BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Kent M. Houston

For Review of Disciplinary Action Taken by

The Financial Industry Regulatory Authority

File No. 3-14175

BRIEF OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY IN OPPOSITION TO APPLICATION FOR REVIEW

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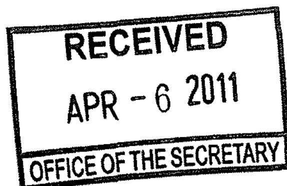

April 6, 2011

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I. INTRODUCTION

This case involves Applicant Kent M. Houston's ("Houston") refusal to appear before FINRA staff and provide on-the-record testimony. Houston refused to abide by the unequivocal duty imposed upon all FINRA members and their associated persons to cooperate promptly and fully with FINRA requests for information and testimony. The core facts are not in dispute and prove that Houston violated NASD Rules 8210 and 2110. FINRA learned that Houston's firm, First Wall Street Corp. ("First Wall Street" or the "Firm") had fired Houston for cause, and FINRA opened an investigation to determine whether he had violated FINRA rules. FINRA requested, on three separate occasions pursuant to NASD Rule 8210, that Houston provide on-the-record testimony concerning allegations levied by First Wall Street and that led to his termination. Houston refused to provide testimony, notwithstanding FINRA's warnings that he could face disciplinary action and a bar if he refused to cooperate.

Consistent with the FINRA Sanction Guidelines ("Guidelines"), the NAC barred Houston from association with any member firm in any capacity for this misconduct. FINRA's sanction of a bar was fully warranted. Houston refused to testify or cooperate with FINRA's investigation. Indeed, he thwarted FINRA's investigation into whether he misappropriated customer trust funds while serving as a trustee. FINRA followed its Guidelines in concluding that these facts were aggravating. Houston's arguments on appeal have no basis in law or fact and should be rejected. Because the sanctions imposed by the NAC's decision are neither excessive nor oppressive, the Commission should dismiss Houston's application for review.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

1. Houston's Appointment as a Trustee

On April 24, 2001, Houston's great aunt, [redacted], appointed Houston to act as co-trustee with her of a trust that she and her now deceased husband had established in 1971 to pay the trust's net income to the [redacted] on a monthly basis. (RP 345-53, 367-70.)[1] [redacted] specified that Houston would serve as sole trustee if she was unwilling or unable to serve. (RP 367-70.)

Two days after his appointment as co-trustee, on April 26, 2001, Houston opened an account for the trust at First Wall Street. (RP 377.) The account application listed [redacted] and Houston as co-successor trustees and Houston as the account representative. (RP 377-79.) Houston's business address at that time was the mailing address on the application. (RP 265, 377-79.) Houston had the ability to write checks on the account without [redacted] signature on the

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[1] "RP" refers to the page numbers in the certified record of this case filed with the Commission.

checks. (RP 382, 385, 387, 394, 396, 400, 405, 412, 420, 426, 433, 443, 456, 602-662, 923.) In June 2005, Houston became the trust's sole trustee. (RP 373-75.) ████ died in June 2006. (RP 525.)

2. Houston Received Compensation from ████ Trust

From October 2001 through December 2005, Houston received more than $400,000 in the form of checks drawn on the trust's First Wall Street account. From October 2001 through 2002, Houston received $98,800 in checks payable to him that ████ signed. (RP 602-616.) From 2003 until ████ died in 2006, Houston signed all checks drawn on the trust account. (RP 617-648.) In 2003, he wrote checks to himself totaling $41,600. (RP 617, 623-26.) In 2004, Houston wrote seven checks to himself or to Countrywide Bank for his benefit as payments on his home equity line of credit, totaling $167,000. (RP 239-40, 526, 627-29, 632-33, 640-41.) In 2005, Houston wrote three checks payable to Countrywide Bank for his benefit, totaling $119,000. (RP 239-40, 526, 643, 645-46.)

3. Houston Failed to Disclose His Trustee Activities to First Wall Street

While Houston had several opportunities to disclose to First Wall Street that he was engaged in outside business activities as a trustee and that he was receiving compensation for these activities, Houston did not give First Wall Street written notice. First Wall Street's written compliance and supervisory procedures required that its registered representatives disclose the name of a potential outside employer, the type of business to be performed, the method of compensation, and the amount of time involved in the outside activity. (RP 515.) The Firm also required that it give written approval before a representative engaged in the disclosed activity. (RP 515.)

Houston also did not disclose his trustee activities on the Firm's "Independent Contractor Agreement" that he signed and dated December 31, 2002 (the "2002 Agreement"). The 2002 Agreement stated that Houston was to notify the Firm of any outside business activities in which he was engaged or intended to engage and expressly delineated acting as a trustee as an example of an outside business activity. (RP 481, 485.) Appended to the 2002 Agreement was an "Outside Business Activity Notification Form" ("Notification Form"). (RP 487-88.) Rather than disclose that he was acting as a trustee for [redacted] trust, Houston left the Notification Form blank and initialed the form. (RP 487-88.)

In 2003 and 2004, Houston again failed to disclose his trustee activities to First Wall Street when he completed the Firm's Independent Contractor Agreement on December 18, 2003 (the "2003 Agreement"), and December 13, 2004 ("2004 Agreement"). (RP 491, 496, 498-99, 503, 508, 511.) The 2003 Agreement included the same outside business notification provisions and appended the same Notification Form as the 2002 Agreement. (RP 491, 498-99.) Houston left the 2003 Notification Form blank. (RP 498-99.) In December 2004, Houston completed First Wall Street's "Outside Business Activities Statement" ("2004 Statement"). (RP 511.) Houston acknowledged in the 2004 Statement that he understood the Firm's policies and procedures regarding the required disclosure to the Firm of all outside business activities and checked the box next to the statement, "I have NOT conducted any outside business activities during the past year." (RP 511.)

