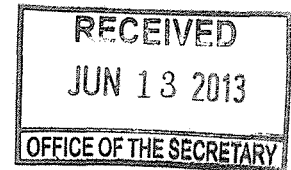


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**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC**

In the Matter of the Application of

Kent M. Houston

For Review of Disciplinary Action Taken by

The Financial Industry Regulatory Authority

File No. 3-14175r

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

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June 12, 2013

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**BEFORE THE  
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In the Matter of the Application of  
  
Kent M. Houston  
  
For Review of Disciplinary Action Taken by  
  
The Financial Industry Regulatory Authority  
  
File No. 3-14175r

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

**I. INTRODUCTION**

This case involves the failure by Applicant Kent M. Houston to provide written notice of his outside business activities to his firm and his refusal to appear before FINRA staff and provide on-the-record (“OTR”) testimony. Specifically, Houston purposefully failed to provide written disclosure to his member firm that, for more than four years, he had served as trustee for and received substantial compensation from his great aunt’s trust, which held an account at his firm. When FINRA attempted to investigate Houston’s activities as trustee, Houston refused to appear and provide testimony, thereby halting FINRA’s investigation into Houston’s possible misappropriation of trust funds.

Houston seeks Commission review of a February 22, 2013 decision of FINRA’s National Adjudicatory Council (“NAC”), in which the NAC suspended Houston for three years and fined

him \$75,000. (RP 1329.)<sup>1</sup> The NAC issued its February 22, 2013 decision on remand from the Commission to reconsider the sanctions imposed for Houston's misconduct. (RP 1264, 1316-17.)

The NAC initially issued a decision dated December 22, 2010 ("2010 Decision"), finding that Houston violated NASD rules by serving for more than four years as trustee for his great aunt's trust without providing his member firm written notice and by failing to appear for OTR testimony before FINRA staff. (RP 947-49.) In the 2010 Decision, the NAC barred Houston in all capacities for his failure to provide testimony, and assessed but declined to impose a one-year suspension and \$50,000 fine for his failure to disclose his outside business activities as trustee due to the imposition of the bar. (RP 947-53.)

Houston appealed the NAC's 2010 Decision to the Commission. (RP 978.) The Commission sustained the NAC's findings of violations. (RP 1249.) Those findings, therefore, are not under review in this appeal. The Commission determined that the record was replete with evidence that Houston did not give his firm written notice of his outside business activities. (RP 1243-44.) The Commission also found that, despite Houston's having notice of FINRA's requests for his testimony and being advised of the potential disciplinary consequences for failing to appear, Houston failed to appear for testimony. (RP 1244.) With respect to sanctions, however, the Commission remanded the matter to the NAC for further consideration. (RP 1247.) The Commission determined that, before requesting Houston's appearance for OTR testimony, FINRA issued several Rule 8210 requests seeking written responses and documents as part of the same investigation. (RP 1246-47.) The Commission reasoned that, because Houston responded to the first two of these written requests and partially to the third request, Houston's failure to

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<sup>1</sup> "RP" refers to the page numbers in the certified record of this case filed with the Commission.



appear for testimony was not a complete failure to respond under FINRA’s then-current edition of the FINRA Sanction Guidelines (“Guidelines”), but rather a failure to respond fully. (RP 1246-47.) The Commission therefore remanded the matter to the NAC to reconsider sanctions consistent with the finding that Houston partially responded to written requests prior to his failure to appear for testimony. (RP 1247.)

The sanctions that the NAC imposed on remand from the Commission—a three-year suspension and \$75,000 fine—are now under review on appeal. In the February 22, 2013 decision, the NAC suspended Houston for two years and fined him \$25,000 for his failure to provide testimony, and imposed a consecutive one-year suspension and an additional \$50,000 fine for Houston’s failure to provide written notice to his member firm of his outside business activities as trustee. (RP 1327, 1329.) FINRA’s sanctions are consistent with the Guidelines and are fully warranted. Houston failed to disclose his outside business activities as trustee for more than four years and refused to cooperate with FINRA’s investigation, thus thwarting the ability of both his firm and FINRA to investigate whether he misappropriated customer trust funds while serving as a trustee.

Houston offers no justification for his misconduct and provides no basis for reducing the sanctions. Because the sanctions imposed in the NAC’s decision are neither excessive nor oppressive, the Commission should dismiss Houston’s application for review.

## **II. FACTUAL BACKGROUND**

The Commission’s December 20, 2011 decision affirmed the NAC’s findings of fact. (RP 1249.) Those findings of fact, therefore, are not under review. We review the facts here to provide context for the Commission’s consideration of Houston’s current appeal of the sanctions that the NAC imposed in its February 22, 2013 decision.

A. *Houston's Appointment as a Trustee*

In 1971, Houston's great aunt, [REDACTED], and her husband established a trust under which they designated a national bank as trustee and directed the trustee to pay the trust's net income to [REDACTED] and her husband on a monthly basis. (RP 345-53.) The trust provided that the trustee was entitled to compensation for its services. (RP 353.) [REDACTED] husband died in 1986, and the trust was amended several times in the ensuing years. (RP 355, 357-66.) On April 24, 2001, [REDACTED] appointed Houston to act as co-trustee with her. (RP 367-70.) [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 his member firm, First Wall Street Corp. ("First Wall Street" or the "Firm"). (RP 377.) The account application listed [REDACTED] and Houston as co-successor trustees and Houston as the account representative. (RP 377-79.) The account was opened in the name "[REDACTED] & Kent Houston Co-Succ TTEE, [REDACTED] Trust." (RP 381.) 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 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 after [REDACTED] doctors indicated that she could no longer manage her finances. (RP 307, 373-75.) [REDACTED] died in June 2006. (RP 525.)

B. *Houston Received Compensation from [REDACTED] 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 [REDACTED] signed. (RP 602-616.) Houston's personal notes related to the trust account state that [REDACTED] agreed to pay him trustee

fees and that she also agreed to pay him for “separate trust w[or]k.” (RP 527.) From 2003 until [REDACTED] 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.) In January 2006, Houston wrote a final check to Countrywide Bank in the amount of \$27,500. (RP 648.)

*C. Houston Failed to Disclose His Trustee Activities to First Wall Street*

During the relevant period, 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.) Despite the Firm’s procedures, Houston did not receive written approval from his Firm to engage in outside business activities acting as a trustee for [REDACTED] trust.<sup>2</sup>

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

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<sup>2</sup> For purposes of our discussion infra, we use the term “trustee” to reflect either a co- or sole trustee.

“Outside Business Activity Notification Form” (“Notification Form”). (RP 487-88.) Rather than disclose that he was acting as a trustee for █████ 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.”<sup>3</sup> (RP 681.) Notwithstanding the memorandum, Houston did not contact the Firm’s compliance department in writing.

In September 2005, the Firm’s compliance department issued a follow-up memorandum 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,” despite having served as a trustee for ██████ trust for more than four years. (RP 513, 520.)

In connection with a December 2005 FINRA examination, First Wall Street compliance staff learned that Houston had check writing authority on ██████ trust account and requested that Houston provide updated account information. (RP 245-46, 465.) At that point, the only documents that the Firm had in ██████ client file were the 2001 new account application and the original 1971 trust instrument. (RP 246.)

