

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.**

In the Matter of the Application of

Wilfredo Felix

For Review of Action Taken by

FINRA

Administrative Proceeding No. 3-20380

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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September 30, 2021

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FINRA’S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

Wilfredo Felix appeals a May 26, 2021 decision of FINRA’s National Adjudicatory Council (“NAC”). This case originated with FINRA’s investigation of whether Felix misclassified personal expenses as business expenses in his member firm’s books and records. The central issue, however, is Felix’s refusal to comply with FINRA Rule 8210 requests for a tax document that would have verified his reported compensation from the member firm. Felix’s repeated refusal to provide this document violated both the letter and purpose of Rule 8210, which requires unequivocal cooperation with an investigation.

Felix does not contest that he failed to provide the requested tax document. Instead, he argues that the document does not fall within Rule 8210’s scope. His contention is incorrect, as Rule 8210 plainly applies to documents that lie within an associated person’s “possession, custody, or control”—and the requested document is a personal tax record lying within Felix’s control. Moreover, the document related to FINRA’s investigation because it would have verified Felix’s reported compensation from his member firm, and it otherwise falls within Rule

8210's scope because it pertains to the relationship between Felix and the firm. Accordingly, Felix violated Rule 8210 when he refused to provide the requested tax document.

The NAC also found that Felix misclassified over \$200,000 of personal expenses as business expenses of the member firm—causing the firm to submit inaccurate regulatory filings. Felix's contention that the relevant expenses were not personal is contradicted by his testimony before the Hearing Panel, in which he conceded that certain personal expenses were classified as business expenses in the firm's books and records. While he testified that other expenses had a business purpose, the Hearing Panel's conclusion to the contrary was well-supported by its credibility findings. Accordingly, the NAC properly concluded that Felix violated FINRA Rule 2010 by misclassifying his personal expenses as business expenses. Because the expense misclassifications caused inaccuracies in the member firm's books, records, and regulatory filings, the NAC also properly concluded that Felix's conduct violated FINRA Rule 4511.

While Felix also argues that FINRA unduly delayed filing the complaint as to the recordkeeping violations, the time periods at issue are appreciably shorter than those that have amounted to undue delay. Moreover, the record reflects that Felix's failure to provide documentation for many of the relevant expenses was due not to the passage of time, but his own failure to maintain expense records. Accordingly, the Commission should reject Felix's argument.

The bar imposed by the NAC for Felix's Rule 8210 violation is not excessive or oppressive. FINRA's Sanction Guidelines provide that a bar is the standard sanction for a Rule 8210 violation where, as here, an associated person only partially cooperates with FINRA's investigation. Moreover, the requested tax document was important to FINRA's investigation into Felix's recordkeeping violations, which serves as an aggravating factor supporting a bar.

Accordingly, a bar is consistent with FINRA’s Sanction Guidelines. A bar is also appropriately remedial because Felix’s repeated refusal to provide the document controverted his unequivocal duty to cooperate with Rule 8210 requests—and the contravention of this duty poses a threat to the industry.

For these reasons, the Commission should affirm the NAC’s determinations with respect to liability, as well as the sanction imposed.

I. FACTUAL BACKGROUND

A. Felix and Primex

In 2001, Felix purchased Primex Prime Electronic Execution, Inc. (“Primex”), a FINRA member. RP¹ 2369-70.² Felix was the sole shareholder of Advantage Trading, LLC, a holding company that was the sole shareholder of Primex. RP 2018-19, 2030-31, 2388-89. During the relevant period (2013-2015), Felix served as Primex’s chief executive officer, chief financial officer, and chief compliance officer. RP 7-8, 41, 2019, 2022. He was registered with the Firm as a general securities principal, financial and operations principal (“FINOP”), operations professional, and corporate securities representative. RP 7-8, 41.

As Primex’s FINOP, Felix was the only person at the firm who made entries in the general ledger and submitted FOCUS reports (periodic summaries of a firm’s assets and liabilities used by regulators). RP 2014-15. In addition, he was the sole person with control over Primex’s bank account. RP 2027-28. Felix’s association with Primex continued until May 27,

¹ “RP” refers to the page numbers in the certified record of this case filed with the Commission on July 12, 2021.

² Felix entered the securities industry in 1995. RP 2369.

2020, when the firm's registration with FINRA was cancelled.³ Felix is not currently associated with a FINRA member.⁴

B. Primex's CPA Reclassifies Firm Expenses as Shareholder Distributions to Felix for the Firm's 2014 and 2015 Annual Audited Reports

Between 2002 and 2016, Primex employed an outside auditor ("CPA") to complete its annual audited reports and provide tax services. RP 1193. CPA dealt primarily with Felix to complete Primex's annual audited reports. RP 1195-96, 2055. For the firm's 2013 report, CPA focused primarily on calculating Primex's net capital. RP 1209-10, 1231, 1235. For Primex's 2014 and 2015 annual audited reports, however, CPA conducted a more rigorous review of the firm's financial statements.⁵

While conducting this more rigorous review for the 2014 and 2015 reports, CPA noticed that many of Primex's business expenses appeared to be personal in nature. RP 1235. CPA testified that a personal expense paid by a firm should be categorized as compensation—and not as a business expense—and that he therefore reviewed the questionable expenses to determine if

³ FINRA, "BrokerCheck," "BrokerCheck Report for Primex" at 14, *available at*: https://files.brokercheck.finra.org/firm/firm_29394.pdf (last visited Sept. 30, 2021).

⁴ Although Primex was a party to this disciplinary proceeding when it was before FINRA's Office of Hearing Officers, the firm did not appeal to the NAC and is not a party to this appeal.

⁵ CPA testified that, beginning in 2014, the Public Company Accountability Oversight Board standards applied to broker-dealer audits. RP 1231, 1235, 1254-55; *see Broker-Dealer Reports*, Exchange Act Release No. 34-70073, at *2, 8, 20-21, 120, 127 (July 30, 2013), 78 Fed. Reg. 51910, 51913, 51915 (Aug. 21, 2013) (amending the Securities Exchange Act of 1934 Rule 17a-5 to provide that PCAOB standards will apply when auditing supplemental information that accompanies a broker-dealer's audited financial statements). CPA determined that these newly applicable standards required him to conduct a more rigorous review of Primex's financial statements. RP 1209-10, 1286. CPA explained, however, that the newly applicable standards had no effect on a broker-dealer's pre-existing responsibility to properly record business expenses. RP 1233, 1287.

they should be reclassified as shareholder distributions. RP 1235-38. To this end, CPA asked Felix to provide documentation for the expenses at issue. RP 1237, 1296-97, 1310, 6489. CPA testified, however, that Felix was unable to provide documentation for many of the expenses.⁶ RP 1246-47, 1265, 1315, 6523.

To determine whether an expense should be reclassified as a shareholder distribution, CPA examined the nature of the expense and any documentation or explanation provided by Primex to determine whether, in his professional judgment, the expense might reasonably be viewed as an ordinary and necessary business expense for a broker-dealer. RP 1246-48, 1267, 1305, 1307, 1316. CPA reclassified a total of \$174,066 in firm expenses as shareholder distributions to Felix for Primex's 2014 annual audited report, and a total of \$140,492 in firm expenses as shareholder distributions to Felix for the 2015 annual audited report. RP 1336, 3063, 3093, 5229-31. CPA testified that the reclassifications had the effect of increasing Felix's personal tax liability. RP 1245, 1342.

Felix did not agree with all of CPA's reclassifications for the 2014 and 2015 audits. RP 2533-35, 2668, 2696. Nevertheless, he acquiesced to CPA's reclassifications because Primex was under time pressure to timely file its annual audited reports and potentially faced fines and a suspension if the reports were not filed timely. RP 2486, 2531-35, 2667-68, 2696-97.

⁶ In fact, after completing Primex's 2014 annual audited report, CPA advised Felix that his firm would not continue as Primex's auditor due to the inefficiencies related to Primex's recordkeeping. RP 1270-73, 6563; *see also* RP 6652-54 (March 26, 2015 governance letter sent from CPA to Primex addressing problems with the 2014 audit). CPA agreed to conduct Primex's 2015 audit based on Felix's assurances that Primex's recordkeeping would improve. RP 1274-75. When completing the 2015 audit, however, CPA encountered many of the same issues that caused problems with the 2014 audit. RP 1276.

