

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Bradley C. Reifler
New York, NY,

Respondent.

DECISION

Complaint No. 2016050924601

Dated: September 30, 2019

Respondent failed to respond to FINRA information requests. Held, findings and sanctions affirmed.

Appearances

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

For the Respondent: Bradley Reifler, Pro Se

Decision

Bradley Reifler appeals a Hearing Panel decision issued on August 7, 2018. The Hearing Panel found that Reifler violated FINRA Rules 8210 and 2010 because he refused to answer questions during two on-the-record interviews with FINRA staff. The Hearing Panel barred Reifler for his refusal to respond.

As part of an investigation into whether Reifler engaged in misconduct, FINRA investigators requested that Reifler provide on-the-record (“OTR”) testimony pursuant to FINRA Rule 8210. Reifler’s refusal to answer dozens of questions posed by the investigators violated FINRA’s rules. After an independent review of the record, we affirm the Hearing Panel’s findings, and the sanction that it imposed.

I. Background

Reifler entered the securities industry in November 1986. From October 2010 to August 2015, he was registered as a general securities representative and general securities principal with Forefront Capital Markets, LLC (“Forefront Capital Markets” or the “Firm”). From August 2015 to November 2015, he was registered as a general securities representative and general

securities principal with Wilmington Capital Securities, LLC (“Wilmington Capital Securities”). He is not currently associated with a FINRA member firm.

II. Facts

Reifler was chief executive officer, chief managing officer, and chairman of the board of directors of a closed-end interval fund named Forefront Income Trust.¹ Reifler was also chief managing officer of Forefront Capital Advisors, LLC, the sole investment adviser to Forefront Income Trust. Reifler held these positions from December 2014, when Forefront Income Trust began operating, and throughout all of 2015. Reifler was registered with FINRA for the entire time that he managed Forefront Income Trust. Eleven investors purchased shares of Forefront Income Trust while Reifler was associated with Forefront Capital Markets or Wilmington Capital Securities.

In 2016, FINRA staff conducted a cycle examination of another FINRA member firm. During that examination, FINRA staff reviewed a one-page flyer about Forefront Income Trust. The headline on the flyer read “99% meet the 1%.” It continued, “[w]hat if we all had access to the same investment opportunities and strategies previously reserved for the 1%? Would we all have a chance to prosper? Of course we would.”

In small print at the bottom of the flyer, one of several disclosures stated: “Investment in the funds is also subject to the following risks: New Fund Risk, Illiquid Investment Risk, High Yield Securities Risk, Internal Redemption Risk, Fair Value Risk and Leverage Risk.”

FINRA staff had concerns that Forefront Income Trust appeared to be directed to non-accredited investors. Consequently, FINRA staff took OTR testimony from the chief compliance officer and a registered representative at the firm and asked questions about Forefront Income Trust, including who invested in it, and what broker-dealers were involved in selling it. FINRA staff learned that two brokers registered with Forefront Capital Markets sold shares of Forefront Income Trust in early 2015. The largest purchase was made by Port Royal North Carolina Mutual Reassurance Trust, which bought nearly one million shares for \$10 million.

FINRA staff also learned that, in September 2016, North Carolina Mutual Life Insurance Company (“North Carolina Mutual”) had filed a federal civil action against Reifler; Forefront Capital Holdings, LLC; Forefront Capital, LLC; Stamford Brook Capital, LLC; and other defendants.² North Carolina Mutual alleged that the defendants had “engaged in a fraudulent scheme to invest [North Carolina Mutual’s] assets in investments designed to benefit the Forefront Entities and themselves individually.” Specifically, North Carolina Mutual’s complaint alleged that Reifler and the Forefront Entities committed the following violations in relation to certain assets that had been placed in a trust:

¹ A “closed-end interval fund” is a “type of investment company that periodically offers to repurchase its shares from shareholders. That is, the fund periodically offers to buy back a stated portion of its shares from shareholders.” US Securities and Exchange Commission, Fast Answers, Interval Funds, <https://www.sec.gov/fast-answers/answersmfinterhtm.html>.

² The complaint refers to Forefront Capital Holdings, LLC; Forefront Capital, LLC; and Stamford Brook Capital, LLC as the “Forefront Entities.”