On January 5, 2006, Houston informed the Firm that he had become the sole trustee of ██████ trust. (RP 246, 685.) While the Firm was aware prior to this date that Houston received commissions for transactions executed on behalf of ██████ trust account, it was unaware of his trustee duties and that he received compensation from the trust for these duties. (RP 247.) On

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<sup>3</sup> The two Forms U4 for Houston contained in the record, dated July 29, 2005 and October 20, 2005, do not reflect that Houston engaged in an outside business activity. (RP 293, 295.)

February 14, 2006, the Firm hired a new chief compliance officer. (RP 237, 247.) Houston informed the new chief compliance officer of [REDACTED] mental decline and asked if it was permissible for Houston to be appointed as sole trustee. (RP 237.) Houston failed to disclose that he already had been acting as sole trustee since June 2005 or that he had received substantial compensation from the trust. (RP 238.) The chief compliance officer informed Houston that it was rare for the Firm to permit registered representatives to act as trustees, other than for immediate family members, because of the potential conflict of interest and the required heightened supervision. (RP 237-38.)

Following his conversation with Houston, the chief compliance officer reviewed the activity in [REDACTED] trust account and noticed large withdrawals. (RP 238.) The chief compliance officer asked the Firm's back-office staff to provide copies of five checks drawn on [REDACTED] trust account. (RP 239.) The chief compliance officer determined that three of the five checks were payable to the same account at Countrywide Bank. (RP 239.) After inquiry, Countrywide Bank informed the chief compliance officer that Houston held the account and that [REDACTED] had no interest in it. (RP 239.) When the chief compliance officer later questioned Houston about the five checks, Houston responded that the funds were deposited into [REDACTED] account to pay her home equity loan. (RP 239.) During his investigation, the chief compliance officer requested that Houston provide a copy of all of the trust amendments, an accounting of the checks written on the trust account, an explanation for the large disbursements from the trust, and a copy of Houston's Countrywide Bank statements. (RP 238-39.)

On May 4, 2006, after Houston failed to provide the requested items, the chief compliance officer informed Houston that the Firm had commenced a formal investigation into possible fraudulent activity in [REDACTED] trust account and that it was freezing the account until the

conclusion of its investigation. (RP 239-40, 319-20.) The chief compliance officer warned Houston that if the documents were not provided by May 8, 2006, he would be suspended from the Firm and all of his accounts would be frozen pending review. (RP 240, 320.) The next day Houston provided the Firm with copies of the trust amendments, but nothing else. (RP 240.) The chief compliance officer told Houston that he had until May 12, 2006, to provide an accounting of the checks that he wrote. (RP 240.) Houston emailed the Firm on May 12, stating that he would not provide the information without first receiving a waiver from [REDACTED], and, pursuant to her direction, he had started the process of transferring the trust account out of First Wall Street. (RP 321.)

First Wall Street terminated Houston's employment on May 15, 2006, for his failure to cooperate with the Firm's investigation. (RP 240, 322.) 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 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.)

*D. Houston Refused to Comply with Rule 8210 Requests*

After First Wall Street filed a Form U5 disclosing Houston's failure to comply with the Firm's requests for information, FINRA commenced its investigation into the reasons for Houston's termination from First Wall Street. (RP 223-24.) On May 25, 2006, pursuant to Rule 8210, FINRA staff sent a request to First Wall Street seeking information related to Houston's termination and the payments that Houston received from [REDACTED] trust. (RP 303-4.) The Firm's

June 9, 2006 response letter raised questions about the appropriateness of Houston's withdrawals from the trust. (RP 305-6.)

1. Requests for Written Information

FINRA staff then issued successive Rule 8210 information requests to Houston to gather more information about Houston's actions surrounding ██████ trust, including how the funds disbursed from the trust were used. (RP 521-24, 533-35, 539-41, 545-56, 583-85.) FINRA's initial Rule 8210 request to Houston, dated June 13, 2006, listed 30 checks drawn from ██████ trust account. (RP 521-23.) The request asked Houston to identify who wrote each check and explain how the funds were used for ██████ benefit and complied with the covenants of her trust. (RP 521.) In a written response, Houston identified, with no additional information or documentation, five checks drawn on the account as "Care provider payments" for ██████, 11 checks were "Gifts to family, nieces & nephews," five checks as payments to him for "Special Trust services provided," and seven others as payments for "Annual Trustee fees." (RP 526.) Houston also gave a written description of the "Special Trust services" that he provided. (RP 526.) Houston described these services as including portfolio analysis, future gifting, year-end tax analysis, and health care facility analysis. (RP 527-32.) Houston did not provide any explanation for two of the checks. (RP 526.) FINRA also had asked in its request for supporting documentation, such as bank statements or other account statements, to clarify for what purpose the funds were used. (RP 522.) Houston did not provide any supporting documentation in his response other than his account notes. (RP 527-32.)

In August 2006, FINRA issued a second Rule 8210 request to Houston asking about the suitability of several of the mutual fund transactions that occurred in ██████ trust account. (RP



533-35.) Houston responded to this request by providing a signed and dated written statement answering FINRA's questions. (RP 537.)

FINRA sent Houston a third Rule 8210 request on September 11, 2006. (RP 539.) In that request, FINRA enumerated a detailed list of documents that Houston was to provide. (RP 539-40.) These documents included copies of any agreements between Houston and ██████ regarding the amount or frequency of payment of the "annual trustee fees;" receipts and invoices evidencing the services that Houston provided in exchange for the annual trustee fees that he received; a description and supporting receipts or invoices for the "special trust services" that Houston provided; receipts, invoices, and cancelled checks evidencing payments made for ██████ care; and copies of Houston's 2003, 2004, and 2005 tax returns. (RP 539-40.) Houston provided a written narrative in response on October 5, 2006, but provided none of the requested documentation. (RP 543.)

Because Houston did not supply the requested documentation sought in the September 11, 2006 letter, FINRA sent Houston follow-up requests on October 12, and November 2, 2006. (RP 545-46, 583-85.) FINRA warned Houston that his continued failure to deliver the requested documentation could result in disciplinary action and sanctions, including a fine, suspension, or bar. (RP 545, 585.) Houston eventually responded and provided copies of his Countrywide account statements; a July 2005 through July 2006 statement of charges and July 2006 invoice from a care facility where ██████ was living before her death; a \$75,000 check, dated August 24, 2006, payable to ██████ trust from Houston's corporate checking account; a \$1,500 check, dated November 14, 2006, payable to ██████ trust from Houston; and account statements for several of Houston's relatives. (RP 557-82, 598.) Houston did not provide the requested copies of checks written from his Countrywide account, claiming that Countrywide "does not send

checks;” documents to substantiate payments made that he claimed were for [REDACTED] care; or his tax returns. (RP 597.)