C. FINRA Investigates the Misclassification of Primex's Expenses in Its Books, Records, and FOCUS Reports

i. FINRA Identifies Concerns with Misclassified Expenses During a Cycle Examination

FINRA identified concerns with Primex's expense classifications in 2015, when its Department of Member Supervision ("Member Supervision") conducted a cycle examination of Primex covering the period from September 2013 to March 2015. RP 1509, 1528-29. After examining the firm's general ledger, Member Supervision suspected that some of Felix's personal expenses were recorded as business expenses of Primex. RP 1528-29, 1540. Member Supervision considered such a practice to be problematic, as any personal expenses paid by a firm are properly recorded as compensation, and any misclassifications of such expenses in a firm's general ledger would cause inaccuracies in its regulatory filings. RP 1507-08, 1541-42. Accordingly, in November 2015, Member Supervision requested information concerning the purpose of some of the expenses it found questionable. RP 1546-50, 5049-54. When Primex (through Felix) ultimately responded to these requests in March 2016, it failed to provide documentation for, or identify the specific business purpose of, many of the expenses in question.⁷ RP 1592-93, 1597-98, 1604, 5071, 5110-60.

Because the payment of personal expenses by a firm is a form of compensation, Member Supervision also requested that Primex provide any Forms 1099 or W-2 the firm issued for its employees during the relevant period. RP 1541-43. In its response, Primex included a copy of

⁷ Member Supervision's requests for additional information concerning Primex's expenses became the subject of cause three of Enforcement's complaint, which alleged that Primex violated Rules 8210 and FINRA Rule 2010 by failing to timely respond. RP 26-28. Because Primex was not a party to the appeal before the NAC and is not a party to this appeal, cause three is not at issue. RP 7826, 7855-72.

Felix's 2013 Form 1099 listing compensation in the amount of \$42,849. RP 1542-43, 5030.

During a prior examination, however, Primex had provided Member Supervision with a 2013 Form 1099 listing compensation in the amount of \$42,200. RP 1941-43, 4470-71, 4475.

Member Supervision ultimately referred these possible records violations to FINRA's Department of Enforcement ("Enforcement"). RP 1605-06, 5076-86, 7284.

ii. FINRA Investigates the Expense Misclassifications and Issues Rule 8210 Requests for Felix's Tax Transcripts

a. Felix refuses to comply with five Rule 8210 requests for his tax transcripts

Because Member Supervision's referral concerned Primex's payment of Felix's personal expenses—and because the payment of personal expenses by a firm is a form of compensation that could have rendered Primex's books and records inaccurate—Enforcement sought to verify Felix's firm compensation by reviewing his tax records. RP 1655, 1677. Based on an interview with Felix, Enforcement was aware that he had not filed personal tax returns during the relevant period. RP 2009-11, 2393, 3976-77. Accordingly, Enforcement asked Felix to provide his IRS account transcripts.⁸ See RP 1655, 1957, 2009-10.

Between May 26, 2016 and October 17, 2016, Enforcement sent Felix three FINRA Rule 8210 requests asking that he either provide his IRS account transcripts for 2013-2015, or complete IRS Form 4506-T ("Request for Transcript of Tax Return") for the purpose of

⁸ As discussed in greater detail below (*infra* at 15), a taxpayer may obtain several different types of tax transcripts reflecting information about his IRS account, including information about his reported compensation. See IRS, "Transcript Types and Ways to Order Them," "Transcript Types," <https://www.irs.gov/individuals/transcript-types-and-ways-to-order-them> (last visited Sept. 30, 2021).

obtaining his account transcripts from the IRS.⁹ RP 5165-70, 5304-05, 5321-22. On each occasion, Felix declined to provide the transcripts. RP 5175, 5319-20, 5327-28. Through counsel, he objected that the transcripts did not fall within Rule 8210's scope. RP 5319-20, 5327-28.

Enforcement renewed its efforts to verify Felix's reported firm compensation following a 2018 on-the-record interview ("OTR") of Felix. During the OTR, Enforcement noted that Primex had provided FINRA with different versions of Felix's 2013 Form 1099 listing different compensation amounts, and asked Felix to explain the discrepancy.¹⁰ RP 3512-13. Felix testified that CPA prepared the Forms 1099 to report his firm compensation to the IRS, and that he did not know why the forms listed different compensation amounts. RP 3513. After reviewing emails between Felix and CPA, Enforcement was unable to confirm that CPA had prepared a 2013 Form 1099 for Felix. RP 1943-44.

To verify the accuracy of the Forms 1099 in its possession—and as part of its continuing efforts to verify Felix's compensation from Primex—Enforcement again requested Felix's tax transcripts. RP 1655, 1944-45, 1955-57. On August 17, 2018, Enforcement sent Felix a Rule 8210 request asking him to provide his IRS wage and income transcripts for years 2012-2017 or

⁹ A Form 4506-T may be used by a taxpayer to request different types of IRS account transcripts. See IRS, "Forms, Instructions, and Publications," "Form 4506-T," <https://www.irs.gov/pub/irs-pdf/f4506t.pdf> (last visited Sept. 30, 2021).

¹⁰ In addition to the two versions of his 2013 Form 1099 described above, Felix also provided FINRA with a third version of his 2013 Form 1099. He had submitted this third version, which listed compensation in the amount of \$271,883.08, to a car dealership. RP 2338-40, 6365-66. The record does not reflect when Felix provided this third version of his 2013 Form 1099 to FINRA, and Enforcement asked Felix only about the other two versions of the 2013 Form 1099 during his 2018 OTR. RP 3512-13. Before the Hearing Panel, Felix testified that the third version of his Form 1099 was mistakenly generated by CPA, and that the compensation listed was that of another Primex employee. RP 2340-44.

obtain the transcripts from the IRS by submitting Form 4506-T or an online request. RP 1946-48, 5883-90. Through counsel, Felix reasserted his position that his tax transcripts do not fall within the scope of Rule 8210. RP 5893-94. Enforcement responded to Felix's attorney on September 7, 2018, explaining that the transcripts fall within Rule 8210's scope because Felix has the right to demand them. RP 1948-50, 5898. Enforcement attached to its letter a final Rule 8210 request, which again sought Felix's IRS wage and income transcripts for years 2012-2017. RP 1948-50, 5899-5902. Felix responded through counsel on September 14, 2018, reiterating his objection to the request. RP 1950, 5915-17. Felix never provided any of his tax transcripts—including his 2013 wage and income transcript—to Enforcement. RP 1950.

In total, Enforcement issued five Rule 8210 requests for Felix's IRS account transcripts, two of which specifically requested his 2013 wage and income transcript. RP 5166-68, 5304-05, 5321-23, 5884-86, 5899-901. Each request warned Felix that his failure to comply could result in a bar or other sanctions. RP 5168, 5305, 5321, 5885, 5900. In its subsequent complaint, Enforcement alleged that Felix violated Rule 8210 based on his refusal to provide his 2013 wage and income transcript in response to the two requests Enforcement issued in 2018. RP 30-31.

b. FINRA investigates the expense misclassifications and their impact on Primex's regulatory FOCUS filings

Enforcement reviewed Primex's expenses from 2013, 2014, and 2015, and asked Primex to provide additional information about many of the expenses that were reclassified by CPA, or that otherwise appeared to be personal in nature.¹¹ Felix responded that he could not recall or determine whether many of the expenses were personal or business in nature. RP 1757, 1782,

¹¹ RP 1661-62, 1749-55, 1778-81, 1895-97, 5551-53, 5726-31, 5862-65, 5871-73.

5739, 5877. For others, Felix identified a general category for the expense (such as “food and entertainment”) but provided no further detail. RP 5611-22.

After reviewing Felix’s responses to its requests—as well as emails between Felix and CPA concerning the 2014 and 2015 reclassifications—Enforcement concluded that Primex improperly had recorded \$174,066 in personal expenses as firm expenses in 2014, and \$140,492 in personal expenses as firm expenses in 2015. RP 3063-92, 3093-3123. Enforcement decided to treat the full amount of CPA’s reclassifications as personal expenses, as CPA had closely reviewed those expenses with Felix. RP 1861-63, 1880-82. For 2013 (the relevant year for which there were no reclassifications by Primex’s CPA), Enforcement followed the methodology CPA used for reclassifications in 2014 and 2015 to conclude that Primex recorded \$123,096 in personal expenses as firm expenses that year. RP 1895-97, 3037-61. Altogether, Enforcement calculated that Primex misclassified a total of \$437,654 in personal spending as business expenses during the relevant period. RP 3037, 3063, 3093.

Based on its net capital requirement, Primex filed quarterly FOCUS reports.¹² Enforcement determined that the expense misclassifications caused inaccuracies in Primex’s quarterly FOCUS report filings for the relevant years. In particular, the misclassified expenses caused the firm’s general ledger to overstate its business expenses and understate Felix’s compensation. RP 1337, 1505-07, 1938-40. The inaccuracies in the general ledger were then reflected in Primex’s 2013, 2014, and 2015 FOCUS reports. RP 1939-40, 2015-16.

¹² See Exchange Act Rule 15c3-1(a)(2)(vi), 17 C.F.R. § 240.15c3-1(a)(2)(vi); Exchange Act Rule 17a-5(a)(2)(iii), 17 C.F.R. § 240.17a-5(a)(2)(iii) (setting forth the requirements for how often a firm must file FOCUS reports).