- Breach of fiduciary duty to North Carolina Mutual, alleging that the defendants invested the trust's funds in loans made to affiliates of the Forefront Entities;
- Constructive fraud, alleging that the defendants invested the trust's funds in investments in which Reifler and the Forefront Entities would benefit;
- Fraud, alleging that defendants failed to advise North Carolina Mutual that they intended to invest the trust's funds in ways that would benefit Reifler and the Forefront Entities; and
- Unauthorized commission discount waiver, alleging that an unauthorized person executed a document that waived the trust's right to a discounted commission of 1.5 percent, instead of 3 percent, for investments over \$5 million.

A. FINRA Staff Sends Reifler a Request for Information

At this point, FINRA staff expanded its investigation of Forefront Income Trust to include Reifler. FINRA staff sent Reifler a FINRA Rule 8210 request that asked a series of questions about Forefront Capital Markets, Forefront Income Trust, and the Firm's supervision of the sales of Forefront Income Trust. FINRA staff's FINRA Rule 8210 request also asked for documents related to sales of Forefront Income Trust, and it asked Reifler for a written statement describing his role at Forefront Income Trust. After being granted an extension of time, Reifler provided short answers to several questions, but he did not provide documents or a description of where responsive documents were located.

For example, question four of the request asked Reifler to describe all due diligence performed at Forefront Capital Markets in connection with the approval of the sale of Forefront Income Trust shares. Reifler responded, "[d]o not know." The question further asked Reifler to identify all other persons at Forefront Capital Markets involved in performing this due diligence. Reifler responded, "[d]o not know." Question six asked Reifler to describe how the suitability of each sale of Forefront Income Trust to customers of Forefront Capital Markets was determined, in addition to who conducted the suitability analysis. It also asked Reifler to "[i]dentify and produce all documents related to those determinations. If you do not possess these documents, then identify their location." Reifler gave no answer to this question.

B. Reifler Does Not Answer Questions at Two OTRs

In connection with its investigation, FINRA staff requested that Reifler appear for OTR testimony pursuant to FINRA Rule 8210. The letter identified Forefront Income Trust as the topic for the OTR. FINRA staff testified that they wanted to learn more about Forefront Income Trust and to gain an understanding, from Reifler's point of view, of the allegations in the North Carolina Mutual lawsuit. The letter requesting that Reifler appear for the OTR informed him,

among other things, that he was “obligated, under FINRA rules, to answer all questions asked by FINRA staff,” and it advised Reifler that his refusal to respond to FINRA staff’s questions may result in disciplinary action.

Reifler appeared for testimony on May 30, 2017. Soon after the examination began, Reifler refused to answer several questions. For example, when asked about Forefront Income Trust, Reifler stated that FINRA had no jurisdiction to ask about it. When asked how often the board of Forefront Income Trust meets, Reifler responded, “[a]ll [Forefront Income Trust] questions really are not under FINRA’s jurisdiction [s]o I’m going to shorten this by letting you know that I’m not going to answer many questions about [Forefront Income Trust].” Indeed, Reifler refused to answer several questions about Forefront Income Trust, including:

- Whether he solicited investments in Forefront Income Trust while he was registered with Wilmington Capital Securities;
- Whether he told a friend about Forefront Income Trust who then made an investment in Forefront Income Trust; and
- Who was the largest investor was in Forefront Income Trust.

When Reifler was asked about a new account application for two customers to open a new Forefront Income Trust account, he did not answer the question, but responded, “we can shorten this if you would – I know you want it on the record. But on the record I will not answer due to jurisdictional issues any questions that have the word [Forefront Income Trust] in it.”

Shortly after the OTR, FINRA staff wrote to Reifler and proposed to resume his testimony on a mutually convenient date. The staff’s letter informed Reifler that he was obligated “under FINRA’s rules, to answer all questions asked by FINRA staff.” It also warned Reifler that his failure to answer questions may subject him to a FINRA disciplinary action and the imposition of a bar. When Reifler appeared for the OTR on June 29, 2017, he again refused to answer numerous questions. When asked about North Carolina Mutual and allegations in North Carolina Mutual’s federal court complaint, Reifler responded that because the North Carolina Mutual case was currently in litigation, he would not answer. He occasionally responded that, “I am not supposed to answer.” Reifler also responded to several of FINRA staff’s questions by asking, “[w]hat does that have to do with FINRA?”