## 2. Requests for Testimony

Believing that Houston may have misappropriated or converted funds from [REDACTED] trust, FINRA sought Houston’s testimony. (RP 233.) On September 7, 2007, FINRA staff sent Houston a Rule 8210 request to appear for OTR testimony on September 27, 2007. (RP 663.) On September 10, 2007, Houston responded to the letter and requested that FINRA staff provide him with certain information before he would agree to a date. (RP 665.) FINRA staff sent Houston a letter dated September 17, 2007, reminding him that he was required by Rule 8210 to testify as requested on September 27, 2007, that he could not impose conditions on his testimony, and that his failure to comply could result in a disciplinary action and sanctions, including a bar.<sup>4</sup> (RP 669.) On September 21, 2007, Houston requested to postpone his testimony for 30 days while he sought legal counsel to represent him. (RP 671.) FINRA staff accommodated Houston’s request and rescheduled the testimony for October 19, 2007. (RP 673.)

On October 10, 2007, FINRA staff received a phone call from attorney Thomas Fehn (“Fehn”), who told staff that he represented Houston and that he was not available to testify on October 19. (RP 234.) FINRA staff again agreed to postpone Houston’s testimony, which was rescheduled for November 27, 2007. (RP 234, 675.) The day before Houston’s rescheduled testimony, FINRA staff received a letter from Houston, stating that he had “nothing further to

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<sup>4</sup> FINRA also directed Houston to various locations on FINRA’s website to review FINRA’s rules and Guidelines and find other information responsive to Houston’s inquiry. (RP 669-70.)

add and will not be attending the [testimony] scheduled on the 27th.” (RP 234, 677-79.)

Houston did not appear for testimony. (RP 234.)

### **III. PROCEDURAL BACKGROUND**

The Department of Enforcement (“Enforcement”) filed a two-cause complaint against Houston in February 2008. (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 and made misrepresentations related to his activities as a trustee for Boyd’s trust. (RP 7-8.) The second cause of the complaint alleged that Houston failed to appear for OTR testimony requested by FINRA, in violation of NASD Rules 8210 and 2110. (RP 9-10.) Houston expressly waived his right to a hearing. (RP 35, 171.)

The Hearing Panel issued a decision on December 17, 2008, finding that Houston violated NASD Rules 3030, 8210, 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 violation. (RP 756-58.) For his failure to appear for testimony, the Hearing Panel barred Houston. (RP 758-59.)

Houston appealed the Hearing Panel’s findings and sanctions to the NAC. (RP 763.) In a December 22, 2010 decision, the NAC affirmed the Hearing Panel’s findings that Houston failed to notify his Firm in writing of his outside business activities as a trustee and to comply with FINRA’s requests for testimony. (RP 947-49.) The NAC barred Houston from association with any FINRA member in any capacity for his failure to provide OTR testimony.<sup>5</sup> (RP 951-52.)

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<sup>5</sup> 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. The NAC

[Footnote continued on next page]

On January 3, 2011, Houston filed an appeal with the Commission.<sup>6</sup> (RP 978.) In a December 21, 2011 decision, the Commission sustained the NAC's findings of violation. (RP 1264.) The Commission determined that the record was replete with evidence that Houston did not give First Wall Street written notice of his outside business activities and that, despite having notice of FINRA's request for testimony, Houston failed to appear. (RP 1258-59.) The Commission also determined that FINRA previously issued several Rule 8210 requests seeking written responses and documents as part of a single investigation. (RP 1261.) The Commission reasoned that, because Houston responded to the first two of these written requests and partially to the third request, Houston's failure to appear for testimony was not a complete failure to respond, but rather a failure to respond fully. (RP 1261-62.) The Commission remanded the matter to the NAC to reconsider sanctions in light of FINRA's then-current edition of the Guidelines and the finding that Houston partially responded to written requests prior to his failure to appear for testimony. (RP 1261, 1264.)

On remand from the Commission, the NAC suspended Houston for two years and fined him \$25,000 for his failure to provide testimony, and imposed a consecutive one-year suspension and an additional \$50,000 fine for his failure to disclose his outside business activities as a trustee. (RP 1327, 1329.) As recommended by the applicable FINRA Guidelines, the NAC specifically analyzed the nature of the information requested—Houston's testimony to determine

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[cont'd]

declined to impose such sanctions, however, because it barred Houston for his Rule 8210 violation. (RP 951.)

<sup>6</sup> Houston also moved the Commission to stay the sanctions imposed in the NAC's December 22, 2010 decision while his appeal was 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. (RP 1140-43.)

whether Houston was misappropriating funds from ██████ trust account. (RP 1324.) The NAC also considered the significant degree of regulatory pressure required to obtain even incomplete written responses from Houston and ultimately no testimony. (RP 1324-26.) The NAC found that these considerations aggravated Houston's failure to appear for OTR testimony. (RP 1324-26.) The NAC also found that Houston's outside business activities misconduct was aggravated by the fact that ██████ trust was a First Wall Street customer and that Houston's inaction undermined First Wall Street's ability to protect ██████ against potential conflicts of interest. (RP 1328.) The NAC found further aggravation in concluding that Houston purposefully attempted to conceal his trustee activities from First Wall Street. (RP 1329.) Finally, the NAC considered and rejected each of Houston's defenses and purported claims of mitigation. (RP 1325-29.)

On March 25, 2013, Houston filed this appeal with the Commission. (RP 1338-51.)

#### **IV. ARGUMENT**

The sanctions that the NAC imposed—a three-year suspension and \$75,000 fine—are fully supported by the record, consistent with FINRA's Guidelines, and neither excessive nor oppressive. The Commission previously affirmed the factual findings that Houston failed to provide testimony to FINRA and failed to provide written notice to First Wall Street of his outside business activities as trustee for his great aunt's trust. (RP 1258-59, 1264.) The Commission also affirmed FINRA's findings that Houston's misconduct violated NASD Rules 3030, 8210, and 2110. (RP 1258-59.) These findings are not under review here. On remand, the NAC imposed a two-year suspension and \$25,000 fine for Houston's failure to appear to provide testimony and a one-year suspension and \$50,000 fine for his failure to provide the Firm with written notice of his outside activities as trustee, and ordered the suspensions to be served consecutively. (RP 1329.) The Commission should affirm these sanctions.

Exchange Act Section 19(e)(2), 15 U.S.C. § 78s(e)(2), directs the Commission to sustain the sanctions imposed by FINRA unless it finds, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.<sup>7</sup> See *Jack H. Stein*, 56 S.E.C. 108, 120-21 (2003). The Commission considers the principles articulated in the Guidelines persuasive and uses them as a benchmark in conducting its review under Exchange Act Section 19(e)(2). See *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at \*20 (July 1, 2008); *Charles C. Fawcett*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at \*21-22 & n.24 (Nov. 8, 2007). The Commission also considers any mitigating factors that an applicant raises, giving 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 sanctions imposed by the NAC are within the parameters established by the Guidelines and are well justified. In choosing its sanctions, the NAC carefully weighed the relevant facts, and the resulting sanctions reflect the egregiousness of Houston’s misconduct. Houston served as trustee for his elderly great-aunt, a customer of the Firm, for more than four years and received significant compensation without providing the Firm written notice and an opportunity to supervise Houston’s actions and protect its customer. Houston thereafter failed to cooperate fully with First Wall Street and FINRA as they attempted to investigate his conduct as trustee and determine whether he misappropriated any of the trust’s funds. Houston provides no relevant or material basis upon which the Commission should modify Houston’s sanctions, and his arguments in mitigation previously have been rejected in similar Commission decisions. The

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<sup>7</sup> Houston does not claim, nor does the record show, that FINRA’s action imposed an unnecessary or inappropriate burden on competition.

sanctions that the NAC imposed are consistent with FINRA's Guidelines and FINRA and Commission precedent. Accordingly, the Commission should dismiss Houston's application for review.

