BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Joseph Ricupero Bayside, NY, Respondent.	DECISION Complaint No. 20060049953-01 Dated: October 1, 2009

Respondent failed to respond to requests for information and failed to file FOCUS Reports, an annual audit report, and an application for approval to transfer customer accounts to another member firm. Held, findings and sanction affirmed.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Joseph Ricupero, Pro Se

Decision

Joseph Ricupero ("Ricupero") appeals a May 14, 2008 Hearing Panel decision pursuant to NASD Rule 9311.[1] The Hearing Panel found that Ricupero completely failed to respond to written requests for information, in violation of NASD Rules 8210 and 2110. The Hearing Panel also found that Ricupero, on behalf of America First Associates ("America First"), failed to file

[1] Following the consolidation of NASD and the member regulation, enforcement and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See FINRA Regulatory Notice 08-57* (Oct. 2008). Because the complaint in this case was filed before December 15, 2008, the procedural rules that apply are those that existed on December 14, 2008. The conduct rules that apply are those that existed at the time of the conduct at issue.

Financial and Operational Combined Uniform Single Reports, Part IIA ("FOCUS Reports"), for the months of March, April, and May 2006, and failed to file America First's annual audit report for fiscal year 2005, in violation of NASD Rule 2110. In addition, the Hearing Panel found that Ricupero failed to file an application for the approval of a transfer of firm assets, in violation of NASD Rules 1017 and 2110. The Hearing Panel barred Ricupero. After a thorough review of the record, we affirm the Hearing Panel's findings of violations and sanction.

I. Background

Ricupero began working in the securities industry as a general securities representative in November 1989. He was associated with various firms until he became associated with America First, an online brokerage firm he founded. He was associated with America First as a general securities representative and general securities principal from November 1995 to December 2006, and as a limited representative-equity trader from August 2003 to December 2006. He also served as the firm's financial and operations principal ("FINOP") from July 1997 to December 2006. In addition, Ricupero owned more than 75 percent of America First and served as its chief executive officer, chief compliance officer, and sole director. Ricupero is not presently associated with a member firm.

II. Facts

A. Failure to Provide Requested Information

1. Requests for Information

On March 29, 2006, FINRA's Department of Enforcement ("Enforcement") staff examiner Tracy Wood-Selem ("Wood-Selem") sent an email to Ricupero's email address, requesting supporting documentation relevant to the firm's FOCUS Report for the month ending February 28, 2006. The email asked Ricupero: (1) to provide staff with copies of "statements to support the firm's [securities] holdings" of $345,520 as reflected on the firm's February 2006 FOCUS Report; and (2) to explain why the only difference between the January and February 2006 FOCUS Reports was $25,000 in "cash and retained earnings" that was included in the February 2006 FOCUS Report. Wood-Selem testified that the FOCUS Reports for January and February 2006 showed the firm owning the same dollar amount of securities – $345,520 – for the two different reporting periods, which was "highly unusual."

On April 10, 2006, Ricupero called Wood-Selem and requested that she provide him with a formal written request for the information that she asked for in her March 29, 2006 email. Consequently, on April 10, 2006, Wood-Selem sent a written request for information to Ricupero under NASD Rule 8210 asking him to provide, by April 12, 2006,[2] the following information

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2 Wood-Selem testified that it was reasonable to request a two-day turnaround because the firm should have had the requested documents "at their fingertips." Ricupero had been on notice since March 29, 2006 – when he received Enforcement's email request for information – about the documents Enforcement was seeking.

concerning the firm's February 2006 FOCUS Report: (1) "a copy of the Firm's proprietary statements that correspond to the Firm's reporting of $345,520" in securities holdings in its February 28, 2006 FOCUS Report; and (2) copies of the firm's trial balances for the periods ending January 31 and February 28, 2006. Wood-Selem sent the April 10, 2006 request for information to Ricupero's email address and via first-class mail to Ricupero at the firm's business address, as listed in FINRA's Central Registration Depository ("CRD"®). Neither the first-class mail, nor the email that attached the April 10, 2006 request for information, was returned.

FINRA did not receive a response to the April 10, 2006 request for information by the requested date. Consequently, Wood-Selem issued a second request letter for the information. This April 13, 2006 letter advised Ricupero that "[f]ailure to comply with this request may subject America First Associates Corporation to disciplinary action." It was sent to Ricupero at his email address, and to the firm's CRD address via first-class and certified mail. The first-class mailing and the email were not returned. The certified mailing was returned as unclaimed.

On April 17, 2006, FINRA received a letter from Ricupero, dated April 12, 2006, addressed to "Tracy Wood Selem" in which he acknowledged having received Wood-Selem's April 10, 2006 request for information. Ricupero stated in the letter that, because he would be "on vacation" observing the religious holidays, he would not be able to provide the requested documents until May 1, 2006. Although Ricupero did not specifically ask that the April 12, 2006 deadline be extended, he indicated in the letter that he would "fulfill" the request for information by May 1, 2006, upon his return from vacation. At the hearing, Ricupero proffered a different explanation for not providing the documents in response to Enforcement's first NASD Rule 8210 request. He testified that, at the time he received the first request for information, the documents were not "readily available" because they "were all boxed up" in a "storage area" near the firm's business location.