Primex amended its 2014 and 2015 FOCUS reports after receiving CPA's final audit adjustments for those years. RP 1916-19, 6127-34, 6159-66. For both years, however, Primex made the year's total adjustment for CPA's reclassifications in the fourth quarter report. RP 1930-32. As a result, the FOCUS reports for the preceding three quarters continued to understate shareholder distributions for those periods, while the amended fourth quarter reports overstated shareholder distributions for those periods.¹³ RP 1928-34, 1936-39, 3133, 3135, 6132-33, 6164-65. Primex did not amend any of its 2013 FOCUS reports, as CPA did not require it to reclassify any expenses that year. RP 1957-58. As a result, all of its 2013 quarterly FOCUS reports reflect the expenses in question as business expenses and not as compensation. RP 1922-26, 3131.

II. PROCEDURAL HISTORY

A. Enforcement Commences a Disciplinary Proceeding

On July 1, 2019, Enforcement filed a six-cause complaint against Felix and Primex. RP 1-34. As relevant here, the complaint alleged that Felix violated: (1) FINRA Rule 2010 by making false expense entries in Primex's books and records (cause one); (2) FINRA Rules 4511 and 2010 by causing Primex to maintain inaccurate books and records and file inaccurate

¹³ Because Primex amended only its fourth quarter FOCUS reports for 2014 and 2015, its reports for the preceding three quarters of each year overstated the Firm's expenses. RP 1928-32, 1936-39, 3133, 3135. Primex's amended fourth quarter FOCUS report for 2014 reported firm expenses in an amount drastically lower than the expenses reported for the previous three quarters (\$4,978, as opposed to amounts ranging between \$115,176 and \$132,434). RP 3133. Accordingly, it appears that the Firm made the full year's adjustment to its expenses in the amended fourth quarter report. *See id.* Primex's amended 2015 fourth quarter report, however, listed firm expenses in an amount consistent with the previous three quarters (\$103,146, with the preceding amounts ranging between \$98,343 and \$135,380). RP 3135. As a result, it is not clear whether, or to what extent, Primex adjusted the firm expenses reported in its amended 2015 fourth quarter FOCUS report. *See id.*

FOCUS reports (cause two); and (3) Rule 8210 when he refused to provide a copy of his 2013 IRS wage and income transcript in response to Enforcement's two 2018 Rule 8210 requests (cause six).¹⁴ RP 1-34.

The Hearing Panel conducted a four-day hearing, during which Felix, CPA, and two FINRA investigators testified. *See generally* RP 1111-2973. In his testimony, Felix admitted that he never produced a copy of his 2013 wage and income transcript in response to FINRA's repeated requests. RP 2355. He also admitted that some of the problematic expenses identified by Enforcement were personal in nature and insisted that others had a business purpose. *See, e.g.*, RP 2028, 2395-2419, 2771.

B. The Hearing Panel's Decision

The Hearing Panel issued a July 1, 2020 decision finding Felix liable for causes one and two (the "books and records violations"), as well as cause six (the Rule 8210 violation). RP 7575-7632. The Hearing Panel majority found that Felix violated Rule 8210 by failing to produce his 2013 IRS wage and income transcript.¹⁵ RP 7620-24. The majority concluded that the requested transcript falls within Rule 8210's scope, as it pertains to the relationship between Felix and Primex and lies within Felix's control because he has the right to demand it. RP 7623-24. For this violation, the Hearing Panel majority imposed a bar. RP 7629-30.

The Hearing Panel also found Felix liable for the books and records violations. RP 7612-16. After a detailed review of the expenses in question, the Hearing Panel concluded

¹⁴ As noted above, cause three is not at issue because it pertained only to Primex, who is not a party to this appeal. RP 26-28. Causes four and five are not at issue because the Hearing Panel dismissed those causes. RP 28-30, 7602-09.

¹⁵ One panelist dissented, opining that IRS tax transcripts fall outside the intended scope of Rule 8210 and, therefore, that Felix should not be found liable for cause six. RP 7631-32.

that Felix caused Primex to misclassify a total of \$248,893 in personal expenses as business expenses. RP 7590-99. The Hearing Panel based this conclusion on its credibility findings, finding that Felix identified a credible business purpose for some expenses (such as computer equipment) and failed to do so for others (such as fitness equipment). RP 7591-99. The Hearing Panel assessed a unitary sanction against Felix for the books and records violations—a \$25,000 fine and a suspension from serving as a FINOP for 30 business days, and thereafter until he requalifies by examination as a FINOP. RP 7625-28. Considering the bar it imposed for cause six, however, the Hearing Panel did not impose these sanctions.¹⁶ RP 7630.

C. The NAC Affirms the Hearing Panel’s Findings and Sanctions

Felix appealed the Hearing Panel’s decision to the NAC, and Enforcement cross-appealed the sanctions the Hearing Panel assessed for the books and records violations. RP 7633-47. After a de novo review, the NAC affirmed the Hearing Panel’s findings and sanctions. RP 7826-53. Considering the text, context, and purpose of Rule 8210—as well as the circumstances of this case—the NAC concluded that Felix’s 2013 wage and income transcript falls within Rule 8210’s scope. RP 7834-40. Specifically, the NAC determined that the transcript related to FINRA’s investigation because it would have confirmed Felix’s reported firm compensation and shown which, if any, of the differing Forms 1099 provided by Primex for Felix was authentic. RP 7835-36. The NAC also determined that the transcript lay within Felix’s “possession, custody, or control,” because it is a personal tax document that he had the ability to obtain from

¹⁶ To the extent Felix complains of errors in the Hearing Panel’s decision on review, his arguments are misplaced because it is the NAC’s decision, and not the Hearing Panel decision, that is FINRA’s final action subject to Commission review. *See Meyers Assoc., L.P.*, Exchange Act Release No. 86497, 2019 SEC LEXIS 1869, at *80 (July 26, 2019).

the IRS. RP 7836-38 (quoting FINRA Rule 8210). The NAC decided that the transcript otherwise falls within Rule 8210's scope because it pertains to the relationship between Felix and his member firm. RP 7838-40. Accordingly, the NAC concluded that Felix violated Rule 8210 when he refused to provide the transcript. RP 7834-40. The NAC barred Felix in light of the importance of the information to FINRA's investigation and Felix's repeated refusal to comply with the Rule 8210 requests. RP 7846-49.

With respect to the books and records violations, the NAC affirmed the Hearing Panel's determination that Felix violated Rules 2010 and 4511 by making false expense entries—which, in turn, caused Primex to maintain inaccurate records and file inaccurate FOCUS reports. RP 7840-43. Finding no basis to set aside the Hearing Panel's detailed findings concerning the purpose of the expenses in question, the NAC also affirmed the Hearing Panel's determination that Felix misclassified \$248,893 in personal expenses as firm expenses. RP 7840-41. The NAC addressed Felix's argument that Enforcement unduly delayed filing the complaint with respect to the books and records violations, concluding that Felix failed to demonstrate that any delay resulted in an unfair proceeding. RP 7843-45. In this respect, the NAC observed that the time periods at issue generally are shorter than those held to amount to undue delay, and that Felix's failure to provide documentation for many expenses was due to his own failure to maintain expense records—and not to any delay by Enforcement. RP 7843-45. Finally, the NAC affirmed the sanctions assessed by the Hearing Panel for the books and records violations. RP 7849-52. Felix filed the present application for review with the Commission. RP 7855-72.

III. ARGUMENT

A. Felix Violated FINRA Rule 8210 by Refusing to Provide His 2013 Wage and Income Transcript

i. IRS Wage and Income Transcripts

As discussed above, Felix's Rule 8210 violation is based on his refusal to provide his 2013 IRS wage and income transcript to FINRA. RP 30-31. A taxpayer may obtain several different types of IRS account transcripts upon request, either by submitting an online request or faxing or mailing a completed Form 4506-T to the IRS. *See* IRS, "Transcript Types and Ways to Order Them," "Transcript Types," <https://www.irs.gov/individuals/transcript-types-and-ways-to-order-them> (last visited Sept. 30, 2021). As relevant here, a wage and income transcript shows the information reported on any information returns (such as a Form 1099) filed with the IRS on an individual's behalf. *See id.* (explaining that a wage and income transcript "shows data from information returns we receive such as Forms W-2 [and] 1099"); *see also* RP 1954-57. In effect, a wage and income transcript serves as a copy of the income reported for an individual to the IRS. *See EEOC v. Brown-Thompson*, No. CIV-16-1142-R, 2018 U.S. Dist. LEXIS 229639, at *6 (W.D. Okla. Nov. 8, 2018) (explaining that there was no need to produce W-2 Forms because that information would be contained in the wage and income transcript).

ii. Felix's 2013 Wage and Income Transcript Falls Within the Scope of FINRA Rule 8210

Felix does not dispute that he failed to comply with FINRA's Rule 8210 requests for his 2013 wage and income transcript. Br. Sppt. Appl., unnumbered at 18-24.¹⁷ Instead, he asserts that Rule 8210 does not provide FINRA with the authority to request the transcript. *Id.* He is

¹⁷ "Br. Sppt. Appl." refers to Felix's Brief in Support of the Application for Review, received by FINRA on September 1, 2021. Because the pages of Felix's brief are unnumbered, FINRA cites to the PDF page numbers for that document.

incorrect, and the NAC properly concluded that the transcript falls within Rule 8210's scope and, therefore, that Felix violated Rule 8210 by refusing to produce it.