In August 2005, First Wall Street's compliance department distributed a memorandum to its registered representatives regarding potential conflicts of interest arising from involvement in a client's personal matters. (RP 681.) The memorandum directed Houston and other registered representatives to contact the Firm's compliance department "immediately in writing if you are

currently listed as a trustee, . . . or if you perform any duties that involve compensation of any kind that does not come through the [F]irm in the form of commissions and is not included on your [Uniform Application for Securities Industry Registration or Transfer ("Form U4")] as an approved outside business activity."[2] (RP 681.) The Firm's compliance department issued a follow-up memorandum in September 2005 that reminded its registered representatives that they were required to request written approval for, among other things, acting as a trustee and distributed a "Disclosure of Appointment" form. (RP 683-84.) The Disclosure of Appointment form required registered representatives to disclose all trusteeship appointments irrespective of whether they were approved by the Firm previously. (RP 683-84.) In October 2005, Houston completed the form and checked the box next to the statement, "I have NOT accepted any appointment as trustee, successor trustee, executor, or power of attorney over any client including my immediate family during the past year." (RP 513, 520.)

In connection with a December 2005 FINRA examination, First Wall Street compliance staff learned of Houston's check writing authority on [redacted] trust account. (RP 245-46, 465.) The Firm subsequently commenced an internal investigation into Houston's activities related to [redacted] trust and the peculiar withdrawals from the trust account. (RP 238-40, 248.) The Firm requested that Houston provide a copy of all of the trust amendments, an accounting of the checks written on the trust account, and a copy of Houston's Countrywide Bank statements. (RP 238-39, 248.) Houston refused to provide the Firm with an accounting of the checks that he wrote and the Firm terminated him. (RP 223, 240, 267, 277, 321.)

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[2] The two Forms U4 contained in the record, dated July 29, 2005 and October 20, 2005, do not reflect that Houston was engaged in an outside business activity. (RP 293, 295.)

4. *Houston Refused to Testify*

Houston refused repeatedly to provide FINRA with testimony regarding his activities at First Wall Street. Houston was associated with First Wall Street from November 1989 until the Firm terminated him for cause on May 15, 2006. (RP 267.) On May 16, 2006, First Wall Street filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") in which it indicated that Houston had violated First Wall Street's policies by failing to supply documents in an internal investigation at the Firm. (RP 273-75, 277.) First Wall Street specifically indicated that it had terminated Houston because of his refusal to comply with the Firm's requests for an accounting of disbursements that he made from [redacted] trust account. (RP 223, 267, 277.) FINRA commenced its investigation of Houston's activities at First Wall Street as a result of the Form U5 disclosure. (RP 223-24, 267.) FINRA staff were concerned that Houston may have misappropriated funds from [redacted] trust. (RP 233.)

FINRA sent Houston a succession of NASD Rule 8210 information requests, but his responses were dilatory and incomplete. (RP 521, 533, 537, 539-41, 543, 545-46, 557, 583-85, 597.) FINRA sought to expedite its information gathering by seeking Houston's testimony and provided Houston with multiple opportunities to appear and testify. In a September 7, 2007 letter from FINRA to Houston, FINRA staff requested that Houston appear at FINRA's offices in Los Angeles, California, to testify on the record on September 27, 2007, in conjunction with its investigation of First Wall Street's termination of Houston. (RP 233, 663.) The September 7 letter stated that FINRA staff had requested Houston's testimony pursuant to NASD Rule 8210 and that Houston was obligated to appear and testify. (RP 663.)

Houston responded to the letter on September 10, 2007, by requesting that FINRA staff provide him with certain information before he would agree to a date.[3] (RP 665.) FINRA staff sent Houston a letter dated September 17, 2007, reminding him that he was required by NASD Rule 8210 to testify as requested at the September 27, 2007 on-the-record interview, that he could not impose conditions on his testimony, and that his failure to comply could result in the initiation of a disciplinary action and imposition of sanctions, including a bar.[4] (RP 669.)

After Houston received FINRA's September 17, 2007 letter, he requested to postpone his testimony for 30 days while he sought legal counsel to represent him. (RP 671.) FINRA staff notified Houston in a September 21, 2007 letter that it had rescheduled the on-the-record interview for October 19, 2007, and reminded him that he was obligated to attend the interview pursuant to NASD Rule 8210. (RP 673.)

After Houston received FINRA's September 21, 2007 letter, attorney Thomas Fehn ("Fehn") contacted FINRA staff, stated that he represented Houston, and requested that Houston's testimony be rescheduled to accommodate Fehn's schedule. (RP 234.) In an October 10, 2007 letter from FINRA to Fehn, FINRA rescheduled Houston's testimony to November 27, 2007.[5] (RP 675.)

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[3] Houston specifically requested "the wording of the 2110 violation in question," "[s]entencing guidelines on violation 2110 & 3030," and "[r]ecent broker history of sentences handed down and accepted by accused on the above mentioned violations." (RP 665.)

[4] FINRA staff also directed Houston to where he could locate on FINRA's website the text of NASD Rule 2110, FINRA's Sanction Guidelines, synopses of settled disciplinary actions, and the text of Hearing Panel and National Adjudicatory Council decisions. (RP 669-70.)

[5] Houston has contended that he did not retain Fehn to represent him. (RP 894-95.) Houston's contention is irrelevant. FINRA staff sent a copy of the October 10, 2007 letter rescheduling the testimony to *both* Fehn and Houston. (RP 675.) And Houston admits that he was aware of the request for his testimony. (RP 138, 711.)