On April 27, 2006, Wood-Selem and other Enforcement staff visited America First's business location after receiving information from another FINRA office that Federal Express mail to the firm's business address had been returned as non-deliverable. Wood-Selem testified that she and her colleagues observed that it looked like the business "was abandoned. There were wrapped chairs . . . [and] terminals pushed to the side." As a result, staff determined that the "business had closed down."

On April 28, 2006, FINRA sent a letter to Ricupero, advising him: (1) that FINRA had not received the information requested in its letters dated April 10 and 13, 2006; and (2) that the firm had not demonstrated that it was making and keeping current required books and records and was in compliance with the net capital rules. The letter also instructed Ricupero to send notice to FINRA and the Commission, under Securities Exchange Act of 1934 ("Exchange Act") Rule 17a-11(b), (d), and (g), specifying the firm's net capital requirement and its current amount of net capital. There is no allegation in the complaint regarding this letter or the firm's net capital compliance.

Wood-Selem sent Ricupero a third NASD Rule 8210 request for information on June 13, 2006, asking for the same information identified in her previous letters. The June 13, 2006 letter required a response by June 20, 2006, and warned Ricupero that failure to comply might result in disciplinary action against the firm or "its registered representative." Wood-Selem sent the letter by first-class and certified mail to Ricupero's residential address and to his email address. Wood-Selem testified that the firm's business address was not used because staff had concluded that "the business address had closed down." The first-class mail to Ricupero's residential address and the email were not returned. The certified mail was returned as unclaimed. Wood-Selem testified that she contacted Ricupero by telephone on June 13, 2006, and that Ricupero advised her that he would not accept mail from Enforcement sent by certified mail or overnight delivery because he was annoyed by having received multiple copies of the same letters. Ricupero did not provide FINRA with the requested information by the June 20, 2006 deadline.

2. Enforcement's Complaint and Ricupero's <u>Belated Responses to the 8210 Requests</u>

Enforcement filed a complaint against Ricupero on June 19, 2007, alleging, among other things, that he failed to respond to FINRA's three requests for information dated April 10, April 13, and June 13, 2006. Just a few weeks prior to the December 12, 2007 hearing date in this matter, Ricupero responded to the outstanding requests for information by providing copies of the firm's trial balances for January and February 2006, the firm's bank statements for February 2006, and the firm's clearing account statements for February 2006.

A few days before the commencement of the December 12, 2007 hearing in this matter, Ricupero provided Enforcement with a copy of a letter dated "May 1, 2006," which he claimed he sent to Enforcement via first-class mail in response to staff's first NASD Rule 8210 information request, dated April 10, 2006. The purported response letter included copies of the trial balances and clearing account statements that Ricupero provided to Enforcement a couple of weeks prior to the hearing, as noted above. Wood-Selem testified, however, that she never received the May 1, 2006 response letter, until Ricupero provided it to Enforcement a few days before the hearing. At the hearing, Enforcement introduced FINRA's correspondence logs for May 2006, which did not reflect receipt of the letter. Ricupero claimed that the May 1, 2006 letter and accompanying documents supported his claim that he had responded to Enforcement's requests for information on May 1, 2006.[3]

The Hearing Panel "did not find [Ricupero's] belated claim of compliance to be credible." The Hearing Panel concluded that if Ricupero had previously complied with Enforcement's requests for information, he would have advised staff of that fact at certain critical stages of the proceedings, such as when he received a "Wells" letter;[4] "when he received the [c]omplaint;

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3 At the hearing, Ricupero confirmed that he had no documentary proof that the May 1, 2006 letter was ever sent or received.

4 A "Wells" letter refers to a letter sent by Enforcement advising a respondent "that a recommendation of formal disciplinary charges is being considered" and typically provides the

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when he answered the [c]omplaint; and during the initial pre-hearing conference." The Hearing Panel also found that Wood-Selem credibly testified that any correspondence that was addressed to "NASD Compliance" concerning this matter would have been directed to her. Moreover, the Hearing Panel noted that no such letter was listed in FINRA's correspondence log and that, although Ricupero had addressed all prior correspondence to Wood-Selem or other staff members by name, his alleged May 1, 2006 response was addressed only to "NASD Compliance." For these reasons, the Hearing Panel found that Ricupero had not provided FINRA with a response on May 1, 2006.

B. Failure to File Required Reports and Application for Sale of Customer Accounts

Wood-Selem testified that America First did not file a FOCUS Report for the months March, April, and May 2006, as required. Ricupero did not dispute his firm's obligation to file monthly FOCUS Reports and his failure to file the required reports on behalf of the firm.

Likewise, Wood-Selem testified that America First did not file the firm's annual audit report for 2005, as required. Ricupero did not dispute this, and testified that he did not file an annual report because of the expense involved and because he had transferred the firm's customer accounts to York Securities, Inc. ("York Securities"), a FINRA member firm.

On or about February 9, 2006, America First agreed to sell substantially all of its customer accounts to York Securities for $50,000.[5] As a result, America First was required to file an application for approval of the transaction with FINRA, pursuant to NASD Rule 1017(a). Ricupero does not dispute that he failed to file the required application on behalf of the firm.