FINRA Rule 8210 lies "at the heart of the self-regulatory system for the securities industry" and "provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations." *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008), *aff'd*, 347 F. App'x 692 (2d Cir. 2009). The obligation to cooperate with requests under the rule is "unequivocal," and violations are serious because a "failure to respond [to a Rule 8210 request] impedes [FINRA's] ability to detect misconduct that threatens investors and markets." *Berger*, 2008 SEC LEXIS 3141, at *13-14.

As relevant here, Rule 8210(a)(2) provides that any person subject to FINRA's jurisdiction shall permit FINRA to "inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in [an] investigation, complaint, examination, or proceeding that is in such member's or person's possession, custody, or control." Contrary to Felix's arguments, his 2013 wage and income transcript falls within the scope of this provision because it: (1) relates to FINRA's investigation; (2) lies within Felix's "possession, custody, or control;" and (3) is a personal tax record pertaining to the relationship between Felix and a member firm.

a. Enforcement's requests for Felix's wage and income transcript were "with respect to" a matter involved in an investigation

FINRA's requests for Felix's 2013 wage and income transcript were "with respect to" a matter involved in its investigation. *See* FINRA Rule 8210(a)(2). The payment of personal expenses by a firm is a form of compensation. *See Meyers Assoc.*, 2019 SEC LEXIS 1869, at

*45-46 & n.80 (explaining that a firm must record the payment or reimbursement of personal expenses as employee compensation in order to maintain accurate books and records and file accurate reports). Accordingly, FINRA's investigation into Primex's payment of Felix's personal expenses concerned his firm compensation. *See id.* Because Felix's 2013 wage and income transcript would have confirmed his reported compensation from Primex for that year, FINRA's requests for the wage and income transcript were "with respect to" its investigation into the misclassification of Felix's personal expenses and the firm's inaccurate books and records. RP 1655, 1957; *cf. Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *12-14 (Nov. 8, 2007) (explaining that the respondent was required to provide a copy of his tax return under Rule 8210 because his income was at issue), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

Felix argues that FINRA did not need his wage and income transcript because Primex provided its tax forms. Br. Sppt. Appl., unnumbered at 18-19. But the tax forms provided by Primex underscore FINRA's need to review Felix's wage and income transcript. Primex provided different versions of Felix's 2013 Form 1099—each of which listed a different compensation amount. RP 4475, 5030, 6366. The wage and income transcript FINRA requested would have confirmed which amount was reported to the IRS. RP 1944-45, 1955-57. Moreover, Enforcement was entitled to investigate whether the differing Forms 1099 were false or misleading. *See John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *35 (June 14, 2013) (explaining that FINRA "was entitled to test the accuracy of the assertions [the respondent] made" in response to a Wells notice); *cf. Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *23 (Aug. 22, 2008) ("An associated person who provides false or misleading information to [FINRA] in the course of an investigation

violates [FINRA] Rule 8210”). Therefore, Enforcement’s requests for Felix’s 2013 wage and income transcript were “with respect to” its investigation for another reason—the transcript would have revealed which, if any, of the Forms 1099 were authentic and accurate.

Felix also argues that his wage and income transcript would not have shed light on who prepared his 2013 Form 1099. Br. Sppt. Appl., unnumbered at 20 (quoting RP 7632). But FINRA did not request the transcript to verify who prepared Felix’s Form 1099.¹⁸ Rather, FINRA requested the transcript to determine Felix’s compensation from the firm and which, if any, of the 2013 Forms 1099 Primex provided for Felix was authentic. RP 1944-45, 1955-57. And, while Felix argues that the transcript would not have shown whether specific expenses were personal in nature, the document would have confirmed Felix’s reported firm compensation—and the firm’s payment of Felix’s personal expenses was part of his compensation. RP 1944-45, 1955-57; *Meyers Assoc.*, 2019 SEC LEXIS 1869, at *45-46 & n.80.

In any event, Felix’s beliefs about whether FINRA had a valid reason for requesting his wage and income transcript do not dictate whether the document falls within Rule 8210’s scope. Rather, the issue of whether a requested record is “with respect to any matter involved in [an] investigation” should be viewed from FINRA’s perspective. *See Erenstein*, 2007 SEC LEXIS 2596, at *12-13 (“Whether a requested record is ‘with respect to any matter involved in [an] investigation’ is a determination made by [FINRA] staff.”) (quoting FINRA Rule 8210(a)(2)). FINRA properly viewed the transcript as a document related to its investigation, and Felix’s contrary opinion did not excuse his obligation to comply with FINRA’s requests. *See Berger*,

¹⁸ As part of its efforts to verify the authenticity of the 2013 Forms 1099 Primex provided for Felix, FINRA tried to determine whether CPA created any of the forms. RP 1943-44. After that effort failed, FINRA requested the transcript as an alternate means of verifying the forms’ authenticity. RP 1944-45.

2008 SEC LEXIS 3141, at *13; *Michael David Borth*, 51 S.E.C. 178, 181 (1992) (“The Rules do not permit second guessing [FINRA’s] requests.”).

b. Felix’s wage and income transcript lies within his “possession, custody, or control”

Felix’s wage and income transcript also was within his possession, custody, or control. Felix contends that Rule 8210 does not require him to obtain his wage and income transcript from the IRS. Br. Sppt. Appl., unnumbered at 18-24. His argument is inconsistent with the plain language of Rule 8210(a)(2), which expressly applies not only to documents in an associated person’s “possession,” but also to those within his “custody or control.” FINRA added the phrase “possession, custody, or control” to the rule to clarify that it applies to records within an associated person’s control, even if the person does not own or physically possess the record at issue. *FINRA Regulatory Notice 13-06*, 2013 FINRA LEXIS 8, at *2 (Jan. 2013); *see also Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 4625, at *21-22 (Apr. 17, 2014) (explaining that the amendment to Rule 8210 addressed whether the rule applies to documents over which a member firm or associated person has possession, custody, or control, if not ownership). Rule 8210’s Supplementary Material confirms that an associated person must make records available when they are in the possession of a third party, as long as the person “controls or has a right to demand them.” FINRA Rule 8210, Supplementary Material .01.

Here, there is no dispute that Felix can obtain his 2013 wage and income transcript from the IRS by making an online request or completing Form 4506-T. *See* Br. Sppt. Appl.,

unnumbered at 18-24; RP 1946-47, 5884, 5899.¹⁹ Because the transcript is a personal tax record that Felix can obtain, it plainly falls within Rule 8210's scope. *See* FINRA Rule 8210, Supplementary Material .01. Felix's assertion that Rule 8210 cannot apply to an IRS document lacks merit, as the amendment to Rule 8210 clarified that the rule applies to a document owned or possessed by a third party, as long as the associated person controls or has a right to demand it (and the document otherwise meets Rule 8210's criteria). *FINRA Regulatory Notice* 13-06, 2013 FINRA LEXIS 8, at *2; FINRA Rule 8210, Supplementary Material .01.

Felix's argument contravenes not only the plain text of Rule 8210, but also caselaw interpreting the phrase "possession, custody, or control" for purposes of Federal Rule of Civil Procedure 34 ("FRCP 34"). Such caselaw is relevant here because the amendment to Rule 8210 linked its use of that phrase "to the existing body of case law that has defined possession, custody or control as used in [FRCP] 34." *Gregory Evan Goldstein*, Exchange Act Release No. 68904, 2013 SEC LEXIS 552, at *19 & n.38 (Feb. 11, 2013) (order denying a stay) (quoting *FINRA Regulatory Notice* 13-06, 2013 FINRA LEXIS 8, at *2). Federal courts interpreting FRCP 34 have determined that its use of the phrase "possession, custody, or control" extends the rule's reach to a document owned or possessed by a third party, as long as the party subject to the request has the "right, authority, or practical ability" to obtain the document. *Gordon Partners v. Blumenthal*, (*In re NTL, Inc. Sec. Litig.*), 244 F.R.D. 179, 195 (S.D.N.Y. 2007). Under this interpretation, federal courts have required parties to obtain and produce their tax records—

¹⁹ *See also* IRS, "Transcript Types and Ways to Order Them," "Transcript Types," <https://www.irs.gov/individuals/transcript-types-and-ways-to-order-them> (last visited Sept. 30, 2021).

including tax transcripts—from the IRS.²⁰ *See Brown-Thompson*, 2018 U.S. Dist. LEXIS 229639, at *5-6 (ordering the claimants to obtain and produce their IRS wage and income transcripts); *United States v. All Assets Held at Bank Julius Baer & Co.*, 142 F. Supp. 3d 37, 43 (D.D.C. 2015) (interpreting FRCP 34 to require that the claimant obtain his tax records from the United States government).

