SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 79007 / September 30, 2016

Admin. Proc. File No. 3-17076

In the Matter of the Application of

KENNY AKINDEMOWO

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY PROCEEDINGS

Fraud

Conversion

Private Securities Transactions

Outside Business Activities

Former associated person of member firm appeals from FINRA disciplinary action finding that he induced investors' securities transactions through misrepresentations, converted the investors' funds to his own use, and engaged in private securities transactions and outside business activities without providing written notice to his firm. *Held*, association's findings of violations and imposition of sanctions are sustained.

APPEARANCES:

Kenny Akindemowo, pro se.

Alan Lawhead, *Michael Garawski*, and *Jennifer Brooks*, for FINRA.

Appeal filed: January 29, 2016
Last brief received: May 17, 2016

Kenny Akindemowo, formerly associated with FINRA member firm Pruco Securities LLC ("Pruco" or the "Firm"), seeks review of FINRA's disciplinary action taken against him. FINRA found that Akindemowo induced two investors to engage in securities transactions by making misrepresentations and then converted the investors' funds for his own use. Based on these violations, FINRA imposed two separate bars from association with any FINRA member firm, ordered Akindemowo to pay disgorgement and prejudgment interest, and assessed costs. FINRA also found that Akindemowo engaged in private securities transactions and outside business activities without providing the required disclosures to the Firm, but did not impose sanctions for those violations.

Akindemowo, who is proceeding *pro se*, does not dispute that he received funds from the investors and used those funds for his own purposes. Instead, he contends that he received the funds as personal loans and that the misconduct at issue in this case has no bearing on his activities in the securities industry. Based on our independent review of the record, we reject Akindemowo's contentions and sustain all of FINRA's findings of violations and its imposition of sanctions.

I. Facts

Akindemowo entered the securities industry in 2000 and was associated with Pruco from June 2010 to October 2011. During that time, Akindemowo was also registered as an insurance agent for Pruco's affiliate, The Prudential Insurance Company of America ("Prudential"). He resigned from Pruco during its investigation of the misconduct at issue.

A. Akindemowo represented to two investors that he would invest their funds but instead he used their funds to pay personal expenses.

This case concerns Akindemowo's recommendations to two investors, AG and RB, regarding an investment in Apex Venture Capital Group ("Apex"). According to Akindemowo, Apex's business was to pool investor funds and use the funds to make loans to businesses. Apex would use the proceeds from the loans to make quarterly interest payments to investors and would keep the difference between the loan proceeds and the investor interest payments. Akindemowo told investors that they could participate in this investment through his firm, Goshen Wealth Management Group ("Goshen"). AG and RB transferred a total of $15,000 to Goshen for this investment. It is undisputed that Akindemowo never provided Pruco with written notice of these recommendations or his receipt and deposit of the investors' funds into Goshen's account. Unbeknownst to the investors, Akindemowo never invested their funds and instead used the money to pay personal expenses.

1. Investor AG

Before meeting Akindemowo, AG's investment experience was limited to a 401(k) plan provided by her employer. She began dating Akindemowo in the summer of 2010, and Akindemowo encouraged her to invest in Apex. He told her that Apex paid investors six percent interest, and that invested funds could be deposited or withdrawn without fee or penalty each quarter. AG checked Akindemowo's LinkedIn page, which stated that he was Goshen's owner and chief investment officer. Later in 2010, Akindemowo encouraged AG to withdraw funds

from her 401(k) account to invest in Apex and told her that "December was [her] window of . . . opportunity" to invest.

On December 6, 2010, AG withdrew $10,000 from her credit union account by a check Akindemowo instructed her to make payable to Goshen. The funds were deposited into Goshen's account, and Akindemowo promised but never gave AG documentation of her investment.

Akindemowo has given various explanations for how he used AG's money—to pay past-due property taxes, for Goshen's lease and office furniture expenses, and for an ultimately unsuccessful attempt to purchase a book of Allstate insurance business. In fact, he generally used the Goshen account to pay property taxes and other home and personal expenses as well as Goshen lease, furniture, and insurance-business expenses. But it is undisputed that Akindemowo never invested AG's money in Apex or made any investment on her behalf.

Soon after AG transferred her money to Goshen, Akindemowo and AG ended their relationship and Akindemowo asked AG if she wanted her investment returned without interest. AG declined because she wanted to wait until March 2011 to receive the Apex quarterly interest payment that Akindemowo had described. AG also made repeated unsuccessful requests for documentation of her investment. Eventually, AG texted Akindemowo that his failure to provide documentation was "quite unprofessional" and she asked for "options . . . for having [her money] returned." Although AG persistently sought written documentation through February 2011, Akindemowo evaded each request. Finally, in March 2011 AG began trying to set up meetings with Akindemowo for him to return her investment. But Akindemowo repeatedly cancelled these meetings.

