

## NAVIGATING A REGULATORY INVESTIGATION

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### INTRODUCTION

Receiving a letter from a regulatory agency or organization can make any person nervous. When this happens, people are naturally unsure what to do, why they are the subject of an investigation, and what comes next. This article will explain the main aspects of a regulatory investigation, using a FINRA investigation as the primary example.

### FINRA'S 8210 LETTER

Most FINRA investigations start with a so-called "8210 letter." This letter is typically issued by a FINRA investigator in the Department of Enforcement and requests documents and information related to an investigation. Rule 8210 states that FINRA staff has the authority to request that any person subject to FINRA's jurisdiction provide information orally, in writing, or electronically and to testify under oath with respect to any matter involved in the investigation, complaint, examination, or proceeding. Modifications to the rule, passed in 2013, have broadened FINRA's authority to request documents and information. Not only does the recipient of an 8210 letter have an obligation to produce records in his possession, he has an obligation to produce records in the possession of someone else if he has a legal right, authority, or ability to obtain those records upon demand.

Once an 8210 letter is received, there

are limited options for how to respond. Part and parcel with being a FINRA member is an obligation to cooperate with FINRA during an investigation. Indeed, FINRA Rule 8210(c) provides that "[n]o member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule." The 8210 letter itself reminds members of this obligation and states that "any failure on your part to satisfy these obligations could expose you to sanctions, including permanent bar from the securities industry." All too often, registered representatives see this language and think responding themselves (without counsel) will make the investigation go away or that they can personally explain-away whatever situation is being investigated. Regrettably, these responses often do not address the most important legal points in the investigation and fail to properly articulate the salient facts to the FINRA investigator. Any recipient of an 8210 letter, or similar letter from the SEC, state Department of Insurance or Department of Securities, would be wise to immediately consult with counsel to (1) ensure a written response is thoughtfully drafted, and (2) work cooperatively with the investigator to discuss any issues with the document requests in an effort to fully comply.

Based on the written response, conversations between counsel and the FINRA staff, and document production,

FINRA can choose to close its investigation or continue its investigation and take it to the next level by requesting an On-The-Record ("OTR") interview.

### FINRA'S ON-THE-RECORD INTERVIEW

An OTR is very similar to a deposition in a civil lawsuit. The witness will respond to questions by a FINRA investigator while under oath. The OTR will delve into the witness's background and qualifications, work experience, and the subject matter of the investigation itself. Questions may relate specifically to documents produced in response to the 8210 letter directed to the witness, as well as an 8210 letter directed to other individuals. Keep in mind that the FINRA investigator typically gathers documents and information from multiple sources. Anyone submitting to an OTR would be wise to consult with counsel before providing testimony to properly prepare for what will be the only opportunity to explain facts to the FINRA investigator before an enforcement action is filed.

Although similar to a civil deposition, an OTR is unique in many ways. Unlike depositions in state or federal court, there are limited bases for counsel to object to questions posed by the FINRA investigator. The importance of counsel is realized more in preparing for the OTR and in negotiating a potential dismissal or resolution. Invoking the Fifth Amendment privilege against self-

incrimination also has a unique effect in an OTR. Indeed, FINRA may view the invocation of the Fifth Amendment privilege against self-incrimination as a lack of cooperation and issue harsh sanctions for doing so, including a permanent bar from the securities industry. Also unique is what occurs at the conclusion of the OTR. FINRA will provide the witness an opportunity to make a closing statement, which may be utilized to further explain prior testimony or explain issues that were not addressed at all. Whether a closing statement is appropriate or beneficial will depend on the facts and circumstances of each case and the performance of each individual witness, and it would be wise for a witness to consult with counsel during the OTR to make this determination.

After the OTR, FINRA will typically decide whether to dismiss the case or pursue sanctions through settlement discussions or take it to the next level by the filing of an enforcement action.

#### FINRA ENFORCEMENT ACTIONS

If a FINRA investigation is not dismissed or resolved after the 8210 letter or OTR, it will turn into a formal enforcement action. The Department of Enforcement initiates an enforcement action by filing a Complaint against the member or associated person. After filing the Complaint, the material phases of an enforcement action are as follows:

1. Answer: The Defendant(s) will have an opportunity to file an Answer to the Complaint, admitting, denying, or stating he is without enough information to admit or deny the allegations.

2. Selection of Panel: The Chief Hearing Officer will appoint a Hearing Panel or an Extended Hearing Panel to oversee the hearing.

3. Conferences: The parties will participate in an initial pre-hearing conference to discuss a litigation schedule and any other material issues.

4. Motion Practice: The Defendant may file a motion for summary disposition, which is similar to a court motion for summary judgment, when there is no genuine issue in dispute with regard to any material fact, and the issues may be decided as a matter of law.

5. Discovery: The Defendant will have the opportunity to inspect and copy documents prepared or obtained by FINRA Staff in connection with the investigation, request that FINRA compel the production of documents or testimony at the hearing from persons over whom FINRA has jurisdiction, or file a written motion requesting that FINRA produce for inspection and copying any witness statements from witnesses that will be called at hearing.

6. Pre-Hearing Submissions: The parties will submit prehearing submissions and exchange witness and exhibit lists, documents to be used during hearing, an outline or narrative summary of a Party's case or defense, the legal theories upon which a Party will rely, and other information called for in FINRA Rule 9242.

7. Hearing: At hearing, the parties will have an opportunity to call witnesses and introduce documents. Within 60 days after final disposition, the Hearing Officer will issue a written decision.

8. Appeal: Either party may appeal the decision within 25 days by appealing

to the National Adjudicatory Council.

Ultimately, FINRA may impose one or more of the following sanctions for each violation: (1) censure; (2) monetary fine; (3) suspension; (4) expulsion; (5) temporary or permanent cease and desist order; or (6) any other fitting sanction.

#### CONCLUSION

Navigating a regulatory investigation can be a daunting task, especially when a person's livelihood is on the line. Whether it is an investigation or enforcement action brought by FINRA, the SEC, state Departments of Insurance or Securities, or professional board like the CFP Board, understanding the process and the potential outcomes can improve your chances for a favorable outcome and help reduce the unknowns that so often create anxiety for those dealing with these types of investigations.

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Cautionary note: Remember to immediately report all regulatory inquiries, including an initial request and any follow up correspondence, to your Compliance Department and any others specified by your Broker/Dealer.