BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of	DECISION
Department of Enforcement,	Complaint No. C07990016
Complainant,	Dated: April 19, 2000
vs.	
James O. Baxter, Jr. Norfolk, Virginia	
and	
Norfolk, Virginia,	
Respondent.	

Where registered individual invested customer funds in limited liability companies without customer authorization and failed to respond to an NASD request for information, held that registered individual violated Conduct Rule 2110 and Procedural Rule 8210. The NAC further held that the default record was insufficient to prove that the limited liability company interests at issue were securities, and therefore reversed the Hearing Officer's finding that the registered individual improperly executed private securities transactions. The NAC also held that the record was insufficient to prove that the registered person improperly shared in a customer account.

This matter was appealed by James O. Baxter, Jr. ("Baxter"). Under review is a default decision of an NASD Regulation, Inc. ("NASD Regulation") Hearing Officer ("Hearing Officer") dated August 26, 1999. After a review of the entire record in this matter, we affirm the Hearing Officer's findings that Baxter executed unauthorized purchases of limited liability company interests on behalf of

two clients and that he failed to respond to an NASD request for information. We bar Baxter in all capacities.

Background

NASD Regulation Department of Enforcement ("Enforcement") staff filed the complaint in this matter after receiving a Form U-5 Uniform Notice of Termination ("Form U-5") from U.S. Life Equity Sales Corp. ("U.S. Life") on behalf of Baxter, in which U.S. Life disclosed that Baxter had been terminated as a result of a customer complaint involving unauthorized trading. Baxter failed to file an answer to the complaint. The Hearing Officer therefore entered a default judgment against Baxter, which Baxter has appealed in its entirety.

From September 1991 through February 1997 (the period relevant to this complaint), Baxter was associated with U.S. Life and registered as an investment company and variable contracts representative. Baxter is not currently associated with a member firm.

Jurisdiction

Baxter contested NASD Regulation's exercise of jurisdiction over him. We affirm the Hearing Officer's determination that NASD Regulation appropriately exercised jurisdiction in this matter. A person whose association with a member has terminated remains subject to the filing of a complaint for two years after the effective date of termination, provided, however, that any amendment to a notice of termination that discloses misconduct and is filed within two years of the original notice shall operate to recommence the running of the two-year period. See Article V, Section 4 of the NASD By-Laws, Retention of Jurisdiction.

U.S. Life filed the original Form U-5 on February 13, 1997 and an amended Form U-5 on March 26, 1997. The amended Form U-5 disclosed additional details regarding the misconduct at issue. The complaint was filed on March 17, 1999, which was within two years of the filing of the amended Form U-5, which itself was filed within two years of the original Form U-5. NASD Regulation therefore appropriately exercised jurisdiction over Baxter.

Service of the Complaint —Entrance of Default Judgement

NASD Regulation staff served the first and second notices of complaint on Baxter via certified and first-class mail at Baxter's Central Registration Depository ("CRD") address and at a second residential address that staff had obtained for Baxter ("the Olney Road address"). Certified and first-class mailings to Baxter's CRD address were returned as not deliverable with an indication that the forwarding order had expired. The first-class mailings to the Olney Road address were not returned. Staff received a certified mail receipt indicating that the first notice of complaint sent to the Olney Road

address via certified mail had been delivered to Baxter on March 26, 1999. The receipt was signed by "J. O. Baxter." Staff's certified mailing of the second notice of complaint to the Olney Road address was returned marked "unclaimed." Baxter failed to file an answer to the complaint.

NASD Regulation complied with the requirements of Procedural Rule 9134 regarding service of the complaint.[1] The record indicates that Baxter actually received the first notice of complaint sent by certified mail to the Olney Road address. Furthermore, as a registered person in the securities industry, Baxter was obligated to inform NASD Regulation of his current residential address. See In re Eric M. Diehm, 51 S.E.C. 938 (1994) (registered representatives are required to sign and file with the NASD a Form U-4, which obligates them to keep a current address on file with the NASD at all times). Baxter failed to advise NASD Regulation of his address changes, and therefore he cannot evade service of the complaint by claiming lack of notice.

If a respondent fails to file an answer to first and second notices of complaint served in accordance with NASD Procedural Rules, the Hearing Officer may issue a default decision. See Procedural Rule 9215(f). NASD Regulation properly served Baxter with first and second notices of complaint. He failed to respond, and the Hearing Officer properly issued a default decision.