Felix’s wage and income transcript squarely lies within his “possession, custody, or control” for purposes of Rule 8210, as it is a personal tax document he can obtain from the IRS. The Commission should affirm the NAC’s conclusion in this respect because it is supported by the rule’s plain language, its Supplementary Material, the purpose of the 2013 amendment to the rule, and relevant precedent interpreting identical language in FRCP 34.

c. Felix’s wage and income transcript otherwise falls within Rule 8210’s scope

Finally, Felix’s wage and income transcript is a record of his under FINRA Rule 8210. *See* FINRA Rule 8210(a)(2) (referring to the books, records, and accounts “of such [FINRA]

²⁰ Felix asserts that FINRA cannot “compel him to sign documentation” to obtain his wage and income transcript. Br. Sppt. Appl., unnumbered at 2, 17-19, 21-22. Felix is mistaken. Federal courts have held that a document lies within a party’s “possession, custody, or control” if he can obtain it by signing an authorization form, and have compelled the completion of such forms when needed. *See Butler v. Exxon Mobil Ref. & Supply Co.*, No. 07-386-C-M2, 2008 U.S. Dist. LEXIS 66091, at *7 (M.D. La. Aug. 28, 2008) (“a request to have the plaintiff execute an authorization for release of tax records is an acceptable and compellable means of obtaining a party’s tax return information”); *see also Friedman v. Sthree Plc.*, No. 14-CV-00378, 2016 U.S. Dist. LEXIS 146960, at *22-23 (D. Conn. Oct. 24, 2016) (ordering the plaintiff to complete Form 4506-T when he advised that he could not provide tax returns for certain years); *Mazariegos v. Am. Home Assur. Ins.*, No. 07-CV-0107, 2008 U.S. Dist. LEXIS 130202, at *18 (N.D. Ga. Mar. 31, 2008) (compelling the plaintiff to complete Form 4506 to request a copy of his tax return from the IRS when his income was at issue, and he did not possess copies of his tax returns); *Grove v. Aetna Cas. & Sur. Co.*, 855 F. Supp. 113, 116 (W.D. Pa. 1993) (compelling the plaintiff to either provide his Social Security Administration disability file, or sign a release permitting the defendant to obtain it).

member or person”). The wage and income transcript is Felix’s personal tax record, as he is the only person who can request it and it is, in effect, a copy of his reported compensation.²¹ *See* RP 1954. Indeed, Rule 8210’s Supplementary Material explains that the “books, records and accounts” referenced in the rule are those “that the broker-dealer or its associated persons make or keep relating to its operation as a broker-dealer or relating to the person’s association with the member.” FINRA Rule 8210(a)(2), Supplementary Material .01. Here, Primex created Felix’s 2013 Form 1099 for transmission to the IRS, and Felix’s 2013 wage and income transcript is a copy of that transmission. The transcript’s content—that is, the amount of compensation Primex reported for Felix—clearly relates to Felix’s association with Primex. *See FINRA Regulatory Notice* 13-06, 2013 FINRA LEXIS 8, at *3 (explaining that Rule 8210’s Supplementary Material “indicates that all aspects of the relationship between a broker-dealer and its associated persons are potentially the subject of a Rule 8210 request”) (emphasis added). Thus, the transcript is a “book, record, [or] account” within the meaning of Rule 8210(a)(2).

Moreover, an associated person’s tax records long have been viewed as falling within Rule 8210’s scope. *See Erenstein*, 2007 SEC LEXIS 2596, at *12, 19; *see also Dep’t of Enf’t v Hansen*, Complaint No. 2005001085001, 2008 FINRA Discip. LEXIS 2, at *11 (FINRA Hearing Panel Jan. 10, 2008) (“[T]ax records are routinely sought pursuant to Rule 8210 requests”). Because Enforcement’s Rule 8210 requests in this case were based on a regulatory need for an associated person’s tax document, they fell within Rule 8210’s parameters. *See Erenstein*, 2007 SEC LEXIS 2596, at *12, 19.

²¹ *See* IRS, “Transcript Types and Ways to Order Them,” “Transcript Types,” <https://www.irs.gov/individuals/transcript-types-and-ways-to-order-them> (last visited Sept. 30, 2021).

Despite the wage and income transcript's connection to FINRA's investigation—and Felix's undisputed ability to obtain it—Felix argues that the transcript falls outside Rule 8210's scope because, in his view, it does not satisfy the rule's requirement that the requested document must be "of [the FINRA] member or person." Br. Sppt. Appl., unnumbered at 19. To the extent Felix's argument is based on his objection that the transcript is an IRS document, his argument lacks merit because Rule 8210 applies to records under the custody or ownership of a third party. FINRA Rule 8210(a)(2) & Supplementary Material .01; *FINRA Regulatory Notice 13-06*, 2013 FINRA LEXIS 8, at *2. And, as discussed above, Rule 8210's Supplementary Material clarifies that the transcript is a "book, record, [or] account" subject to the rule because it is, in effect, a copy of a record created by Primex (a Form 1099) concerning its relationship with Felix. FINRA Rule 8210(a)(2) & Supplementary Material .01. Moreover, accepting Felix's argument in this regard would frustrate Rule 8210's objective—to facilitate the detection of misconduct—by permitting him to withhold a personal tax document that would verify his reported compensation from a member firm. *CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *37 (Jan. 30, 2009) (the purpose of Rule 8210 "is to give [FINRA], in the absence of subpoena power, the ability to detect misconduct among its members and associated persons"). Accordingly, the Commission should reject Felix's assertion that Enforcement's requests for his transcript were beyond Rule 8210's scope. *See* Br. Sppt. Appl., unnumbered at 19-20.

In sum, the wage and income transcript FINRA requested is Felix's personal tax record, and it is a copy of information provided by a member firm concerning its association with Felix. The transcript lies within Felix's control, and it related to FINRA's investigation into the misclassification of expenses in Primex's books and records. For these reasons, it falls within

Rule 8210's purview. *See* FINRA Rule 8210(a)(2) & Supplementary Material .01; *FINRA Regulatory Notice* 13-06, 2013 FINRA LEXIS 8, at *2. Felix therefore violated Rule 8210 when he repeatedly refused to produce his 2013 wage and income transcript.

B. The NAC Properly Determined that Felix Misclassified Expenses, Causing Primex to Maintain Inaccurate Books and Records

i. The NAC Properly Concluded that Felix is Liable for the Books and Records Violations

Contrary to Felix's assertions, the NAC properly concluded that he is liable for the books and records violations. RP 7807-10. As an initial matter, the Commission should reject Felix's attempt to characterize this proceeding as a tax case. Br. Sppt. Appl., unnumbered at 10-11. This case concerns Felix's violation of regulatory requirements for broker-dealers and associated persons—namely, the failure to make bona fide expense entries and maintain accurate books and records. *See* FINRA Rules 2010, 4511; RP 23-25; Exchange Act Rules 17a-3(a)(2) & 17a-5(a)(2)(iii); *Meyers Assoc.*, 2019 SEC LEXIS 1869, at *42-47 (the firm violated the Exchange Act and FINRA rules by misclassifying personal expenses as firm expenses); *Kimberly Springsteen-Abbott*, Exchange Act Release No. 88156, 2020 SEC LEXIS 2684, at *28-30 (Feb. 7, 2020) (the respondent violated FINRA Rule 2010 by charging personal expenses to investment funds). While Felix argues that FINRA failed to present expert testimony about these requirements, no such testimony was necessary because they are basic requirements with which Felix—as an associated person and FINOP—should have been familiar.²² *See* FINRA Rule 0140 (“[p]ersons associated with a member shall have the same duties and obligations as a member under the Rules”); FINRA Rules 1220(a)(4)(A)(i) & (iv) (a FINOP's responsibilities

²² Even if testimony were required (which it is not), Enforcement's witnesses testified that a firm's payment of personal expenses should be recorded as compensation. RP 1235-38, 1541-43, 1655.

include ensuring the accuracy of financial reports and maintenance of the books and records used to make such reports); *see also David R. Williams*, 48 S.E.C. 122, 123 (1985) (“we have repeatedly held that the requirement that records be kept embodies the requirement that such records be true and correct”).