In a letter dated November 21, 2007, Houston notified FINRA that he would not appear for testimony. (RP 234, 677-79.) Houston did not, in fact, appear for testimony. (RP 234.)

B. Procedural Background

FINRA initiated disciplinary proceedings against Houston on February 1, 2008, when the Department of Enforcement ("Enforcement") filed a two-cause complaint against Houston. (RP 6-11.) The first cause of the complaint alleged that Houston violated NASD Rules 3030 and 2110 when he failed to provide First Wall Street with written notice of outside business activities related to him acting as trustee for his great-aunt's trust. (RP 6-8.) The second cause of the complaint alleged that Houston failed to provide on-the-record testimony requested by FINRA, in violation of NASD Rules 8210 and 2110. (RP 9-10.)

In his amended answer, Houston admitted that he received FINRA's requests for testimony and acknowledged that he stated in a letter to FINRA staff that he would not attend the on-the-record testimony that FINRA had scheduled for November 27, 2007. (RP 138, 711.) Houston also expressly waived his right to a hearing in his answer. (RP 35, 171.)

Following a second prehearing conference with the Hearing Officer and Enforcement, Houston confirmed by letter to the Hearing Officer his "request to not have a hearing but to submit my answers in writing."[6] (RP 171.) Accordingly, in lieu of a hearing, the Hearing Panel considered the parties' written submissions, which included narrative statements about the case and documentary evidence (exhibits and declarations).[7]

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[6] Because this case was presented to the Hearing Panel on the paper record, Houston avoided being cross-examined regarding the payments that he received from his great-aunt's trust after he was appointed trustee and his failure to notify his Firm that he was acting as trustee.

[7] While Houston submitted a narrative statement, he did not offer any documentary evidence. (RP 733-39.)

The Hearing Panel issued a decision on December 17, 2008, finding that Houston engaged in violations of NASD Rules 8210, 3030, and 2110 as alleged in the complaint. (RP 741-60.) The Hearing Panel fined Houston $100,000 and suspended him in all capacities for one year for the outside business activities violations. (RP 756-58.) For his failure to appear for testimony, the Hearing Panel barred Houston. (RP 758-59.)

Houston's appeal to the NAC of the Hearing Panel's findings and sanctions followed. (RP 763.) In its December 22, 2010 decision, the NAC affirmed the Hearing Panel's findings that Houston violated NASD rules by failing to notify his Firm in writing of his outside business activities as a trustee and to comply with requests for testimony issued under NASD Rule 8210. (RP 947-49.) The NAC considered fully Houston's arguments that his Firm was aware that he was acting as a trustee, that he had already provided all the necessary information to FINRA staff and had nothing to add by attending the on-the-record interview, and that he misunderstood his obligations to attend the testimony. (RP 947-49.) The NAC concluded that a preponderance of the evidence did not support Houston's arguments and consistent with a wealth of FINRA and Commission precedent, Houston's actions violated NASD rules. (RP 947-49.) The NAC agreed with the Hearing Panel that barring Houston from association with any FINRA member in any capacity was an appropriate sanction for his failure to provide on-the-record testimony as required.[8] (RP 951-52.)

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[8] The NAC found that a one-year suspension and a $50,000 fine would have been appropriate sanctions for Houston's failure to disclose his outside business activities, in violation of NASD Rules 3030 and 2110. It declined to impose such sanctions, however, because he was barred in all capacities for his Rule 8210 violation. (RP 951.)

On appeal to the Commission, Houston does not contest the NAC's findings that he violated NASD Rules 3030 and 2110. (Houston's Br. at 1 (unnumbered pages).) Houston states that he "ADMITTED" his "GUILT back in 2007 of incorrectly signing an outside business

[Footnote continued on next page]

On January 3, 2011, Houston filed this appeal with the Commission.[9] (RP 978.)

III. ARGUMENT

The Commission should dismiss Houston's application for review. There is no dispute that Houston failed to appear for on-the-record testimony. This represents a textbook violation of NASD Rule 8210. *See, e.g.*, *Howard Brett Berger*, Exchange Act Rel. No. 55706, 2007 SEC LEXIS 895, at *15-16 (May 4, 2007), *remanded on other grounds*, No. 07-2692 (2d Cir. Sept. 13, 2007) (remand order); *Justin F. Ficken*, Exchange Act Rel. No. 54699, 2006 SEC LEXIS 2547, at *13 (Nov. 3, 2006); *Toni Valentino*, Exchange Act Rel. No. 49255, 2004 SEC LEXIS 330, at *9 (Feb. 13, 2004); *cf. Warren E. Turk*, Exchange Act Rel. No. 55942, 2007 SEC LEXIS 1355, at *7 (June 22, 2007) (stating that a failure to appear for testimony establishes a prima facie violation of analogous NYSE rule). On appeal, Houston does not deny that he did not appear for testimony and offers only excuses and strained arguments seeking a reduction of the sanctions. Houston, however, committed a serious violation, ignoring FINRA's requests for

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[cont'd]

activity form." (*Id.*) Houston attempts, however, to underplay significantly his subterfuge related to the nondisclosure of trustee activities. The record reflects that he completed the Firm's 2002, 2003, and 2004 Agreements, Notification Forms, 2004 Statement, and 2005 Disclosure of Appointment without disclosing that he was involved in any outside business activities. And with respect to the 2004 Statement and 2005 Disclosure of Appointment, Houston falsely stated that he had not conducted any outside business activities, including accepting an appointment as a trustee.