At the hearing for this matter, FINRA staff testified that they believed that Reifler had intimate knowledge of the assets held by Forefront Income Trust, and that he would have information about the allegations in North Carolina Mutual’s complaint. FINRA staff further testified that, because they knew of no one else who could provide the information, Reifler’s refusal to answer questions at the two OTRs substantially impeded the investigation.

III. Procedural History

The Department of Enforcement (“Enforcement”) filed the complaint in September 2017. Enforcement alleged that Reifler’s refusal to respond to FINRA staff’s questions during the two OTR sessions violated FINRA Rules 8210 and 2010. After Reifler filed his answer to the complaint, Enforcement also made a motion to strike the defenses that Reifler had raised and

filed a motion for partial summary disposition. The Hearing Panel granted Enforcement's motion for partial summary disposition on March 20, 2018. In that order, the Hearing Panel rejected Reifler's defenses based on jurisdiction and current litigation. Three months later, the Hearing Panel held a hearing that addressed whether Reifler violated FINRA's rules and, if so, what sanctions to impose. On August 7, 2018, the Hearing Panel found that Reifler violated FINRA Rules 8210 and 2010 and barred him for his misconduct. This appeal followed.

IV. Discussion

We affirm in all respects the Hearing Panel's findings that Reifler violated FINRA Rules 8210 and 2010.

A. Reifler Failed to Provide Information to FINRA in Violation of Rule 8210

FINRA Rule 8210 authorizes FINRA, in the conduct of an investigation, to require an associated person to provide information and to respond completely and truthfully to FINRA's information requests. FINRA Rule 8210 requires associated persons, among others, to "provide information orally [or] in writing . . . and to testify at a location specified by FINRA staff . . . with respect to any matter involved in [a FINRA] investigation, complaint, examination, or proceeding." A violation of FINRA Rule 8210 occurs when an associated person fails to provide full and prompt cooperation to FINRA in response to a request for information. *See Brian L. Gibbons*, 52 S.E.C. 791, 794 n.11 (1996), *aff'd*, 112 F.3d 516 (9th Cir. 1997) (table). "[A]ssociated persons may not ignore [FINRA] inquiries; nor take it upon themselves to determine whether information is material to an . . . investigation of their conduct." *CMG Institutional Trading*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21 (Jan. 30, 2009) (internal quotation marks and citations omitted). Rather, they have an obligation to respond fully to FINRA's inquiries. *See id.*

Here, FINRA staff was investigating the sales of Forefront Income Trust shares by member firms to determine whether recommended purchases complied with FINRA's suitability rule. The investigation also sought information regarding Reifler's role in providing advice to North Carolina Mutual and his involvement in alleged constructive fraud, breach of fiduciary duty, and a sales commission that was too high. During this investigation, FINRA staff had the right to require Reifler to provide information orally and to take his testimony at an OTR. FINRA Rule 8210(a).

When Reifler repeatedly refused to answer questions at the two OTRs, he violated FINRA Rule 8210. Reifler refused to answer an entire category of questions that was the focus of FINRA's investigation. Although he was chief executive officer of Forefront Income Trust, Reifler refused to answer questions concerning his solicitation of Forefront Capital Markets' or Wilmington Capital Securities' customers to buy the product while he was registered as a general securities representative. He further refused to answer questions concerning Forefront Income Trust's largest investor, and whether he was involved in, or reviewed, customer applications to buy Forefront Income Trust. As the Hearing Panel found, Reifler refused to answer at least 65 questions during his OTRs.

The requirement under FINRA Rule 8210 to provide information to FINRA is unequivocal and unqualified. *See Dep't of Enforcement v. Asensio Brokerage Servs., Inc.*, Complaint No. CAF030067, 2006 NASD Discip. LEXIS 20, at *44 (NASD NAC July 28, 2006),

aff'd, Exchange Act Release No. 62315, 2010 SEC LEXIS 2014 (June 17, 2010). A failure to comply with FINRA's requests for information "frustrates [FINRA's] ability to detect misconduct, and such inability in turn threatens investors and markets." *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009). Reifler's failures to answer violated both FINRA Rule 8210 and the important policies that underlie the rule. *See Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 1350, at *12-19 (Apr. 17, 2014).³

1. Reifler's Objection to FINRA's Jurisdiction Is Meritless

In an effort to excuse his refusals to answer questions, Reifler contends that FINRA had no jurisdiction to investigate. We understand Reifler to make several versions of this argument, each of which we address in turn and find unpersuasive.