Facts

This case involves Baxter's execution of two unauthorized purchases on behalf of married customers JS and WS of interests in two limited liability companies ("LLCs") -- Paramount Payphone Select LLC ("Paramount Payphone") and Paramount Cash LLC East ("Paramount Cash").[2] The complaint also alleged that Baxter had failed to advise U.S. Life of the LLC purchases and that he used $500 of his own money to make the purchases on behalf of the customers, thereby sharing in a customer account. Finally, the complaint also alleged that Baxter failed to respond to an NASD Regulation request for information.

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[1] Procedural Rule 9134 indicates that service of a complaint may be accomplished by U.S. Postal Service first-class, certified mail or Express Mail. It further indicates that papers served on a natural person may be served at the person's residential address as reflected in the CRD and that, when the serving party has knowledge that the CRD address is out of date, duplicate copies shall be served on the person's last known residential address and CRD business address. CRD did not indicate a current business address for Baxter, who had already left U.S. Life.

[2] Paramount Payphone involved established payphone routes. Paramount Cash involved automatic teller machine routes. The operating agreement for the Paramount Payphone LLC indicated that Paramount Communications & Co., Inc. had acted as organizer. The operating agreement for the Paramount Cash LLC indicated that Paramount Cash, Inc. had acted as organizer. (The organizers hereafter will be referred to collectively as "Paramount" and the LLCs together will be referred to as "the Paramount LLCs.")

At the time of the trades, JS and WS resided in Hawaii and were in their early forties. In a written statement dated January 24, 1997 and a customer questionnaire dated June 1997, JS related that, since 1985, she and her husband, WS, had owned interests in Oppenheimer Mutual Funds ("Mutual Funds") that they had purchased through Baxter. As of November 1996, their Mutual Fund account values were $9,500 (WS' account) and $8,900 (JS' account). JS and WS had not heard from Baxter since 1985, when they initially invested with him. On November 26, 1996, Baxter contacted JS and WS and indicated that he expected a downturn in the stock market and recommended that they move their money into money market accounts. JS agreed to move their funds into money market accounts. Baxter indicated that he would send them "some papers," but he did not elaborate as to their contents.

Baxter sent JS and WS a November 26, 1996 letter in which he indicated that he had moved their funds to money market accounts and recommended that they invest in Paramount Payphone and Paramount Cash. He stated that he had been placing clients in these ventures since March of 1996 and that they offered significant returns with "no exposure to the stock market." Paramount Payphone required a minimum investment of $5,000, and Paramount Cash required a minimum investment of $10,000. Baxter recommended investing WS' $9,500 plus $500 of Baxter's own funds[3] into Paramount Cash and $5,000 of JS' money into Paramount Payphone. Baxter stated that JS and WS should review the materials that he had enclosed and that they should speak at the beginning of the following week. He indicated that he could cover the "details" by phone.[4]

During the week of December 8, 1996, JS and WS notified Baxter that they were not interested in investing in either of the Paramount LLCs and requested that he transfer their money from the money market accounts back to the Mutual Funds in which they originally had invested. During the second week of January 1997, JS and WS received statements from Oppenheimer indicating that their funds had not yet been transferred back into the Mutual Funds. JS again contacted Baxter and reiterated her request to reinvest her and her husband's money in the Mutual Funds.

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[3] Baxter indicated that he would cut a "company check" to cover the difference between what WS held in his account and the $10,000 required for a minimum investment in Paramount Cash.

[4] Baxter included with his November 26 letter copies of the Paramount Payphone and Paramount Cash operating agreements, Paramount questionnaires, and Paramount subscription documents for JS and WS to sign. He also enclosed information, account applications, Individual Retirement Account ("IRA") transfer rollover forms, and investment authorization forms from Retirement Accounts, Inc. ("Retirement Accounts"), an entity involved in self-directed individual retirement accounts.

On January 23, 1997, JS contacted Oppenheimer and was advised that on November 26, 1996, $5,000 had been transferred out of her Mutual Fund account, and on December 16, 1996, $9,500 had been transferred out of WS' Mutual Fund account. Both sums were transferred to Retirement Accounts pursuant to transfer request forms that bore JS' and WS' signatures and were guaranteed by First Trust Corp. Neither JS nor WS had signed transfer request forms.[5] JS contacted Retirement Accounts and learned that Baxter had established two accounts, one each in JS' and WS' names, and that the money in those accounts already had been transferred to the two Paramount LLCs.[6] On November 26, 1996, Baxter purchased one unit of Paramount Payphone on behalf of JS. On December 16, 1996, he purchased one unit of Paramount Cash on behalf of WS.

