HARD COPY

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Mitchell H. Fillet

For Review of Disciplinary Action

Taken by

FINRA

File No. 3-15601r

BRIEF OF FINRA IN OPPOSITION TO APPLICATION FOR REVIEW

Alan Lawhead
Vice President and
Director – Appellate Group

Colleen E. Durbin
Assistant General Counsel

Jennifer Brooks
Associate General Counsel

FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8083

July 27, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Decisions **Pages**

SEC Decisions and Releases

FINRA Decision

Federal Statutes and Codes

FINRA Guidelines, Notices, and Rules

Miscellaneous

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Mitchell H. Fillet

For Review of Disciplinary Action

Taken by

FINRA

File No. 3-15601r

BRIEF OF FINRA IN OPPOSITION TO APPLICATION FOR REVIEW

I. INTRODUCTION

It has already been established by the Commission that Mitchell H. Fillet committed fraud when he breached his duty to provide accurate and complete information to an investor in a private offering of securities. Fillet also intentionally falsified firm documents and provided these falsified documents to FINRA. For Fillet's intentional falsification of firm records, the Commission sustained the National Adjudicatory Council's ("NAC") two-year suspension of Fillet and $10,000 fine. The sole issue in the current appeal is the sanction to be imposed for Fillet's fraudulent misrepresentations and omissions.

On remand from the Commission, the NAC considered the record anew and determined to suspend Fillet for 12 months and fine him $10,000 for his fraud. As the NAC correctly found, Fillet's misconduct was serious and accompanied by numerous aggravating factors. Fillet, acting with scienter, placed his interests in marketing a private securities offering above the interests of

an investor who needed complete and accurate information when deciding whether to participate in the offering. Fillet stood to profit from the investment and this potential monetary gain incentivized Fillet's withholding of material information concerning the offering. Fillet's actions ultimately contributed to the investor's complete loss of the $150,000 that he invested in the offering. FINRA's sanctions are fully warranted, and Fillet makes no cogent argument to the contrary.

In his ongoing effort to evade all responsibility for his misconduct, Fillet perseverates that FINRA should impose no sanction because, in Fillet's view, FINRA never proved that he defrauded anyone. Fillet's refusal to acknowledge that FINRA, and in turn, the Commission have already found him liable for fraud provides profound support for the well-balanced sanctions imposed by the NAC. Fillet blames others for his current situation and denounces FINRA and the Commission as working in concert in a years' long conspiracy against him. Fillet, however, has no one to blame but himself for misrepresenting and concealing material information in a securities offering. Fillet's misconduct squarely reflects on his ability to comply with the regulatory requirements necessary to the proper functioning of the securities industry and protection of the investing public. Because the record fully supports—and because Fillet cannot provide any legitimate basis for disturbing—the NAC's sanctions, the Commission should dismiss Fillet's application for review.

II. PROCEDURAL BACKGROUND

In prior proceedings, the Commission affirmed the NAC's findings that Fillet falsified his firm's records by backdating his approval of customer documents related to variable annuity transactions and then providing these records to FINRA during an examination, in violation of

NASD Rules 3110 and 2110. (RP 1676-77.)[1] The Commission also sustained the NAC's suspension of Fillet for two years and the $10,000 fine that the NAC ordered for this misconduct. (RP 1678-82.) The Commission saw "no reason to delay imposition of these sanctions and, for purposes of Section 25(a) of the [Securities] Exchange Act [of 1934 ("Exchange Act")], deem[ed] the disposition of this portion of the case 'the final order of the Commission.'" (RP 1682.) Fillet did not seek reconsideration by the Commission within 10 days after service of the Commission's order nor did he seek further appellate review with a court of appeals within 60 days after the entry of the Commission's order. *See* SEC Rule of Practice 470, 17 C.F.R. § 201.470; 15 U.S.C. § 78y(a). Thus, the Commission's findings and sanctions related to Fillet's falsification of records are not subject to further review and are final.