A. *FINRA's Sanction For Houston's Failure to Provide Testimony Is Consistent with the FINRA Sanction Guidelines and the Public Interest and Is Neither Excessive Nor Oppressive*

Houston refused to appear for OTR testimony with FINRA in violation of NASD Rules 8210 and 2110. (RP 1259.) For this violation, the NAC fined Houston \$25,000 and suspended him for two years. (RP 1327.) The NAC considered the Guidelines for the failure to respond to requests made pursuant to Rule 8210.<sup>8</sup> (RP 1323-27).

The Guidelines recommend, in cases where mitigation exists, that adjudicators should consider suspending the individual for up to two years. *Guidelines*, at 35. For the failure to respond fully to requests for information, the Guidelines also recommend a fine of \$10,000 to \$25,000. *Id.* The Commission previously determined that, because Houston responded to two of FINRA's written requests for information and at least partially responded to a third request, Houston's failure to provide testimony in connection with the same investigation was not a complete failure to respond. (RP 1261-62.) Accordingly, on remand, the NAC appropriately

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<sup>8</sup> See *FINRA Sanction Guidelines* 35 (2007) ("*Guidelines*"). In 2011, FINRA revised its Guidelines, including those applicable to Rule 8210 violations. See *FINRA Regulatory Notice 11-07*, 2011 FINRA LEXIS 5 (Feb. 2011). As part of these revisions, FINRA revised the principal considerations particular to the Guidelines for failing to respond to Rule 8210 requests, increased the high end of the fine range for providing an incomplete response, and recommended a bar as the standard sanction for a partial but incomplete response, unless the respondent can demonstrate that the information provided substantially complied with all aspects of the request. *Id.* Because the 2007 version of the Guidelines was in effect at the time the NAC issued its initial decision in December 2010 (and during Houston's appeal to the Commission), the NAC applied the 2007 Guidelines on remand. A copy of the relevant 2007 Guidelines is attached hereto as Appendix A.

determined that Houston's partial responses provided some mitigation and reduced the bar to a two-year suspension and \$25,000 fine for Houston's failure to provide testimony. (RP 1323-27.)

1. The NAC Followed the Guidelines

The NAC correctly analyzed and applied the Guidelines' principal considerations for failure to respond to Rule 8210 requests. (RP 1323-25.) The Guidelines provide two principal considerations: (1) the nature of the information requested; and (2) whether the requested information has been provided and, if so, the number of requests made, the time respondent took to respond, and the degree of regulatory pressure required to obtain a response. *Guidelines*, at 35.

First, the NAC considered the nature of the information that FINRA sought in its requests for Houston's testimony. (RP 1324.) FINRA was investigating First Wall Street's termination of Houston for violating Firm policies and his refusal to provide information to his firm as to his sizeable withdrawals from Boyd's trust account. (RP 223-24.) Prior to seeking Houston's testimony, FINRA sent several Rule 8210 requests to Houston seeking written answers and the production of documents. (RP 521-24, 533-35, 539-41, 545-56, 583-85.) Houston provided some written answers, but many of his answers were incomplete or nonresponsive and required further clarification. (RP 525-26, 537, 543, 557, 598.) And although Houston provided some documents, he failed to produce all the documents requested by FINRA. (RP 526-32, 557-82, 598.) FINRA was seeking Houston's testimony to further its investigation and determine whether Houston had misappropriated funds from ████████ trust. (RP 233, 1326.) Because Houston refused to testify, however, FINRA was unable to gain additional information, not apparent from his written answers to the prior Rule 8210 requests, about Houston's actions with respect to the trust account.



Indeed, FINRA was attempting to substantiate Houston's representations regarding the hundreds of thousands of dollars that he paid to himself and others from his elderly great aunt's assets that he controlled. (RP 233, 1324.) Houston's refusal to provide OTR testimony, in effect, halted FINRA's investigation into whether Houston engaged in improprieties with respect to Boyd's trust. The NAC properly considered this an aggravating factor. *See CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at \*35 (Jan. 30, 2009) (finding it aggravating that respondent's failure to give complete and timely responses prevented NASD's efforts to determine the firm's financial stability and if misconduct had occurred); *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at \*31-32 (Nov. 8, 2007) (holding that the failure to "provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate"), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

Second, the NAC considered whether the requested information was provided and, if so, the number of requests, amount of time, and degree of regulatory pressure required for FINRA to secure Houston's cooperation. (RP 1324.) FINRA alleged that Houston failed to appear for OTR testimony, and Houston indeed never appeared and testified as requested. (RP 9-10, 1259.) Houston argues that he produced "all documents requested" by Enforcement, "provided all information," and never avoided his responsibility to answer all questions or provide information to FINRA.<sup>9</sup> (Houston's Br. 2, 4 (unnumbered pages).) The record, however, belies Houston's

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<sup>9</sup> Houston also points to his attendance at the NAC oral argument as evidencing his "aggressive" efforts to fulfill his responsibilities before FINRA. (Houston's Br. 4.) Houston's choice to pursue the appellate remedies available to him under FINRA rules is different than his obligation to testify and provides him with no mitigation. *See Erenstein*, 2007 SEC LEXIS 2596, at \*19.

assertion. Although Houston eventually provided FINRA with some written answers and documents, Houston's cooperation, as a whole, was incomplete and dilatory.<sup>10</sup> Houston's misperception of what constitutes full cooperation underscores the importance of imposing a significant sanction. *See, e.g., Hans N. Beerbaum*, Exchange Act Release No. 55731, 2007 SEC LEXIS 971, at \*17-18 (May 9, 2007) (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).

FINRA requested that Houston provide OTR testimony on three separate occasions, but Houston never provided the requested testimony. In response to FINRA's first request for his testimony, Houston attempted to condition his appearance on FINRA supplying him with

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<sup>10</sup> For example, FINRA asked Houston to produce documentation, including receipts, invoices, and cancelled checks, to reflect care that Houston's mother purportedly provided to ██████ and the payment of ██████ expenses. (RP 540.) Houston initially ignored the request and provided no documents. (RP 545.) When FINRA followed up with a second request for the information, Houston produced an invoice and what he called a "billing doc" from the care facility where ██████ lived before she died. (RP 571.) Although this showed payments made for ██████ care during one year's time, it did not reflect the source of those payments or evidence payments purportedly made for ██████ care before July 2005. (RP 571.) In 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 583.) Houston never produced documentation to substantiate his representations regarding the payment of ██████ care expenses. (RP 597.) Houston also refused to produce requested copies of his tax returns. (RP 597.)