On January 23, 1997, JS attempted repeatedly to contact Baxter, but he failed to return her telephone and electronic mail messages. JS thereafter complained to Oppenheimer, Paramount, and U.S. Life.

Discussion

Procedural Rule 9269 indicates that a respondent's failure to file an answer to a complaint may be deemed an admission of the allegations of the complaint. By failing to file an answer, Baxter admitted the allegations of the complaint. Our findings, however, are not based on these admissions. Rather, our findings are based on a detailed analysis of the record evidence.

Cause One. Under cause one, the Hearing Officer found that Baxter's purchases of Paramount Cash and Paramount Payphone LLC interests on behalf of JS and WS were unauthorized and violated Conduct Rule 2110. We agree. Conduct Rule 2110 requires members to observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business.[7] Baxter's

[5] In a June 19, 1997 letter to NASD Regulation staff, Baxter admitted that he had signed JS' and WS' names to the transfer request forms. Baxter asserted that JS and WS had agreed to allow him to do so and that he did it to "expedite the process." JS and WS denied that they had authorized Baxter to sign documents on their behalf. Baxter did not produce written authorization to support his contention.

[6] The accounts that Baxter had established in JS' and WS' names at Retirement Accounts listed Baxter's Olney Road address as JS' and WS' address. Similarly, the Paramount LLC subscription documents listed Baxter's address as theirs. In a June 19, 1999 response to an NASD request for information, Baxter indicated that he listed his Virginia address as JS' and WS' address because Paramount could not sell interests in Hawaii, the state in which JS and WS resided.

[7] Rule 115 indicates that persons associated with a member shall have the same duties and obligations under the NASD's Rules as members. Thus, the ethical standards imposed on members in Rule 2110 apply equally to persons associated with members.

"business" included his commercial relationships with JS and WS, his customers.[8] Baxter's willingness to invest his customers' funds in limited liability companies without their consent reflects directly on his ability to comply with regulatory requirements fundamental to the securities industry and "to fulfill his fiduciary responsibilities in handling other people's money." In re James A. Goetz, Exchange Act Rel. No. 39796 (Mar. 25, 1998). This type of "business-related misconduct is actionable under NASD Rules as unethical misconduct," even though the conduct involves the purchases of LLC interests rather than securities. Goetz, supra.

At the outset, we note that JS' and WS' Paramount LLC purchases were reversed in February 1997 and that their previous positions were restored. Thus, in June and July 1997, when JS provided NASD Regulation staff with information, she and her spouse already had been made whole and would have had little financial incentive to misinform NASD Regulation. Moreover, there is nothing in the record to contradict JS' and WS' claim that they did not authorize the Paramount LLC purchases.

Additionally, the timing and content of Baxter's initial solicitation letter cast doubt on his contention that the purchases were authorized. Baxter's solicitation letter was dated November 26, 1996, and JS received it on December 6. The letter indicated that Baxter was "recommending" making changes in their investments "as soon as possible" and that he was "recommending" two investments with Paramount, for which he included informational material. The letter went on to explain the type of investments that he was recommending and indicated the minimum amount required for investment in each LLC. He closed the letter with a request that JS and WS review the material and that they speak at the beginning of the following week. JS' Paramount Payphone purchase occurred on November 26 (the date that the letter was mailed). Given that the Paramount Payphone purchase occurred on November 26, the date of the letter, JS would have had to have authorized the purchase before Baxter's letter was sent and before she even received the materials. The content of Baxter's November 26 letter indicates that Baxter sought to solicit JS and WS for investments in the Paramount LLCs, not