In the proceedings below, the NAC thoroughly evaluated the question of whether Houston failed to disclose to First Wall Street that he was acting as a trustee and thereby engaged in undisclosed outside business activities. When the Commission considers this aspect of Houston's application for review, we direct the Commission to the NAC's analysis. (*See* RP 946-47.)

[9] Houston also moved the Commission to stay the sanctions imposed in the NAC's decision while his appeal is pending. (RP 978.) FINRA opposed Houston's request to stay the effectiveness of the bar, the only sanction in effect. (RP 982-996.) The Commission denied Houston's motion for stay on January 13, 2011.

testimony and hindering FINRA's investigative efforts. Moreover, the matters being investigated—which involved the failure to disclose outside business activities and the possible misappropriation of customer funds—were of a very serious nature. Consistent with FINRA's Guidelines and years of FINRA and Commission precedent, the NAC barred Houston for the violation.

Houston offers no reasonable excuses for his misconduct, yet seeks to eliminate the bar and receive credit for "time served" out of the industry. Houston provides no relevant or material basis upon which the Commission should modify Houston's sanction, which is consistent with the FINRA Guidelines. The Commission should affirm FINRA's findings, sustain the bar imposed, and dismiss Houston's application for review.[10]

A. *FINRA's Finding that Houston Failed to Appear for Testimony, in Violation of NASD Rules 8210 and 2110, Is Supported by Overwhelming Evidence.*

Houston failed to comply with his unequivocal obligation to cooperate with FINRA's investigation of him and provide testimony. *See* NASD Rule 8210(c) (requiring the cooperation of any member or associated person to provide information or testimony requested by FINRA). NASD Rule 8210 grants FINRA the right to require members and persons subject to FINRA's jurisdiction "to provide information orally, in writing, or electronically . . . and to testify . . .

[10] The standards articulated in Section 19(e) of the Securities Exchange Act of 1934 ("Exchange Act") provide that the Commission must dismiss Houston's application for review if it finds that Houston engaged in conduct that violated FINRA rules, FINRA applied its rules in a manner consistent with the purposes of the Exchange Act, and FINRA imposed sanctions that are neither excessive nor oppressive and that do not impose an unnecessary or inappropriate burden on competition. 15 U.S.C. § 78s(e). Houston does not contend that FINRA applied its rules in a manner inconsistent with the Exchange Act or that FINRA's sanctions impose an undue burden on competition. Houston also does not dispute the underlying facts that he received the NASD Rule 8210 requests and did not appear for testimony. Furthermore, as argued in more detail below, the specific grounds on which FINRA based its action exist in fact, and FINRA's determination to bar Houston is in accordance with its rules.

under oath or affirmation . . . with respect to any matter involved" in an investigation, complaint, examination or proceeding. NASD Rule 8210(a); *see also Michael J. Markowski*, 54 S.E.C. 830, 838 (2000) ("The NASD has the right to request information and require cooperation from its members and persons associated with them."), *aff'd*, 274 F.3d 525 (D.C. Cir. 2001). NASD Rule 8210 enables FINRA to conduct meaningful examinations and investigations. FINRA relies heavily on Rule 8210, and the Commission has "repeatedly stressed the importance of cooperation in NASD investigations . . . [and] emphasized that the failure to provide information undermines the NASD's ability to carry out its self-regulatory functions." *Joseph Patrick Hannan*, 53 S.E.C. 854, 858 (1998) (internal citations omitted); *see also Joseph G. Chiulli*, 54 S.E.C. 515, 524 (2000). Indeed, Rule 8210 is widely accepted as FINRA's most important tool for investigating potential wrongdoing primarily because FINRA lacks subpoena authority and has limited power to compel the production of evidence from its members. *See John B. Busacca, III*, Exchange Act Rel. No. 63312, 2010 SEC LEXIS 3787, at *57 n.67 (Nov. 12, 2010), *appeal docketed*, No. 10-15918 (11th Cir. Dec. 23, 2010); *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *12 (Apr. 11, 2008), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009). FINRA is therefore entitled to the "full and prompt cooperation" of all persons subject to its jurisdiction when investigative requests are made by members of its staff. *Michael David Borth*, 51 S.E.C. 178, 180 (1992). Houston's duty to provide testimony is therefore unambiguous. *See Chiulli*, 54 S.E.C. at 524 ("When Chiulli registered with NASD, he agreed to abide by its rules which are unequivocal with respect to an associated person's duty to cooperate with NASD investigations."); *Valentino*, 2004 SEC LEXIS 330, at *13-14.

Houston admitted all of the material facts required to support the Hearing Panel's and the NAC's findings that he violated NASD Rules 8210 and 2110. There is no controversy over the

fact that FINRA requested that Houston provide on-the-record testimony on three separate occasions, that he received each of these requests, and that he did not provide the requested testimony. (RP 663, 665, 669, 671, 673, 675, 677-79, 736.) Houston's refusal to comply with his unmistakable obligation to cooperate fully and promptly with FINRA's investigation demonstrates with certainty a violation of NASD Rule 8210. *See Elliot M. Hershberg*, Exchange Act Rel. No. 53145, 2006 SEC LEXIS 99, at *8 (Jan. 19, 2006) (finding "the specific grounds for NASD's findings of a violation, Hershberg's failure to testify, exist in fact"), *aff'd*, 210 Fed. Appx. 125 (2d Cir. 2006); *Ficken*, 2006 SEC LEXIS 2547, at *13 ("The failure to respond to NASD's requests for testimony demonstrates a prima facie violation of NASD Procedural Rule 8210."); *Markowski*, 54 S.E.C. at 838 ("Markowski's refusal to testify was in direct conflict with his obligation to do so. . . . We accordingly sustain the NASD's findings of violation.").