III. Procedural Background

Enforcement filed a five-cause complaint against Ricupero on June 20, 2007. The first cause alleged that Ricupero failed to respond to three NASD Rule 8210 requests for information dated April 10, April 13, and June 13, 2006, in violation of NASD Rules 8210 and 2110. The second cause alleged that America First, acting through Ricupero, failed to file required monthly FOCUS Reports for March 2006, April 2006, and May 2006, in violation of NASD Rule 2110. The third cause alleged that America First, acting through Ricupero, failed to comply with Exchange Act Rule 17a-5(d) by failing to file with FINRA its annual audit report for the fiscal

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respondent with an opportunity to "submit a written statement explaining why such charges should not be brought." *NASD Notice to Members 97-55* (Aug. 1997).

[5] Ricupero stated at the hearing that the transfer of the firm's customer accounts occurred by March 2006.

year ending December 31, 2005, in violation of NASD Rule 2110.[6] The fifth cause alleged that America First, acting through Ricupero, failed to file an application for approval of the changes to its ownership, control, or business operations with NASD, in violation of NASD Rules 1017(a)(3) and 2110.

The hearing in this matter was held, as scheduled, on December 12, 2007. The Hearing Panel made findings of violation and barred Ricupero. Ricupero filed a timely appeal. Because neither party requested oral argument on appeal, this matter was considered on the basis of the written record, including the briefs and other relevant documents on appeal.[7]

IV. Discussion

The Hearing Panel found that Ricupero's "conduct amounted to a complete failure to respond" to staff's requests for information. We agree and affirm the Hearing Panel's finding of violation. In addition, we affirm the Hearing Panel's finding that Ricupero failed to make certain required filings on behalf of the firm.

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[6] At the hearing, Enforcement withdrew the fourth cause of complaint, which alleged that America First, acting through Ricupero, failed to comply with Exchange Act Rule 17a-5(f)(2), in that it failed to notify FINRA of the change in its auditors, in violation of NASD Rule 2110.

[7] The Subcommittee empanelled to preside over this appeal made a number of evidentiary rulings. The Subcommittee denied Ricupero's request to admit as additional evidence exhibits attached to his opening brief that concerned settlement negotiations, on the grounds that settlement negotiations generally are not relevant to disciplinary proceedings. *See* NASD Rule 9346; *Dep't of Enforcement v. Paratore*, Complaint No. 2005002570601, 2008 FINRA Discip. LEXIS 1, at *13 n.9 (FINRA NAC Mar. 7, 2008). In addition, pursuant to Rule 9346(f), the Subcommittee ordered that the record be supplemented with two other documents that Ricupero attached to his opening brief: (1) the staff's "Wells" letter; and (2) a November 23, 2007 letter from Ricupero that the Hearing Officer declined to accept for filing because it did not include a certificate of service, and it did not request any relief. The "Wells" letter was not introduced as evidence in the proceedings below; nevertheless, the Hearing Panel referenced the "Wells" letter in its decision in its discussion of sanctions. The November 23, 2007 letter from Ricupero put the Hearing Panel on notice that Ricupero was in the process of retaining an attorney who would address Ricupero's failure to provide his hearing exhibits by the deadline. *See* Section V, *infra*. Finally, the Subcommittee denied Enforcement's request to strike from Ricupero's brief any arguments concerning evidence that was not admitted into the record, such as evidence concerning the parties' settlement negotiations. The Subcommittee advised the parties that it would place the appropriate weight on such arguments in its deliberations. We concur with all of the Subcommittee's evidentiary rulings in this matter and adopt them as our own.

A. Failure to Respond to Requests for Information

NASD Rule 8210(a)(1) requires "a member, person associated with a member, or person subject to the Association's jurisdiction to provide information orally, in writing, or electronically . . . with respect to any matter involved in the investigation, complaint, examination, or proceeding." Because FINRA lacks subpoena power, it must rely upon NASD Rule 8210 "to police the activities of its members and associated persons." *Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008) (citation omitted), *petition for review filed*, No. 09-0062 (2d Cir. Jan. 6, 2009). The failure to provide information impedes FINRA's ability to carry out its self-regulatory functions and is, therefore, a serious violation. *Elliot M. Hershberg*, Exchange Act Rel. No. 53145, 2006 SEC LEXIS 99, at *10 (Jan. 19, 2006), *aff'd*, 210 Fed. Appx. 125 (2d Cir. 2006).[8] Indeed, the failure to respond to FINRA's information requests "frustrates [its] ability to detect misconduct, and such inability in turn threatens investors and markets." *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008), *aff'd*, 2009 U.S. App. LEXIS 11500 (D.C. Cir. May 29, 2009).

The requests for information were properly sent to Ricupero at the firm's business address and to his residential address pursuant to NASD rules.[9] Moreover, Ricupero admitted in his April 12, 2006 letter to staff that he received staff's April 10, 2006 Rule 8210 letter in which staff requested that he provide financial documents related to the firm's FOCUS Reports. Thus, Ricupero received actual notice of the April 10, 2006 request for information.[10]

FINRA requested copies of the firm's trial balances for the periods ending January 31 and February 28, 2006, and a copy of the firm's proprietary statements supporting the firm's reporting of $345,520 of securities owned in its February 2006 FOCUS Report. Ricupero finally provided staff with the requested documents just a few weeks prior to the hearing, which was approximately one and one-half years after the requests for information were made and five months *after* the complaint had been issued. Such prolonged unresponsiveness and noncompliance is tantamount to a complete failure to respond.[11] It is well settled that "NASD

[8] A violation of NASD Rule 8210 constitutes a violation of NASD Rule 2110. *Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999).