After months of Akindemowo's stalling, AG hired an attorney. The attorney sent a letter to Akindemowo's Prudential and Goshen addresses on April 13, 2011 seeking a return of AG's investment. The letter stated that AG "deposited $10,000 at your direction with Goshen Wealth Management Group on December 6, 2010 for the purchase of an interest in Apex" and described Akindemowo's longstanding refusal to document or return her investment. When a Pruco officer asked Akindemowo about the letter, he claimed AG was a former girlfriend who had loaned him money to purchase a home and had sent the letter out of spite. He also claimed that he had set up Goshen as an LLC before he started at Pruco to purchase and sell homes or cars, but that he was no longer running this business and that Goshen was not active. Akindemowo never returned AG's money.

2. Investor RB

RB first met Akindemowo in 2008 or 2009 while working as a real estate agent. Akindemowo re-contacted RB in December 2010 about selling his house. Around this time, RB asked Akindemowo for advice about investing funds she had received from her mother's estate. Akindemowo responded with two investment options: an IRA with Pruco with limited liquidity, and a pooled investment that could be withdrawn on a regular basis and that would receive a guaranteed investment return of 9 percent. Over several months, RB tried to determine whether the pooled investment was "too good to be true." RB was concerned that she could not find information about Goshen or Akindemowo on the internet. Akindemowo pressed RB to make an

investment decision and tried to assuage her concerns by taking her to his Prudential office to assure her of his affiliation with Pruco and Prudential.

On March 28, 2011, RB wrote a $5,000 check to Goshen.[1] When Akindemowo deposited the check in Goshen's account, it had a balance of $115.33. Akindemowo used the deposit for personal expenses, including a $3,300 mortgage-related payment.

As he had with AG, Akindemowo told RB that he would document her investment. Despite RB's repeated requests for the promised documentation, however, Akindemowo consistently refused to comply. Akindemowo scheduled meetings with RB to provide the documents, but then arrived without them. RB threatened to contact Akindemowo's supervisor at Prudential, but Akindemowo responded that "it wouldn't make any difference" because "he was an independent contractor and he can do whatever he wants." Becoming increasingly alarmed by Akindemowo's evasion, RB e-mailed Akindemowo asking him to return her investment. Akindemowo responded that she would need to wait 90 days.

As RB persisted, Akindemowo's evasion escalated. In August 2011, Akindemowo gave her a postdated check for $5,300, but told her to delay cashing it. After more than two weeks of delays from Akindemowo, RB made two unsuccessful attempts to cash the check, first learning that the account had insufficient funds and then that the check was facially invalid because it showed two different payment amounts and did not include her last name.

When she learned that the check was invalid, RB concluded that Akindemowo had defrauded her, contacted the police, and called Pruco—eventually speaking with Akindemowo's supervisor. When she mentioned that the investment involved Goshen, the supervisor referred the complaint for an internal investigation. Hours later, Akindemowo called RB to accuse her of "ruin[ing] his livelihood." He contacted her again after several weeks to promise her "$5,000 if [she] would make this go away" by "writ[ing] a letter saying that [she] lied."

Akindemowo resigned in September 2011, while Pruco was investigating AG's and RB's complaints. On October 5, 2011 Pruco reported his resignation and those complaints to FINRA, which began the investigation leading to this disciplinary proceeding. After Akindemowo resigned, Pruco repaid both AG and RB with interest.

B. Akindemowo did not provide Pruco with written notice of his Allstate insurance business.

Less than three months after joining Pruco, Akindemowo filed articles of incorporation to register Goshen as a Minnesota LLC to operate as an Allstate insurance agency. Allstate authorized him to sell Allstate insurance products on September 14, 2010.

Akindemowo did not provide Pruco with written notice of his Allstate insurance business. A month after joining Pruco, he completed a Form U4 indicating that he was not

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[1] RB also wrote a $5,000 check to open a Pruco IRA, but Pruco rejected her IRA application.

engaged in any outside business activities, and he attested each month that no additional activities needed to be disclosed on the Form U4. But in January 2011, after Akindemowo expressed interest in selling property casualty insurance through a Prudential-affiliated company, Pruco searched the insurance agent database and discovered his appointment with Allstate. When a Pruco supervisor told him that his Allstate appointment was impermissible, Akindemowo assured the supervisor that he would cancel it. He did not do so until March 2011.

C. FINRA found that Akindemowo committed fraud, converted investor funds, and failed to provide Pruco with written notice that he was engaging in private securities transactions and outside business activities.

FINRA's Department of Enforcement ("Enforcement") filed a four-cause complaint alleging that Akindemowo made fraudulent misrepresentations in violation of FINRA Rules 2020 and 2010; converted investor funds in violation of FINRA Rule 2010; failed to provide Pruco with written notice of private securities transactions in violation of NASD Rule 3040 and FINRA Rule 2010; and failed to provide Pruco with written notice of outside business activities in violation of FINRA Rule 3270, its predecessor NASD Rule 3030, and FINRA Rule 2010.