In an effort to excuse his repudiation of FINRA's investigative process, Houston argues that he had no legal counsel to advise him. (Houston's Br. at 1 (unnumbered pages).) Houston's argument is unavailing. Although FINRA rules permit the participation of counsel, there is no right to counsel in FINRA disciplinary proceedings. *See Jason A. Craig*, Exchange Act Rel. No. 59137, 2008 SEC LEXIS 2844, at *23 (Dec. 22, 2008); *Mark H. Love*, Exchange Act Rel. No. 49248, 2004 SEC LEXIS 318, at *18 (Feb. 13, 2004). FINRA staff nonetheless accommodated Houston's request for additional days to retain legal counsel, after which time Houston elected to proceed without counsel. *Cf. Citadel Sec. Corp.*, Exchange Act Rel. No. 49666, 2004 SEC LEXIS 949, at *10-11 (May 7, 2004) (finding that FINRA complied with rules that permitted an applicant in an eligibility proceeding to retain counsel, where FINRA afforded such applicant additional time to do so and where applicant "elected to go forward with the proceeding without counsel"). Moreover, reliance on legal advice has no bearing on whether a respondent has

violated NASD Rule 8210. *See Morton Bruce Erenstein*, Exchange Act Rel. No. 56768, 2007 SEC LEXIS 2596, at *23 (Nov. 8, 2007) (holding that "reliance on counsel is immaterial to an associated person's obligation to supply requested information to the NASD"), *aff'd*, 316 F. App'x 865 (11th Cir. 2008). Accordingly, that Houston chose to proceed without counsel does not in any way excuse his failure to cooperate with FINRA's requests. He knew that FINRA had summoned his testimony and made clear that he had no intention to appear. (RP 736.)

Houston further asserts that he misunderstood the purpose of the on-the-record testimony and that Enforcement should have stated its reasons for requesting the testimony and rescheduled the interview. (Houston's Br. at 1 (unnumbered pages).) Such assertions have been consistently rejected by the Commission, and for the same reasons, they fail here as well. When Houston registered with FINRA, he "agreed that [he] understood and consented to abide by its rules, including the requirement to provide information requested by NASD for its investigations." *See Valentino*, 2004 SEC LEXIS 330, at *13-14. NASD Rule 8210 has no requirement that FINRA explain its reasons for making the information request or justify its relevance. Moreover, Rule 8210 precedent makes abundantly clear that Houston was obligated to cooperate and provide testimony after FINRA's first request of him, that he had no right to set conditions on his cooperation, and that Enforcement had no obligation to explain its reasons for the request. *See Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *2 n.2 (Nov. 14, 2008) (explaining that the obligation to cooperate after FINRA's first request for testimony is unequivocal), *aff'd*, 347 F. App'x 692 (2d Cir. 2009); *Erenstein*, 2007 SEC LEXIS 2596, at *13 (stating that a "member or an associated person may not second guess[ ] an NASD information request or set conditions on their compliance" and that a "belief that NASD does not need the requested information provides no excuse for a failure to provide it" (internal quotations

omitted)). The Commission has consistently rejected an applicant's attempt to blame FINRA staff for noncompliance with regulatory requirements. *See CMG Institutional Trading, LLC*, Exchange Act Rel. No. 59325, 2009 SEC LEXIS 215, at *27 n.33 (Jan. 30, 2009) (rejecting attempts to shift the burden of compliance with Rule 8210 requests to FINRA); *Donner Corp. Int'l*, Exchange Act Rel. No. 55313, 2007 SEC LEXIS 334, at *63-64 (Feb. 20, 2007) (rejecting attempt to blame FINRA for failing to comply with applicable rule requirements); *John Montelbano*, 56 S.E.C. 76, 92 (2003) (stressing that "the responsibility for compliance with applicable requirements cannot be shifted to regulatory authorities"); *cf. PAZ*, 2008 SEC LEXIS 820, at *16 n.17 ("NASD should not have to bring disciplinary proceedings, as it was required to do here, in order to obtain compliance with its rules governing its investigations.").[11]

Houston's claimed ignorance of his obligation to testify is not plausible and even more unbelievable when viewed in light of his twenty-five years' experience in the securities industry. *See, e.g.*, *Philippe N. Keyes*, Exchange Act Rel. No. 54723, 2006 SEC LEXIS 2631, at *21 (Nov. 8, 2006) (noting that a registered representative's lengthy experience undercuts a claim of ignorance of the rules of conduct). As a participant in the securities industry, Houston is required to take personal responsibility for compliance with regulatory requirements, including the duty to provide testimony to FINRA, and cannot be excused for a lack of understanding or appreciation of these requirements. *See Thomas C. Kocherhans*, 52 S.E.C. 528, 531 (1995); *Jay Frederick Keeton*, 50 S.E.C. 1128, 1130 (1992). Houston is therefore presumed "as a matter of law to have read and have knowledge of [FINRA's] rules and requirements." *See Carter v. SEC*,

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[11] Moreover, the record shows that FINRA accommodated Houston twice by rescheduling the on-the-record interview, and despite these efforts, he still refused to attend. (RP 673, 675.) Houston's refusal to testify was his decision, not the result of scheduling problems.

726 F.2d 472, 474 (9th Cir. 1983) (rejecting as a defense the claim that applicant was unaware of NASD prohibition against private securities transactions).