[9] NASD Rule 8210(d) states that "[a] notice under this Rule shall be deemed received by the member or person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the [CRD]."

[10] Ricupero claimed not to have received a copy of the June 13, 2006 request for information because he supposedly no longer lived at the residential address listed in CRD. Even if that assertion is true, Ricupero had the responsibility to notify FINRA of any changes to his address. *See* FINRA By-Laws, Art. V, Sec. 2; *NASD Notice to Members 99-77* (Sept. 1999).

[11] Wood-Selem also testified that Ricupero's response was incomplete based on the documentation provided showing that the firm owned $311,993 in "marketable securities,"

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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." *PAZ Sec., Inc.*, 2008 SEC LEXIS 820, at *16 ("The failure to respond until after NASD barred Applicants is not merely a 'slow' response; such a failure is tantamount to a complete failure to respond."); *accord Elliott M. Hershberg*, 2006 SEC LEXIS 99, at *12.

Ricupero claims that he provided the documents relevant to Enforcement's April 10 and 12, 2006 requests for information in a letter to staff dated May 1, 2006. The Hearing Panel found that testimony not credible. The Hearing Panel noted that Ricupero never raised the issue at critical stages of the proceedings, that neither Ricupero nor Enforcement had a record of the letter having been received by Enforcement, and that Wood-Selem testified credibly that any correspondence that was addressed to "NASD Compliance" with respect to this matter would have been directed to her. A hearing panel's credibility determinations are entitled to deference and can only be overturned by "substantial evidence." *See Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *16 n.11 (NASD NAC Dec. 21, 2004), *aff'd*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655 (Oct. 13, 2005). We find no evidence to challenge the Hearing Panel's credibility finding. Ricupero contended at the hearing that because the firm was closed and he had "no computers," he "just quickly wrote [the May 1, 2006 letter] to make sure it went out to [Wood-Selem]" by first-class mail. We note that the purported May 1, 2006 letter was generically addressed to "NASD Compliance," while Ricupero's April 12, 2006 letter in response to Wood-Selem's April 10, 2006 request for information was addressed specifically to "Tracy Wood Selem." Furthermore, Enforcement had no record in its correspondence logs of having received the letter, and Ricupero had no record showing that he actually sent a letter to Enforcement dated May 1, 2006. We conclude that Ricupero's claim of having sent the May 1, 2006 letter is untrue and constitutes a deliberate attempt to mislead.

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$2,946 in "marketable securities long," and $8,170 in "marketable securities worthless securities account," for a total of $323,109, which differed from the firm's reporting of $345,520 of securities owned on the February 28, 2006 FOCUS Report. We disagree. Enforcement had asked for proprietary statements and trial balances that support the securities-owned figure of $345,520 that appeared in the firm's February 2006 FOCUS Report. Ricupero provided the requested documents. The fact that the documents supported a securities-owned figure of $323,109 rather than the $345,520 figure that was included in the February 2006 FOCUS Report shows that the FOCUS Report was inaccurate. Furthermore, Ricupero acknowledged at the hearing that the February 2006 FOCUS Report figure was "erroneous." The completeness of Ricupero's eventual response, however, has no impact on the conclusion that Ricupero's prolonged unresponsiveness is tantamount to a complete failure to respond.

Ricupero also asserted at the hearing that he could not provide the documents that Enforcement requested in its April 10, 2006 letter by the April 12, 2006 deadline because they were in boxes in a storage facility and were not readily available.[12] The record shows, however, that Ricupero made no mention of any problems associated with retrieving the requested documents in the letter that he sent to staff in response to its April 10, 2006 request for information. Instead, he represented in the letter that he could not provide the requested documents by the deadline because he would be on vacation. In any event, even if Ricupero "did not have access to the requested documents, he was required to respond with that information," which he did not do. *Dep't of Enforcement v. Hoeper*, Complaint No. C02000037, 2001 NASD Discip. LEXIS 37, at *6 (NASD NAC Nov. 2, 2001). Additionally, although Ricupero indicated that upon his return from vacation he would "fulfill [the NASD Rule 8210] request by May 1, 2006," he failed to meet that self-imposed extended deadline. More importantly, Ricupero did not provide the requested information by the subsequent deadlines established in Enforcement's second and third NASD Rule 8210 requests for information.

We therefore find that Ricupero failed to respond to Enforcement's requests for documents, in violation of NASD Rules 8210 and 2110.[13]

B. Failure to File Required Reports

Ricupero does not dispute that he failed to file the firm's FOCUS Reports for March, April, and May 2006. Exchange Act Rule 17a-5(a) requires broker-dealers to file FOCUS reports with FINRA within 17 business days after the end of each month. Thus, America First, acting through Ricupero, failed to comply with Exchange Act Rule 17a-5(a), in violation of NASD Rule 2110.[14]

Ricupero also does not dispute that he failed to file the firm's audit report for the fiscal year ending December 31, 2005. Exchange Act Rule 17a-5(d) requires broker-dealers to file annually a report that is audited by an independent public accountant. Therefore, the firm, acting through Ricupero, failed to comply with Exchange Act Rule 17a-5(d), and thus violated NASD Rule 2110.