At the hearing, both AG and RB denied that they loaned Akindemowo their funds for his personal use. AG and RB did not meet before the hearing, but they gave similar testimony about Akindemowo's description of the alleged investment, his sales methods, and his evasion of their repeated requests for documentation and remittance of their money after they had transferred their funds into Goshen. Documentary evidence corroborated their testimony.

On April 29, 2014, a FINRA Hearing Panel found Akindemowo liable for each of the charged violations. It found that Akindemowo "exploited the trust of women with whom he had personal relationships," "misrepresented that their funds would be invested," and then intentionally "converted their funds to his own use." The Hearing Panel rejected Akindemowo's characterization of the transactions, concluded that he acted with scienter when he misrepresented how the investors' funds would be used, and "provided a false account of the facts to his employer, FINRA Staff, and the Hearing Panel." Based on its findings that Akindemowo engaged in fraud and conversion, the Hearing Panel imposed two separate bars from association with a FINRA member firm and assessed hearing costs. The Hearing Panel also found that Akindemowo failed to provide written notice to Pruco before engaging in private securities transactions and outside business activities, but declined to assess additional sanctions for those violations.

Akindemowo appealed to FINRA's National Adjudicatory Counsel (the "NAC"), which issued a December 29, 2015 decision affirming the Hearing Panel's findings. The NAC concluded that the evidence showed a deliberate intent to defraud the investors. The NAC found that Akindemowo's explanations were "riddled with discrepancies" and that AG and RB each independently provided similar accounts of Akindemowo's investment pitch, his evasion of their requests for documentation, and his refusal to return their funds. It affirmed the separate bars for fraud and conversion and the assessment of hearing costs, ordered Akindemowo to disgorge $15,000, along with prejudgment interest, and ordered him to pay appeal costs. Like the Hearing Panel, the NAC declined to impose sanctions for the private securities transaction and outside business activity violations. This appeal followed.

II. Analysis

We consider applications for review of self-regulatory organization ("SRO") disciplinary actions under Section 19(e)(1) of the Securities Exchange Act of 1934. We determine whether the applicant engaged in the conduct found by the SRO, whether such conduct violates the SRO's rules, and whether such SRO rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[2] We base our findings on an independent review of the record.

A. Akindemowo induced the purchase of a security by means of fraudulent misrepresentations in violation of FINRA Rule 2020 and Rule 2010.

FINRA Rule 2020 prohibits members and associated persons from "effect[ing] any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance." FINRA found that Akindemowo, acting with scienter, induced AG and RB to remit funds for the purchase of securities by means of "a manipulative, deceptive or fraudulent device or contrivance, namely the false statements" about how their funds would be invested. We find that a preponderance of the evidence supports these findings and FINRA's conclusion that Akindemowo violated FINRA Rules 2020 and 2010.[3]

1. The investment Akindemowo recommended was a security.

We affirm FINRA's findings that that the Apex investment was a security. Section 2(a)(1) of the Securities Act of 1933 states that the "term 'security' means," among other things, an "investment contract,"[4] which includes a "contract, transaction or scheme whereby a person invests his or her money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party."[5] The Apex investment that Akindemowo recommended satisfied each of these elements. As Akindemowo described it, Apex would pool AG's and RB's funds with those of other investors in a common enterprise in which profits would be generated solely by the efforts of a third party who would place loans, collect interest payments, and pay

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2 15 U.S.C. § 78s(e)(1).

3 FINRA Rule 2010 requires FINRA members and associated persons to "observe high standards of commercial honor and just and equitable principles of trade." It is well established that a violation of an SRO rule is conduct inconsistent with just and equitable principles of trade and therefore is also a violation of FINRA Rule 2010. *See, e.g., North Woodward Financial Corporation*, Exchange Act Release No. 74913, 2015 WL 2151765, at *15 n.8 (May 8, 2015).

4 Securities Act § 2(a)(1), 15 U.S.C. 77q(a); Exchange Act § 3(a)(10), 15 USC 77b(a)(1).

5 *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

the investors a specified rate of return from the loan proceeds. These investments were investment contracts, and therefore securities.[6]

Akindemowo denies that the transactions with AG and RB "involve[d] securities." He is incorrect. As FINRA explained, an investment is deemed a security based on "how it was presented to the investors," and not the subjective belief of the respondent.[7] To the extent Akindemowo means that AG's and RB's transfers were loans and not intended for investment in Apex, the record belies that contention. AG and RB both testified that their transfers to Goshen were not personal loans to Akindemowo, and the Hearing Panel found their testimony credible. We generally defer to such credibility determinations, unless substantial evidence supports a contrary finding.[8] Here, the record amply supports the Panel's determination that AG and RB were telling the truth. They testified unequivocally and similarly about Akindemowo's description of a pooled investment paying fixed quarterly interest and allowing regular withdrawals. And both investors testified that Akindemowo never told them that he needed a loan before they transferred their funds.