Houston's purported beliefs that "this matter was now closed pending sentencing" and that FINRA's request for testimony "was an offer . . . to fight the ruling of the business activity form" were implausible and lacked any reasonable basis. (*See* Houston's Br. at 1 (unnumbered pages).) In its first request for Houston's testimony, FINRA stated that Houston "was obligated to appear on the date and at the time specified," and that "[u]nless and until a postponement is agreed to, you are still obligated to appear on the date and time specified" in the letter. (RP 663.) In its second request, FINRA reminded Houston that he was obligated and FINRA expected him to appear for testimony at the specified date and that FINRA had not agreed to postpone the testimony. (RP 669.) In its letter agreeing to a postponement, FINRA again reminded Houston that he was obligated to appear on the new date and time specified. (RP 673.) FINRA gave Houston clear and unambiguous instructions that he was obligated to appear for testimony and warned of the potential consequences of his failing to comply with requests made of him under Rule 8210.[12] (*See* RP 669; *cf.* RP 522, 535, 540, 545, 585.) Houston chose to disregard his obligation and refused to provide testimony, even in the face of severe consequences as a result of his inaction. The uncontroverted evidence establishes that Houston violated NASD Rules 8210 and 2110, and the Commission therefore should affirm FINRA's findings of violation.[13]

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[12] For example, in FINRA's September 17, 2007 correspondence with Houston, FINRA warned him that he "was not permitted to impose conditions on [his] obligation to provide information and/or testimony," and that pursuant to NASD Rule 8210, his "failure to appear and testify truthfully" was grounds for "formal disciplinary action that [could] result in a fine, suspension, and/or bar from associating with any FINRA member." (RP 669.)

[13] Houston's violation of NASD Rule 8210 constitutes conduct inconsistent with just and equitable principles of trade and therefore also establishes a violation of NASD Rule 2110. *See,*

[Footnote continued on next page]

B. FINRA's Sanction of a Bar Is Consistent with the FINRA Sanction Guidelines and the Public Interest and Is Neither Excessive Nor Oppressive.

Because FINRA lacks subpoena power, Houston's failure to comply with Rule 8210 requests for testimony subverted FINRA's "ability to carry out its regulatory responsibilities and must be viewed as a serious violation." *See Charles R. Stedman*, 51 S.E.C. 1228, 1232 (1994). Houston engaged in serious misconduct by refusing to testify regarding an ongoing investigation surrounding his possible misappropriation of funds from an account that belonged to his elderly great aunt and over which he served as a trustee. A bar is well justified and Houston's arguments seeking a modification of the bar are without merit.

In conducting its examination into whether FINRA imposed sanctions that are neither excessive nor oppressive, the Commission gives considerable weight to whether the sanctions are consistent with the Guidelines. *See Joseph Ricupero*, Exchange Act Rel. No. 62891, 2010 SEC LEXIS 2988, at *15 (Sept. 10, 2010) (noting that the Guidelines serve as a "benchmark" in the Commission's review of sanctions). The Commission also considers any mitigating factors that an applicant raises and gives due regard to the "public interest and the protection of investors." *See PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007); *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005).

The NAC, in determining what sanctions to impose, considered the Guidelines for a failure to respond to requests made pursuant to NASD Rule 8210. (RP 951-52.) Because Rule 8210 plays a critical role in FINRA's self-regulatory efforts, the Guidelines recognize the importance of enforcing Rule 8210 and requiring associated persons to cooperate with FINRA's

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[cont'd]

e.g., *Hershberg*, 2006 SEC LEXIS 99, at *1 n.1 (holding that the failure to provide information requested by FINRA constitutes a failure to observe high standards of commercial honor and just and equitable principles of trade).

investigations. Indeed, the Guidelines for the violation of failure to provide testimony state that, "[if] the individual did not respond in any manner, a bar should be standard." *FINRA Sanction Guidelines* 35 (2007) (hereinafter "*Guidelines*").[14] That is exactly what occurred in this case—Houston refused to appear and testify, he obstructed FINRA's investigation, and after finding no mitigating factors, the NAC barred him. (RP 951-52.)

The NAC also correctly analyzed and applied the Guidelines' principal considerations for a failure to comply with a request for information. The Guidelines recommend consideration of the nature of the information requested. *See Guidelines*, at 35. In this case, FINRA was investigating First Wall Street's termination of Houston for violating Firm policies and his refusal to provide information related to his possible misuse of customer funds while acting as a trustee. Houston's failure to testify, like any failure to comply with an information request, in essence stopped FINRA's investigation of potential wrongdoing in its tracks and must be considered an aggravating factor. *See Berger*, 2007 SEC LEXIS 895, at *33 (recognizing FINRA's need for timely information and when an associated person delays his response to requests for information, he impedes FINRA's ability to conduct its investigation fully and expeditiously); *Stedman*, 51 S.E.C. at 1232 (finding that the failure to comply with FINRA information requests is a serious violation because it compromises FINRA's regulatory capabilities). Houston actively attempted to delay FINRA's investigation by refusing to testify and hampered the investigation.

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[14] In February 2011, FINRA revised its Guidelines, including the Rule 8210 Guidelines. *See FINRA Regulatory Notice 11-07* (Feb. 2011). The NAC applied the 2007 version of the Guidelines, which were in effect at the time the decision was issued in December 2010, to sanction Houston's misconduct. FINRA has attached as "Appendix A" the 2007 version of the Rule 8210 Guidelines for the Commission's review of the NAC's decision.