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[12] Ricupero's argument provides no defense to his failure to produce the requested documents when requested because SEC and NASD Rules required the firm to keep its books and records current and readily accessible. *See* Exchange Act Rules 17a-3, 17a-4(e) and NASD Rule 3110.

[13] We therefore reject Ricupero's assertion that he fulfilled his duty to cooperate with FINRA under NASD Rule 8210.

[14] Violations of the Commission's and FINRA's rules constitute a violation of NASD Rule 2110. *See Fox & Co. Inv.*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822, at *27 n.29 (Oct. 28, 2005).

In addition, there is no dispute that Ricupero failed to file an application to FINRA for approval of America First's agreement to sell its customer accounts to York Securities. NASD Rule 1017(a)(3) requires a member to file an application for approval of direct or indirect acquisitions or transfers of 25 percent or more in the aggregate of its assets, or an asset, business or line of operation that generated revenues comprising 25 percent or more of its earning measured on a rolling 36-month basis, unless both the seller and acquirer are members of the New York Stock Exchange ("NYSE"). America First, which was not an NYSE member, transferred substantially all of its customer accounts to York Securities for $50,000, thus triggering the Rule 1017(a)(3) requirement to file an application for approval of the transaction. America First, acting through Ricupero, failed to file the required application for approval of the firm's transfer of assets, in violation of NASD Rules 1017(a)(3) and 2110.

V. Procedural Issues

Ricupero claims that the Hearing Officer improperly denied his requests to postpone the hearing below. We disagree and affirm the Hearing Officer's decision to deny Ricupero's multiple requests to postpone the hearing in this matter.

In reviewing the denial of a motion for continuance, our inquiry is limited to determining whether the denial was the sort of "unreasoning and arbitrary insistence upon expeditiousness that invalidates a refusal to postpone a hearing." *Dist. Bus. Conduct Comm. v. Bozzi*, Complaint No. C10970003, 1999 NASD Discip. LEXIS 5, *11 (NASD NAC Jan. 13, 1999) (internal quotations omitted). Under the facts of this matter, we find no such arbitrary insistence upon expeditiousness. Moreover, NASD Rule 9235 specifies that a Hearing Officer "shall have authority to do all things necessary and appropriate to discharge his or her duties," including the authority to decide procedural matters. Indeed, it is well settled that in FINRA proceedings, as in judicial proceedings, the trier of fact has broad discretion in determining whether a request for continuance should be granted, based upon the particular facts and circumstances presented. *See Falcon Trading Group, Ltd.*, 52 S.E.C. 554, 560 (1995), *aff'd*, 102 F.3d 579 (D.C. Cir. 1996).

On Sept. 14, 2007, the Hearing Officer informed the parties that the hearing would begin on December 12, 2007. On November 7, 2006, Ricupero requested that the hearing be postponed to permit him to hire an attorney. The Hearing Officer denied the request. Ricupero nevertheless retained an attorney, and his attorney also requested that the hearing be postponed because he had a scheduling conflict, among other reasons. We note that Ricupero was given over three months' notice of the December 12, 2007 hearing date. Although he had sufficient time to retain an attorney who would be available to prepare for and attend the hearing on December 12, 2007, Ricupero waited until several weeks before the hearing date to hire an attorney who already had an existing conflict with the hearing date. At the hearing, Ricupero was represented by counsel who cross-examined Enforcement's witness and otherwise fully participated in the hearing. Considering these facts and the broad discretion afforded Hearing Officers to determine whether a postponement of a hearing date should be granted, we find no

abuse of discretion.[15] Moreover, Ricupero does not articulate any alleged prejudice that he suffered.[16]

VI. Sanctions

The Hearing Panel imposed the standard sanction of a bar against Ricupero based on findings that his actions amounted to a complete failure to respond, and that there were no mitigating facts. We affirm the Hearing Panel's decision to bar Ricupero for the reasons discussed below.

The Hearing Panel did not impose sanctions against Ricupero for his filing violations in light of the bar it imposed against him for the failure to respond violation, but stated that if it were to impose sanctions for those violations, it would impose the sanctions recommended by Enforcement: a 30-business-day suspension from association with any member firm in any capacity and a $25,000 fine. We conclude that a 30-business-day suspension and $15,000 fine would be an appropriate sanction for Ricupero's failures to file FOCUS Reports and the firm's

