associated with members to cooperate with NASD investigations, to make any report required by the NASD, and to provide any books or records that the NASD wishes to inspect. In re Richard J. Rouse, 51 S.E.C. 581 (1993). As the Securities and Exchange Commission stated in Rouse, "[Procedural Rule 8210] provides a means, in the absence of subpoena power, for the NASD to obtain from its members information necessary to conduct investigations. It is a key element in the NASD's effort to police its members." Id. at 584. Therefore, a member or person associated with a member may not refuse to comply with NASD requests for information or set conditions upon those requests. In re Robert A. Quiel, Exchange Act Rel. No. 39056 (Sept. 11, 1997). Although Chlowitz' arguments are not a defense to the underlying violation, they may be considered in mitigation of sanctions. As discussed below, we find that there is no evidence in the record that mitigates Chlowitz' failure to respond.

October 24 and November 11, 1997 Requests - Capital Markets Investigation. It is relevant to our consideration of this matter that in 1995, NASD staff had asked Chlowitz to provide 1993 and 1994 federal income tax records in connection with an unrelated investigation of limited partnerships that had been offered through Columbus. NASD staff asked for these documents in order to determine whether Chlowitz had improperly received compensation from the limited partnerships under investigation. Chlowitz initially refused to provide these

documents. Following the second request letter, Chlowitz did provide certain information, but not the 1993 and 1994 tax returns.

On November 30, 1995, NASD Regulation issued a complaint against Chlowitz, and he subsequently produced the requested tax returns. Chlowitz represented that he had initially refused to submit his federal income tax returns because he believed it was an invasion of his privacy and because an attorney had told him he was not required to do so. In 1996, Chlowitz entered into an Offer of Settlement, pursuant to which he agreed to a censure and a \$1,000 fine.² Chlowitz attached to his Offer a statement of corrective action in which he stated:

I have been a member of the NASD for many years and am aware of it's (sic) Rules and Regulations which include Article III Section 1 and Article IV Section 5 of the Rules of Fair Practice [now Rules 2110 and 8210]. I have always cooperated with the NASD and will respond promptly when any documentation is requested.

Notwithstanding his apparent understanding in 1996 that he was required to provide requested federal income tax information to NASD Regulation, and his statement that he would in the future respond promptly to NASD Regulation requests for information, Chlowitz refused to cooperate the following year with NASD Regulation's requests in connection with its Capital Markets investigation. Chlowitz characterized NASD Regulation staff's 1997 request for tax information as "blatant harassment." During the course of these proceedings, Chlowitz advised NASD Regulation that, while still employed at Capital Markets, he had told an NASD Regulation examiner that he had no real knowledge of what was going on at Capital Markets because he was merely using Capital Markets "as a base camp to get another job outside of the securities field." Chlowitz stated that he became "incensed" when NASD Regulation staff asked him to submit his 1994, 1995, and 1996 income tax returns and 1997 tax filings because he had already provided "[his] full return" to the NASD, notwithstanding having been advised by counsel that he did not have to do so. Chlowitz stated that he had complied with NASD Regulation's request for tax information notwithstanding his belief that NASD Regulation was not entitled to these documents, and that this second request was "an invasion of his rights."

We find that Chlowitz' claim of harassment is unfounded. Although Chlowitz claimed that he had no relevant information about Capital Markets, he did in fact sell approximately "two units" of one of the partnerships under investigation, and NASD Regulation staff was justified in requesting information about those sales. We find that NASD Regulation's request was not overly broad since Chlowitz' responses would have been limited to the sale of those two units. Although Chlowitz was on notice that he was required to produce his income tax returns upon request, he chose not to do so, using as an excuse the fact that NASD staff had previously requested Chlowitz' 1994 income tax returns in connection with an earlier, unrelated investigation. There is no evidence in the record that Chlowitz made any attempt to determine

² Pursuant to Procedural Rule 9145, NASD Regulation takes administrative notice of the Complaint (dated November 20, 1995), Offer of Settlement, and Decision and Order of Acceptance of Offer of Settlement (dated August 19, 1996) in the matter of Complaint No. C02950053.

whether NASD Regulation staff had access to his earlier submission. Instead, Chlowitz simply refused to submit any of the requested income tax documentation.