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[8] As discussed in more detail herein in the section addressing cause three, we have determined that the evidence as to whether the LLC interests at issue were securities is inconclusive. The Securities and Exchange Commission ("SEC") consistently has held, however, that the NASD's disciplinary authority is broad enough to encompass business-related conduct that does not involve a security. In re Leonard John Ialeggio, 52 S.E.C. 1085 (1996), aff'd, No. 98-70854 (9th Cir. July 15, 1999) (Conduct Rule 2110 (formerly known as Article III, Section 1 of NASD Rules of Fair Practice) violated when registered person retained reimbursement from member firm for expenses that he did not incur and improperly induced the firm to pay country club fees to which he was not entitled)); In re Henry E. Vail, 52 S.E.C. 339 (1995), aff'd, 101 F.3d 37 (5th Cir. 1996) (rule violated when registered person misappropriated funds of unrelated organization for which he served as treasurer); In re Daniel Joseph Alderman 52 S.E.C. 366 (1995), aff'd, 104 F.3d 285 (9th Cir. 1997) (rule violated when associated person delayed return of customer funds erroneously transferred to member firm's parent for which associated person served as director and vice president).

that they already had agreed to invest. If JS and WS already had agreed to purchase the Paramount LLCs, as Baxter suggests, then his letter more likely would have confirmed their decisions rather than recommended investments. Thus, the content and timing of Baxter's November 26 letter, at a minimum, belie his claim that JS authorized the November 26 Paramount Payphone purchase.

Furthermore, Baxter signed JS' and WS' names on the paperwork for processing the Paramount LLC purchases and recorded his own address as JS' and WS' address.[9] These occurrences are consistent with our finding that Baxter executed the Paramount LLC purchases without JS' and WS' knowledge or consent. Additionally, Baxter admittedly contributed $500 of his own money to fund WS' purchase of Paramount Cash, since WS' mutual fund account held only $9,500 and the minimum investment in Paramount Cash was $10,000. If WS had authorized the purchase, presumably he would have supplemented the funds in his mutual fund account with an additional $500 of his own to fully fund the purchase. We find that this fact further supports our conclusion that Baxter acted without his clients' authorization.

Baxter's conduct concerned the mishandling and unauthorized investment of funds of the customers of a member firm with which he was associated. Conduct of this nature is, at the least, unethical and violates Conduct Rule 2110. See NASD Interpretive Material 2310-2, Fair Dealing with Customers (the execution of transactions that are unauthorized by customers violates the responsibility for fair dealing and is not within the ethical standards established in the NASD's Rules). We affirm the Hearing Officer's findings of violation under cause one of the complaint.

Cause Two. Under cause two, the Hearing Officer found that Baxter improperly shared in a customer account in violation of Conduct Rules 2110 and 2330(f).[10] We do not find that the record supports this finding.

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[9] Baxter contended that he signed JS' and WS' names to expedite the purchases and that he used his address rather than JS' and WS' address because Paramount did not intend to conduct business in Hawaii, the state in which JS and WS resided. We note, however, that Baxter's November 26 letter did not indicate that he would have to sign the paperwork for JS and WS or that Baxter would use his address in lieu of JS' and WS' address for processing purposes. Additionally, JS denied that she or her husband granted Baxter permission to sign their names, and enclosed with Baxter's November 26 letter were Paramount subscription forms that Baxter prepared for JS and WS to sign themselves. Thus, we give little credence to Baxter's contentions in this regard.

[10] Rule 2330(f) states, in part, that associated persons shall not share directly or indirectly in the profits or losses in any account of a customer carried by the member with which the person is associated or any other member.

Although it is not disputed that Baxter transferred approximately $500 to WS' account at Retirement Accounts in order to enable WS to purchase an interest in Paramount Cash, the record is not clear that Baxter ever transferred his money to a customer account carried by the member with which Baxter was associated or any other member.[11] Violations of Rule 2330 involve sharing in customer accounts held at member firms. Baxter did not transfer his money to or share in a member firm customer account. He shared in WS' account at Retirement Accounts, which has not been shown to be a member firm or a broker/dealer. We therefore reverse the Hearing Officer's finding of violation under cause two.[12]

Cause Three. Under cause three, the Hearing Officer found that Baxter violated Conduct Rule 3040 by selling interests in the Paramount Payphone and Paramount Cash LLCs without providing prior written notice to U.S. Life, the member firm with which he was associated. In order to affirm the Hearing Officer's finding of violation, we must conclude that the LLC interests were in fact securities.[13] Based on the limited evidence in the record, we are unable to reach that conclusion.

In a number of cases, federal and state courts have concluded that LLC interests are securities based on analysis of the four criteria for identifying an "investment contract" set forth in SEC v. Howey, 328 U.S. 293 (1946).[14] A key factor in the determination of whether LLC interests are securities is

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[11] The record does not indicate that Retirement Accounts was a broker-dealer or member firm.