The Guidelines also recommend consideration of whether the requested information (in this case, sworn testimony) has been provided and, if so, the number of requests, amount of time, and degree of regulatory pressure required for FINRA to secure the respondent's cooperation. *See Guidelines*, at 35. In this case, the information that Enforcement requested was not provided because Houston never appeared for testimony. In addition, Houston repeatedly frustrated FINRA's attempt to obtain his testimony and blamed Enforcement for his own failure to appear. In response to FINRA's first request for his testimony, Houston attempted to condition his appearance on FINRA supplying him with information. (RP 663, 665.) FINRA reminded Houston of his obligation to provide testimony, advised Houston that his failure to appear could result in disciplinary action and a bar, and requested that Houston confirm that he would appear. (RP 669-70.) On the day that FINRA had scheduled Houston's on-the-record interview to take place, Houston faxed a letter to FINRA requesting a 30-day extension for his testimony. (RP 671.) FINRA agreed to the extension, but Houston nevertheless refused to appear for testimony that FINRA had rescheduled to accommodate him. (RP 673, 675, 679, 736.)

In *Toni Valentino*, the Commission found the respondent's "attempts to delay and ultimately avoid her appearance . . . especially troubling given the importance of Rule 8210." 2004 SEC LEXIS 330, at *15. The same analysis holds true for Houston as well. The NAC determined that Houston's failure to understand his unequivocal obligations under NASD Rule 8210 warranted a bar. (RP 952.) As the Commission has emphasized, "[a] complete failure to respond to a request for information issued pursuant to Rule 8210 renders the violator presumptively unfit for employment in the securities industry because the self-regulatory system of securities regulation cannot function without compliance with Rule 8210 requests." *PAZ*, 2008 SEC LEXIS 820, at *10; *see also Berger*, 2008 SEC LEXIS 3141, at *24 (emphasizing that

the "risks presented by persons who, in the absence of mitigating factors, completely fail to respond to Rule 8210 requests are appropriately remedied by a bar").[15]

Houston's arguments fail to demonstrate any mitigating factors. Houston argues that he "produced all the documents requested" by Enforcement, "cooperated fully and withheld nothing" from Enforcement, and that he "never evaded [his] responsibility in this investigation." (Houston's Br. at 1 (unnumbered pages).) Houston's purported perception of full cooperation could not be more distorted. It is uncontroverted that Enforcement charged Houston with a failure to appear to provide testimony and Houston did not appear and testify as requested. The Commission can reject Houston's arguments based on these facts alone. Moreover, as the record shows, Houston did not produce all the documents that Enforcement requested. For example, FINRA asked Houston to produce documentation, including receipts, invoices, and cancelled checks, to reflect care that Houston's wife provided to [redacted] and payment of [redacted] expenses. (RP 539-40.) Houston first tried to ignore the request. (RP 543.) When FINRA followed up

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[15] Houston admits that he should be sanctioned for his misconduct but argues that he should be credited with "time served" out of the industry. (Houston's Br. at 1-2 (unnumbered pages).) He states that he has been out of the industry for ninety days. (*Id.* at 2 (unnumbered pages).) As explained above, however, a bar is needed to remedy Houston's serious violations. Moreover, Houston's argument is specious. His "time served" was a result of his own decision to refuse to cooperate with FINRA's request for testimony. He, and he alone, made that decision, a decision that clearly evidences his complete disregard for an associated person's obligation to cooperate with FINRA investigations.

Houston also contends that he has endured financial hardship as a result of the bar and advocates to remain working in the securities industry. (*Id.* at 2 (unnumbered pages).) The Commission should reject his argument outright. Houston's actions reflect total disregard for the regulatory process and evidence a lack of appreciation for the requirements that he was subject to as an associated person of a FINRA member firm. *See Craig*, 2008 SEC LEXIS 2844, at *27 (rejecting as mitigating the economic disadvantages suffered as a result of disciplinary action); *Hans N. Beerbaum*, Exchange Act Rel. No. 55731, 2007 SEC LEXIS 971, at *20 (May 9, 2007) (same).

with a second request for the information, Houston produced what he called a "billing doc" from a care facility. (RP 557, 572.) While this document showed payments made for [redacted] care, it did not reflect the source of those payments. (RP 572.) In yet another follow-up request, FINRA highlighted the deficiencies in Houston's response and asked that he produce responsive documents or state that he had none. (RP 584.) Houston never produced documentation to substantiate his representations regarding the payment of [redacted] care expenses. Houston also refused to produce requested copies of his tax returns for the years 2003, 2004, and 2005. (RP 540, 584, 597.) Houston's misperception of what constitutes full cooperation underscores the importance of barring him from the securities industry.[16] *See, e.g.*, *Beerbaum*, 2007 SEC LEXIS 971, at *17-18 (finding that respondent's statements throughout disciplinary proceedings raised concerns that respondent lacked an understanding of the requirements of the securities business and that he would not comply in the future).

Houston's assertion that his was a "victimless crime" is particularly disturbing in light of the fact that he purposely frustrated FINRA's investigation of him and kept FINRA from determining the full extent of his misconduct. (Houston's Br. at 2 (unnumbered pages).) Houston's failure to provide testimony harmed the regulatory process by undermining FINRA's investigation into the appropriateness of Houston's withdrawals from his great-aunt's trust. *See PAZ*, 2008 SEC LEXIS 820, at *18 (determining that a failure to provide information to FINRA seriously harms the regulatory process because "it impedes detection of . . . violative conduct").

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[16] The fact that Houston provided some information responsive to FINRA's *information* requests does not mitigate his complete failure to provide *testimony*, which is the violation in this case. *See Charles C. Fawcett, IV*, Exchange Act Rel. No. 56770, 2007 SEC LEXIS 2598, at *21-22 (Nov. 8, 2007) ("[A] complete failure to cooperate with NASD requests for information *or* testimony is so fundamentally incompatible with NASD's self-regulatory function that the risk to the markets and investors posed by such misconduct is properly remedied by a bar." Emphasis added).