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[15] Ricupero raised several other procedural claims. He asserts that he was subject to unlawful selective prosecution in FINRA's initiation and pursuit of this action against him. To prove selective prosecution, Ricupero must demonstrate that he was singled out for enforcement action, while others similarly situated were not, and that his selection as a target for enforcement was based on an unjustifiable consideration such as his race, religion, national origin, or the exercise of constitutionally protected rights. *See United States v. Huff*, 959 F.2d 731, 735 (8th Cir. 1992); *Maximo Justo Guevara*, 54 S.E.C. 655, 665 (2000), *pet. for review denied*, 47 Fed. Appx. 198 (3d Cir. 2002) (table); *Kim G. Girdner*, 50 S.E.C. 221, 227 (1990). Ricupero has provided no such support for his argument. Similarly, Ricupero has provided no support for the claim in his brief that the Enforcement attorney who handled the appeal of this matter had a "personal vendetta" against him. The Commission has rejected an applicant's claim that counsel for FINRA displayed bias and prejudice where counsel "acted within the bounds of appropriate advocacy," stating that "the hearing panels and the NAC, not counsel," make the final decisions. *Robert Tretiak*, 56 S.E.C. 209, 232 (2003). *See, e.g.*, *Stephen Russell Boadt*, 51 S.E.C. 683, 685 (1993). Ricupero also contends that Wood-Selem acted negligently because he claims she was unwilling to make follow-up requests for information as a result of strained relations between Enforcement and him. Based on the record, there is no support for Ricupero's claim that Wood-Selem failed to make follow-up requests for the information at issue. Indeed, Wood-Selem sent Ricupero an initial email request for the information and followed up with three separate Rule 8210 requests for information. In light of the foregoing, there is no evidence that the fairness of the proceedings was compromised.

[16] We afford no weight to Ricupero's arguments on appeal regarding issues relevant to settlement negotiations, including Ricupero's unsupported assertion that Enforcement filed the complaint in this matter to "coerc[e] Respondent to sign an AWC accepting a full bar." *See, e.g.*, *Paratore*, 2008 FINRA Discip. LEXIS 1, at *13 n.9 (finding that settlement negotiations generally are not relevant to FINRA disciplinary proceedings and therefore are not material to an appeal).

2005 annual report, and that a $10,000 fine would be an appropriate sanction for Ricupero's failure to file an application for approval of the transfer of customer accounts to York Securities. Because we have barred Ricupero for the Rule 8210 violation, however, we decline to impose these sanctions.

A. Failure to Respond to Requests for Information

For failing to respond to NASD Rule 8210 requests for information, the FINRA Sanction Guidelines ("Guidelines") provide that a bar should be "standard" when there is a complete failure to respond.[17] The Guidelines for failing to respond to requests for information list principal considerations for adjudicators to assess in determining appropriate sanctions.[18] Adjudicators are instructed to consider "[w]hether the information was provided and, if so, [to] consider the number of requests made, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response."[19] We also consider the nature of the information requested in assessing appropriate sanctions.[20] As with any violation, we further consider any other aggravating and mitigating factors.

We find Ricupero's dishonest testimony that he provided the requested information in a May 1, 2006 letter to be aggravating. Ricupero asserted at the hearing that he *did comply* with staff's requests for documents via a purported letter, dated May 1, 2006, that he claims to have sent timely to FINRA. As noted previously, the Hearing Panel did not credit Ricupero's claim, and we agree with that finding. Like the Hearing Panel, we find this "belated and dishonest claim of compliance to be aggravating" for purposes of assessing sanctions. Ricupero's claim belies reason because—if true—it should have been made repeatedly and much earlier in the proceedings. Ricupero has no supporting evidence for his claim, and it is convincingly refuted by credible testimony. Ricupero's eleventh-hour claim of compliance in addition to his various justifications for failing to provide the documents when requested demonstrate a troubling pattern of dishonesty. Throughout the investigative phase and disciplinary process relevant to this matter, Ricupero ignored staff's Rule 8210 requests. Neither his claim of being on vacation nor his claim of having to find the documents offers any valid reason to lessen the severity of Ricupero's complete disregard of his obligation to respond to FINRA's request for information. "'[D]elay and neglect on the part of members and their associated persons undermine the ability of the NASD to conduct investigations and thereby protect the public interest.'" *Id.*, at *12 (*quoting Barry C. Wilson*, 52 S.E.C. 1070, 1075 (1996)). As the Commission has recognized,

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17 *FINRA Sanction Guidelines*, 35 (2007), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*]. Where mitigation exists, or the person did not respond in a timely manner, the Guidelines recommend that a suspension of up to two years should be considered. *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

"[f]ailure to comply with [NASD Rule 8210] is a serious violation because it subverts the NASD's ability to carry out its regulatory responsibilities." *John A. Malach*, 50 S.E.C. 618, 621 (1993). Thus, Ricupero "acted at his peril" when he failed to provide Enforcement with the documents at the time they were requested. *Id.* at 620.

As to the nature of the information, we find that the requested documents were important to determine whether the firm was in violation of its net capital requirement. Wood-Selem testified that it was "highly unusual" for the $345,520 reported securities-owned figure, which appeared in the January and February 2006 FOCUS Reports, to be the same in two different reporting periods. Consequently, she requested a copy of the firm's "proprietary statements" that corresponded to the firm's reporting of $345,520, in securities owned and copies of the firm's trial balances for January and February 2006.[21] The concern at the time Wood-Selem made this request was that any inaccuracies in the firm's FOCUS Reports for January and February 2006 could have been concealing whether the firm was in compliance with its minimum net capital requirement. The "Net Capital Rule . . . is one of the most important tools that the SEC and NASD use to protect investors."[22] When staff sent its second request for information on April 13, 2006, the requested information became more critical, because America First was 13 days late filing its annual audit report for the fiscal year ending December 31, 2005.[23]