With respect to Fillet's violations of the antifraud provisions, the Commission sustained the NAC's findings of violation with one exception, the violation of Exchange Act Rule 10b-5(b). (RP 1666-76.) The Commission did find that Fillet, in a private placement of securities offering document, misrepresented material facts and failed to disclose the criminal history of the person integral to the success of the offering, in violation of NASD Rules 2120 and 2110 and NASD IM-2310-2. (RP 1666-70.) The Commission further determined that Fillet's omission of the criminal history information violated Exchange Act Section 10(b) and Exchange Act Rules 10b-5(a) and (c).[2] (RP 1671-74.) Again, Fillet did not seek the Commission's reconsideration of

---

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

[2] The Commission set aside FINRA's findings that the misrepresentations in the offering document violated Exchange Act Section 10(b) and Exchange Act Rule 10b-5(b). (RP 1675-76.)

these findings. The determinations that Fillet violated the antifraud provisions, therefore, are not subject to further review by the Commission.[3]

---

[3] The vast majority of Fillet's brief argues that the Commission should dismiss its previous findings that Fillet committed fraud. (Br. at 1-5.) These findings are no longer subject to Commission review. Within 10 days after service of the Commission's May 27, 2015 decision, Fillet could have further challenged the Commission's decision by seeking reconsideration pursuant to SEC Rule of Practice 470, which is the procedure in place for an applicant like Fillet who is aggrieved by a Commission determination. *See* 17 C.F.R. § 201.470. Because Fillet failed to seek reconsideration, the Commission should not now unwind its final determinations concerning Fillet's violations. The narrow limitation provided by a timely motion for reconsideration intends and, in fact, brings finality to the administrative process and reflects a deliberate choice to impose finality on Commission action.

In any event, Fillet's contentions that the Commission's findings were erroneously decided are as unsound and without support now as they were when the Commission first considered them. For example, Fillet argues that Malkin's $150,000 payment to Sloan was a loan and not a transaction involving the purchase or sale of securities. (Br. at 2, 3, 4.) The Commission already rejected this baseless assertion, which was supported only by Fillet's self-serving testimony. (RP 1667.) The Commission correctly found the Sweet Shoppes/CAC offering involved the sale of securities. (RP 1667.) The Term Sheet and subscription agreement expressly described that each $150,000 investment unit included an $80,000 CAC "Series A 10% Corporate Note" due December 1, 2009, a $70,000 FAO Sweet Shoppes "Series A 10% Corporate Note" due December 1, 2009, and detachable warrants to purchase shares of CAC and FAO Sweet Shoppes. (RP 906, 908, 910.) Malkin purchased one $150,000 unit. (RP 910-19.) Malkin was told at the meeting with Fillet that that notes and warrants "would be coupled . . . if you bought the notes, you would get the warrants." (RP 594.) The Exchange Act's definition of a "security" includes a warrant to purchase stock. 15 U.S.C. §78c(a)(10). In addition, notes are presumed to be securities, and the Commission found that the notes at issue here appeared to meet the test set forth in *Reves v. Ernst & Young*, 494 U.S. 56 (1990). (RP 1667 n.17.)

Further, other portions of the transactional documents that Fillet prepared, and Malkin acknowledged, plainly contemplate that the offering was a sale of securities, and not a personal loan as Fillet insists. The subscription agreement required an investor's acknowledgment that the units were "restricted securities under the 1933 Act inasmuch as they are being acquired from the Companies in a transaction not involving a public offering." (RP 911.) Fillet misguidedly asserts these transactional documents "are null and void" under the laws of the state of New York because, according to Fillet, they were "not properly counter-signed." (Br. at 3.) While the subscription agreement in the record lack's Sloan's signature, the Commission determined that "the preponderance of the evidence, including PM's testimony and his cashed check, establish that the transaction took place as contemplated by the document." (RP 1667.) The pertinent points are that Malkin signed the agreement and invested $150,000 in the securities offering that Fillet fraudulently marketed to him. (RP 917-19.) Thus, Fillet is responsible as a

[Footnote continued on next page]

The Commission set aside FINRA's findings that the misrepresentations in the offering document violated Exchange Act Section 10(b) and Exchange Act Rule 10b-5(b). (RP 1675-76.) Because the Commission set aside a portion of the fraud findings, the Commission remanded the case to FINRA to re-determine the sanctions for Fillet's fraud in light of this dismissal. (RP 1678, 1682.)