The record supports the NAC’s conclusion that Felix violated basic recordkeeping and reporting requirements by misclassifying expenses, thereby causing Primex to maintain inaccurate records and file inaccurate reports. RP 7840-43. In his testimony, Felix admitted that many of the expenses he listed as firm expenditures in Primex’s records were his personal expenses. *See, e.g.*, RP 2028, 2265, 2771, 2873-76, 2879-80, 2883, 2885-96. While he maintained that other expenses had a business purpose, the Hearing Panel made well-supported findings that much of this testimony lacked credibility—and Felix does not identify substantial evidence to overturn those findings. RP 7591-99; Br. Sppt. Appl., unnumbered at 6-17; *Daniel D. Manoff*, 55 S.E.C. 1155, 1161-62 & n.6 (2002) (a credibility determination is entitled to deference absent substantial evidence to the contrary). Moreover, Primex’s regulatory FOCUS filings reflect that the firm’s inaccurate expense classifications were transferred to those reports. RP 1507-08, 1927-33, 1936-39, 2015-16, 3133, 3135. Accordingly, the NAC properly concluded that Felix violated Rules 4511 and 2010 by causing Primex to maintain inaccurate books and records and file inaccurate regulatory reports, as well as Rule 2010 by intentionally misclassifying his personal expenses as firm expenses.²³ *See Springsteen-Abbott*, 2020 SEC

²³ Felix also argues that the NAC improperly referred to the misclassification of personal expenses as the “falsification” of expenses. Br. Sppt. Appl., unnumbered at 5-6. Throughout its decision, however, the NAC frequently referred to the conduct as misclassification—only occasionally using the word “falsification.” *See, e.g.*, RP 7826, 7829, 7831, 7835, 7840, 7842-43. In any event, it is appropriate to refer to the intentional mis-recording of an expense as a falsification. *See Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629,

[Footnote continued next page]

LEXIS 2684, at *28-30; *Meyers Assoc.*, 2019 SEC LEXIS 1869, at *42-47; *Williams*, 48 S.E.C. at 123.

Felix's remaining arguments addressing the books and records violations lack merit. He suggests that FINRA based its determination of whether expenses were personal in nature solely on its impressions of the vendors involved, and erroneously assumed that Primex, as a small firm, would not purchase items such as food for the office. Br. Sppt. Appl., unnumbered at 12-13. But Felix received the opportunity to testify and present evidence concerning the individual charges in question, and the Hearing Panel's decision demonstrates that it considered his explanations for individual charges. *See* RP 7590-99. For instance, the Hearing Panel considered and accepted Felix's explanations that certain purchases with clothing and cosmetic retailers were for business gifts, that some food purchases had a business purpose, and that purchases at an online retailer known for clothing were for office items. RP 7593, 7597, 7599. The NAC considered these matters in turn and did not disturb the Hearing Panel's detailed findings on appeal. RP 7840-41 & n.21-22. Accordingly, the Commission should reject Felix's contention that the NAC based its liability finding on improper assumptions concerning small firms or certain vendors.²⁴

at *7 (Sept. 3, 2015) (the "falsification of expense reports" is inconsistent with FINRA Rule 2010); *cf. Sky Sci., Inc.*, Admin. Proceeding No. 3-9201, 1999 SEC LEXIS 475, at *111-12 (Mar. 5, 1999) (concluding that an issuer's control person "falsified" accounting records by failing to accurately record a net loss, in violation of Exchange Act Section 13).

²⁴ Because the Hearing Panel considered Felix's testimony as to the purpose of individual expenses, the Commission should also reject his argument that FINRA made improper assumptions about his spending because he did not hold a checking account in his name. Br. Sppt. Appl., unnumbered at 14.

Felix also argues that he followed CPA's guidance by recording personal expenses as "miscellaneous" expenses in Primex's books and records. Br. Sppt. Appl., unnumbered at 7, 16, 24. But CPA testified that he instructed Felix to record personal expenses as compensation. RP 1251-52, 1288-91, 1293; *see also* RP 6653. Noting that CPA's testimony in this regard was corroborated by email communications, the Hearing Panel expressly credited CPA's testimony over Felix's as to this issue. RP 7584. Felix does not point to substantial evidence to overturn that finding. *See* Br. Sppt. Appl., unnumbered at 7, 16, 24; *Manoff*, 55 S.E.C. at 1161-62 & n.6. In any event, Felix was Primex's FINOP and bore the ultimate responsibility of ensuring that expenses were properly recorded in the firm's books and records. *See* FINRA Rules 1220(a)(4)(A)(i) & (iv). He cannot shift this responsibility to CPA. *Townsley Assoc. & Co.*, 50 S.E.C. 755, 759 (1991) (a FINOP cannot shift responsibility for compliance by putative reliance on the advice of a certified public accountant).²⁵

Finally, based on the NAC's statement that it would "briefly" discuss his liability for the books and records violations, Felix argues that the NAC failed to thoroughly consider the issue. Br. Sppt. Appl., unnumbered at 6. But Felix fails to explain what factor or evidence the NAC overlooked. *See id.* Moreover, Felix did not address his liability for the books and records violations in his notice of appeal or briefs before the NAC. RP 7634-44, 7707-13, 7739. At oral argument, his contention on this point consisted only of his assertion that some expenses had a

²⁵ For similar reasons, the Commission should reject Felix's argument that he followed CPA's and FINRA's guidance by amending only Primex's fourth quarter FOCUS reports following CPA's reclassification of expenses as compensation. Br. Sppt. Appl., unnumbered at 8. Felix's assertion in this regard is not supported by the record, and the accuracy of Primex's FOCUS reports was his responsibility—not CPA's or FINRA's. FINRA Rules 1220(a)(4)(A)(i) & (iv); *Townsley Assoc.*, 50 S.E.C. at 759; *Robert Marcus Lane and Jeffrey Griffin Lane*, Exchange Act Release 74269, 2015 SEC LEXIS 558, at *56 (Feb. 13, 2015) (the Commission has rejected attempts to shift a member or associated person's compliance burden to FINRA).

business purpose—an issue thoroughly addressed by the Hearing Panel’s credibility analysis. RP 7591-99, 7754-55, 7764-66. Accordingly, the NAC’s liability discussion for the books and records violations—which expressly addressed the relevant facts and law—was sufficient. *Cf. In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 265 n.25 (3d Cir. 2009) (explaining that “the District Court’s analysis, though brief, was more thorough than the [appellant’s] objection on this point”).

ii. Felix Has Not Demonstrated that Any Delay in Filing the Complaint Resulted in an Unfair Proceeding

The Commission should reject Felix’s contention that FINRA unduly delayed filing the complaint with respect to the books and records allegations. Br. Sppt. Appl., unnumbered at 2-8. While Felix asserts that the five-year statute of limitations set forth in 26 U.S.C. § 2462 applies to this case, he is incorrect. Br. Sppt. Appl., unnumbered at 2-4. Even assuming this statute of limitations applied to FINRA disciplinary proceedings (which it does not), Felix waived any argument in this regard by failing to raise it before FINRA’s Office of Hearing Officers.²⁶ RP 37-55, 231-60; *Laurie Jones Canady*, 54 S.E.C. 65, 89 (1999) (explaining that a statute of limitations argument under § 2462 is waived if not timely raised). In any event, the Commission has squarely rejected an argument that § 2462’s limitations period applies to FINRA disciplinary proceedings. *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *92-93 (July 2, 2013). Indeed, the Commission explained that “the disciplinary authority of

²⁶ Although Felix raised an undue delay argument before the Hearing Officer, he did not assert that a statute of limitations applies to this case. RP 231-60, 1043-52 (order rejecting Felix’s undue delay argument). Felix also did not raise an argument concerning a statute of limitations before the NAC. RP 7634-44, 7707-13, 7747-87.

private self-regulatory organizations [] such as FINRA is not subject to any statute of limitation.” *Murphy*, 2013 SEC LEXIS 1933, at *92-93 (internal quotation and alteration omitted).²⁷

Rather than being subject to a statute of limitations, FINRA disciplinary proceedings are governed by an inherent fairness standard with respect to claims of delay. *See William D. Hirsh*, 54 S.E.C. 1068, 1077 (2000). To evaluate claims of undue delay, the Commission has considered the time periods between the filing of the complaint and: (i) the initial misconduct; (ii) the last misconduct; (iii) notice to the self-regulatory organization (“SRO”) of the misconduct; and (iv) the initiation of the investigation. *Id.* The Commission does not apply this test mechanically, and instead will “determine the fairness of [the] proceeding [based] on the entirety of the record.” *Mark H. Love*, 57 S.E.C. 315, 323-24 (2004).