The Commission stated in its December 20, 2011 remand that Houston's responses to the first two written requests were "apparently to NASD's satisfaction" and the failures to respond in full to the third request and two follow-up requests were not charged in FINRA's complaint. (RP 1261.) On remand, the NAC found it aggravating that Houston's cooperation with FINRA's requests for documents was incomplete and that FINRA was forced to issue numerous subsequent requests. (RP 1324-25.) The NAC appropriately considered Houston's failure to respond fully to the third request for sanctions purposes. *See, e.g., Sears*, 2008 SEC LEXIS 1521, at \*22 n.33 (finding, in an unauthorized trading case, that evidence of unauthorized trading, which was not alleged in the complaint, was admissible to gauge aggravating factors to assess sanctions).

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.<sup>11</sup> (RP 669-70.) On the day that FINRA had scheduled Houston's OTR testimony to take place, Houston faxed a letter to FINRA requesting a 30-day extension for his testimony. (RP 671.) FINRA agreed to an extension to accommodate Houston. (RP 673.) After receiving a phone call from an attorney claiming to represent Houston, FINRA again agreed to reschedule the testimony to accommodate Houston. (RP 234, 675.) The day before Houston's rescheduled testimony was to take place, Houston told FINRA staff that he refused to attend. (RP 234, 677-79.) In sum, FINRA exerted significant regulatory pressure in a fruitless effort to obtain Houston's testimony. (RP 1326.)

## 2. Houston's Refusal to Provide OTR Testimony Was an Aggravating Factor

Despite warnings that his noncompliance violated FINRA rules, Houston nonetheless chose to disregard FINRA's requests for testimony regarding an ongoing investigation. The NAC properly found Houston's failure to testify highly aggravating in determining sanctions because it permanently stalled FINRA's investigation of Houston's potential wrongdoing. (RP 1324.) *See Howard Brett Berger*, Exchange Act Release No. 55706, 2007 SEC LEXIS 895, at \*33 (May 4, 2007) (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), *reh'g granted in part on other grounds*, Exchange Act

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<sup>11</sup> Commission precedent makes clear that FINRA members and associated persons may not impose conditions, such as Houston's demand that FINRA first respond to his questions, under which they will respond to requests for information and testimony. *See, e.g., Toni Valentino*, Exchange Act Release No. 49255, 2004 SEC LEXIS 330, at \*11 (Feb. 13, 2004) (holding that respondent could not impose as a condition to her appearing to testify a requirement as to the location of the interview).

Release No. 58950, 2008 SEC LEXIS 3141 (Nov. 14, 2008), *petition denied*, 347 F. App'x 692 (2d Cir. 2009); *Charles R. Stedman*, 51 S.E.C. 1228, 1232 (1994) (finding that the failure to comply with FINRA information requests is a serious violation because it compromises FINRA's regulatory capabilities).

3. Houston's Arguments for Mitigation of the Sanctions Are Without Merit

Houston asserts that he misunderstood the purpose of the OTR testimony, which he believed was to set forth a defense to engaging in outside business activities.<sup>12</sup> (Houston's Br. 4.) He states that he had admitted his guilt in 2007 and asked to "move on to an equitable settlement." (Houston's Br. 1, 4.) Houston, however, had an obligation to appear and testify even if he believed he had already provided FINRA with the relevant information. *Cf. Ashton Noshir Gowadia*, 53 S.E.C. 786, 790 (1998) (finding that respondent had an obligation to respond to an NASD request even if his response was a statement that he believed he had already provided NASD with the requested information). Moreover, Houston had not answered questions about whether funds from ██████ trust, a First Wall Street account, had been converted.

Houston also argues that Enforcement should have stated its reasons for requesting the testimony and rescheduled the interview. (Houston's Br. 4.) But Houston's plain statement that he "will not be attending" was not a request to reschedule: it was a refusal to testify. (RP 234, 677-79.) 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 Release No. 58950, 2008 SEC LEXIS

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<sup>12</sup> See also discussion IV.C.2 *infra*.

3141, at \*13 & n.20 (Nov. 14, 2008) (explaining that the obligation to cooperate after FINRA’s first request for testimony is unequivocal); *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). Indeed, “[t]he determination of when it is appropriate for an investigation to proceed is a matter for the NASD to decide, not the respondent.” *Michael J. Markowski*, 54 S.E.C. 830, 838 (2000), *aff’d*, 274 F.3d 525 (D.C. Cir. 2001). As a result of its written inquiries, FINRA was entitled to investigate further whether Houston had engaged in misconduct with respect to ██████ trust and demand his testimony. Moreover, as a seasoned securities professional with more than two decades of experience, Houston should have understood his obligation to appear. *See Valentino*, 2004 SEC LEXIS 330, at \*13-14 (rejecting mitigation arguments for respondent’s failures to respond and holding that “[w]hen [respondent] registered with NASD, she agreed that she understood and consented to abide by its rules, including the requirement to provide information requested by NASD for its investigations.”).

Houston also asserts that his conduct “did not result in injury to [his] investors.” (Houston’s Br. 2.) But by Houston’s refusing to testify, Enforcement was unable to determine whether his investor, ██████ trust, was harmed. Moreover, Houston’s failure to provide testimony harmed the regulatory process by undermining FINRA’s investigation into the appropriateness of Houston’s withdrawals from ██████ trust. *See PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at \*18 (Apr. 11, 2008) (determining that a failure to provide information to FINRA seriously harms the regulatory process because “it impedes detection of . . . violative conduct”), *aff’d*, 566 F.3d 1172 (D.C. Cir. 2009). 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; *see also Elliott M. Hershberg*, Exchange Act Release No. 53145, 2006 SEC LEXIS 99, at \*10 (Jan. 19, 2006) (“[C]ompliance is essential to NASD’s self-regulatory function.”), *aff’d*, 210 F. App’x 125 (2d Cir. 2006); *Joseph G. Chiulli*, 54 S.E.C. 515, 524 (2000) (“[Respondent] substantially undermined the NASD’s ability to carry out its regulatory responsibilities by failing to provide the documents when the 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* [NASD] from completing the investigation and assessing any misconduct and its gravity.” *PAZ*, 2008 SEC LEXIS 820, at \*21 (internal quotations omitted) (emphasis in original).

\* \* \* \*

Based on all of the facts, the NAC properly concluded that Houston’s dilatory tactics and refusal to testify regarding possible misappropriation of funds from his elderly great aunt was egregious and warranted a two-year suspension and \$25,000 fine. Gamesmanship and delay tactics, such as those employed by Houston, pose the risk that evidence will be lost or destroyed, allow ongoing misconduct to continue in the intervening period, and require FINRA to use resources unnecessarily, all of which pose a potential threat to the investing public. *See Valentino*, 2004 SEC LEXIS 330, at \*15 (finding that respondent’s “attempts to delay and ultimately avoid her appearance . . . especially troubling given the importance of Rule 8210.”) FINRA appropriately sanctioned Houston for his actions. Lesser sanctions would subvert

FINRA's investigative process and encourage others to refuse to testify.<sup>13</sup> The sanctions imposed by the NAC are appropriately remedial and neither excessive nor oppressive.

Therefore, the Commission should affirm the imposed sanctions.