First, we review whether FINRA had jurisdiction over Reifler under the applicable rules. Reifler's registration with Wilmington Capital Securities terminated on November 16, 2015. Under FINRA's By-Laws, FINRA retained jurisdiction over Reifler for two years from that date for purposes of requiring that he respond to FINRA Rule 8210 requests, or for Enforcement to file a complaint against him. *See* FINRA By-Laws, Article V, Sec. 4(a). The first OTR was held on May 30, 2017, the second occurred on June 29, 2017, and Enforcement filed the complaint on September 26, 2017. Each of these three events took place within two years of when Reifler was registered. We therefore affirm that FINRA had jurisdiction over Reifler at these times.

Second, Reifler contends that FINRA does not have jurisdiction over mutual funds and an investment company such as Forefront Income Trust, which was regulated by the Commission under the Investment Company Act of 1940. Reifler further implies that his role as investment adviser to Forefront Income Trust is outside of FINRA's jurisdiction.⁴ Reifler is incorrect.

FINRA's efforts to investigate Reifler's activities were squarely within FINRA's regulatory mandate. FINRA's jurisdiction includes the broad ethical rule, FINRA Rule 2010, which applies "when the misconduct reflects on [an] associated person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money." *Daniel D. Manoff*, 55 S.E.C. 1155, 1162 (2002). For example, our previous precedent establishes that FINRA has jurisdiction over a registered representative who was alleged to have taken monies from a fund for which he acted as manager. *See Dep't of Enforcement v. Grivas*, Complaint No. 2012032997201, 2015 FINRA Discip. LEXIS 16, at *22 (FINRA NAC July 16, 2015) ("FINRA's authority to pursue discipline for violations of FINRA Rule 2010 is sufficiently wide to encompass any unethical, business-related conduct regardless of whether it involves a security."), *aff'd*, Exchange Act Release No. 77470, 2016 SEC LEXIS

³ We also find that Reifler violated FINRA Rule 2010. FINRA Rule 2010 requires members and associated persons, in the conduct of their business, to "observe high standards of commercial honor and just and equitable principles of trade." A violation of FINRA Rule 8210 constitutes a violation of FINRA Rule 2010. *See Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, *55 n.49 (Sept. 24, 2015). FINRA Rule 2010 applies to associated persons via FINRA Rule 0140.

⁴ In his closing statement to the Hearing Panel, Reifler stated that he was no longer arguing that FINRA lacked jurisdiction. We choose to address the argument to be thorough in our analysis of this appeal.

1173 (Mar. 29, 2016). In that case, we assessed the argument that FINRA lacked jurisdiction and explained “[t]hese facts establish that [the respondent’s] conduct, which we conclude was unethical and demonstrates his unfitness to handle other people’s money, falls squarely within FINRA’s jurisdiction.” *Grivas*, 2015 FINRA Discip. LEXIS 16, at *23. The just-and-equitable principles of trade rule applies to business-related conduct, including when a respondent has misappropriated an investor’s funds or used funds without authorization in a mutual fund that he manages. *Dep’t of Enforcement v. Fretz*, Complaint No. 2010024889501, 2015 FINRA Discip. LEXIS 54, at *3 (FINRA NAC Dec. 17, 2015) (finding that respondents “violated their fiduciary duties by using the fund’s assets to make self-interested loans instead of buying equities, overvalued their contributions to the fund, and loaned money to their struggling broker-dealer to keep it in business”).

FINRA staff’s investigation was plainly within FINRA’s jurisdiction. One aspect of FINRA staff’s inquiry was asking sales-practice related questions, such as who at the firm where Reifler had been registered was selling securities to customers. Another aspect concerned Reifler’s involvement with the allegations in North Carolina Mutual’s complaint. FINRA unequivocally has jurisdiction to ask those and related questions.