After looking at the record anew, the NAC reduced Fillet's suspension to 12 months in all capacities and fined him $10,000 for the fraudulent misrepresentations and omissions.[4] (RP 1739-42.) In re-determining the sanctions for Fillet's fraud, the NAC considered that the Commission vacated a segment of the findings against Fillet. (RP 1739, 1742.) The NAC followed FINRA's Sanction Guidelines ("Guidelines") and determined that Fillet's misconduct was serious and accompanied by significant aggravating factors. After considering the arguments that Fillet presented in mitigation, the NAC concluded that no further reduction of the sanctions was warranted. (RP 1740-42.)

On April 7, 2016, Fillet filed this appeal with the Commission. (RP 1747-50.)

III. FACTUAL BACKGROUND

The Commission has already made relevant factual findings in its May 27, 2015 decision. The Commission found, in pertinent part, as follows:

> In 2004, Fillet joined Riderwood, a registered broker-dealer that provided various investment-banking services to its customers, including assistance in private placements, mergers, and acquisitions. In 2007 and 2008, the period relevant to this proceeding, Fillet held an ownership interest in the Firm and

---

[cont'd]

then-registered person who participated in the perpetration of a fraud that involved the purchase or sale of securities.

[4] The NAC in its initial decision suspended Fillet for 18 months and fined him $10,000 for his fraud. (RP 1463, 1678.)

was Riderwood's chief executive officer, president, and senior investment banker. . . .

A. Fillet provided private placement services to FAO Sweet Shoppes, Inc., and Catering Acquisition Corp.

FINRA's fraud allegations arise out of Fillet's communications to an investor concerning a private placement offering by FAO Sweet Shoppes, Inc. ("Sweet Shoppes") and Catering Acquisition Corp. ("CAC"), two shell companies run by Allan Sloan ("Sloan"), their principal and founder. Sloan formed Sweet Shoppes to operate a retail café that would sell toys, food, and party facilities in close alignment with and under a "global license" from FAO Schwarz, Inc. ("FAO"), the national toy retailer. Sloan formed CAC to acquire food service companies to produce and supply food for the Sweet Shoppes cafés. . . .

In June 2007, Sloan hired Riderwood to provide CAC with "advisory, investment banking, and placement services" for CAC's "acquisition of a series of food-related enterprises." On behalf of Riderwood, Fillet executed the engagement agreement (the "Engagement Agreement"), agreeing to conduct due diligence, draft transactional documents, identify prospective investors, and act as a placement agent for CAC's securities offering. According to Fillet, CAC paid Riderwood a total of $20,000 to $30,000 for its services. Riderwood also had the potential under the Engagement Agreement to earn five percent of the outstanding and voting common shares of CAC within ten days of the closing of any offering and a percentage of the gross proceeds raised in the offering.

1. Fillet drafted the Term Sheet for the Sweet Shoppes/CAC offering.

Pursuant to the Engagement Agreement, Fillet drafted various documents for the Sweet Shoppes/CAC offering, including a Confidential Term Sheet (the "Term Sheet").[N7] According to the Term Sheet, the offering totaled $3,000,000 and consisted of twenty investment units at $150,000 per unit. Each unit was comprised of an $80,000 CAC "Series A 10% Corporate Note," a $70,000 Sweet Shoppes "Series A 10% Corporate Note," and detachable warrants to purchase shares of Sweet Shoppes and CAC common stock. The Term Sheet identified Riderwood as the "sole marketing agent," Fillet as a person to contact for the offering, and Sloan as the CEO for both issuers in the offering.