2. Akindemowo's material misrepresentations induced the investments.

We also find that Akindemowo's misstatements about how AG's and RB's funds would be invested operated as a "fraudulent device or contrivance" to induce their investments. Akindemowo told AG and RB that their funds would be pooled with the investments of others, that they would receive fixed quarterly interest payments and would be able to redeem their funds, and that they would receive documentation of their investments. Each of these statements was false. They were also material because a reasonable investor would want to know how their funds were actually being used.[9] And we agree with FINRA that these falsehoods were the means by which Akindemowo induced AG and RB to transfer their money.

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6 *See, e.g., SEC v. Banner Fund Int'l*, 211 F.3d 602, 615 (D.C. Cir 2000) (holding that an investment that pooled investors funds for loans was a security); *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) (finding that "it is the representations made by the promoters, not their actual conduct, that determine whether an interest is an investment contract (or other security)" and that therefore a fictitious investment was an "investment contract" because, "as it was represented to [the investor]," it was supposed to be an undivided passive financial interest in a pool of assets).

7 *See Howey*, 328 U.S. at 299 (defining securities based on what the investors were "led to expect"); *Warfield v. Alaniz*, 569 F.3d 1015, 1021 (9th Cir. 2015) (noting that "[u]nder Howey, courts conduct an objective inquiry into the character of the instrument or transaction offered").

8 *William Scholander*, Exchange Act Release No. 77492, 2016 WL 1255596, at *12 n.45 (Mar. 31, 2016) (explaining that credibility determinations "based on hearing the witness's testimony and observing demeanor . . . are entitled to considerable deference").

9 *See SEC v. Smart*, 678 F.3d 850, 857 (10th Cir. 2012) ("[I]t would be material to a reasonable investor that his or her money was not being used as represented in safe investment strategies, but rather, in high risk ventures and for the payment of personal expenses.").

We also agree with FINRA that "[t]he fact that Akindemowo [ultimately] failed to actually buy or sell securities" with the money they transferred does not preclude his liability.[10] AG and RB intended to "become actual purchasers" of the securities based on Akindemowo's falsehoods, and his fraud "was directly connected" with those false statements.[11]

Akindemowo acted with scienter when he used these fraudulent statements to induce AG's and RB's transfers. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud."[12] Scienter includes recklessness, which is defined as conduct that is "an extreme departure from the standards of ordinary care . . . to the extent that the danger [of deceiving investors] was either known to the [applicant] or so obvious that the [applicant] must have been aware of it."[13] Akindemowo's use of AG's and RB's funds was so obviously contrary to the Apex investment that he described that he must have known he was deceiving them. His efforts to "misle[ad] AG and RB about the status of" their funds is also evidence of scienter.[14]

Accordingly, we find that Akindemowo, with scienter, induced investments in securities by means of material false statements that were manipulative, deceptive or fraudulent devices or contrivances and that he thereby violated FINRA Rules 2020 and 2010. We also find that these rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. Rule

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[10] *See, e.g., SEC v. George*, 426 F.3d 786, 789 (6th Cir. 2005) (finding fraud under the securities laws when investors' funds for securities transactions were instead used "to pay purported profits to other investors or to make extravagant personal purchases").

[11] *See Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 WL 3397780 (May 27, 2015) (finding that respondent violated NASD's antifraud rule by drafting an offering document containing material misstatements that induced the investor to invest); *Joseph Abbondate*, Exchange Act Release No. 53066, 2006 WL 42393, *aff'd*, 209 Fed. Appx. 6, at *8 (2d Cir. 2006) (finding that respondent violated NASD's antifraud rule by using a false term sheet even though investors' funds were ultimately used in "a classic Ponzi scheme" and not to purchase securities).

[12] *Aaron*, 446 U.S. at 686 n.5 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976)).

[13] *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008) (quoting *SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992)). Scienter may be demonstrated by circumstantial evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983); *Valicenti Advisory Servs., Inc. v. SEC*, 198 F.3d 62, 65 (2d Cir. 1999).

[14] *See SEC v. Presto Telecoms., Inc.*, 237 F. App'x 198, 200 (9th Cir. 2007) (finding that scienter was established by "the pervasiveness" of misrepresentations, "the obvious falsity of the information . . . provided to investors, and the flagrant personal use of investor funds"); *see also Blair Alexander West*, Exchange Act Release No. 74030, 2015 WL 137266, at *8 (Jan. 9, 2015) (noting that concealment and deceit demonstrate deliberate intent and bad faith), *aff'd*, __ F. App'x __, 2016 WL 386062 (2d Cir. Feb. 2, 2016); *Butler*, 2016 WL 3087507, at n.17 (finding that a person's "concealment of his conversion further demonstrates that he acted intentionally").