Third, Reifler asserts that FINRA was focused on his actions that occurred after he was no longer registered with FINRA. We find to the contrary. One line of questions was targeted to learning details of the sales of Forefront Income Trust to customers of Forefront Capital Markets during the time that Reifler was registered with FINRA. In fact, 11 investors purchased Forefront Income Trust while Reifler was registered with FINRA. Another line of questions asked about Reifler’s involvement with North Carolina Mutual and his involvement in alleged constructive fraud and breach of fiduciary duty. The North Carolina Mutual complaint alleged that several of these events took place in April 2015 and May 2015, while Reifler was registered with FINRA.

Finally, to the extent that Reifler is contending that FINRA Rule 8210 requests can be refused because respondents believe that they are asking about events that occurred after their termination of registration, this is incorrect. Respondents may raise a defense based on the timing of their registration termination during a hearing. They may not, however, refuse to provide information based on this theory when they are asked for information under FINRA Rule 8210. Reifler’s first obligation is to provide information and answer the questions at his OTR. “Enforcement often commences an investigation in advance of having a clear picture of the nature and breadth of potential misconduct.” *Dep’t of Enforcement v. N. Woodward Financial Corp.*, 2014 FINRA Discip. LEXIS 32, at *47 (FINRA NAC July 21, 2014), *aff’d*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867 (May 8, 2015). Associated persons of a member firm are not allowed to thwart FINRA’s investigation based on their self-serving claims that the requests are irrelevant or unrelated to their broker-dealer’s activities.

2. Reifler’s Objection Based on Current Litigation Is Invalid

During the second OTR, Reifler refused to answer dozens of questions because they were related to current litigation. We find no merit in this position. An objection to answering Rule 8210 requests based on concerns about other litigation has been considered and rejected. For example, the Commission has affirmed that “a recipient of a Rule 8210 request cannot avoid compliance . . . because of implications for other litigation.” *Li-Lin Hsu*, Exchange Act Release

No. 78899, 2016 SEC LEXIS 3585, at *12 (Sept. 21, 2016) (citing *Darrell Jay Williams*, 50 S.E.C. 1070, 1072 (1992)); see *Brian Prendergast*, Exchange Act Release No. 44632, 2001 SEC LEXIS 2767, at *37 (Aug. 1, 2001) (explaining that respondent’s “desire to deprive potential litigants of the transcript of the requested interview” did not justify refusal to testify) (internal citation omitted). This has been true for more than 25 years. See *Williams*, 50 S.E.C. at 1072 (ruling that respondent “was clearly obligated to supply the information that [FINRA] requested, and the possibility of litigation in connection with the underlying transaction provided no excuse for his failure to do so”).

In his reply brief on appeal, Reifler claims that he needed to delay answering any OTR questions about the North Carolina Mutual lawsuit “at the advice of his former legal counsel.” But advice of counsel is not valid defense to non-scienter based violations, such as FINRA Rule 8210. *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *39 (Nov. 14, 2008) (holding that scienter is not an element of a FINRA Rule 8210 violation). In addition, Reifler waived this argument by not making it before the Hearing Panel and not arguing it in his opening brief to the NAC. The Hearing Panel decision did not discuss the defense because Reifler did not raise it, and we decline to allow it based on a single reference in a reply brief. The parties must make fully developed arguments to avoid waiver. See *Merrimac Corp. Sec., Inc.*, Exchange Act Release No. 86404, 2019 SEC LEXIS 1771, at *99 n.158 (July 17, 2019).

Our findings in this case are consistent with the importance of FINRA staff being able to conduct a thorough investigation. The filing of a federal civil action can be an important event that leads to evidence of rule violations. Reifler’s blanket objection to answering questions that related to current litigation is plainly invalid. Based on the record before us, we affirm the Hearing Panel’s findings that Reifler violated FINRA Rules 8210 and 2010.

V. Sanctions

The Hearing Panel imposed a bar in all capacities on Reifler for his refusal to answer questions during the OTRs. For the reasons discussed below, we affirm.