[12] The Department of Enforcement argued that the record also demonstrated that Baxter shared in WS' account at Oppenheimer subsequent to WS' purchase of an interest in Paramount Cash, since after WS' investment in Paramount Cash was canceled, his funds (including Baxter's contribution) were returned to Oppenheimer. We reject this argument. The complaint alleged that Baxter violated Conduct Rule 2330 by contributing money toward WS' purchase of an interest in Paramount Cash, not by allowing his funds to be transferred back to Oppenheimer. Staff's argument therefore differs from what was alleged in cause two of the complaint. Additionally, Baxter did not cause his funds to be transferred into WS' Oppenheimer account. The funds were transferred to the Oppenheimer account when the Paramount Cash purchase was canceled. For these reasons, we reject Enforcement staff's argument and reverse the Hearing Officer's finding under cause two.

[13] Rule 3040 indicates that no person associated with a member shall participate in any manner in a private securities transaction except in accordance with the requirements of the rule. (The rule requires the associated person to provide prior written notice to the firm with which he is associated and includes other requirements that vary based on whether the transaction at issue is for compensation.) Rule 3040 also defines "private securities transaction" as any securities transaction outside the regular course or scope of an associated person's employment with a member firm.

[14] To find an investment contract, Howey requires: 1) that the investor give up tangible and

whether the investors expect to derive profits from the entrepreneurial efforts of others. In determining whether investors intend to control the management of an LLC or whether they intend to rely on the management of a third party to derive profits, courts have considered the wording of the operating agreement, but also have focused on how the LLC actually operated. Even if, on the face of the operating agreement, the investor theoretically retains substantial control over the investment and intends to participate in management, the investor nonetheless may demonstrate such dependence on a third party that the investor is in fact unable to exercise meaningful management authority. In cases of this nature, courts have concluded that investors intended to and did derive profits from the efforts of others, notwithstanding indications in the operating agreement that investors would participate in management. See Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981).[15] See also In re Maximo J. Guevara, Complaint No. C9A970018 (NAC Jan. 28, 1999) (NAC found general partnership interests to be securities under the Howey and Williamson tests).

The LLC operating agreements and subscription documents were the only evidence included in the default record of this case regarding the LLC investments. These documents indicated that investors would participate in the management of the LLCs. In order for us to make a determination as to whether these LLC interests are securities, however, we must review and consider evidence in addition to the operating agreements.[16]

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definable consideration in return for an interest obtained; 2) that there exist a common enterprise -- i.e., common interests between the investors and manager or the pooling of interests by members; 3) that there be an expectation of profit by the investor; and 4) that the expectation of profit be derived from the entrepreneurial efforts of others.

[15] In Williamson, which other circuit courts have followed, the United States Circuit Court of Appeals for the Fifth Circuit adopted the following test for determining whether an investment meets the "profits from a third party" prong of the Howey test:

1041. Consider legal powers afforded the investors by the legal documents without regard to practical implications. If control is absent, the investment may meet the Howey test.
1042. Consider investors' sophistication and expertise. If investors lack experience and expertise, investment may meet the Howey test.
1043. Consider whether the investors are so dependent on some unique ability of the promoter, organizer or manager that they cannot replace the manager or otherwise exercise meaningful power. If investors are dependent, investment may meet the Howey test.

[16] Based on case law in this area, in order to determine if LLC interests are securities, we would need to consider other evidence, such as: how many investors actually invested; whether they knew each other; the investors' general business experiences and geographic locations; whether they intended to be passive investors when they invested; when the first organizational meeting occurred; whether an investor/manager was chosen at that meeting; how many managers were chosen; the

In light of the dearth of evidence regarding the LLC investors and the actual operation of the LLCs, we cannot find that the LLC interests at issue were securities. We acknowledge that many courts have found LLC interests to be securities and that the SEC has taken a position in its enforcement efforts that LLC interests are securities. In this case, however, we simply do not have evidence sufficient to make a determination in this regard. We therefore reverse the Hearing Officer's finding of violation under cause three.[17]

Cause Four. Under cause four, the Hearing Officer found that Baxter failed and refused to respond to an NASD Regulation request for information, in violation of Conduct Rule 2110 and Procedural Rule 8210. We affirm the Hearing Officer's finding.

