

**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 REQUEST FOR STAY**

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January 5, 2011

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTUAL BACKGROUND	2
A. Houston’s Registration Status.....	2
B. Houston Was a Trustee	2
C. Houston Stonewalled First Wall Street’s Investigation.....	3
D. FINRA’s Requests to Houston.....	4
III. ARGUMENT	5
A. Houston Has No Likelihood of Success on the Merits.....	6
B. Houston Has Not Demonstrated that a Denial of the Stay Will Impose Irreparable Harm	8
C. Denial of the Stay Will Avoid Potential Harm to Others and Will Serve the Public Interest	9
IV. CONCLUSION.....	11

TABLE OF AUTHORITIES

Federal and State Decisions

Associated Sec. Corp. v. SEC, 283 F.2d 773 (10th Cir. 1960)8, 9, 10

CityFed Fin. Corp. v. OTS, 58 F.3d 738 (D.C. Cir. 1995)9

Hamilton Bank, N.A. v. OCC, 227 F. Supp. 2d 1 (D.C. 2001)9

Va. Petroleum Jobbers Ass'n. v. FPC, 259 F.2d 921 (D.C. Cir. 1958).....5

SEC Decisions

Howard Brett Berger, Exchange Act Rel. No. 55706, 2007 SEC LEXIS 895
(May 4, 2007).....5

Morton Bruce Erenstein, Exchange Act Rel. No. 56768, 2007 SEC LEXIS 2596
(Nov. 8, 2007)6

Charles C. Fawcett, IV, Exchange Act Rel. No. 56770, 2007 SEC LEXIS 2598
(Nov. 8, 2007)10

Justin F. Ficken, Exchange Act Rel. No. 54699, 2006 SEC LEXIS 2547 (Nov. 3, 2006)5

Richard Dale Grafman, 48 S.E.C. 83 (1985)10

Millenia Hope, Inc., Exchange Act Rel. No. 42739, 2000 SEC LEXIS 854 (May 1, 2000).....5, 6

John Montelbano, Exchange Act Rel. No. 45107, 2001 SEC LEXIS 2490
(Nov. 27, 2001)5

PAZ Securities, Inc., Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820
(Apr. 11, 2008).....6, 7, 8

Robert A. Quiel, 53 S.E.C. 165 (1997)7

Joseph Ricupero, Administrative Proceeding File No. 3-13727, slip op.
(SEC Jan. 5, 2010)5, 8

Joseph Ricupero, Exchange Act Rel. No. 62891, 2010 SEC LEXIS 2988 (Sept. 10, 2010)6, 7

Richard J. Rouse, 51 S.E.C. 581 (1993)7

William Timpinaro, Exchange Act Rel. No. 29927, 1991 SEC LEXIS 2544
(Nov. 12, 1991)5, 8

Toni Valentino, Exchange Act Rel. No. 49255, 2004 SEC LEXIS 330 (Feb. 13, 2004)5, 7, 8

FINRA Rules, Notices, and Guidelines

FINRA Rule 93119

FINRA Rule 93709

FINRA Sanction Guidelines (2007 ed.)7

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**BRIEF OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY
IN OPPOSITION TO REQUEST FOR STAY**

I. INTRODUCTION

Applicant Kent M. Houston (“Houston”) has moved the Securities and Exchange Commission to stay the sanctions imposed in a December 22, 2010 decision of FINRA’s National Adjudicatory Council (“NAC”).¹ In that decision, the NAC found that Houston violated NASD Rules 8210 and 2110 by failing to appear and provide testimony at an on-the-record interview (“OTR”).² *See* Decision at 8-9. The NAC found that there were several aggravating and no mitigating factors and, in accordance with FINRA’s Sanction Guidelines,

¹ A copy of the NAC’s decision is attached as Appendix A. References to the NAC’s December 22, 2010 decision will be cited as “Decision.”

² The NAC also found that Houston violated NASD Rules 3030 and 2110 for engaging in outside business activities without providing his member firm with written notice. Decision at 7. In light of the bar for Houston’s failure to testify, the NAC declined to impose a sanction for his outside business activities. *Id.* at 11. Thus the only sanction in effect is the bar for the Rule 8210 violation.

barred Houston. *Id.* at 11-12. The bar became effective immediately upon the issuance of the NAC's decision. *See id.* at 13.

FINRA opposes Houston's request to stay the effectiveness of the bar. Houston refused to provide testimony regarding FINRA's investigation into whether he misappropriated customer funds while serving as a trustee. The facts supporting the NAC's findings of violation related to the bar are undisputed, and the imposition of sanctions is well supported by a long line of Commission decisions. Houston's misconduct was extremely serious and there is no likelihood that he will prevail on the merits of his appeal. Houston has failed to satisfy the high burden necessary to stay the effectiveness of the bar. The Commission therefore should deny Houston's request for a stay.