We apply the sanction-specific FINRA Sanction Guideline (“Guidelines”) for a violation of FINRA Rule 8210, which includes a failure to respond, failure to respond truthfully or in a timely manner, or providing a partial but incomplete response.⁵ The Hearing Panel found that Reifler did not respond in any manner to FINRA staff’s Rule 8210 requests. The Hearing Panel considered the transcript of the OTRs and the scores of times that Reifler refused to answer, as well as the entirety of his testimony, which yielded “no useful information to FINRA staff.”

A. The Guidelines Recommend a Bar

Based on our independent review of the OTRs, we agree and find that Reifler’s refusals to answer were a complete failure to respond. The Guidelines recommend, when a respondent

⁵ See *FINRA Sanction Guidelines* 33 (Failure to Respond, Failure to Respond Truthfully or in a Timely Manner, or Providing a Partial but Incomplete Response to Requests Pursuant to FINRA Rule 8210) (2019), http://www.finra.org/sites/default/files/Sanction_Guidelines.pdf. [hereinafter “*Guidelines*”].

did not respond in any manner, that a bar should be standard.⁶ The Guidelines provide one violation-specific consideration for a failure to respond – the importance of the information requested as viewed from the perspective of the investigator.⁷ We conclude that FINRA staff considered the information important, because they were trying to investigate sales of Forefront Income Trust to retail investors, Reifler’s management of the Forefront Income Trust, and his use of investors’ funds. The questions posed to Reifler were critical to understanding these events. And we, relying on the Hearing Panel’s credibility determinations, credit the testimony of the investigator that Reifler’s refusal to answer questions completely halted the investigation.

Affirming that Reifler did not respond in any manner is also consistent with our previous decision in *Asensio Brokerage Serv., Inc.*, 2006 NASD Discip. LEXIS 20, at *1. In that case, the respondent refused to answer numerous questions during an OTR and left the room because he believed the questions were not directly related to his activities that were regulated by FINRA.⁸ On appeal, the respondent argued that the standard sanction of a bar for a failure to respond in any manner to FINRA Rule 8210 requests was unsupported. We explained that a respondent’s selective refusal to answer questions should be treated as a complete failure to respond:

[Respondent] failed to respond to numerous questions that were at the heart of NASD’s investigation into respondents’ compliance with Rule 2711(h). It is thus neither an excuse nor mitigating evidence that [respondent] provided some, but not all, of the requested information [His] failure to respond to numerous key requests for information, notwithstanding his responses to other questions, was a failure to respond “in any manner.”⁹

Based on his failure to respond in any manner and the importance of the questions, we impose a bar in all capacities on Reifler.

B. Other Factors in the Guidelines Are Aggravating and None Are Mitigating

We also consider the overarching Principal Considerations contained in the Guidelines. For example, Reifler has a disciplinary history, which we consider in determining an appropriate sanction in this case.¹⁰ In 1999, the Commodity Futures Trading Commission (“CFTC”) issued a disciplinary order fining Reifler \$59,033 for violating the Commodity Exchange Act and CFTC regulations.¹¹

Two additional Principal Considerations in the Guidelines are aggravating factors here. Principal Consideration No. 8 asks whether a respondent engaged in numerous acts or a pattern

⁶ See *id.*

⁷ See *id.*

⁸ See *Asensio Brokerage Serv., Inc.*, 2006 NASD Discip. LEXIS 20, at *15.

⁹ *Id.* at *47-48.

¹⁰ See *Guidelines*, at 2 (General Principle, No. 2).

¹¹ In addition, in 2016, the State of Massachusetts issued a disciplinary order and fined Reifler \$36,000 for failing to disclose the CFTC order.

of misconduct.¹² During the two OTRs, Reifler refused to answer at least 65 questions, exhibiting numerous acts and a pattern of misconduct. Principal Consideration No. 12 includes the issue of whether a respondent attempted to delay FINRA's investigation.¹³ Reifler's refusals to answer not only attempted to delay the investigation, but also succeeded in completely impeding it. This is an aggravating factor.