NASD Regulation staff sent Baxter a letter dated January 5, 1999 in which staff reiterated a request for information that it previously had propounded and which Baxter previously refused to answer.[18] The January 5 letter requested a list of the names of other customers to whom Baxter had sold Paramount LLCs. NASD Regulation staff sent the letter via certified and first-class mail to Baxter's CRD and Olney Road addresses. The certified and first-class mailings to Baxter's CRD address were returned marked "forwarding order expired." The certified mail receipt for the letter sent to the Olney Road address appears to bear Baxter's signature and indicates a delivery date of January 25, 1999. The first-class mailing to the Olney Road address was not returned.

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managers' qualifications; whether all managers were also investors; whether important organizational activities occurred before the managers were chosen; whether the promoter controlled the acquisition of systems and other necessary prerequisites to start the enterprise without input from the investors; whether the promoter had a particular expertise applicable to these enterprises; whether, once chosen, the managers relied on the promoter's expertise; and whether the operating agreements, when given to the investors, were accompanied by other literature or verbal representations.

[17] We have concluded that the evidence did not support a finding that the LLC interests were securities, and Rule 3040 therefore did not apply. We note, however, that Enforcement could have pleaded alternatively that Baxter's sales of LLC interests violated Rule 3030, which requires associated persons to provide prompt written notice to their employers of outside business activities that do not involve securities. Had Enforcement alternatively pleaded a violation of Rule 3030, we would not need to reach the issue of whether the LLC interests were securities in order to find a violation.

[18] In correspondence dated November 6, 1997 and February 25, 1998, NASD Regulation staff requested that Baxter provide a list of the names and addresses of other clients to whom he had sold Paramount LLCs and information regarding the compensation that he received on those sales. Baxter responded "[t]he listing of my clients is private and my income is also private." Baxter never provided the information.

Baxter argues on appeal that he was not properly served with the January 5 information request. This assertion is not supported by the record. Rule 8210 indicates that notice of a Rule 8210 request may be deemed received if it is mailed to the individual's residential address as reflected in CRD and a copy is sent to any other more current address of which the staff is aware. NASD Regulation staff properly mailed this Rule 8210 request to Baxter's CRD and Olney Road addresses and obtained evidence (a signed return receipt) that he received the letter sent to the Olney Road address. Additionally, Baxter responded to other portions of the earlier information requests, so he was aware that staff sought to obtain a list of the other customers to whom he had sold Paramount LLCs. Furthermore, registered persons have a duty to receive and review mail sent to them at their CRD addresses. In re Lance E. VanAlstyne, Exchange Act Rel. No. 40738 (Dec. 2, 1998). NASD Regulation therefore properly provided Baxter with the January 5 request, and Baxter failed to respond.

Baxter also argues on appeal that the Hearing Officer erred in failing to consider that Baxter had responded to other information requests that staff previously had propounded. We reject this argument. Staff requested a list of other customers to whom Baxter sold Paramount LLCs. Although Baxter provided staff with other information that it had requested, he never provided this information. Baxter cannot excuse his failure to respond with an assertion that, although he did not provide the requested information, he had provided staff with other information. See In re General Bond and Share Co., 51 S.E.C. 411 (1993), aff'd in part, vacated and remanded on other grounds, 39 F.3d 1451 (10th Cir. 1994) (associated persons may not ignore NASD inquiries, nor may they determine for themselves if the information requested is material to an investigation); In re Michael David Borth 51 S.E.C. 178 (1992) (respondent's refusal to respond because he did not believe that the NASD needed the information provided no excuse for his failing to respond).

The purpose of Rule 8210 is to provide a means for the NASD, in the absence of subpoena power, to obtain information from its members in the course of its investigations. In re Daniel C. Adams, 47 S.E.C. 919 (1983). A registered person's failure to comply with this rule subverts the NASD's ability to carry out its regulatory functions. In re Edward C. Farni, 51 S.E.C. 1118 (1994). "Since the NASD lacks subpoena power, it must rely heavily upon Rule 8210 in connection with its obligation to police the activities of its members and associated persons." In re Joseph P. Hannan, Exchange Act Rel. No. 40438, at 5 (Sept. 14, 1998).

We conclude that the evidence supports our finding that Baxter failed to respond to an NASD request for information in violation of Conduct Rule 2110 and Procedural Rule 8210.