II. FACTUAL BACKGROUND

A. Houston's Registration Status

Houston entered the securities industry in 1988 as a general securities representative. *Id.* at 2. From November 1989 until May 2006, Houston was registered as a general securities representative with First Wall Street Corp. ("First Wall Street" or "the Firm"). *Id.* Houston's conduct relevant to the NAC's decision occurred while he was associated with First Wall Street. *Id.* Houston is currently associated with another member firm as a general securities representative and an investment banking limited representative. *Id.*

B. Houston Was a Trustee

On April 24, 2001, Houston's great aunt [REDACTED] appointed Houston to act as a co-trustee with her on her trust account and specified that Houston would serve as sole trustee if she was unwilling or unable to serve. *Id.* Two days later, Houston opened an account for the trust at First Wall Street. *Id.* Houston had the ability to write checks on the account

without [REDACTED] signature on the checks. *Id.* In June 2005, Houston became the trust's sole trustee. *Id.* at 3. 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.³ *Id.*

C. Houston Stonewalled First Wall Street's Investigation

First Wall Street's chief compliance officer learned that Houston had check writing authority on [REDACTED] trust account at the Firm in connection with a December 2005 FINRA examination. *Id.* at 4. Houston had actively concealed from the Firm that he was serving as a trustee and receiving compensation from the trust for these duties. *Id.* at 3-4. He did so despite FINRA and Firm requirements to report outside business activities and the Firm's emphasis to employees that they disclose trustee positions in particular. *Id.* at 3. The Firm subsequently requested that Houston provide updated account information related to the [REDACTED] trust. *Id.* at 4. Upon review of the trust account, the Firm noticed large and peculiar withdrawals. *Id.* The Firm then 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. *Id.* Houston did not provide these items to the Firm. *Id.*

On May 4, 2006, First Wall Street informed Houston that it 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. *Id.* at 4-5. The next day Houston provided the Firm with copies of the trust amendments. *Id.* at 5. The Firm told Houston that he had until May 12, 2006, to provide the accounting of the checks that he wrote. *Id.* Houston did not provide the requested accounting to the Firm. *Id.* First Wall Street terminated Houston's employment on

³ [REDACTED] died in June 2006. *Id.*

May 15, 2006, for his failure to cooperate with the Firm's investigation. *Id.*

D. FINRA's Requests to Houston

After First Wall Street terminated Houston in 2006, FINRA staff began an investigation into Houston's possible misconduct. *Id.* FINRA staff first sent an information request to First Wall Street seeking information about the payments that Houston received from [REDACTED] trust. *Id.* The Firm's response letter raised questions about the appropriateness of Houston's withdrawals from the trust. *Id.*

On September 7, 2007, FINRA staff sent Houston an NASD Rule 8210 request to appear for an OTR on September 27, 2007. *Id.* 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. *Id.* 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 OTR, 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. *Id.* On September 21, 2007, Houston requested to postpone his OTR for 30 days while he sought legal counsel to represent him. *Id.* FINRA staff rescheduled the OTR for October 19, 2007. *Id.*

On October 10, 2007, FINRA staff received a phone call from an attorney, Thomas Fehn, who told staff that he would be representing Houston and that he was not available to attend the OTR on October 19. *Id.* at 6. FINRA staff agreed to reschedule the OTR for November 27, 2007. *Id.* FINRA staff sent a copy of the October 10, 2007 letter rescheduling the OTR to both Fehn and Houston. *Id.* at n.9. FINRA staff received a letter from Houston on November 26, 2007, stating that he had "nothing further to add and will not be attending the OTR scheduled on the 27th." *Id.* at 6. Houston did not appear for the November 27, 2007 OTR. *Id.*

III. ARGUMENT

There is no dispute that Houston failed to appear for an OTR. Moreover, the matter being investigated—possible misappropriation of customer funds—was of a very serious nature. This represents a textbook violation of 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). Consistent with FINRA's Sanction Guidelines and years of FINRA and Commission precedent, the NAC barred Houston for the violation. Houston cannot demonstrate a likelihood of success on the merits, and he is, moreover, unable to demonstrate any degree of harm, much less irreparable harm, that he will suffer without a stay.

The imposition of a stay is an extraordinary and drastic remedy, and Houston has the burden of establishing that a stay is appropriate. *See Joseph Ricupero*, Administrative Proceeding File No. 3-13727, slip op. at 2 (SEC Jan. 5, 2010); *William Timpinaro*, Exchange Act Rel. No. 29927, 1991 SEC LEXIS 2544, at *6 (Nov. 12, 1991). Houston has not met that burden. To obtain a stay, Houston must show (1) a strong likelihood that he will prevail on the merits; (2) that, without a stay, he will suffer irreparable harm; (3) there would not be substantial harm to other parties if a stay were granted; and (4) that the issuance of a stay would be likely to serve the public interest. *See John Montelbano*, Exchange Act Rel. No. 45107, 2001 SEC LEXIS 2490, at *12 (Nov. 27, 2001) (citing *Va. Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)); *Millenia Hope, Inc.*, Exchange Act Rel. No. 42739, 2000 SEC LEXIS

854, at *2-3 (May 1, 2000). Under this standard, the Commission must deny Houston's motion to stay.