In addition, we assess the length of time it took Ricupero to respond to staff's requests for information and conclude that Ricupero's failure to respond for one and one-half years after staff's first request for documents demonstrates a pattern of total disregard for the Rule 8210 process. Indeed, there is no evidence that Ricupero attempted to respond to staff's requests for documents with any reasonable diligence despite staff's simple and straightforward request for copies of Ricupero's proprietary statements corresponding to the firm's reporting of $345,520 in securities holdings in its February 28, 2006 FOCUS Report and the firm's trial balances for the periods ending January 31 and February 28, 2006. Instead, Ricupero offered varying explanations for his failure to produce the documents upon staff's requests. In his April 12, 2006

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[21] Ricupero argues that the documents requested were insignificant in nature. As explained above, the documents were important to Enforcement's investigation of the firm's net capital situation. Moreover, it is well established that a member or an associated person "may not second guess [] an NASD information request." *Dennis A. Pearson, Jr.*, Exchange Act Rel. No. 54913, 2006 SEC LEXIS 2871, at *17 (Dec. 11, 2006) (internal quotations omitted). Thus, Ricupero was obligated to comply with Enforcement's requests for information no matter his view of the significance of the information requested.

[22] *Dep't of Enforcement v. Fox & Co. Invs., Inc.*, Complaint No. C3A030017, 2005 NASD Discip. LEXIS 5, at *20 (NASD NAC Feb. 24, 2005) (internal citation omitted), *aff'd*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822 (Oct. 28, 2005). "By limiting the ratio of a broker's indebtedness to his capital, the rule operates to assure confidence and safety to the investing public." *Blaise E'Antonai & Assocs. v. SEC*, 289 F.2d 276, 277 (5th Cir. 1961).

[23] FINRA had granted the firm a 30-day extension to March 31, 2006, to file its annual audit for fiscal year ending December 31, 2005.

letter to staff, he stated that he would be unable to respond to the request for documents until May 1, 2006 because of a planned vacation. At the hearing, however, he contended that he was unable to provide the documents in response to staff's initial request because the documents were stored in boxes at an offsite storage facility. Ricupero was required to maintain the firm's current records in an easily accessible place under Exchange Act Rules 17a-3 and 17a-4(e) and NASD Rule 3110. Thus, his professed inability to obtain the documents provides no mitigation for his failure to comply with Rule 8210 requests for information.

We also consider the amount of regulatory pressure that FINRA had to exert before Ricupero finally provided staff with copies of the requested documents, and find the pressure was significant given that FINRA was forced to file a complaint in this matter. Even after the filing of the complaint, however, Ricupero still did not readily provide the requested documents; instead, he waited until five months after the complaint had been filed and just a few weeks prior to the hearing to provide the requested documents. Such extensive regulatory involvement could have been avoided. Wood-Selem testified that had Ricupero provided the information when she first requested it, she would have contacted him to let him know that "either there was some sort of error or something [Ricupero] wasn't reporting . . . on his trial balance," since the documentation could not be reconciled with the information on the firm's February 2006 FOCUS Report. A driving purpose underlying the Guideline's statement that a bar is standard in cases like these is to enable Enforcement and FINRA's Department of Market Regulation to complete investigations.[24]

We conclude that a bar from associating with any FINRA member firm in all capacities is an appropriately remedial sanction given all of the facts and circumstances, including a lack of mitigating factors that would warrant a lesser sanction. Ricupero has demonstrated a cavalier disregard for his duty to ensure that he responds to Rule 8210 requests for information. Enforcement consequently faces a "great risk of being unable to obtain from [Ricupero] information necessary for the protection of investors." *See PAZ*, 2008 SEC LEXIS 820 at *28-29. The bar we impose remedies that risk. *Id.* The bar also will serve to deter others from failing to provide Enforcement with information requested under Rule 8210 at the time such requests are made.

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[24] We also find unpersuasive Ricupero's argument that a different Hearing Panel in a separate FINRA disciplinary action found him to be a credible witness in that matter. Credibility findings in an entirely different disciplinary proceeding have no relevance to this proceeding and are therefore not material. Ricupero also argues that certain other FINRA disciplinary cases should determine the sanctions in this matter. Those cases have different facts and circumstances and therefore are not applicable. As the Commission has stated, sanctions depend on the "particular facts and circumstances of each case, and cannot be determined by comparison with the action taken in other cases." *John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *50 (Jan. 22, 2003).

B. Filing Violations

1. Failure to File FOCUS Reports and Annual Audit Report

We aggregate Ricupero's failure to file FOCUS Reports and annual audit report violations for purposes of sanctions because they emanated from the same underlying circumstances: the firm was in the process of closing and selling its customer accounts to York Securities during the relevant period. *Dep't of Mkt. Regulation v. Kresge*, Complaint No. CMS030182, 2008 FINRA Discip. LEXIS 46, at *5 (FINRA NAC Oct. 9, 2008) (imposing a single sanction for multiple violations attributable to a common underlying problem).