Sanctions. The Hearing Officer censured Baxter, barred him in all capacities, fined him $45,000, and suspended him for 90 days.[19] In light of our dismissal of causes two and three, we impose no sanctions as to those two causes.

We first address our findings under cause four that Baxter failed to respond to a request for information. We affirm the bar from associating with any NASD member in any capacity and eliminate the $25,000 fine.[20] At the outset, we note that Procedural Rule 8210 is widely accepted as one of NASD Regulation's most important tools for investigating potential wrongdoing, particularly in the absence of subpoena power. As recommended in the NASD Sanction Guideline for failure to respond, we have considered as aggravating the fact that Baxter never provided staff with the requested information and the nature of the information requested.[21] Staff requested a list of the other customers to whom Baxter had sold Paramount LLCs. If provided, the information might have assisted NASD Regulation staff in gathering evidence regarding whether the LLC interests were securities. NASD Regulation staff expended substantial efforts to obtain a response from Baxter to no avail. We find that Baxter's failure to respond significantly hindered the staff's investigation and that a bar is appropriately remedial.

As to our findings under cause one that Baxter executed two unauthorized purchases of LLC interests, we find that it would be appropriate to increase the sanctions imposed by the Hearing Officer to a two-year suspension and $20,000 fine. In light of our imposition of a bar under cause four, however, we see no remedial purpose in also imposing a suspension. Similarly, in light of our recent policy determination that, in certain cases involving the imposition of a bar, no further remedial purpose is served by the additional imposition of a monetary sanction (See NASD Notice to Members 99-86), we also do not impose a fine for Baxter's unauthorized trading.

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[19] The Hearing Officer apportioned the sanctions as follows: a $10,000 fine and 30-day suspension for unauthorized purchases under cause one; a $5,000 fine and 30-day suspension for improper sharing in a customer account under cause two; a $5,000 fine and 30-day suspension for private securities transactions under cause three; and a $25,000 fine and bar for failing to respond to information requests under cause four.

[20] In accordance with our recently adopted policy on the imposition of monetary sanctions (NASD Notice to Members 99-86), we have determined that no remedial purpose would be served by imposing a fine in addition to the bar for Baxter's failure to respond. We therefore eliminate the fine of $25,000 imposed by the Hearing Officer for Baxter's failure to respond to an NASD request for information.

[21] See NASD Sanction Guidelines ("Guidelines") (1998 ed.) at 31 (Failure to Respond or Failure to Respond Truthfully, Completely, or Timely to Requests Made Pursuant to NASD Procedural Rule 8210).

We do not concur with the Hearing Officer's determination that Baxter's misconduct under cause one was not egregious, that he did not attempt to conceal his misconduct, and that the record contains no evidence that he was motivated by personal gain. Baxter's execution of unauthorized purchases "belies his claim of fair dealing with his customers," and remedial sanctions must recognize the seriousness of the misconduct. In re Jon R. Butzen, Exchange Act Rel. No. 36512, at 6 (Nov. 27, 1995).

We first turn to the principal considerations listed in the Guidelines.[22] We find no mitigating factors present in this case. Unlike the Hearing Officer, we do not believe that the record indicates that Baxter did not attempt to conceal his misconduct. He signed his customers' names to account transfer documents. He listed as his customers' address his own address, thereby ensuring that information mailed to his customers would be mailed to him. Additionally, he did not inform U.S. Life of these sales, thereby preventing any oversight of his activities. Furthermore, unlike the Hearing Officer, we do not find that the record contains no evidence that Baxter was motivated by personal gain. The record indicates that Baxter stood to receive 15 to 25 percent commissions on these purchases and that the Paramount offerings were due to close soon after JS' and WS' purchases, thereby providing an incentive for Baxter to execute the Paramount purchases quickly and receive commissions of approximately $2,250 to $3,750. In our view, these commissions may have served as an incentive for Baxter to effect Paramount LLC purchases without authorization. Additionally, the Sanction Guidelines recommend consideration of the fact that Baxter profited from the misconduct through receipt of commissions as an aggravating factor.[23] See In re Aaron Eugene Granath, Complaint No. C02970007 (NAC March 6, 1998) (lack of disciplinary history, cancellation of unauthorized trades, and reversal of commissions should not mitigate severity of sanctions).