A. Houston Has No Likelihood of Success on the Merits

Houston has not demonstrated that he is likely to succeed on the merits of his appeal. As reflected in the NAC's decision, FINRA has engaged in a detailed review of the evidence, and Houston concedes that he did not attend the OTR. Based on this, the NAC found that Houston violated NASD Rules 8210 and 2110 by failing to attend an OTR. *See* Decision at 8-9. The excuses that Houston raises—that he already provided sufficient information and that this is a “victimless crime”—have no basis in law or fact. Such assertions have been consistently rejected by the Commission, and for the same reasons, they fail here as well. *See, e.g., Joseph Ricupero*, Exchange Act Rel. No. 62891, 2010 SEC LEXIS 2988, at *12 (Sept. 10, 2010) (“We have emphasized repeatedly that NASD should not have to initiate a disciplinary action to elicit a response to its information requests made pursuant to Rule 8210.”); *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *21 (Apr. 11, 2008) (“We emphasize that the importance of the information requested must be viewed from NASD's perspective at the time it seeks information.”), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009); *Morton Bruce Erenstein*, Exchange Act Rel. No. 56768, 2007 SEC LEXIS 2596, at *13 (Nov. 8, 2007) (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)), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

Houston's assertion that his was a “victimless crime” is particularly curious in light of the fact that he purposely frustrated an investigation into whether he misappropriated customer

funds. His actions kept FINRA from determining the full extent of his misconduct. As the Commission has emphasized repeatedly, a failure to respond to a FINRA request for information undermines FINRA's ability to carry out its regulatory mandate. *See, e.g., Ricupero*, 2010 SEC LEXIS 2988, at *21; *Robert A. Quiel*, 53 S.E.C. 165, 168 (1997); *Richard J. Rouse*, 51 S.E.C. 581, 588 (1993). 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*, 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"). FINRA should not be forced to bring disciplinary actions to obtain compliance with its rules. *Valentino*, 2004 SEC LEXIS 330, at *15.

Both the Hearing Panel and the NAC determined that Houston's failure to attend the OTR warranted a bar. *See* Decision at 6, 8-9. The record amply supports this conclusion. FINRA's Sanction Guidelines provide that, for complete failures to respond to information requests in violation of Rule 8210, "a bar should be standard." *See* FINRA Sanction Guidelines 35 (2007), <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf>. As the NAC correctly concluded, there are no mitigating factors in this case. *See* Decision at 11. Rather, there are aggravating factors that further support the NAC's decision to bar Houston. *See id.* at 11-12. The NAC considered the nature of the information requested and concluded that Houston's testimony was important because FINRA was attempting to investigate whether Houston was misappropriating funds from ██████ trust. *Id.* at 11. Houston actively attempted to delay FINRA's investigation by refusing to testify and hampered the investigation. The information that Enforcement requested was not provided because Houston never appeared for an OTR. *Id.*

In addition, the NAC determined that Houston's failure to understand his unequivocal obligations under NASD Rule 8210 warranted a bar. *Id.* at 12. "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. 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.

In sum, Houston has made no showing that he is likely to succeed on the merits of his appeal or that the NAC's imposition of a bar is likely to be overturned.

B. Houston Has Not Demonstrated that a Denial of the Stay Will Impose Irreparable Harm

Houston has not shown that a denial of the stay will result in his suffering irreparable harm. "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time, and energy . . . are not enough." *Timpinaro*, 1991 SEC LEXIS 2544, at *8; *see also Ricupero*, slip op. at 4 & n.9 ("That a moving party may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay." (internal quotations omitted)). Indeed, Houston makes no credible argument that he will suffer *any* harm unless the bar is stayed during the pendency of his appeal. Any possibility that Houston may suffer personal economic loss if the bar is not stayed does not rise to the level of irreparable injury and provides no basis for relief. *See Associated Sec. Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir.

1960) (stating that the “necessity of protection to the public far outweighs any personal detriment”).⁴

Even if Houston could show irreparable injury, which he cannot, the Commission should still deny the motion for stay. A showing of irreparable injury is not, standing alone, sufficient grounds upon which to grant a stay, particularly given the strength of the other three factors that overwhelmingly weigh against Houston. *See Hamilton Bank, N.A. v. OCC*, 227 F. Supp. 2d 1, 7 (D.D.C. 2001) (“No single factor is dispositive; rather, the Court ‘must balance the strengths of the requesting party’s arguments in each of the four required areas.’”) (quoting *CityFed Fin. Corp. v. OTS*, 58 F.3d 738, 747 (D.C. Cir. 1995)). The potential harm to the public interest, as discussed below, and Houston’s inability to demonstrate a likelihood of success on the merits overwhelmingly outweigh any minor injury to Houston.