November 11 and December 4, 1997 Requests - Arbitration Claims Investigation. Following Capital Markets' submission of the amended Form U-5, which reported that approximately 140 arbitrations had been filed against Chlowitz, NASD Regulation staff telephoned Chlowitz to ask about the arbitration claims and to advise him that he would be receiving a written request for information about the claims. Chlowitz refused to provide the requested information on the basis that the NASD already had copies of the arbitrations in its Arbitration Department, and "[a]ll they had to do was go across the hall to get them." Chlowitz believed that these arbitration claims, which he asserted were identical claims that had all been filed by an attorney who had solicited Capital Markets' customers, were frivolous. In fact, all of those arbitrations were subsequently dismissed. Chlowitz stated that there were three other arbitrations filed against him, one of which resulted in his complete exoneration, and two of which were still pending.

We find that NASD Regulation did not harass Chlowitz by requesting certain information regarding these arbitrations. NASD Regulation staff did not ask Chlowitz to provide copies of all 140 arbitrations. Taking into account Chlowitz' representation that the attorney representing the claimants had filed the same complaint for each of the 140 claimants, NASD Regulation staff asked Chlowitz only for three examples of these "cookie-cutter" arbitrations and any other examples of arbitrations that were not part of the "cookie-cutter" category. NASD Regulation staff also asked for documentation of the claims that had been dismissed and a general statement of the circumstances that led to the filing of the arbitrations. Instead of responding to these requests, Chlowitz invited NASD Regulation staff to visit the NASD's Arbitration Department and conduct its own investigation of the arbitrations. This response was unacceptable. NASD Regulation staff spoke to Chlowitz before sending out a written request and fashioned the request to take into account the circumstances that Chlowitz had described. We therefore find that Chlowitz' characterization of the request as "unjust harassment" is without basis.

We find that Chlowitz' conclusion that NASD Regulation was harassing him was purely subjective and without basis in fact. Chlowitz represented on appeal that he worked for Capital Markets for only about three months, and during that time he had unsuccessfully tried to obtain an insurance license. He stated that he was in financial difficulty at the time, and he had a mindset that "everything" was working against him. He stated that he felt that NASD Regulation was harassing him by asking him to provide information about a firm where he had worked for a very short time and about which he knew very little. Chlowitz stated that his "reaction was to act in the manner which I did by telling the NASD, 'I don't care what you do. Just leave me alone.'" Chlowitz made his position clear in his Response to Statement of and Against Motion For Summary Disposition, in which he stated:

When I was asked to produce my tax returns in regard to the complaint heard in this hearing, after everything that had gone on, I felt this was a case of total harassment. The NASD already had tax returns of mine and under the privacy act enough was enough. I would not give any more. I felt so strongly on this issue and the issue of providing arbitration papers which were clearly already in

the possession of the NASD, that I would rather give up my license and never be part of the NASD again, then (sic) to respond to what I felt was unjust harassment.

In the face of Chlowitz' adamant and unreasonable refusals to respond to NASD Regulation's requests in any manner, we find that the bar is wholly justified. NASD Procedural Rule 8210(a) authorizes the NASD to require an associated person "to provide information orally, in writing, or electronically . . . with respect to any matter involved in [an] investigation" Chlowitz' failure to respond prevented NASD Regulation staff from proceeding with its investigation of Capital Markets, thereby undermining the Association's ability to carry out its self-regulatory functions. See, e.g., *In re Barry C. Wilson*, Exchange Act Rel. No. 37867 (Oct. 25, 1996). We find that in refusing to provide the requested information, Chlowitz impermissibly substituted his judgment for that of NASD Regulation. Robert A. Quiel, *supra*, at 11. A bar is consistent with the applicable NASD Sanction Guideline, which states that a bar is standard if the individual did not respond in any manner and no mitigation exists.

Accordingly, we impose a bar in all capacities.³ Pursuant to Rule 9360, the bar shall be effective upon service of this decision.⁴

On Behalf of the National Adjudicatory Council,

Alden S. Adkins
Senior Vice President and General Counsel

³ The recommended sanction is consistent with applicable NASD Sanction Guidelines ("Guidelines"). See Guidelines (1998 ed.) at 31 (Failure to Respond). We have eliminated the censure imposed by the Hearing Panel based on the policy adopted by the National Adjudicatory Council on June 10, 1999, which provides that censures will not be imposed in cases where the respondent is barred. See Notice to Members 99-61 (July 1999). Because Chlowitz received a discharge in bankruptcy in May 1999, we also eliminate the \$25,000 fine. Chlowitz filed a Chapter 7 petition in bankruptcy in the U.S. Bankruptcy Court, Central District, California on January 1, 1999. He did not, however, raise the issue of his bankruptcy with Enforcement Department staff until June 29, 1999, at which time Chlowitz had already received a Chapter 7 discharge.

⁴ We have considered all of the arguments of the parties. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

Pursuant to NASD Procedural Rule 8320, any member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment. Similarly, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction, after seven days' notice in writing, will summarily be revoked for non-payment.