*B. FINRA's Sanction For Houston's Failure to Provide Written Notice of Outside Business Activities Is Consistent with the FINRA Sanction Guidelines and the Public Interest and Is Neither Excessive Nor Oppressive*

Houston failed to provide written notice to the Firm of his outside business activities in violation of NASD Rules 3030 and 2110. (RP 1259.) For these violations, the NAC, suspended Houston for one year and fined him \$50,000. (RP 1329.) In determining the appropriate sanctions to impose, the NAC considered the Guidelines for the failure to comply with rule requirements for outside business activities. (RP 1327-29.) The Guidelines recommend a fine of \$2,500 to \$50,000 and a suspension up to 30 business days where the misconduct does not involve aggravating factors. *Guidelines*, at 14. Where aggravating factors are present, the Guidelines recommend a suspension of up to one year or, in egregious cases, a longer suspension or bar. *Id.*

The NAC correctly analyzed and applied the Guidelines' principal considerations for failure to comply with rule requirements for outside business activities.<sup>14</sup> (RP 1327-29.) First,

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<sup>13</sup> Houston asserts his misconduct will never happen again and the "lesson has been learned." (Houston's Br. 1.) Notwithstanding Houston's assertion that he has been rehabilitated, adjudicators are instructed to design sanctions that are significant enough not only to prevent and discourage future misconduct by the respondent, but also to deter others from engaging in similar misconduct. *See PAZ*, 494 F.3d at 1066 (noting that although "general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry") (quoting *McCarthy*, 406 F.3d at 189); *see also Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 1). A copy of the relevant Guidelines is attached hereto as Appendix A.

<sup>14</sup> The specific principal considerations set forth in the Guidelines for outside business activities are: (1) whether the outside activities involved customers of the firm; (2) whether the

[Footnote continued on next page]

the NAC considered that Houston's outside business activities involved a First Wall Street customer, ██████ trust. (RP 1328.) NASD Rule 3030 ensures that firms "receive prompt notification of all outside business activities of their associated persons so that the member's objections, if any, to such activities could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law." *Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons*, Exchange Act Release No. 26063, 1988 SEC LEXIS 1841, at \*3 (Sept. 6, 1988); *see also NASD Notice to Members 88-86*, 1988 NASD LEXIS 207 (Nov. 1988) (introducing the substance of NASD Rule 3030 in Article III, Section 43 of the NASD Rules of Fair Practice and explaining that the rule "intended to improve the supervision of registered personnel by providing information to member firms concerning outside business activities of their representatives"). As the NAC correctly concluded, because Houston failed to disclose his trustee activities, ██████ trust was deprived of supervision and oversight by the Firm aimed at preventing potential conflicts of interest. (RP 1328.) *Cf. Sears*, 2008 SEC LEXIS 1521, at \*25-26 (finding that respondent's failure to disclose outside business activities deprived firm customers of the oversight and supervision by respondent's firm); *Micah C. Douglas*, 52 S.E.C. 1055, 1060 (1996) (same).

Second, the NAC correctly concluded that Houston purposefully misled First Wall Street about the existence of his trustee activities by intentionally completing disclosure forms

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outside activities resulted directly or indirectly in injury to customers of the firm and, if so, the nature and extent of the injury; (3) the duration of the outside activities, the number of customers, and the dollar volume of sales; (4) whether the respondent's marketing and sale of the product or service could have created the impression that the employer (member firm) had approved the product or service; and (5) whether the respondent misled his employer member firm about the existence of the outside activities or otherwise concealed the activities from the firm. *Id.* A copy of the relevant Guidelines is attached hereto as Appendix A.



inaccurately. (RP 1329.) Houston repeatedly misled First Wall Street by failing to disclose his trustee activities on annual questionnaires, falsely certifying that he had not engaged in any outside business activity, and falsely representing that he had not accepted any appointment to serve as a trustee. (RP 481, 485, 487-88, 491, 496, 498-99, 503, 508, 511, 513, 515, 520, 681, 683-84.) Indeed, on five occasions over the course of four years, Houston failed to disclose his trustee activities on Firm forms that expressly stated that acting as a trustee required disclosure. (RP 487-88, 498-99, 511, 513, 683-84.) Further, when the chief compliance officer asked Houston directly about the checks made payable to Houston's Countrywide Bank account, Houston falsely told him the account belonged to [REDACTED]. (RP 239.) Moreover, when the Firm became aware of Houston's activities as trustee and requested from him copies of all of the trust amendments, an accounting of the checks written on the trust account, an explanation for the large disbursements from the trust, and a copy of Houston's Countrywide Bank statements, Houston repeatedly delayed and ultimately refused to cooperate with the Firm's investigation.<sup>15</sup> (RP 238-40, 319-21.) Taken together, these factors served to aggravate Houston's misconduct.

Finally, the NAC found aggravating that Houston acted as a trustee for several years and received substantial compensation during this time. (RP 1329.) The NAC noted that, from October 2001 through December 2005, Houston received more than \$400,000 in the form of checks drawn on the trust. (RP 1329.)

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<sup>15</sup> The fact that the 2001 new account application listed Houston as co-trustee and the account was opened in the name "[REDACTED] & Kent Houston Co-Succ TTEE, [REDACTED] Trust" does not refute the overwhelming evidence that Houston purposefully misled the Firm by intentionally completing the Firm's disclosure forms inaccurately. *Cf. Sears*, 2008 SEC LEXIS 1521, at \*25-26 (finding that respondent's firm was not "well aware" of respondent's outside business activities providing tax services where, notwithstanding respondent's retention of tax returns in customer files, respondent failed to disclose her activities on her firm's outside business activities form).

Houston contends that a one-year suspension and \$50,000 fine is excessive and inappropriate, given the sanctions allegedly imposed upon others in the industry. (Houston's Br. 3.) 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. Furthermore, a comparison to settled cases, such as the ones cited by Houston (Houston's Br. 3), is particularly inappropriate "where pragmatic factors may result in lesser sanctions." *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at \*85 (May 27, 2011).

The NAC properly concluded that Houston's misconduct involved a variety of aggravating factors and warranted a one-year suspension and \$50,000 fine.<sup>16</sup> The NAC's sanction will deter others from failing to disclose outside business activities and prevent potential harm to the investing public by impressing upon associated persons the importance of providing member firms with notice of the associated person's outside business activities so that appropriate supervision can be exercised. The sanctions imposed by the NAC are appropriately remedial and neither excessive nor oppressive. Therefore, the Commission should affirm the imposed sanctions.

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<sup>16</sup> Because Houston's failure to provide testimony and failure to provide written notice of his outside business activities are different kinds of misconduct and raise separate and serious regulatory concerns, the NAC properly ordered Houston to serve the suspensions consecutively. *See, e.g., Siegel v. SEC*, 592 F.3d 147, 157-58 (D.C. Cir. 2010) (affirming imposition of consecutive suspensions for violations involving different kinds of misconduct).