C. Denial of the Stay Will Avoid Potential Harm to Others and Will Serve the Public Interest

The balance of equities weighs against a stay of the bar. Houston’s misconduct goes to the very heart of FINRA’s investor protection mission. By failing to attend the OTR, Houston demonstrated a dangerous nonchalance toward complying with a FINRA investigation. Indeed, as the NAC found, Houston did not simply fail to attend the OTR; he actively blamed Enforcement for his own failure to appear and failed to understand his unequivocal obligation to provide FINRA with requested testimony. *See* Decision at 12. Those failures continue to this

⁴ Houston argues that he should be allowed to continue to conduct “business without stoppage” during his appeal to the Commission as he has during his appeal to the NAC. Houston misunderstands the rules of procedure. FINRA Rule 9311(b) stayed the Hearing Panel’s decision and the sanctions imposed therein when Houston appealed that decision to the NAC. FINRA rules do not stay a bar upon an appeal to the Commission. *See* FINRA Rule 9370.

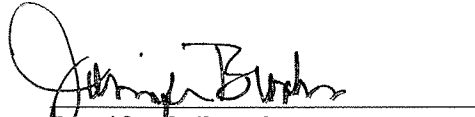
day and are evident in his description of this as a “victimless crime” in his Notice of Appeal to the Commission.

Granting Houston the ability to remain in the industry and associated with a FINRA member firm during the pendency of his appeal raises unnecessary risk to the investing public. As the Commission has explained, “in the absence of mitigating factors, 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.” *See Charles C. Fawcett, IV*, Exchange Act Rel. No. 56770, 2007 SEC LEXIS 2598, at *21-22 (Nov. 8, 2007). In balancing the possibility of injury to Houston against the possibility of harm to the public, the necessity of protecting the public far outweighs any potential injury to Houston. *See Associated Sec. Corp.*, 283 F.2d at 775; *Richard Dale Grafman*, 48 S.E.C. 83, 85 (1985). In light of the seriousness of Houston’s actions, the Commission will further the public interest by denying the stay request.

IV. CONCLUSION

By refusing to provide testimony regarding an extremely important investigation, Houston disregarded his obligations to comply with FINRA rules. The bar that the NAC imposed is fully warranted by the facts of this case and is consistent with FINRA's Sanction Guidelines, Commission precedent, and the public interest. The Commission should deny Houston's stay request.

Respectfully submitted,



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January 5, 2011

Appendix A

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Kent M. Houston
Carlsbad, CA,

Respondent.

DECISION

Complaint No. 2006005318801

Dated: December 22, 2010

Respondent engaged in outside business activities without providing his member firm with written notice and failed to appear for an on-the-record interview with FINRA staff. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Leo F. Orenstein, Esq. and Joel T. Kornfeld, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

Kent M. Houston ("Houston") appeals the Hearing Panel's decision in this matter. In that decision, the Hearing Panel found that Houston violated NASD Rules 3030 and 2110 by engaging in outside business activities without providing his member firm with written notice. The Hearing Panel also found that Houston failed to appear for an on-the-record interview ("OTR") with FINRA staff, in violation of NASD Rules 8210 and 2110. For his failure to provide written notice of outside business activities, the Hearing Panel fined Houston \$100,000

and suspended him in all capacities for one year. The Hearing Panel barred Houston for his failure to appear.¹ We affirm the findings of violation and modify the sanctions.

I. Background

Houston entered the securities industry in 1988 when he registered as a general securities representative. Houston has been associated with several FINRA member firms since he entered the securities industry. Houston's conduct relevant to this decision occurred during the time when he was associated with First Wall Street Corp. ("First Wall Street" or "the Firm"). Houston first registered with First Wall Street in November 1989 as a general securities representative. First Wall Street terminated him in May 2006 for failing to abide by Firm policy and to supply documents in an internal investigation. Houston is currently associated with another member firm as a general securities representative and an investment banking limited representative.

II. Facts

A. Houston Was a Trustee

In 1971, VB and WB (together, "the Bs"), Houston's great aunt and uncle, established a trust under which they designated a national bank as trustee and directed the trustee to pay the trust's net income to the Bs on a monthly basis. The trust provided that the trustee was entitled to compensation for its services. WB died in 1986, and the trust was amended several times in the ensuing years. On April 24, 2001, VB appointed Houston to act as co-trustee with her and specified that Houston would serve as sole trustee if VB was unwilling or unable to serve.

Two days after his appointment as co-trustee, on April 26, 2001, Houston opened an account for the trust at First Wall Street. The account application listed VB and Houston as co-successor trustees and Houston as the account representative. The account was opened in the name "[VB] & Kent Houston Co-Succ TTEE, [VB] Trust." The mailing address on the application was Houston's business address as shown in the Central Registration Depository ("CRD"®) at that time. Houston had the ability to write checks on the account without VB's signature on the checks.

¹ Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See FINRA Regulatory Notice 08-57* (Oct. 2008). Because the complaint in this case was filed before December 15, 2008, the procedural rules that apply are those that existed on December 14, 2008. The conduct rules that apply are those that existed at the time of the conduct at issue.