2020 was designed to prevent fraud and manipulation in the industry,[15] and the application of the rule to Akindemowo's conduct furthered this objective.[16]

B. Akindemowo converted investor funds in violation of FINRA Rule 2010.

FINRA Rule 2010 requires FINRA members and associated persons to "observe high standards of commercial honor and just and equitable principles of trade." The rule is designed to "regulate the ethical standards" of FINRA members and associated persons,[17] and applies to "business-related conduct that is inconsistent with just and equitable principles of trade."[18] FINRA defines conversion as the "intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it."[19] Because conversion casts doubt on a 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,"[20] it is well established that conversion is contrary to the mandate of Rule 2010.[21]

We agree with FINRA that Akindemowo's use of AG's and RB's funds meets each element of its definition of conversion. Akindemowo represented that he would invest AG's and RB's money in Apex and AG and RB transferred their funds to him for this purpose. But Akindemowo did not invest AG's and RB's money as they wished. Instead, he used it for his personal expenses.

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15 *Notice of Filing of a Proposed Rule Change*, Exchange Act Release No. 58095, 2008 WL 2971979, at *4 (July 3, 2008); *Rule Change Approved Without Modification*, Exchange Act Release No. 58643, 2008 WL 4468749 (Sept. 25, 2008).

16 Rule 2010 is designed to prevent conduct inconsistent with just and equitable principles of trade. As discussed above, the violation of an SRO rule is conduct inconsistent with just and equitable principles of trade. The application of Rule 2010 to Akindemowo's conduct furthered the objective of preventing conduct inconsistent with just and equitable principles of trade.

17 *West*, 2015 WL 137266, at *7 (citations and internal quotation marks omitted).

18 *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (per curiam) (citations and internal quotation marks omitted).

19 *See* FINRA Sanction Guidelines at 36 & n.2 (2013 ed.) (the "Guidelines").

20 *Daniel D. Manoff*, Exchange Act Release No. 46708, 2002 WL 31769236, at *4 (Oct. 23, 2002) (internal quotation omitted).

21 *Stephen Grivas*, Exchange Act Release No. 77470, 2016 WL 1238263, at 4 (Mar. 29, 2016).

Akindemowo contends that FINRA's rules should not apply because the transactions were purportedly private and personal matters not involving Pruco customers or securities.[22] But we have long held that Rule 2010 applies to business-related conduct that is inconsistent with just and equitable principles of trade, and neither Rule 2010 nor FINRA's definition of conversion is limited to misconduct involving firm customers or securities.[23] In any case, we have already found that the transactions involved securities.

Accordingly, we find that Akindemowo's conversion of investor funds was "patently antithetical" to just and equitable principles of trade and violated Rule 2010.[24] We also find that FINRA Rule 2010 is, and was applied in a manner, consistent with the purposes of the Exchange Act. Rule 2010 was designed to promote just and equitable principles of trade, and the application of the rule to Akindemowo's conversion is consistent with that objective. [25]

C. Akindemowo engaged in private securities transactions without providing Pruco with prior written notice in violation of NASD Rule 3040 and FINRA Rule 2010.

NASD Rule 3040 prohibits an associated person from participating in any manner in "any securities transaction outside the regular course or scope of an associated person's employment with a member" without prior written notice to his or her member firm.[26] FINRA found that Akindemowo violated NASD Rule 3040 and FINRA Rule 2010 by participating in the transactions with AG and RB without prior written notice to Pruco. We agree.

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[22] Akindemowo asserts that he was not associated with Pruco "during [his] interactions" and "personal dealings" with AG, but he was associated with Pruco during the investment-related dealings that establish his violation of Rule 2010. He was associated with Pruco in December 2010, when AG transferred her funds to Goshen, through April 2011, when his longstanding evasion prompted AG to send a letter documenting his misconduct.

[23] *Grivas*, 2016 WL 123826, at *5 ("Nor must the conduct relate to the associated person's customers or to a securities transaction in order to be covered by Rule 2010"); *Manoff*, 2002 WL 31769236, at *4 (finding that an associated person's unauthorized use of co-worker's credit card was "unethical business-related conduct"); *Vail*, 101 F.3d at 39 (finding that misappropriation of funds from a political organization was subject to the SRO rule requiring just and equitable principles of trade).

[24] *West*, 2015 WL 137266, at *8 (citations and internal punctuation omitted).

[25] *Thomas W. Heath*, Exchange Act Release No. 59223, 2009 WL 56755, at *5 (Jan. 9, 2009), *aff'd*, 503 F.2d. 122 (2d Cir. 2009) (noting that it is proper for the rule to be applied flexibly to a "wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace.").

[26] NASD Rule 3040(3)(1) and (b).