We have considered Reifler's arguments for a sanction less than a bar, and we do not find them persuasive. Reifler contends that a bar is unnecessary or too harsh because he has exited the securities industry. He notes that he ended his affiliation with FINRA and offered, in settlement discussions, to agree never to reapply to associate with a FINRA member firm. We do not consider, however, what offers and counteroffers were made during settlement negotiations because settlement negotiations should be candid and frank, a goal that is furthered by keeping those discussions strictly separate from factors we consider in litigation. If Reifler is directing his offer not to reapply for association with a FINRA member firm, we find it contrary to long-established practices to consider such a promise in determining an appropriate sanction. The Guidelines provide recommendations for our analysis and, for a complete failure to respond to a FINRA Rule 8210 request, a bar is standard. Our practice is to impose a sanction when a respondent violates FINRA's rules, and, in this case, the decision on sanctions reflects the judgment of FINRA adjudicators that refusing to answer questions during an investigation undercuts the ability of FINRA investigators to do their jobs. Accepting a promise not to reapply from Reifler would be imposing essentially no consequence because Reifler states that he has no plans to conduct any further broker-dealer business. Because FINRA has no subpoena power, a bar imposes consequences on a respondent that refuses to provide information.

Reifler also asserts that we should be lenient toward him because he believed that supplying information to the investigators would have led to them acting as judge and jury and finding against him. Reifler's argument is flawed in several respects.¹⁴ Reifler's hunch that the investigators would bring a case against him is pure speculation. By placing a roadblock across the investigation, Reifler prevented the investigators from evaluating critical and relevant evidence. Moreover, Reifler fails to acknowledge that respondents who Enforcement accuse of violating securities laws or rules can defend themselves before a hearing panel, which provides a neutral and independent ruling on the alleged violations.¹⁵ We therefore give no mitigation to

¹² See *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 8).

¹³ See *id.* at 8 (Principal Considerations in Determining Sanctions, No. 12).

¹⁴ To be sure, we acknowledge that truthfully answering the investigators' questions and providing documents – when that information would provide a preponderance of evidence that a respondent violated FINRA rules – would result in negative consequences for a respondent.

¹⁵ Reifler is mistaken that – because he felt that his integrity was being challenged during the investigation – he was justified in withholding information. The investigators had specific issues for which they sought information. Because those issues were part of a FINRA investigation, Reifler had an obligation to provide answers.

Reifler's claim that refusing to answer FINRA's questions was justified due to the possibility that he would be found liable for violations that he did not commit.

We also evaluated Reifler's arguments that FINRA lacked jurisdiction and that he was in active litigation as potentially mitigating factors.¹⁶ We find that they are not. These were also Reifler's defenses to liability, which the Hearing Panel found had no merit and with which we concur. In effect, Reifler's arguments operated as an attempt to impose conditions, on both the timing of providing answers and the subject of the questions, which must have been met before he would provide information to the investigators. We give no mitigation for taking baseless positions while refusing to provide information.¹⁷ We affirm that Reifler should be barred in all capacities from associating with any FINRA member firm.

VI. Conclusion

We affirm the Hearing Panel's findings that Reifler failed to answer questions during OTR interviews in violation of FINRA Rules 8210 and 2010. Accordingly, we bar Reifler effective upon service of this decision. We affirm the Hearing Panel's order that Reifler pay \$2,968.81 in hearing costs and order that he pay \$1,500.72 in appeal costs.¹⁸

On Behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell
Vice President and Deputy Corporate Secretary

¹⁶ We considered Reifler's advice of counsel defense for purposes of sanctions. To establish that advice of counsel is mitigating for purposes of sanctions under the Guidelines, Reifler must demonstrate "reasonable reliance on competent legal . . . advice." *Dep't of Enforcement v. Fergus*, Complaint No. C8A990025, 2001 NASD Discip. LEXIS 3, at *48 (NASD NAC May 17, 2001). Reifler failed to meet this standard. During the hearing, he did not offer evidence that his legal counsel was fully informed about Reifler's status as an associated person of a FINRA member firm, and that he was required to testify pursuant to FINRA Rule 8210, or even any evidence that an attorney gave him the advice to refuse to answer the investigator's questions. In short, there is no evidentiary basis for the advice-of-counsel claim.

¹⁷ See *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *13 (Nov. 8, 2007) (stating that a "member or associated person may not second guess . . . information request[s] or set conditions on their compliance" and that a "belief that NASD does not need the requested information provides no excuse for a failure to provide it" (internal quotation marks omitted)), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

¹⁸ We have considered and reject without discussion all other arguments of the parties.