In June 2005, Houston became the trust's sole trustee.² In June 2006, VB died.

B. Houston Received Compensation from the 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 VB signed. Houston's personal notes related to the trust account state that VB agreed to pay him trustee fees and that she also agreed to pay him for "separate trust w[or]k." From 2003 until VB died in 2006, Houston signed all checks drawn on the trust account. In 2003, he wrote checks to himself totaling \$41,600. 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. In 2005, Houston wrote three checks payable to Countrywide Bank for his benefit, totaling \$119,000.

C. Houston Failed to Disclose His Trustee Activities on Firm Compliance Forms

Houston did not give First Wall Street written notice that he was engaged in an outside business activity or that he was receiving compensation for acting as a trustee for VB's trust.³ First Wall Street's "Standards of Conduct" contained within the Firm'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. The Firm also required that it give written approval before a representative engaged in the disclosed activity.

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. Appended to the 2002 Agreement was an "Outside Business Activity Notification Form" ("Notification Form"). Rather than disclose that he was acting as a trustee for VB's trust, Houston left the Notification Form blank and initialed the form.

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"). The 2003 Agreement included the same outside business notification provisions and appended Notification Form as the 2002 Agreement. Houston left the 2003 Notification Form blank. In December 2004,

² In March 2005, two of VB's doctors indicated that VB suffered from "probable [REDACTED]" and lacked the "capacity and decisional ability to manage her finances or to handle her personal affairs."

³ For purposes of our discussion infra, we use the term "trustee" to reflect either a co- or sole trustee.

Houston also completed First Wall Street's "Outside Business Activities Statement" ("2004 Statement"). 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."

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. The memorandum directed recipients 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."⁴ 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. The Disclosure of Appointment form required registered representatives to disclose all trusteeship appointments irrespective of whether they were approved by the Firm previously. 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."

D. First Wall Street Attempted to Investigate Houston's Trustee Activities

In connection with a December 2005 FINRA examination, First Wall Street's chief compliance officer learned that Houston had check writing authority on VB's trust account at the Firm and requested that Houston provide updated account information. At that point, the only documents that the Firm had in VB's client file were the 2001 new account application and the original 1971 trust instrument.

On January 5, 2006, Houston informed the Firm that he had become the trustee of VB's trust. While the Firm was aware prior to this date that Houston was receiving commissions for transactions within VB's trust account, it was unaware of his trustee duties and that he had received compensation from the trust for these duties. Upon review of the trust account, the Firm noticed large withdrawals that the Firm considered peculiar. The Firm subsequently 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.

On May 4, 2006, after Houston failed to provide the requested items, First Wall Street informed Houston that it had commenced a formal investigation into possible fraudulent activity in VB's trust account and that it was freezing the account until the conclusion of its

⁴ 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.

investigation. The Firm warned Houston that if the documents were not provided by May 8, 2006, he would be suspended from the Firm and his accounts would be frozen pending review. The next day Houston provided the Firm with copies of the trust amendments, but nothing else. The Firm told Houston that he had until May 12, 2006, to provide the accounting of the checks that he wrote. Houston emailed the Firm on May 12, stating that he would not provide the information without first receiving a waiver from VB, and, that pursuant to her direction, he had started the process of transferring the trust account out of First Wall Street. First Wall Street terminated Houston's employment on May 15, 2006, for his failure to cooperate with the Firm's investigation.⁵

E. FINRA Requested that Houston Appear for an OTR

After First Wall Street terminated Houston in 2006, FINRA staff began an investigation into his possible misconduct while First Wall Street employed him. On May 25, 2006, pursuant to NASD Rule 8210, FINRA staff sent an information request to First Wall Street seeking information about the payments that Houston received from VB's trust. The Firm's June 9, 2006 response letter raised questions about the appropriateness of Houston's withdrawals from the trust. FINRA staff then issued successive NASD Rule 8210 information requests to Houston to gather more information about VB's trust, including how the funds were used to either benefit VB or complied with the covenants of her trust.

On September 7, 2007, FINRA staff sent Houston an NASD Rule 8210 request to appear for an OTR on September 27, 2007. 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.⁶ 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 OTR, 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.⁷ On September 21, 2007, Houston requested to postpone his OTR testimony for 30 days while he sought legal counsel to represent him. FINRA staff rescheduled the OTR for October 19, 2007.

⁵ First Wall Street lifted the restriction on VB's trust account in September 2006, and the proceeds were distributed to the beneficiaries.

⁶ 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."

⁷ FINRA staff also directed Houston 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.

On October 10, 2007, FINRA staff received a phone call from attorney Thomas Fehn (“Fehn”) who told staff that he would be representing Houston and that he was not available to attend the OTR on October 19.⁸ FINRA staff agreed to reschedule the OTR for November 27, 2007.⁹ FINRA staff received a letter from Houston on November 26, 2007, stating that he had “nothing further to add and will not be attending the OTR scheduled on the 27th.” Houston did not appear for the OTR.