It is undisputed that Akindemowo did not provide prior written notice of his transactions with the investors, and that those transactions were outside of the scope of his employment with Pruco. And Akindemowo participated in the private securities transactions by introducing and recommending the pooled investment to investors, directing the investors to send their funds to a Goshen account he controlled, and using those funds for his own purposes. "Participating in any manner" in private securities transactions includes soliciting investors by providing information that may influence their investment decisions and facilitating the execution of transactions.[27]

Akindemowo contends that Rule 3040 does not apply because "no securities transactions were involved." We have already rejected that argument. And Rule 3040 applies even if the representative does not believe that the investment is a security.[28] Akindemowo also argues that he "was not associated with a FINRA member during [his] interactions with" AG. Akindemowo was, in fact, associated with Pruco when he recommended the pooled investment to her, described December 2010 as her window of opportunity to invest, instructed her to transfer funds to Goshen, and controlled and used these funds in the Goshen account. We therefore sustain FINRA's finding that Akindemowo participated in undisclosed private securities transactions in violation of NASD Rule 3040 and FINRA Rule 2010.

We also find that these rules are, and were applied in a manner, consistent with the purposes of Exchange Act. Rule 3040 was designed, among other things, to protect investors and the public interest. Akindemowo's violation of the rule prevented Pruco from monitoring his activities for compliance with regulatory requirements, from disapproving of his activities, and from intervening before AG and RB remitted or Akindemowo used their funds.

D. Akindemowo engaged in outside business activities without providing written notice to Pruco in violation of FINRA Rule 3270, NASD Rule 3030, and FINRA Rule 2010.

FINRA Rule 3270 prohibits associated persons from "be[ing] an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be[ing] compensated, or hav[ing] the reasonable expectation of compensation, from any other person as a result of any" outside business activity, unless he or she has provided prior written notice to his or her member firm. FINRA Rule 3270 superseded NASD Rule 3030 on December 15, 2010.[29] Rule 3030 prohibited any associated person from being "employed by, or accept[ing] compensation from, any other person as a result of any business activity . . . outside the scope of his relationship with his employer firm, unless he has provided prompt written notice." FINRA found that Akindemowo violated Rules 3270, 3030, and 2010 by failing to provide Pruco with

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27 *See, e.g.*, *Abbondate*, 2006 WL 42393, at *7.

28 *Id.*; *see also Joseph J. Vastano, Jr.*, Exchange Act Release No. 50219, 2004 WL 1857139, at *4 (Aug. 19, 2004) (finding violation when the representative gave oral notice and a supervisor told him that the product was not a security).

29 *See* FINRA Regulatory Notice 10-49 (Oct. 2010).

written notice of the business he conducted through Goshen and his efforts to establish an Allstate insurance business. We agree.

During his association with Pruco, Akindemowo operated an outside business as Goshen's owner and chief investment officer and thereby acted as a Goshen officer or director under Rule 3270 and was employed by Goshen within the meaning of Rule 3030. Akindemowo also registered Goshen to operate as a Minnesota LLC in September 2010 for his Allstate business and secured an appointment from Allstate to sell insurance as its agent.[30] There is no dispute that Akindemowo's Goshen and Allstate business activities were outside of the scope of his relationship with Pruco, and that he did not disclose these business activities to Pruco in writing. Although Akindemowo asserts that he updated his Form U4 with any "new information" required to be disclosed, he did not. In July 2010 and March 2011, Akindemowo completed Forms U4 indicating that he was not "engaged in any other business either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise." He also attested to Pruco on a monthly basis that there was no need to report any such activities.

Akindemowo attempts to blame his supervisors for failing to require him to report Goshen or Allstate activities. But even assuming that his supervisors knew about his outside business activities, the obligation to disclose lies with the registered person, not his supervisors.[31]

We therefore sustain FINRA's finding that Akindemowo's failure to provide written notice of his outside business activities violated FINRA Rule 3270, NASD Rule 3030, and FINRA Rule 2010. We also find that these rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. Rule 3270 and Rule 3030 were designed, among other things, to protect investors and the public interest. The written disclosure requirement allows member firms to assess the risks of outside business activities of associated persons and raise timely objections to such activities. Akindemowo's failure to provide the written notice required by the rule frustrated Pruco's ability to assess the risks that his outside business activities may cause harm to potential investors and to manage those risks by taking appropriate action.

E. Akindemowo's challenges to FINRA's proceeding lack merit.

Akindemowo claims that it was improper for FINRA to initiate this proceeding after he resigned from Pruco. But FINRA's By-Laws provide that a person continues to be subject to the filing of a complaint based on conduct that occurred prior to his resignation for two years after

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30 *Cf. Micah C. Douglas*, Exchange Act Release No. 37865, 1996 WL 616364 (Oct. 25, 1996) (finding that associated person who registered his own broker-dealer with a state regulator engaged in undisclosed "outside business activity" that violated just and equitable principles of trade).