C. *Houston's Remaining Arguments for Mitigation Are Without Merit*

1. Enforcement Was Not Obligated to Settle the Matter

Houston argues that Enforcement refused to settle the matter with him, even after he accepted responsibility, “admitted [his] guilt from the on set [sic] of this investigation,” and “asked to settle this matter over a dozen times in the past [s]even years.” (Houston’s Br. 1, 3.) Houston further asserts that “FINRA and [the] NAC never negotiated in good faith to settle [the] matter.” (Houston’s Br. 1, 4.) As an initial point, Houston did not his admit his misconduct with respect to his failure to disclose his outside business activities to his firm until November 21, 2007, and only after Enforcement sent him five Rule 8210 requests for written information and three Rule 8210 requests for testimony. (RP 677-679.) As a result of information Houston supplied in response to the Rule 8210 requests for written information, Enforcement had sufficient information to prove that Houston engaged in outside business activities without providing written notice to his firm, but Enforcement also had the right to investigate further whether Houston had engaged in misconduct with respect to █████ trust and demand his testimony.

Furthermore, FINRA is “not obligated to accept an offer once made.” *Clyde J. Bruff*, 53 S.E.C. 880, 886 (1998), *aff’d*, 1999 U.S. App. LEXIS 27405 (9th Cir. 1999). “The FINRA procedural rules unmistakably do not afford a respondent or potential respondent the right to settle disciplinary matters by [Acceptance, Waiver, and Consent] or otherwise.” *Dep’t of Enforcement v. Neaton*, Complaint No. 2007009082902, 2011 FINRA Discip. LEXIS 13, at \*27 (FINRA NAC Jan. 7, 2011), *aff’d*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719

(Oct. 20, 2011). Accordingly, Houston's arguments regarding the lack of an opportunity to settle this matter lack merit.<sup>17</sup>

2. Houston's Lack of Legal Counsel Does Not Excuse His Misconduct

Equally unavailing are Houston's various mitigation arguments regarding his lack of counsel throughout these proceedings. (Houston's Br. 2, 4.) In an effort to excuse his repudiation of FINRA's investigative process, Houston argues that he had no legal counsel to advise him about the purpose of the requested OTR testimony and the consequences of not attending. (Houston's Br. 4.) As previously affirmed by the Commission, Houston failed to appear for testimony despite having notice of the requests for his testimony and being advised of the potential disciplinary consequences for failing to appear. (RP 1244.) Notwithstanding such facts, although FINRA rules permit the participation of counsel, there is no right to have counsel appointed in FINRA disciplinary proceedings. *See Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at \*23 (Dec. 22, 2008); *Mark H. Love*, Exchange Act Release No. 49248, 2004 SEC LEXIS 318, at \*18 (Feb. 13, 2004).

In any event, FINRA staff accommodated Houston's request for additional days to retain legal counsel, after which time Houston elected to proceed without counsel and, ultimately, to refuse to appear to testify. *Cf. Citadel Sec. Corp.*, Exchange Act Release No. 49666, 2004 SEC LEXIS 949, at \*10-11 (May 7, 2004) (finding that FINRA complied with rules that permitted an

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<sup>17</sup> After a complaint is filed, NASD Rule 9270 allows a respondent to propose in writing an offer of settlement at any time, including a contested offer of settlement, which if approved by the Hearing Panel would be reviewed by the NAC. Indeed, the notice of complaint filed in this matter alerted Houston to this right under NASD Rule 9270. Houston never availed himself of the opportunity to make an offer of settlement at any time after these proceedings commenced. *See id.* at \*27 n.24. Regardless, the Commission has long held that settlement negotiations are not relevant to the determination of sanctions in a contested proceeding. *See, e.g., Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at \*36 (Oct. 20, 2011).

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, the Commission has rejected reliance on counsel as a mitigating factor as to sanctions in cases involving violations of Rule 8210. *See Valentino*, 2004 SEC LEXIS 330, at \*13 (holding that reliance on counsel does not mitigate sanctions imposed for associated person’s failure to supply information or testimony); *see also Erenstein*, 2007 SEC LEXIS 2596, at \*23 (holding that “reliance on counsel is immaterial to an associated person’s obligation to supply requested information to the NASD”). 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 requested his testimony, and the requests for testimony explicitly outlined the potential disciplinary consequences for failing to appear. (RP 663, 669-70, 673, 1259.)

In addition, Houston asserts that, after the Commission issued its December 20, 2011 order vacating the bar imposed in the NAC’s 2010 Decision, he “sat out another full year believing [he] was still suspended.” (Houston’s Br. 2.) He argues that FINRA should have notified him about his misunderstanding regarding his suspension and that FINRA “Deliberately and Intentionally knew and withheld the suspension” from him. *Id.* FINRA is under no obligation to provide legal advice or explain Commission rulings to parties in appellate proceedings. The Commission issued the order, and, if Houston had any questions regarding its substance, he could have sought clarification from the Commission. FINRA should not be faulted for his failure to do so.

### 3. Houston Should Not Be Credited for Time Served

Houston argues that a fair and just sanction for his misconduct should be “time served” out of the industry. (Houston’s Br. 5.) Houston is mistaken. Houston’s “time served” and

inability to get “re-licensed” are the result of his own decision to refuse to cooperate with FINRA’s request for testimony and to disclose his outside business activities to his firm. He, and he alone, made that decision, and his actions evidence his complete disregard for an associated person’s obligation to cooperate with member firm and FINRA investigations. The economic hardship that results from disciplinary sanctions and the impact that this matter may have upon him does not mitigate his misconduct. *See Beerbaum*, 2007 SEC LEXIS 971, at \*20; *see also Gowadia*, 53 S.E.C. at 793 (holding that “economic harm alone is not enough to make the sanctions imposed upon [respondent] by the NASD excessive or oppressive”); *Craig*, 2008 SEC LEXIS 2844, at \*27 (rejecting as mitigating the economic disadvantages suffered as a result of disciplinary action).<sup>18</sup> The total suspension and monetary fine that the NAC imposed is appropriately remedial and within FINRA’s Guidelines.

#### 4. Houston’s Absence of Disciplinary History is Not Mitigating

Houston argues that, for more than 20 years as an associated person, he has had no disciplinary history and has “never been disciplined by [his] firm” or received a customer complaint. (Houston’s Br. 3.) As the federal courts and the Commission have stressed, the lack of a disciplinary history is not a mitigating factor. *See Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006); *John B. Busacca, III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at \*64 n.77 (Nov. 12, 2010), *aff’d*, 449 F. App’x 886 (11th Cir. 2011). Houston should not be rewarded because he previously may have acted appropriately as a registered representative. *See*

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<sup>18</sup> The NAC similarly has rejected such claims as not constituting evidence of mitigation. *See Dep’t of Enforcement v. Jordan*, Complaint No. 2005001919501, 2009 FINRA Discip. LEXIS 15, at \*53-54 (FINRA NAC Aug. 21, 2009) (rejecting as mitigating respondent’s claim that her personal and business reputation had been hurt by FINRA’s action); *Dep’t of Enforcement v. Cipriano*, Complaint No. C07050029, 2007 NASD Discip. LEXIS 23, at \*40 (NASD NAC July 26, 2007) (rejecting as mitigating the impact that the disciplinary action had on respondent’s career).

*Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at \*23 (Nov. 8, 2006).