The Guidelines for failing to file FOCUS Reports recommend a fine in the range of $10,000 to $50,000.[25] The Guidelines also recommend suspending the FINOP for up to two years.[26] Although there are no separate Guidelines for failure to file an annual audit report, we consider the Guideline for failure to file FOCUS Reports to be analogous.[27]

For purposes of determining an appropriate sanction, we consider aggravating that Ricupero has relevant disciplinary history that demonstrates a pattern of disregard for regulatory requirements.[28] In November 1999, FINRA accepted an Acceptance, Waiver, and Consent ("AWC") in which Ricupero consented to findings that America First, acting through Ricupero, sold shares into the secondary market and failed to rebill the canceled shares at the initial public offering prices and thus failed to comply with FINRA's free-riding and withholding interpretation. Ricupero was fined $7,050, jointly and severally with America First. In April 2000, Ricupero entered into an AWC, in which he consented to findings that America First, acting through Ricupero, among other things: (1) conducted a securities business while failing to maintain the firm's minimum net capital requirement; and (2) failed to abide by the terms and conditions of its restrictive agreement with FINRA by not providing prompt written notice to FINRA of the departure of three principals who left after FINRA approved its membership. Ricupero was fined $12,500, jointly and severally with America First. On August 15, 2008, the NAC issued a decision finding that Ricupero failed to timely amend his Uniform Application for Securities Industry Registration or Transfer ("Form U4") to disclose a federal court action filed against him alleging that he committed common-law fraud and violated the federal securities

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[25] *Guidelines*, at 72.

[26] *Id.*

[27] The Guidelines encourage adjudicators to look to the most analogous guidelines when determining sanctions for violations not addressed specifically therein. *See id.* at 1 (Overview).

[28] The Guidelines state that adjudicators should consider a respondent's prior disciplinary history that, among other things, includes past misconduct similar to that at issue or evidences a disregard for regulatory requirements. *Id.* at 2 (General Principles Applicable to All Sanction Determinations, No. 2). The Guidelines also recommend imposing more severe sanctions for recidivists. *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 1).

laws, and that Ricupero and America First executed two settlement agreements with improper confidentiality provisions. Ricupero was fined $5,000 for the Form U4 violation and $2,500 for the improper confidentiality provision violations.[29]

Ricupero's belated realization at the hearing that he should have filed a Uniform Request for Broker-Dealer Withdrawal ("Form BDW"), because the firm was no longer conducting a securities broker-dealer business, is not mitigating. Although Ricupero contended that America First was essentially out of business during the period relevant to the FOCUS Report and audit report filing violations, the firm had not filed a BDW; therefore, the firm was not excused from the relevant filing requirements. Given Ricupero's role as the firm's FINOP, his past disciplinary history, and the absence of any mitigating factors, we find that a 30-business day suspension in all capacities and a $15,000 fine would be an appropriate sanction for Ricupero's failures to file FOCUS Reports and an annual report. Nevertheless, we decline to impose a sanction for these violations because Ricupero is barred in all capacities for his Rule 8210 violation.

2. Failure to File Application for <u>FINRA Approval of Firm's Asset Transfer</u>

There are no Guidelines that address the failure to file an application for approval of a firm's transfer of assets. We therefore look to the Guidelines for registration violations,[30] which are the most analogous,[31] and apply them here. The Guidelines recommend a fine of $2,500 to $50,000 for a firm and/or individual and a suspension of six months in any or all capacities, or longer in egregious cases, against an individual. Although we conclude that a fine of $10,000 is an appropriately remedial sanction for Ricupero's failure to file the requisite application to transfer assets,[32] we do not impose a sanction for this violation because of the bar imposed for his Rule 8210 violation.

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[29] Ricupero's assertion on appeal that he ran America First for 14 years without incident is contrary to his past disciplinary history. Moreover, we find unpersuasive Ricupero's attempt on appeal to minimize the importance of his disciplinary history, by stating that the violations were settled and not customer-related. There is no requirement that disciplinary history be customer-related to be considered for purposes of assessing appropriate sanctions. *See Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 2). In addition, the Guidelines do not exclude settlements from consideration as past disciplinary history. *Id*; *see, e.g.*, *Dep't of Mkt. Regulation v. Kresge*, 2008 FINRA Discip. LEXIS 46, at *32-33 (finding that Kresge's past settlements constituted relevant past disciplinary history).

[30] *See id.* at 48.

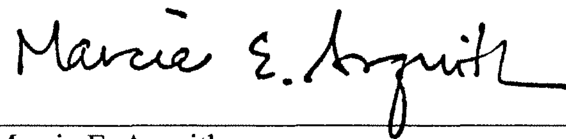
[31] *See id.* at 1 (Overview).

[32] Because of Ricupero's prior disciplinary history, which demonstrates a pattern of disregarding regulatory requirements, we do not consider a fine at the lowest end of the recommended monetary sanction to be sufficiently remedial.

VII. Conclusion

We find that Ricupero violated NASD Rules 8210 and 2110 by failing to respond to written requests for information. We also find that Ricupero failed to file three FOCUS Reports, an annual audit for fiscal year 2005, and an application with FINRA for the transfer of firm customer accounts. For the failure to respond violation, we bar Ricupero from associating with any FINRA member firm in all capacities. The bar imposed in this decision will become effective immediately upon issuance of this decision.[33]

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith
Senior Vice President and Corporate Secretary

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33 The Hearing Panel decision did not assess hearing costs against Ricupero. There also are no hearing costs on appeal because the parties did not request oral argument.

We have considered and reject without discussion all other arguments advanced by the parties.