31 *Vastano*, 2004 WL 185139, at *5.

the effective date of his resignation.[32] The complaint was timely because it was filed in February 2013, within two years of Akindemowo's resignation in October 2011.

Akindemowo also argues that Pruco cleared him of wrongdoing and only disclosed its investigation as retaliation for his planned association with another firm. But Pruco was continuing to investigate AG's and RB's claims when Akindemowo resigned, and it was obligated to disclose its investigation when reporting his resignation.[33] In any case, FINRA initiated this proceeding based on its own investigation of Akindemowo's misconduct.

Akindemowo also contends that FINRA's proceeding was unfair. According to Akindemowo, it was unfair for FINRA to act as "the judge, the prosecutor and the jury." But the Commission has approved FINRA rules ensuring separation of functions in FINRA disciplinary proceedings, and there is no evidence that those rules were not followed here.[34] There is also no evidence supporting Akindemowo's claims that FINRA and Pruco offered to pay AG and RB for their testimony, that he was not allowed to call any witnesses, and that FINRA manipulated his testimony. And the record establishes that Akindemowo did not meet the deadline for calling witnesses and was given ample leeway to testify and cross-examine the investors and supervisors who testified. Akindemowo also complains that the Hearing Panel simply adopted the sanction Enforcement recommended.[35] We find no evidence of improper influence by Enforcement staff.[36]

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[32] *See* FINRA By-Laws Article V, Section 4.

[33] *See* Form U5 (requiring firm to disclose whether the associated person "currently is, or at termination was . . . under internal review for fraud or . . . violating investment-related statutes, regulations, rules or industry standards of conduct").

[34] *See, e.g.*, FINRA Rule 9144 (Separation of Functions); *Self-Regulatory Organizations*, Exchange Act Release No. 38908, 1997 WL 441929 (Aug. 7, 1997); *Self-Regulatory Organizations*, Exchange Act Release No. 58643, 73 FR 57174 (Oct. 1, 2008).

[35] Akindemowo asserts that the Hearing Panel was not diverse, but he has not offered evidence that he was unfairly singled out for prosecution or that his prosecution was motivated by improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right. *United States v. Huff*, 959 F.2d 731, 735 (8th Cir. 1992). He also had an opportunity to object to the hearing panel members under FINRA rules but did not do so. *See* Rule 9233(b) (motions to disqualify). And there is no evidence that the composition of the panel prejudiced its decision or that it failed to act "fairly and objectively." *Stephen Thorlief Rangen*, Exchange Act Release No. 38486, 1997 WL 163991 (Apr. 8, 1997).

[36] *See Scott Epstein*, Exchange Act Release No. 59328, 2009 WL 223611, at *18 (Jan. 30, 2009) ("Adverse rulings, by themselves, generally do not establish improper bias.").

III. Sanctions

Pursuant to Exchange Act Section 19(e)(2), we will sustain a FINRA sanction unless we find it is "excessive or oppressive" or imposes an unnecessary or inappropriate burden on competition.[37] As part of this review, we consider any aggravating or mitigating factors,[38] and whether the sanctions imposed by FINRA are remedial and not punitive.[39]

A. The bars FINRA imposed on Akindemowo are neither excessive nor oppressive.

FINRA's Sanction Guidelines recommend consideration of a bar for egregious cases involving an associated person who engages in intentional or reckless misrepresentations of fact.[40] And we have repeatedly held that fraud violations are "'especially serious and should be subject to the severest of sanctions under the securities laws.'"[41] We agree with FINRA that the egregiousness of Akindemowo's fraud warrants a bar. Akindemowo acted with scienter and exploited the trust of persons with whom he had personal relationships.[42] He deprived investors of their funds for his own gain.[43] He repeatedly evaded requests for documentation or remittance and continued his deceit during Pruco's and FINRA's investigations.[44] Like FINRA, we note

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[37] 15 U.S.C. § 78s(e)(2). Akindemowo does not claim, and the record does not show, that FINRA's action imposed an unnecessary or inappropriate burden on competition.

[38] *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *Paz Sec., Inc. v. SEC*, 494 F.3d 1059, 1064-65 (D.C. Cir. 2007).

[39] *Paz*, 494 F.3d at 1065; *see also* Guidelines at 2 ("Disciplinary sanctions are remedial in nature and should be designed to deter future misconduct and to improve overall business standards in the securities industry.").

[40] Guidelines at 88. Although we are not bound by the Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 (June 14, 2013). The Guidelines lists aggravating and mitigating factors, and encourages adjudicators to consider appropriate additional "case-specific factors." Guidelines at 6-7.

[41] *Scholander*, 2016 WL 1255596, at *9 & n.55 (quoting *Marshall E. Melton*, Investment Advisers Act Release No. 2151, 2003 WL 21729839, at *9 (July 25, 2003).