III. Procedural History

The Department of Enforcement (“Enforcement”) filed a two-cause complaint against Houston on February 1, 2008, alleging 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 his acting as trustee for his great aunt’s trust. The complaint also alleged that Houston violated NASD Rules 8210 and 2110 when he failed to appear for OTR testimony before FINRA staff. Houston waived his right to a hearing before the Hearing Panel empanelled below to consider this case. 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).¹⁰

The Hearing Panel found Houston liable for the allegations as alleged in the complaint. The Hearing Panel fined Houston \$100,000 and suspended him in all capacities for one year for the outside business activities. For his failure to appear for testimony, the Hearing Panel barred Houston. This appeal followed.

IV. Discussion

After a thorough review of the record, we affirm the Hearing Panel’s findings of violation. We determine that Houston engaged in outside business activities without providing his Firm with written notice, in violation of NASD Rules 3030 and 2110.¹¹ We further find that he failed to appear for testimony, in violation of NASD Rules 8210 and 2110. We discuss the violations in detail below.

⁸ Houston denied that he retained counsel or authorized Fehn to seek an extension.

⁹ FINRA staff sent a copy of the October 10, 2007 letter rescheduling the OTR for November 27, 2007, to both Fehn and Houston.

¹⁰ While Houston submitted a narrative statement, he did not offer any documentary evidence.

¹¹ NASD Rule 0115 makes all FINRA rules applicable to both FINRA members and all persons associated with FINRA members.

A. Houston Engaged in Outside Business Activities Without Providing Written Notice to His Firm

NASD Rule 3030 prohibits any person associated with a member firm from being “employed by, or accept[ing] compensation from, any other person as a result of any business activity, other than a passive investment, outside the scope of his relationship with his employer firm, unless he has provided prompt written notice to the member.” The member firm determines the form of the requisite written notice. *Id.* The rule was “intended to improve the supervision of registered personnel by providing information to member firms concerning outside business activities of their representatives.” *NASD Notice to Members 88-86* (Nov. 1988) (introducing the substance of NASD Rule 3030 in Article III, Section 43 of the NASD Rules of Fair Practice). Member firms are to receive “prompt notification of *all outside business activities* of their associated persons so that the member’s objections, if any, to such activities [can] be raised at a meaningful time and so that appropriate supervision [can] be exercised.” *Id.* (emphasis added); *see also NASD Notice to Members 01-79* (Dec. 2001) (emphasizing that under NASD Rule 3030, associated persons are required to report any kind of outside business activity); *see also Dep’t of Enforcement v. Schneider*, Complaint No. C10030088, 2005 NASD Discip. LEXIS 6, at *13 (NASD NAC Dec. 7, 2005) (explaining that NASD Rule 3030’s reach extends to all outside business activity, not just securities-related activity).

Houston does not dispute that he acted as a trustee for VB’s trust, beginning in April 2001, while First Wall Street employed him. The record also shows that he received compensation from the trust during this time. Houston contends that First Wall Street knew that he was receiving funds from VB’s trust. The Firm’s chief compliance officer at the relevant time stated in a sworn declaration that the Firm was only aware that Houston was receiving commissions as a result of being the registered representative assigned to VB’s trust account. Even if the Firm knew that Houston was receiving commissions from the trust account, that did not relieve him of his obligation to inform First Wall Street promptly and in writing of his trustee activities, which he admits he did not do. Instead, 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. The record demonstrates by a preponderance of the evidence that Houston violated NASD Rules 3030 and 2110.¹² Accordingly, we affirm the Hearing Panel’s findings of violation.

¹² NASD Rule 2110 provides that members shall “observe high standards of commercial honor and just and equitable principles of trade.” Conduct that violates other FINRA rules is inconsistent with the high standards of commercial honor and just and equitable principles of trade and therefore also violates NASD Rule 2110. *See Wanda P. Sears*, Exchange Act Rel. No. 58075, 2008 SEC LEXIS 1521, at *19 & n.28 (July 1, 2008) (determining that a violation of NASD Rule 3030 is also a violation of NASD Rule 2110).

B. Houston Refused to Appear at an OTR

We also affirm the Hearing Panel's findings that, by failing to appear for the November 27, 2007 OTR, Houston violated NASD Rules 8210 and 2110.

NASD Rule 8210 requires persons associated with a member to "provide information orally [or] in writing . . . with respect to any matter involved in [a FINRA] investigation." Houston does not dispute that he did not appear at the scheduled OTR, nor does he dispute that he received notice of the OTR. To the contrary, Houston stated in his November 2007 letter to Enforcement that he was aware of FINRA's request that he appear for an OTR scheduled for November 27, 2007, and that he would not appear. Houston's failure to appear and provide testimony demonstrates a prima facie violation of NASD Rule 8210. *See 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); *Dep't of Mkt. Regulation v. Sciascia*, Complaint No. CMS040069, 2006 NASD Discip. LEXIS 22, at *11-12 (NASD NAC Aug. 7, 2006).