[N7] In addition to the Term Sheet, Fillet drafted the promissory notes, subscription agreement, and business and investment summary for the offering. [End of Footnote]

It is uncontested that the Term Sheet that Fillet drafted contained representations about Sweet Shoppes and CAC that were inaccurate as of the date on the Term Sheet, January 14, 2008. The Term Sheet stated that CAC "was founded in 2007 to create a vertically-integrated, brand name food service company that started in New York City but became national in scope." It also stated that Sweet Shoppes "is closely aligned with FAO" and operates under "a global license from FAO Schwarz and the FAO Family Trust." Fillet conceded in his hearing testimony that, as of January 14, 2008, CAC was neither an operating company with any assets, nor "national in scope," and Sweet Shoppes had not secured "a global license from FAO and FAO Family Trust."

2. Fillet communicated with potential investor PM.

The record shows that at least one person, PM, invested in the Sweet Shoppes/CAC offering. PM testified that he became interested in Sweet Shoppes/CAC through his friend Edward Schmults, then the CEO of FAO.[N8] According to PM, in late 2007, Schmults asked him to speak with Sloan about investing in Sweet Shoppes/CAC, describing Sloan as an "experienced food [services] operator" who would be running Sweet Shoppes for FAO. After PM had several phone conversations with Sloan, Sloan invited him to meet with Fillet.

[N8] Schmults did not testify at the hearing. [End of Footnote]

---

a. Fillet met with PM to discuss investment in CAC/Sweet Shoppes.

On January 16, 2008 (two days after the date of the Term Sheet), Fillet and Sloan met with PM at PM's office. PM testified that although he had several subsequent telephone conversations with Fillet, this was the only time he met with Fillet in person. PM believed that Sloan arranged the meeting with Fillet because Fillet was an investment banker and would "add credibility to Sloan" and the investment. During the meeting, Fillet discussed the business plans of Sweet Shoppes and CAC, the terms of the offering, PM's qualifications as an accredited investor, and PM's potential investment of $150,000. PM understood from his discussions with Sloan and Fillet that the Sweet Shoppes/CAC business venture was developing, that CAC was on the verge of acquiring a large catering business, and that "there already was a commissary, going business, . . . providing the food that would be used in the[] different [Sweet Shoppes stores]." PM testified that he was not given a copy of the Term Sheet at the January 16th meeting.

b. PM received the Term Sheet and invested in CAC/Sweet Shoppes.

The record indicates that PM received the Term Sheet along with other offering documents sometime between January 16 and February 21, 2008. But the record is unclear as to the exact date or the identity of the person who provided the Term Sheet to PM. Fillet has maintained throughout the proceeding that the Term Sheet and other offering documents he drafted were "just drafts," which he gave to Sloan and Sloan's lawyer to review. Fillet testified that he never gave PM the Term Sheet, stating that "I'm not really sure [who gave PM a copy] but it was not from Riderwood" because "[PM] had very little contact with Riderwood." Fillet acknowledged that he later became aware that the Term Sheet had been provided to PM and there is no evidence that he sought to correct any of the statements in it.

PM could not recall who gave him the Term Sheet, testifying that the offering documents "were delivered to my office but I don't . . . remember anybody physically delivering them to me." On February 21, 2008, PM returned a signed subscription agreement to Sloan and gave him a $150,000 check that was payable to CAC and noted "re notes and warrants" in the memo portion of the check.

3. PM sought reimbursement for his investment after discovering Sloan's criminal history.

In the months after PM's investment, the Sweet Shoppes/CAC business venture unraveled. According to PM, a few months after investing he voiced his concerns about the deal to Sloan, who told him that he could have his money back. PM then spoke with Schmults, who informed PM that FAO recently had terminated its business arrangement with Sloan. When PM asked Schmults why, Schmults told him that he could not say but that PM could "Google Sloan and find out [for himself]." Soon after the conversation, PM had one of his employees conduct a search of Sloan, which found that Sloan had an extensive criminal and civil record and had been disbarred as an attorney.

Public records searches of Sloan (under "Alan Sloan" and aliases "Allen Sloan" and "Allan Gerald Slotnick") show two criminal convictions, disbarment, personal bankruptcy, and eighty-seven tax and judgment liens against him. Sloan was convicted and sentenced to one to three years' imprisonment in 1987 for submitting a false affidavit to a New York court. Shortly thereafter, the State of New York disbarred Sloan based on his 1987 conviction and for converting client funds, issuing bad checks, and refusing to return client funds. Sloan also was convicted in 2003 and sentenced to three to six years' imprisonment for possession of stolen property (a rental

car). None of Sloan's legal history was disclosed in the Term Sheet or any other offering document.