Indeed, "compliance with . . . rules requiring cooperation in investigations is essential to enable NASD to carry out its self-regulatory functions." *Valentino*, 2004 SEC LEXIS 330, at *15 (*citing Borth*, 51 S.E.C. at 180); *see also Ricupero*, 2010 SEC LEXIS 2988, at *21; *Hershberg*, 2006 SEC LEXIS 99, at *10 ("[C]ompliance is essential to NASD's self-regulatory function."); *Chiulli*, 54 S.E.C. at 524 ("Chiulli substantially undermined the NASD's ability to carry out its regulatory responsibilities by failing to provide the documents when NASD requested them."). "[M]itigation cannot be based on a respondent's second guessing the importance of the investigation because, in cases such as this, it is the respondent who has prevented [FINRA] from completing the investigation and assessing any misconduct and its gravity." *PAZ*, 2008 SEC LEXIS 820, at *21 (internal quotations omitted).

Houston argues that, with the exception of one arbitration matter against him, he has no prior disciplinary history and has "never been disciplined by [his] firm" or received a customer complaint. (Houston's Br. at 1 (unnumbered pages).) As the federal courts and the Commission have stressed, the lack of a disciplinary record is not a mitigating factor. *See Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006); *Busacca*, 2010 SEC LEXIS 3787, at *64 n.77. In another complete failure to respond case, the Commission made clear that the "Guidelines recommend a bar as the standard sanction, and a clean disciplinary record does not justify a departure from that recommended sanction." *PAZ*, 2008 SEC LEXIS 820, at *26 n.27. Houston should not be rewarded because he previously may have acted appropriately as a registered representative. *See Keyes*, 2006 SEC LEXIS 2631, at *23.

Houston also argues that barring him is an excessive sanction and inappropriate given sanctions allegedly imposed upon others in the industry for unrelated misconduct. (Houston's Br. at 1-2 (unnumbered pages).) However, as a threshold matter, "[i]t is well recognized that the

appropriate sanction depends upon the facts and circumstances of each particular case and cannot be determined precisely by comparison with actions taken in other proceedings or against other individuals in the same proceeding." *Christopher J. Benz*, 52 S.E.C. 1280, 1285 (1997), *aff'd*, 168 F.3d 478 (3d Cir. 1998); *see also PAZ*, 2008 SEC LEXIS 820, at *22 n.23, 30-31. When taking into account the facts and circumstances of this case, the bar is entirely appropriate for Houston's complete failure to testify. *See Guidelines*, at 35. And the Commission has upheld bars of individuals who refuse to provide FINRA with information or testimony in countless other cases. *See, e.g., Berger*, 2008 SEC LEXIS 3141, at *51 (affirming bar of individual who failed to provide testimony); *PAZ*, 2008 SEC LEXIS 820, at *31 (affirming bar of individual and expulsion of firm for complete failure to provide information); *Fawcett*, 2007 SEC LEXIS 2598, at *25-26 (affirming bar of individual for failure to provide information and testimony).

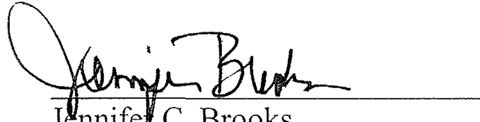
As these cases demonstrate, a bar is necessary to ensure that FINRA is able to carry out its core self-regulatory functions of enforcing compliance with the federal securities laws and FINRA rules. *See Chiulli*, 54 S.E.C. at 524. Non-compliance with FINRA information requests inhibits FINRA's ability to conduct investigations "fully and expeditiously" and renders FINRA's rules meaningless. *Hershberg*, 2006 SEC LEXIS 99, at *8-9. Houston chose to disregard FINRA's requests for testimony regarding an ongoing investigation despite warnings that his noncompliance violated FINRA rules. To award Houston a reduction in his sanctions would subvert FINRA's investigative process and encourage others to refuse to testify. Such gamesmanship cannot be tolerated. FINRA is responsible for protecting investors and ensuring the integrity of the marketplace. Not only do delay tactics pose the risk that evidence will be lost or destroyed, they also allow ongoing misconduct to continue in the intervening period and

require FINRA to use resources unnecessarily. The standard sanction of a bar is appropriate here.

IV. CONCLUSION

Houston's refusal to testify regarding an extremely important investigation runs contrary to Rule 8210's fundamental requirement that members and their associated persons cooperate fully and promptly with FINRA investigations. The NAC properly barred Houston for failing to cooperate with FINRA's investigation of First Wall Street's termination of Houston for cause. Houston's application is without merit and should be dismissed.

Respectfully submitted,



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April 6, 2011

APPENDIX A

Failure to Respond or Failure to Respond Truthfully, Completely or Timely to Requests Made Pursuant to FINRA Procedural Rule 8210

NASD Conduct Rule 2110 and Procedural Rule 8210

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section 1. Nature of the information requested. 2. Whether the requested information has been provided and, if so, consider the number of requests made, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response.	***Failure to Respond or to Respond Truthfully*** Fine of $25,000 to $50,000. ***Failure to Respond Completely*** Fine of $10,000 to $25,000. ***Failure to Respond In a Timely Manner*** Fine of $2,500 to $25,000.	***Individual*** If the individual did not respond in any manner, a bar should be standard. Where mitigation exists, or the person did not respond in a timely manner, consider suspending the individual in any or all capacities for up to two years. ***Firm*** In an egregious case, expel the firm. If mitigation exists, consider suspending the firm with respect to any or all activities or functions for up to two years. In cases involving failure to respond in a timely manner, consider suspending responsible individual(s) in any or all capacities and/or suspending the firm with respect to any or all activities or functions for a period of up to 30 business days.