We next turn to NAC precedent, which makes clear that unauthorized trading is serious misconduct deserving of rigorous sanctions. We noted in In re Daniel S. Hellen, Complaint No. C3A970031 (NAC June 15, 1999), that, although the Sanction Guideline for unauthorized trading does not define what constitutes an "egregious" case, a number of our earlier decisions had identified two categories of egregious unauthorized trading: (1) quantitatively egregious unauthorized trading and (2) unauthorized trading that is egregious because it is accompanied by certain aggravating misconduct. We further noted in Hellen that in In re Ted D. Wells, Complaint No. C07970045 (NAC July 24, 1998), we had concluded that there was a third category of egregious unauthorized trading -- conduct that was "qualitatively egregious" -- and barred a respondent who had effected a single unauthorized transaction that we concluded was qualitatively egregious. In Hellen, we also attempted to elaborate on the

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[22] See Guidelines (1998 ed.) at 86 (Unauthorized Transactions).

[23] The fact that Paramount ultimately reversed Baxter's commissions does not negate the fact that Baxter expected to obtain a monetary benefit from his misconduct.

principles underlying the Wells decision and clarified that, for purposes of determining sanctions, the relevant issue is whether the trading was qualitatively egregious. We concluded in Hellen that two factors are relevant to the determination as to whether unauthorized trading was or was not qualitatively egregious. The first concerns the strength of the evidence that the trades at issue were unauthorized. The second concerns the evidence relating to the respondent's motives.

In the instant case, the statements of the customers that the trades in question were unauthorized is corroborated by highly persuasive circumstantial evidence. As discussed earlier in this decision, significant evidence supports our finding. The timing and content of Baxter's initial solicitation letter suggests that the trade executed on the same day as the letter could not have been authorized by the customer. JS and WS had no monetary incentive to misrepresent Baxter's actions to NASD Regulation. Baxter signed JS' and WS' names on the paperwork for processing the Paramount LLC purchases and recorded his own address as JS' and WS' address. Additionally, Baxter admittedly contributed $500 of his own money to WS' purchase of Paramount Cash. Finally, when JS contacted Baxter to complain, he did not return her calls. These facts are consistent with our finding of unauthorized purchases.

With respect to Baxter's motives,[24] the evidence suggests that Baxter intentionally or recklessly executed these unauthorized purchases for his own monetary benefit. He intentionally signed his customers' names to transfer papers, listed his own address as his customers' on purchase forms, and used his own money to meet the required minimum for investment rather than requesting additional funds from his customer. Baxter ignored JS' initial complaints about the trades, and he stood to earn substantial commissions from the sales. Conduct of this nature represents a clear betrayal of customer trust and rises to the level of qualitatively egregious action, warranting the imposition of weighty sanctions.

Thus, we find that Baxter's misconduct under cause one justifies the imposition of a two-year suspension and $20,000 fine. Since we bar Baxter under cause four, however, we will not additionally impose a suspension and fine under cause one. We find that the sanction imposed is appropriate and necessary to impress upon Baxter and others the importance of following customer instructions and responding to NASD requests for information and to deter Baxter from engaging in similar misconduct.[25]

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[24] In Hellen, we noted that in cases involving evidence that a registered representative acted with a good faith belief that a trade, albeit unauthorized, would benefit his or her customer or that an unclear, ambiguous or misunderstood communication from a customer led a registered representative to believe, honestly but mistakenly, that he or she was authorized to trade, then imposition of a lengthy suspension or bar is not appropriate. In this case, there is no evidence that Baxter acted with a good faith belief that his customers had authorized these purchases.

[25] The sanction is consistent with the applicable NASD Sanction Guidelines. See

Accordingly, Baxter is barred from associating with any NASD member in any capacity. The bar imposed herein is effective as of the date of this decision.[26]

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Senior Vice President and Corporate Secretary

Guidelines (1998 ed.) at 31 (Failure to Respond or Failure to Respond Truthfully, Completely, or Timely to Requests Made Pursuant to NASD procedural Rule 8210) and 86 (Unauthorized Transactions).

[26] Consistent with our policy regarding censures, we eliminate the censure imposed by the Hearing Officer. Under this new policy, we have determined not to impose censures in cases in which respondents are barred or suspended, since bars and suspensions are significant sanctions that already signify the NASD's disapproval of a respondent's misconduct. See Notice to Members 99-59 (July 1999).

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.