[42] *See* Guidelines at 7 (addressing misconduct resulting from "an intentional act, recklessness or negligence").

[43] *See* Guidelines at 6-7 (addressing patterns of misconduct, the length of misconduct, injury to others, and monetary or other gain to respondent).

[44] Guidelines at 6 (addressing attempts to conceal misconduct or lull, deceive or intimidate customers or the firm and acceptance of responsibility before "detection and intervention by the firm").

that Akindemowo has consistently given a "false account of the facts," attempted to shift blame to the investors and Pruco, and failed to recognize the seriousness of his misconduct and the harm it caused. The bar FINRA imposed for Akindemowo's fraudulent statements is neither excessive nor oppressive.

FINRA's Sanction Guidelines state that "a bar is standard" for conversion "regardless of [the] amount converted."[45] This guideline reflects FINRA's judgment that conversion "poses so substantial a risk to investors and/or the markets as to render the violator unfit for" industry association[46] because investors and firms must be able to trust associated persons with their money.[47] We agree with FINRA that Akindemowo's conversion demonstrates a disregard for a fundamental responsibility of all securities professionals—ethically handling the funds of others. As we have recently held, "one who, regardless of motivation, intentionally misappropriates money from others on more than one occasion, may do so again" and "would pose a continuing and unacceptable threat to investors and other industry participants if not barred."[48] The bar FINRA imposed for Akindemowo's conversion is neither excessive nor oppressive.

There are no mitigating circumstances. Akindemowo asserts that the sanctions are "too extreme and unwarranted," citing his history of awards at other firms and the purported absence of other "direct client complaints." But it is well established that a lack of disciplinary history is not mitigating.[49] Akindemowo also argues that the sanctions should not affect his industry association because the transactions were "private matters" that were unrelated to securities, his firm affiliation, or his registration. These assertions are meritless. Akindemowo defrauded investors with false statements about securities and pocketed funds entrusted to him—this conduct demonstrates a fundamental unfitness for association in the securities industry.

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45 Guidelines at 6-7.

46 *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 WL 3306105, at *5 n.27 (Nov. 8, 2007).

47 *See Joseph H. O'Brien II*, Exchange Act Release No. 34105, 1994 WL 234279, at *3 (May 25, 1994) ("In converting [customer] funds, O'Brien abused the trust that is the cornerstone of the relationship between a securities professional and his customer.").

48 *John M.E. Saad*, Exchange Act Release No. 76118, 2015 WL 5904681, at *7 (Oct. 8, 2015).

49 Guidelines at 6 n.1 (quoting *Rooms v. SEC*, 444 F.3d 1209, 1214-15 (10th Cir. 2006) ("[W]hile the existence of a disciplinary history is an aggravating factor . . . , its absence is not mitigating.")); *Kent. M. Houston*, Exchange Act Release No. 71589A, 2014 WL 936398, at *7 (Feb. 20, 2014).

B. The disgorgement FINRA ordered is neither excessive nor oppressive.

The Guidelines state that disgorgement of ill-gotten gain may be an appropriate remedy for misconduct that resulted in a direct or indirect financial benefit to the respondent.[50] FINRA's order that Akindemowo disgorge the $15,000 that he fraudulently obtained (plus prejudgment interest)[51] serves the remedial purpose of depriving him of his ill-gotten gains.[52]

Accordingly, we conclude that barring Akindemowo from the securities industry and ordering disgorgement is neither excessive nor oppressive and is necessary to protect investors.

An appropriate order will issue.[53]

By the Commission (Chair WHITE and Commissioners STEIN and PIWOWAR).

Brent J. Fields
Secretary

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[50] Guidelines at 5. We encourage disgorgement where "a professional has acquired a [financial] benefit by failing to meet his obligations to investors." *Mission Securities Corp.*, Exchange Act Release No. 63453, 2010 WL 5092727 (Dec. 7, 2010).

[51] *See Terence Michael Coxon*, Exchange Act Release No. 48385, 2003 WL 21991359, at *14 (Aug. 21, 2003) ("[E]xcept in the most unique and compelling circumstances, prejudgment interest should be awarded on disgorgement. . . ."), *aff'd*, 137 F. App'x 975 (9th Cir. 2005).

[52] It is "irrelevant to the analysis that the investors may be compensated from other sources. The aim of disgorgement is to prevent unjust enrichment which is entirely separate from compensating the investors." *SEC v. Alliance Leasing Corp.*, 2000 WL 35612001, at *14 (S.D. Cal. Mar. 20, 2000).

[53] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 79007 / September 30, 2016

Admin. Proc. File No. 3-17076

In the Matter of the Application of

KENNY AKINDEMOWO

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY FINRA

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by FINRA against Kenny Akindemowo, and the assessment of costs imposed, is sustained.

By the Commission.

Brent J. Fields
Secretary