As the NAC observed, the timeframes at issue here generally are shorter than those that have been held to result in inherent unfairness. RP 7843-45. The time that elapsed between the initial misconduct (January 2013) and the filing of the complaint (July 1, 2019) is six years and six months, and the time between the last act of misconduct (December 2015) and the filing of the complaint is three years and six months. RP 1, 23-25; *compare with Jeffrey Ainley Hayden*, 54 S.E.C. 651, 653-54 (2000) (dismissing charges that, among other things, were brought 14 years after the first act of misconduct and more than six years after the last incident of misconduct). Enforcement received notice of the misconduct when Member Supervision referred the matter to that department on April 8, 2016, and filed the complaint approximately

²⁷ While Felix cites to the Supreme Court’s decision in *Kokesh*, that decision does not apply here because it addressed solely whether “disgorgement, as applied in SEC enforcement actions, is subject to § 2462’s limitations period.” *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 n.3 (2017); *see also Saad v. SEC*, 980 F.3d 103, 108 (D.C. Cir. 2020) (emphasizing the narrowness of *Kokesh*’s holding). FINRA’s action is not an SEC enforcement action and Enforcement did not seek disgorgement.

three years and three months thereafter. RP 1, 7284-85; *compare with Hayden*, 54 S.E.C. at 653-54 (charges were brought five years after the SRO was informed about the misconduct). And, Enforcement’s investigation began with its first Rule 8210 request on May 26, 2016—approximately three years and one month before it filed the Complaint. RP 1, 5165; *cf. Hirsh*, 54 S.E.C. at 1077 (finding that the proceedings were fair where only 20 months elapsed between the SRO receiving notice of an arbitration award and the filing of a complaint concerning conduct relating to that award). Thus, the timeframes at issue here do not support Felix’s claim of inherent unfairness.

More importantly, the record, taken as a whole, demonstrates that the proceeding was fair and that Felix was able to defend himself against the charges. *See Love*, 57 S.E.C. at 323-24; *Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 SEC LEXIS 5100, at *53 (June 26, 2014) (emphasizing that, with respect to claims of delay, “fairness is determined by examining the entire record”). Felix was on notice since at least the 2015 cycle examination that FINRA was investigating Primex’s expense records. RP 1509, 1546-50, 5049-54. As of 2015, Primex’s expense records for the relevant period (2013-2015) fell within the minimum three-year retention window. *See Exchange Act Rules 17a-4(b)(2)-(3), (5)*, 17 C.F.R. § 240.17a-4(b)(2)-(3), (5). Because he was on notice of the potential claim, Felix—as Primex’s principal and FINOP—could have preserved the firm’s expense records for the relevant period, assuming any existed, in anticipation of this litigation. *See Timbervest, LLC*, Initial Decisions Release No. 658, 2014 SEC LEXIS 2990, at *180 (Aug. 20, 2014) (noting that the respondent “could easily have [] preserved [records] in anticipation of possible litigation” when it became aware of the Commission’s investigation); FINRA Rule 1220(a)(4)(A)(iv). His choice not to do so does not render the proceeding unfair. *See Timbervest*, 2014 SEC LEXIS 2990 at *180 (observing that “if

Respondents have been unduly prejudiced by the passage of time, it has largely been self-inflicted”).

It appears that Felix’s failure to present documentation for certain expenses during the hearing was caused not by the passage of time, but by his own failure to maintain diligent records. *See Edward John McCarthy*, 56 S.E.C. 1138, 1159-60 (2003) (rejecting the applicant’s claim that a delay prejudiced his ability to present a defense where he presented no evidence that the alleged delay caused evidence to be unavailable), *remanded on other grounds*, 406 F.3d 179 (2d Cir. 2005). Notably, CPA testified that Felix was unable to provide documentation for many expenses in response to requests CPA made when completing Primex’s annual audited reports. RP 1246-47, 1265-66, 1315. The record also reflects that, during the 2015 cycle examination, Primex failed to provide Member Supervision with details or requested documentation for a number of expenses incurred during the relevant period. RP 1592-93, 1597-98, 1604, 5071, 5110-60. In light of his apparent failure to maintain complete expense records during the regulatory retention period, Felix cannot now blame the passage of time for his failure to locate them. *See McCarthy*, 56 S.E.C. at 1159-60; Exchange Act Rules 17a-4(b)(2)-(3), (5), 17 C.F.R. § 240.17a-4(b)(2)-(3), (5).

In any event, Felix generally was able to testify at the hearing about the purposes of his spending with various vendors, and he fails to point to any specific unavailable evidence that likely would have changed the outcome of the proceeding. *See, e.g.*, RP 2248-94; Br. Sppt. Appl., unnumbered at 2-8. Thus, for this reason as well, Felix has failed to demonstrate that any delay in filing the complaint resulted in an unfair proceeding. *See Love*, 57 S.E.C. at 324-25 (concluding that the applicant failed to demonstrate that his “ability to mount an adequate defense was harmed by any delay in the filing of a complaint against him”).

iii. The Commission Should Reject Any Argument that FINRA's Investigation was Discriminatory or Otherwise Improper

Felix also appears to argue that FINRA conducted its investigation into the misclassification of personal expenses in a discriminatory manner.²⁸ *See* Br. Sppt. Appl., unnumbered at 19-20 (asserting that FINRA displayed jealousy and bias during the investigation). His unsupported assertions in this respect do not support such an argument. Rather, to establish a claim of unlawful, selective prosecution, Felix was required to present evidence that he was unfairly singled out and that FINRA's disciplinary action was motivated by a discriminatory purpose or desire to prevent his exercising a constitutionally protected right. *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *44 (July 27, 2015); *Nicholas T. Avello*, 55 S.E.C. 1197, 1209 n.19 (2002) (explaining that a party claiming selective prosecution "must establish, not merely assert, that the action against him was motivated by an unjust motive").

Here, Felix has not identified evidence showing that FINRA's investigation was motivated by a discriminatory purpose, and the record does not reflect that FINRA unfairly or unlawfully targeted him for disciplinary action. Instead, the record demonstrates that FINRA's

²⁸ Felix asserts that FINRA staff expressed jealousy and asked racially charged questions concerning whether he carried cash in bags. *See* Br. Sppt. Appl., unnumbered at 20. He does not indicate where these alleged statements by FINRA staff are found in the record. *See id.* It appears that he may be referring, in part, to an exchange with FINRA's Enforcement staff during a 2018 OTR—during which Enforcement asked Felix about a large cash transaction. *See id.*; RP 3558-65, 3574-75. The transcription of this exchange, however, provides no support for Felix's assertions of racial bias or otherwise improper behavior by FINRA staff. *See* RP 3558-65, 3574-75.

Felix also contends that FINRA staff asked about his wife's underwear size. Br. Sppt. Appl., unnumbered at 20. During the hearing, Felix testified that clothing purchases were not for his wife because the items (shoes and a dress) were not in her size. RP 2777-78, 2812. The record does not support his contention that he was asked about his wife's underwear size at any point during the investigation or hearing.

investigation began when a cycle examination caused concern that Felix's personal expenses were misclassified as firm expenses. RP 1509, 1528-29, 1540. FINRA's investigative requests were aimed at gathering more information concerning the questionable expenses, and Felix received ample opportunity throughout the investigation and the hearing to explain whether those expenses had a legitimate business purpose.²⁹ Felix admitted that many of the expenses at issue were personal (e.g., RP 2028, 2265, 2771), and his disagreement with FINRA's conclusion as to the purpose of other expenses is not evidence of discrimination. Accordingly, Felix has failed to establish that FINRA's disciplinary action was motivated by an unlawful or discriminatory purpose. *See Avello*, 55 S.E.C. at 1209 n.19.

C. The Sanctions Assessed and Imposed Are Neither Excessive nor Oppressive

The Commission should affirm the NAC's sanctions because they are neither excessive nor oppressive. Section 19(e)(2) of the Exchange Act provides that the Commission may eliminate, reduce, or alter a sanction if it finds that the sanction is excessive, oppressive, or imposes a burden on competition not necessary or appropriate to further the purposes of the Exchange Act. *See Jack H. Stein*, 56 S.E.C. 108, 120-21 (2003). "Under this standard, [the Commission] consider[s] any aggravating or mitigating factors and whether the sanctions are remedial and not punitive." *Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911, at *24 (Apr. 3, 2020). In considering whether sanctions are excessive or oppressive, the Commission gives significant weight to whether the sanctions are consistent with the framework provided in FINRA's Guidelines. *See Plunkett*, 2013 SEC LEXIS 1699, at *42

²⁹ *See, e.g.*, RP 2248-71, 5049-54, 5551-53, 5726-31, 5862-65, 5871-73.