Houston contends that he had already provided all the necessary information to FINRA staff and had nothing further to add by attending an OTR. It was not, however, up to Houston to determine the importance or completeness of the information requested, which must be viewed from FINRA's perspective at the time that it seeks the information. *See PAZ Sec., Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *21 (Apr. 11, 2008), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009); *see also Morton Bruce Erenstein*, Exchange Act Rel. No. 56768, 2007 SEC LEXIS 2596, at *13 (Nov. 8, 2007) (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)), *aff'd*, 316 F. App'x 865 (11th Cir. 2008). Among other matters, FINRA was investigating whether Houston may have misappropriated funds from VB's trust and the OTR was intended to obtain information from Houston that addressed this issue. Houston's belief that FINRA did not need the requested information did not absolve his failure to appear for testimony. *See Dennis A. Pearson, Jr.*, Exchange Act Rel. No. 54913, 2006 SEC LEXIS 2871, at *17 (Dec. 11, 2006). Moreover, in FINRA's September 17, 2007 correspondence with Houston, FINRA staff 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."

Houston further contends that he "misunderstood" Enforcement's intentions, that he believed the OTR was "a forum for [him] to come and defend [him]self," and that Enforcement should have contacted him again to request his attendance at an OTR before commencing this disciplinary action. We reject Houston's attempt to shift his burden of compliance with NASD Rule 8210 to Enforcement. *See 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”). Houston’s obligation to cooperate after Enforcement’s first request for testimony was unequivocal. *See Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *2 n.2 (Nov. 14, 2008), *aff’d*, 347 F. App’x 692 (2d Cir. 2009). Further, FINRA staff warned Houston that disciplinary action could be taken against him and that he could be barred if he failed to comply with the requests made of him under NASD Rule 8210.

Accordingly, we affirm the Hearing Panel’s findings that Houston violated NASD Rules 8210 and 2110.¹³

V. Sanctions

The Hearing Panel suspended Houston for one year and fined him \$100,000 for the outside business activities and barred him for his failure to provide testimony. We affirm both the one-year suspension and bar, but modify the fine.

A. Outside Business Activities

The FINRA Sanction Guidelines (“Guidelines”) for outside business activities recommend a fine of \$2,500 to \$50,000 and a suspension of up to 30 business days where the misconduct does not involve aggravating factors and up to one year where aggravating factors are present.¹⁴ In an egregious case, the Guidelines recommend a suspension of more than one year or a bar.¹⁵ Houston’s misconduct was serious, involving several aggravating factors.¹⁶

¹³ A violation of NASD Rule 8210 is also a violation of NASD Rule 2110. *See Berger*, 2008 SEC LEXIS 3141, at *2 n.2.

¹⁴ *FINRA Sanction Guidelines* 14 (2007), <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf> [hereinafter *Guidelines*].

¹⁵ *Id.*

¹⁶ *See id.* 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 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.*

Houston's outside business activities involved a First Wall Street customer, VB's trust.¹⁷ Houston also received more than \$400,000 in the form of checks drawn from VB's trust during the time he acted as a trustee.¹⁸ We further find that Houston attempted to conceal his trustee activities from the Firm.¹⁹ Houston contends that his failure to disclose his trustee activities was merely negligent and that he never intended to mislead or hide anything from the Firm. Houston's actions belie his claims, and we find that Houston intended to complete the forms inaccurately.²⁰ Houston repeatedly misled First Wall Street by failing to disclose the 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. When the Firm finally learned of Houston's status as a trustee and attempted to investigate his activities in that capacity, Houston refused to cooperate and stonewalled the Firm. We find that suspending Houston for one year for his violation of NASD Rules 3030 and 2110 is warranted.

We determine, however, that it is appropriate to reduce the fine to \$50,000. While the evidence readily establishes that Houston failed to meet his obligations under NASD Rules 3030 and 2110, we determine that the record does not support a fine exceeding the range recommended by the Guidelines. For example, the record is unclear as to whether Houston's withdrawals from the trust account were in contravention of the trust agreement.²¹

Houston argues that the one-year suspension and fine are excessive because he will lose his clients and has already spent his time and money defending this matter. The economic hardship that results from a one-year suspension and \$50,000 fine and the impact that this matter may have upon Houston do not mitigate his misconduct. *See Hans N. Beerbaum*, Exchange Act Rel. No. 55731, 2007 SEC LEXIS 971, at *20 (May 9, 2007); *see also Ashton Noshir Gowadia*, 53 S.E.C. 786, 793 (1998) (holding that "economic harm alone is not enough to make the sanctions imposed upon [respondent] by the NASD excessive or oppressive"); *Dep't of Enforcement v. Cipriano*, Complaint No. C07050029, 2007 NASD Discip. LEXIS 23, at *40-41 (NASD NAC July 26, 2007) (determining that the impact that a matter has upon a respondent's career does not mitigate sanctions).

¹⁷ *See id.*

¹⁸ *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 17).

¹⁹ *See id.* at 14.

