

Preparing for an On-the-Record (OTR) Interview: What Brokers Need to Know about FINRA Rule 8210

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All registered brokerage firms and broker-dealers are subject to Financial Industry Regulatory Authority (FINRA) Rules. While these rules govern firms' and brokers' customer-related activities, they also impose requirements for dealing with FINRA. This includes requirements related to the disclosure of records and information during FINRA's enforcement investigations.

One of the most important Rules in this area is [FINRA Rule 8210](#). This is the Rule that gives FINRA staff the authority to conduct on-the-record (OTR) interviews. When a brokerage firm or broker-dealer receives an "8210 letter," the firm or broker must respond appropriately, as failure to do so can lead to suspension and other penalties.

"Rule 8210 is critical to FINRA's ability to conduct its enforcement activities. Not only does it give FINRA broad authority to compel registered firms and brokers to provide records and testimony on the record, but it also presents significant risks for firms and brokers that fail to comply. Before appearing for 8210 OTR interviews, brokers and firm representatives must prepare thoroughly, and they must ensure that they have a clear understanding of what to expect during the OTR interview process." – Dr. Nick Oberheiden, Founding Attorney of Oberheiden P.C.

Responding to an 8210 Letter from FINRA

While preparing for an OTR interview is (or should be) a time-intensive and detail-oriented process, responding to an 8210 letter is a process of its own. How a firm or broker responds to an 8210 letter can significantly influence subsequent stages of FINRA investigation. With this in mind, upon receiving an 8210 letter from [FINRA](#), a brokerage firm or broker should:

- **Review the Letter with Counsel** – Brokerage firm representatives and individual brokers that receive 8210 letters from FINRA should review their letters with a legal counsel as soon as possible. While many smaller firms and individual brokers will try to deal with FINRA on their own, this is a mistake. Usually, these firms and brokers end up engaging a legal counsel later in the process, and by this time they have already made irreversible (and costly) mistakes. Engaging a legal counsel upon the receipt of an 8210 letter ensures that the firm or broker can act on sound legal advice and with a clear understanding of what is required.

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- **Have Counsel Contact FINRA** – After reviewing the 8210 letters, the counsel’s next step should be to contact FINRA directly. The purpose of this communication is to open a dialogue and establish a courteous working relationship. Even when a firm or broker is in a defensive posture, it will often be in the firm’s or broker’s best interests to work with (rather than against) FINRA staff to achieve a favorable outcome in light of the circumstances at hand.
 - **Decide Whether to Request an Extension** – Based on a review of the 8210 letters, the recipient should decide whether to request an extension. In addition to requesting OTRs, 8210 letters will also typically request voluminous records. If a firm or broker needs more time to collect, review, and submit these records than FINRA has allowed, submitting a good-faith extension request promptly generally affords the best chance for approval.
 - **Decide Whether to Negotiate FINRA’s Requests** – 8210 letter recipients must also quickly determine if they should attempt to negotiate the scope of FINRA’s requests. In some cases, it may make sense to negotiate the timing or location of an OTR interview as well. If compliance is unfeasible, unduly burdensome, or unnecessary for FINRA investigations, then showing why this is the case and proposing a reasonable alternative could prove to be an effective strategy.
 - **Prepare and Submit Responsive Documents** – With a clear understanding of what is required, brokerage firms and brokers can shift their focus to complying with FINRA’s record requests. In doing so, firms and brokers should ensure that they examine all relevant repositories and storage media. They must also be extremely careful to preserve the attorney-client privilege, as inadvertently waiving the privilege could have significant negative ramifications. Due to the risks of failing to produce all non-privileged responsive documents and making an inadvertent waiver, 8210 letter recipients should work closely with their legal counsel throughout this process thus, it’s important to have a good attorney-client relationship during the entire procedure.

Along with taking these steps that are specific to responding to an 8210 letter, brokerage firms and broker-dealers that are facing scrutiny from FINRA should also take the steps that are necessary when dealing with an enforcement investigation generally. For example, firms and brokers should promptly institute legal holds to avoid the destruction, deletion, or other “spoliation” of responsive documents. They should also work with their counsel to evaluate their compliance efforts, assess their potential exposure as a result of the FINRA investigation, and determine what defenses they have available.

Preparing for an On-the-Record Interview with FINRA

As noted above, a key aspect of Rule 8210 is its provision for on-the-record interviews. Section (a) of Rule 8210 states, in pertinent part:

“For the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an Adjudicator or FINRA staff shall have the right to . . . require a member, person associated with a member, or any other person subject to FINRA’s jurisdiction . . . to testify at a location specified by FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in the investigation, complaint, examination, or proceeding”

FINRA OTR or on-the-record interviews are not subject to time limits, and they often last multiple days. During an OTR interview, FINRA staff members may ask hundreds of questions, and the counsel's ability to object to these questions is limited. As a result, thorough preparation is imperative. Preparations for an OTR interview should span days, not hours, and they should focus on both the witness's substantive answers and how the witness will conduct himself or herself during the interview.

Some of the key steps involved in preparing for an OTR interview with FINRA include:

1. Understanding the Scope and Nature of FINRA's Investigation

Enforcement investigations can target violations of [FINRA Rules](#) as well as federal securities laws such as the Securities Act of 1933 and the Securities Exchange Act of 1934. These sources of authority create an extremely broad universe of requirements and prohibitions, but most investigations focus on no more than a handful of specific violations. To prepare effectively for an OTR interview, a witness must have a clear understanding of the scope and nature of FINRA's investigation and the specific allegations that are at issue.

2. Anticipating Potential Questions and Preparing Responses

A significant portion of OTR preparations should be devoted to anticipating potential questions and preparing responses. Witnesses and their counsel should work to avoid surprises during the interview to the greatest extent possible. This should be a collaborative process conducted in conjunction with the review and preparation of responsive documents according to the 8210 letters.

3. Practicing Prepared Responses Out Loud

Witnesses should practice their prepared responses out loud, and ideally in front of a mirror. Most people tend to skip over details when reading (and especially when reading the same information repeatedly), and most people need to practice speaking at a steady pace and in a confident, non-confrontational tone.

4. Practicing Responding to Unanticipated Questions

In addition to preparing substantive responses to anticipated questions, witnesses should also prepare for the unknown. This includes responding to unanticipated questions to which witnesses know the answers as well as those to which they do not.

5. Conducting Mock OTR Interview Sessions

One of the most effective ways to prepare a witness is to conduct mock OTR interviews. During these mock interviews, lawyers from the witness's defense firm will pose as FINRA staff, and the firm will seek to recreate the entire interview process as much as possible. After each mock interview session, the witness and counsel will debrief, address any concerns, and determine what additional preparations are necessary.

6. Developing a Strategy for Objections and Attorney-Client Communications

Preparations for an OTR interview should also involve developing a strategy for counsel to object to

FINRA staff members' questions and for the witness to seek counsel's advice when necessary. This is critical for ensuring that the witness does not inadvertently make statements against his or her (or the firm's) interests on the record.

7. Going Over OTR Interview Day Procedures

Even with thorough preparations, most witnesses will still be nervous about answering questions on the record. If a witness isn't nervous, he or she probably should be. In any case, when heading into an OTR interview day, witnesses and their counsel should script as much of the day as possible.

This means going over every aspect of the day in detail, from when and where the witness and counsel will meet to what they will say (and won't say) to FINRA staff before the interview begins and after it ends. Not only will this help prevent miscues; but, if a witness is unprepared for an OTR interview, FINRA staff will pick up on this and use it to their advantage.

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