5. Houston Has Not Demonstrated an Inability to Pay

For the first time on appeal, Houston asserts he has a bona fide inability to pay the fines imposed by FINRA. (Houston's Br. 5.) By failing to raise this argument before the NAC, Houston has waived it. *See Brooklyn Capital*, 52 S.E.C. 1286, 1294 n.34 (1997) (holding that the Commission is not required to consider an argument raised for the first time on appeal). Houston's waiver notwithstanding, it is well settled that a respondent bears the burden of demonstrating an inability to pay. *See, e.g., Castle Secs. Corp.*, 58 S.E.C. 826, 837 (2005). Houston has failed to meet that burden. Other than general statements regarding his net worth, divorce, foreclosure, and government assistance (Houston's Br. 5-6), Houston offers no proof of his inability to pay or evidence of his current financial situation, and has not met his burden. *Cf. Guang Lu*, 58 S.E.C. 43, 62 n.45 (2005) (sustaining the imposition of costs where respondent offered no proof of inability to pay), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006).

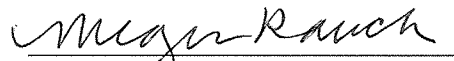
\* \* \* \*

Houston's arguments for mitigation of the sanctions are not supported by the law or the facts. The record supports FINRA's conclusion that Houston's misconduct is egregious and accompanied by aggravating factors. The sanctions that the NAC imposed are within the ranges recommended in FINRA's Guidelines, are in the public interest, and are neither excessive nor oppressive. The Commission should affirm the sanctions imposed by the NAC.

## V. 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. Moreover, Houston intentionally failed to provide written notice to his Firm of his outside business activities acting as a trustee. He knowingly withheld important information from the Firm, and his failure deprived a member of the investing public of supervision and oversight by the Firm aimed at preventing potential conflicts of interest. The NAC properly imposed sanctions that are neither excessive nor oppressive. The two-year suspension and \$25,000 fine for his refusal to testify before FINRA and a one-year suspension and \$50,000 fine for his failure to provide the Firm with written notice of his outside business activities are consistent with the Guidelines. Accordingly, Houston's application is without merit and should be dismissed.

Respectfully submitted,



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June 12, 2013



# APPENDIX A

## General Principles Applicable to All Sanction Determinations

- 1. Disciplinary sanctions are remedial in nature and should be designed to deter future misconduct and to improve overall business standards in the securities industry.** The overall purposes of NASD's disciplinary process and NASD's responsibility in imposing sanctions are to remediate misconduct by preventing the recurrence of misconduct, improving overall standards in the industry, and protecting the investing public. Toward this end, Adjudicators should design sanctions that are significant enough to prevent and discourage future misconduct by a respondent, to deter others from engaging in similar misconduct, and to modify and improve business practices. Depending on the seriousness of the violations, Adjudicators should impose sanctions that are significant enough to ensure effective deterrence. When necessary to achieve this goal, Adjudicators should impose sanctions that exceed the range recommended in the applicable guideline.

When applying these principles to rule violations other than fraud and egregious violations, and in crafting appropriately remedial sanctions, Adjudicators also should consider a firm's size and available resources with a view toward ensuring that the sanctions imposed, while sufficiently remedial to achieve deterrence, are not punitive. Factors to consider in assessing whether sanctions should be proportionately reduced based on firm size could include: the amount of the firm's revenues; the financial resources of the firm; the nature of the firm's business; the number of individuals associated with the firm; the level of sales and trading activity at the firm; other entities that the firm controls, is controlled by, or is under common control with; the firm's contractual relationships; and prior disciplinary actions against the firm (see General Principle

No. 2 regarding recidivists). This list is included for illustrative purposes and is not exhaustive. When reducing a monetary sanction for a firm, Adjudicators should aim to achieve a remedial sanction that is proportionately scaled to the firm's size and may reduce the sanction below the minimum level otherwise indicated in these Guidelines.

These principles apply solely to firms. Adjudicators should not consider the amount of an individual's income in assessing monetary sanctions. Individuals have the ability to claim and prove an inability to pay. (See General Principle No. 8 regarding ability to pay.)

- 2. Disciplinary sanctions should be more severe for recidivists.** An important objective of the disciplinary process is to deter and prevent future misconduct by imposing progressively escalating sanctions on recidivists beyond those outlined in these guidelines, up to and including barring registered persons and expelling firms. Adjudicators should always consider a respondent's disciplinary history in determining sanctions. Adjudicators should consider imposing more severe sanctions when a respondent's disciplinary history includes (a) past misconduct similar to that at issue; or (b) past misconduct that evidences disregard for regulatory requirements, investor protection, or commercial integrity. Even if a respondent has no history of relevant misconduct, however, the misconduct at issue may be so serious as to justify sanctions beyond the range contemplated in the guidelines; i.e., an isolated act of egregious misconduct could justify sanctions significantly above or different from those recommended in the guidelines.

# Outside Business Activities—Failure to Comply with Rule Requirements

NASD Conduct Rules 2110 and 3030

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
<p><i>See Principal Considerations in Introductory Section</i></p> <ol style="list-style-type: none"> <li>1. Whether the outside activity involved customers of the firm.</li> <li>2. Whether outside activity resulted directly or indirectly in injury to customers of the firm and, if so, the nature and extent of the injury.</li> <li>3. The duration of the outside activity, the number of customers, and the dollar volume of sales.</li> <li>4. Whether the respondent's marketing and sale of the product or service could have created the impression that the employer (member firm) had approved the product or service.</li> <li>5. Whether the respondent misled his or her employer member firm about the existence of the outside activity or otherwise concealed the activity from the firm.</li> </ol>	<p>Fine of \$2,500 to \$50,000.<sup>1</sup></p>	<p>When the outside business activities do not involve aggravating conduct, consider suspending respondent for up to 30 business days.</p> <p>When the outside business activities involve aggravating conduct, consider a longer suspension of up to one year.</p> <p>In egregious cases, including those involving a substantial volume of activity or significant injury to customers of the firm, consider a longer suspension or a bar.</p>

<sup>1</sup> As set forth in General Principle No. 6, Adjudicators may increase the recommended fine amount by adding the amount of a respondent's financial benefit.

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

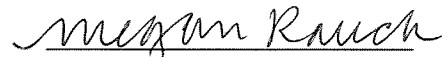
NASD Conduct Rule 2110 and Procedural Rule 8210

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
<p><i>See Principal Considerations in Introductory Section</i></p> <ol style="list-style-type: none"> <li>1. Nature of the information requested.</li> <li>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.</li> </ol>	<p><b><i>Failure to Respond or to Respond Truthfully</i></b> Fine of \$25,000 to \$50,000.</p> <p><b><i>Failure to Respond Completely</i></b> Fine of \$10,000 to \$25,000.</p> <p><b><i>Failure to Respond In a Timely Manner</i></b> Fine of \$2,500 to \$25,000.</p>	<p><b><i>Individual</i></b></p> <p>If the individual did not respond in any manner, a bar should be standard.</p> <p>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.</p> <p><b><i>Firm</i></b></p> <p>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.</p> <p>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.</p>

CERTIFICATE OF COMPLIANCE

I, Megan Rauch, certify that this brief complies with the length limitation set forth in Commission Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 8,937 words.

Respectfully submitted,



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