²⁰ *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

²¹ In addition, the record shows that the Firm had indications that Houston was potentially engaging in trustee activities. VB's trust account was opened in the name "[VB] & Kent Houston Co-Succ TTEE, [VB] Trust," the trust account was held at First Wall Street, and the Firm was paying Houston commissions on the account.

Houston also asserts that the NAC should eliminate the sanctions imposed by the Hearing Panel because he has no disciplinary history over the course of his 20-year career. As we have emphasized many times previously, the absence of disciplinary history is not mitigating. *See Dep't of Enforcement v. Winters*, Complaint No. E102004083704, 2009 FINRA Discip. LEXIS 5, at *21 (FINRA NAC July 30, 2009); *see also Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006) (determining that the lack of disciplinary history is not mitigating and the representative "was required to comply with the NASD's high standards of conduct at all times").

Accordingly, we find that it would be appropriate to suspend Houston for one year and fine him \$50,000 for his violation of NASD Rules 3030 and 2110. However, in light of the bar imposed upon Houston for his failure to provide testimony as discussed below, we do not impose the suspension and fine.

B. Failure to Provide Testimony

The Guidelines for NASD Rule 8210 violations state that, if a person does not respond in any manner, a bar should be the standard sanction.²² If there are mitigating factors present, adjudicators should consider suspending the individual in any or all capacities for up to two years.²³ There are no mitigating factors present here. Rather, there are several aggravating factors that support barring Houston.

The two relevant principal considerations specifically listed in the Guidelines applicable to NASD Rule 8210 violations weigh against Houston.²⁴ First, Enforcement's investigation was undertaken in response to First Wall Street's termination of Houston based on his failure to cooperate in the Firm's investigation of his sizeable withdrawals made from VB's trust account. Houston's testimony was important because Enforcement was attempting to investigate whether Houston was misappropriating funds from VB's trust.²⁵ Houston's failure to provide testimony hampered that investigation. Second, the information requested was not provided because Houston never appeared for an OTR.²⁶

²² *Guidelines*, at 35.

²³ *Id.*

²⁴ The Principal Considerations for adjudicators to consider specific to NASD Rule 8210 are the nature of the information requested and whether the information requested was provided. *Id.*

²⁵ *See id.*

²⁶ *See id.*

Houston argues that the bar is excessive because he is the only “victim” in this matter. We reject Houston’s argument. As we discussed, Houston’s failure to provide testimony undermined FINRA’s investigation into the appropriateness of Houston’s withdrawals from VB’s trust funds. His failure to provide testimony harmed the regulatory process, and “it is serious because it impedes detection of . . . violative conduct.” *See PAZ*, 2008 SEC LEXIS 820, at *18.

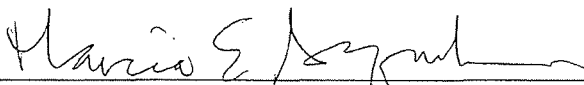
We are troubled by Houston’s blaming of Enforcement for his own failure to appear.²⁷ Houston argues that before Enforcement resorted to bringing this action, it should have requested again his attendance at an OTR. The record shows that Enforcement accommodated Houston by rescheduling the OTR and that he chose not to attend. His failure to understand his unequivocal obligations under NASD Rule 8210 warrants significant sanctions. *See, e.g., Geoffrey Ortiz*, Exchange Act Rel. 58416, 2008 SEC LEXIS 2401, at *28 (Aug. 22, 2008) (finding that the fact that respondent blamed others for what occurred supported a bar); *Michael G. Keselica*, 52 S.E.C. 33, 37 (1994) (determining “attempts to blame others for his misconduct . . . demonstrate that [the respondent] fails to understand the seriousness of [his] violations”), *petition for review dismissed*, No. 95-1012, 1995 U.S. App. LEXIS 40288 (D.C. Cir. 1995). Consequently for his refusal to provide testimony to FINRA in violation of NASD Rules 8210 and 2110, we find that Houston is “presumptively unfit for employment in the securities industry” and bar him. *See PAZ*, 2008 SEC LEXIS 820, at *10. Barring Houston is appropriately remedial and will serve as a deterrent to others who may seek to avoid providing FINRA with testimony. *See Charles C. Fawcett, IV*, Exchange Act Rel. No. 56770, 2007 SEC LEXIS 2598, at *21-22 (Nov. 8, 2007) (explaining that the imposition of a bar as the standard sanction for a complete failure to respond to FINRA information requests “reflects the judgment that, in the absence of mitigating factors, 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”); *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”).

²⁷ *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2).

VI. Conclusion

We affirm the Hearing Panel's findings that Houston engaged in outside business activities without providing written notice to his Firm, in violation of NASD Rules 3030 and 2110 and failed to provide FINRA with testimony, in violation of NASD Rules 8210 and 2110. Accordingly, we bar Houston for his failure to appear and provide testimony. The bar is effective upon service of this decision.²⁸

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith
Senior Vice President and Corporate Secretary

²⁸ We also have considered and reject without discussion all other arguments of the parties.