(noting that while the Guidelines are not binding on the Commission, they serve as a “benchmark” in the Commission’s review of sanctions).

i. The Bar Imposed for the Rule 8210 Violation is Appropriately Remedial

The Commission should affirm the NAC’s decision to bar Felix for his Rule 8210 violation because this sanction is consistent with the Guidelines and, considering the circumstances of this case, appropriately remedial. *See Newport Coast Sec.*, 2020 SEC LEXIS 911 at *24; *Plunkett*, 2013 SEC LEXIS 1699 at *42. Acknowledging that Felix partially cooperated with FINRA’s investigation, the NAC applied the Guidelines for a partial, but incomplete, response.³⁰ RP 7814-15; *FINRA Sanction Guidelines* (Oct. 2020) (hereinafter “*Guidelines*”), at 33; *Plunkett*, 2013 SEC LEXIS 1699, at *55-57 (concluding that the Guidelines for a partial, but incomplete, response was appropriate considering the respondent’s cooperation with other Rule 8210 requests). Under that Guideline, a bar is the standard sanction “unless the person can demonstrate that the information provided substantially complied with all aspects of the request.” *Guidelines*, at 33. There is no such mitigating circumstance here, as Felix wholly refused to provide the wage and income transcript FINRA requested. RP 5893-94, 5915-17.

Moreover, an aggravating factor applies. The wage and income transcript was important, as it would have aided FINRA’s investigation into whether Primex’s books and records accurately reflected his compensation. *See Guidelines*, at 33 (the importance of the information requested, as viewed from FINRA’s perspective, is a principal consideration). FINRA relies on its members and associated persons to maintain accurate records and submit truthful and accurate filings. *Charles E. Kautz*, 52 S.E.C. 730, 734 (1996). Because Felix’s wage and income

³⁰ Available at: https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf (last visited Sept. 30, 2021).

transcript would have aided FINRA in determining whether he and Primex met this “basic requirement,” the document was important. RP 1655, 1957, 2009-10; *Kautz*, 52 S.E.C. at 734; *Meyers Assoc.*, 2019 SEC LEXIS 1869, at *45-46 & n.80 (noting the connection between the firm’s underreporting of an employee’s compensation and its failure to submit accurate regulatory filings). And, the transcript was important for another reason—it would have shown which, if any, of the three 2013 Forms 1099 provided for Felix was authentic and accurate. RP 1944-45, 1955-57. Felix’s refusal to provide the transcript stymied that line of inquiry, which potentially involved a serious violation—the provision of a false or misleading document to FINRA. *See Ortiz*, 2008 SEC LEXIS 2401, at *32 (explaining that supplying false information to FINRA is serious, as it “misleads [FINRA] and can conceal wrongdoing and thereby subverts [FINRA’s] ability to perform its regulatory function and protect the public interest”). In light of the importance of the requested information, the NAC’s decision to impose a bar was particularly appropriate and consistent with the relevant Guidelines. *See Guidelines*, at 33.

The facts and circumstances of this case demonstrate that a bar is appropriately remedial. Felix repeatedly refused to cooperate with FINRA’s requests for the transcript, despite FINRA’s response to his objections. RP 5893-94, 5898, 5915-17. This behavior contravened his unequivocal duty to cooperate with FINRA’s investigation. *See Michael Markowski*, 51 S.E.C. 553, 557 (1993), *aff’d*, 34 F.3d 99 (2d Cir. 1994); *N. Woodward Fin. Corp.*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, at *26 (May 8, 2015) (“If [a]pplicants had concerns about responding to [the Rule 8210] requests, they should have raised, discussed, and resolved them with FINRA in the cooperative spirit and prompt manner contemplated by the Rules . . . [i]nstead, [a]pplicants refused to comply.”). Felix’s violation of this duty is serious, as a person’s failure to comply with requests for information, documents, and testimony under the

rule “subverts FINRA’s ability to carry out its regulatory responsibilities, threatening investors and the markets.” *Plunkett*, 2013 SEC LEXIS 1699, at *33 (internal quotation omitted). Thus, in this case, a bar serves the remedial purposes of protecting the industry from an individual who will not cooperate with FINRA’s investigative requests and deterring such misconduct by others. *See Berger*, 2008 SEC LEXIS 3141, at *15 (explaining that those who fail to respond to Rule 8210 requests in any manner demonstrate that they are unfit to remain in the industry); *Elliot M. Hershberg*, 58 S.E.C. 1184, 1189 (2006) (a bar was appropriate for the applicant’s Rule 8210 violation because it would “serve as a deterrent to others who may be inclined to ignore [FINRA’s] information requests” (internal quotation omitted)).

While Felix contends that the bar imposed for the Rule 8210 violation is unwarranted, his argument in this regard appears to be based only on his contention that he is not liable for a Rule 8210 violation. Br. Sppt. Appl., unnumbered at 2, 18, 20-21, 23-24. For the reasons discussed above (*supra* at 15-24), the NAC properly found Felix liable for violating Rule 8210. Moreover, the imposition of a bar in this case is not excessive or oppressive. *See* 15 U.S.C. § 78s(e). Accordingly, the Commission should affirm the sanction imposed.

ii. Felix Has Waived Any Challenge to the Sanction Assessed for the Books and Records Violations and, in any Event, this Sanction is Not Excessive or Oppressive

Felix does not challenge the unitary sanction assessed by the NAC for the books and records violations—a \$25,000 fine, as well as a suspension from associating with any member firm as a FINOP for 30 business days, and thereafter until he requalifies by examination as a FINOP. *See generally* Br. Sppt. Appl. Accordingly, the Commission properly may deem any such argument waived. *See* Commission Rule of Practice 450(b); *Merrimac Corporate Sec., Inc.*, Exchange Act Release No. 86404, 2019 SEC LEXIS 1771, *99 n.158 (July 17, 2019)

(noting that a party, including a *pro se* party, waives an argument by failing to develop it in his brief). Even if the Commission were to reach this issue, however, the assessed sanctions are not excessive or oppressive. *See Rani T. Jarkas*, Exchange Act Release No. 77503, 2016 SEC LEXIS 1285, at *48 (Apr. 1, 2016) (concluding that, even if FINRA had imposed the assessed sanctions, they were not excessive or oppressive).

The assessed sanctions are consistent with the applicable Guidelines, which range from \$1,000 to \$155,000 in fines and a suspension in any capacity for 10 days to two years, or a bar. *See Guidelines*, at 29, 37, 70 (Guideline ranges for forgery, recordkeeping violations, and filing inaccurate FOCUS reports). Moreover, several aggravating factors apply. Felix's books and records violations involved the intentional mis-recording of a significant amount of expenses—nearly \$250,000—over a three-year period. *See RP 7808; Guidelines*, at 29, 37 (providing that the principal considerations include the nature and size of the records at issue, as well as whether the inaccurate information was entered intentionally). The intentional mis-recording of these expenses over time amounted to a pattern of misconduct, from which Felix stood to gain financially. *See Guidelines*, at 8, 29 (providing that principal considerations include whether the respondent stood to gain financially from the misconduct, and whether the violations involved a pattern of misconduct). Considering these aggravating factors, the assessed fine and suspension are consistent with the Guidelines, appropriate to deter similar misconduct by others, and neither excessive nor oppressive. *See Newport Coast Sec.*, 2020 SEC LEXIS 911 at *24; *Plunkett*, 2013 SEC LEXIS 1699, at *42.

IV. CONCLUSION

It is undisputed that Felix refused to comply with Rule 8210 requests for his wage and income transcript. The transcript related to FINRA's investigation, lay within Felix's possession or control, and pertained to his relationship with a member firm. Felix thus was unequivocally required to produce his wage and income transcript pursuant to Rule 8210, yet he repeatedly failed to do so. Felix's refusal to comply with FINRA's requests for the document renders him unfit to remain in the securities industry, as his disregard for this critical obligation poses a threat to investors. Further, the NAC properly affirmed Felix's liability for his books and records violations. Felix admitted that he recorded personal expenses as business expenses in Primex's books and records, and the Hearing Panel's well-supported credibility findings undercut Felix's argument that certain expenses were business-related. Felix's mis-recording of expenses caused his member firm to file inaccurate FOCUS reports, and the assessed sanctions for this misconduct are not excessive or oppressive. Accordingly, the Commission should dismiss the application for review.

Respectfully submitted,

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September 30, 2021

CERTIFICATE OF COMPLIANCE

I, Ashley Martin, certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

I, Ashley Martin, further certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition not to exceed 14,000 words. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 11,697 words.

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CERTIFICATE OF SERVICE

I, Ashley Martin, certify that on this 30th day of September 2021, I caused a copy of the foregoing “FINRA’s Brief in Opposition to Application for Review,” Administrative Proceeding File No. 3-20380, to be filed through the SEC’s eFAP system and served by electronic mail on:

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