At FINRA's hearing, Fillet admitted that he knew about Sloan's 2003 criminal conviction, testifying that he learned about the conviction in late 2007 while conducting his due diligence of CAC. Fillet testified that Sloan thereafter provided him with a letter from Sloan's criminal defense attorney in which the attorney described the stolen property prosecution as "absurd," despite Sloan's conviction. Fillet claimed that he did not disclose the information in the Term Sheet or directly to PM because he had told Sloan to disclose it. Although there is no evidence that Fillet was aware of Sloan's other legal problems during the relevant period, the record demonstrates that the background search of Sloan by Riderwood at the time was flawed. As Fillet concedes, the Firm searched only under the name "Alan Sloan" and not under Sloan's other aliases, even though "Allan" was used in the Engagement Agreement and "Allen" was the name listed on Sloan's 2003 conviction.[N9]

[N9] The letter from Sloan's criminal defense attorney, which Fillet reviewed, also used the name "Allen" Sloan. [End of Footnote]

PM's discovery of Sloan's criminal past prompted him to seek rescission from Sloan and Fillet. According to PM, Sloan agreed to reimburse PM but on three separate occasions gave PM a check that bounced. Fillet disclaimed any responsibility for returning the funds, informing PM that he was only Sloan's agent and reminding him that he had paid Sloan the money. PM testified that, had he known about Sloan's criminal past, he "never would have made this investment." PM never recovered any of his money. He filed a complaint with FINRA, prompting an investigation.

(RP 1661-65.)

IV. ARGUMENT

A. The 12-Month Suspension and $10,000 Fine Are Appropriate for Fillet's Fraud and Neither Excessive nor Oppressive

The NAC suspended Fillet for 12 months in all capacities and fined him $10,000 for his fraudulent misrepresentations and omissions in connection with the CAC/Sweet Shoppes securities offering. The sanctions that the NAC crafted in this case are appropriate given the

gravity of Fillet's conduct and neither excessive nor oppressive.[5] *See* 15 U.S.C. § 78s(e)(2). "Fraud violations . . . are especially serious and subject to the severest of sanctions under the securities laws." *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *36 (Mar. 31, 2016) (internal quotation marks omitted).

As detailed in the NAC's decision in this matter, the NAC carefully considered the sanction ranges suggested in the applicable Guidelines and accounted for the fact that the Commission dismissed a segment of the fraud findings when conducting its sanctions analysis. (RP 1739-42.) After applying the aggravating and mitigating factors, the NAC determined that the factors that Fillet presented in mitigation were insufficient to sustain lesser sanctions. The Commission should affirm the sanctions.

The NAC in sanctioning Fillet considered the Guidelines for intentional or reckless misrepresentations of material facts. (RP 1740.) The Commission in its review of sanctions gives weight to whether the sanctions are within the allowable sanction range under the Guidelines. *See Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *18-19 (Feb. 24, 2012); *see also Steven Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *25 n.37 (Mar. 29, 2016) (using Guidelines "as a benchmark" when reviewing FINRA's sanctions on appeal).

The Guidelines recommend that the adjudicator should consider fining the responsible individual between $10,000 and $100,000 and suspending him for 10 business days to two years.

---

[5] The standards articulated in Section 19(e) of the Exchange Act provide that the Commission must dismiss Fillet's application for review if it finds that FINRA imposed sanctions that are neither excessive nor oppressive and that do not impose an unnecessary or inappropriate burden on competition. 15 U.S.C. § 78s(e). Fillet does not contend that FINRA's sanctions impose an undue burden on competition.

FINRA Sanction Guidelines 88 (2011), (hereinafter "*Guidelines*").[6] The $10,000 fine and 12-month suspension of Fillet are well within the parameters of the Guidelines and consistent with these recommendations.

B. Fillet's Fraud Was Accompanied by Numerous Aggravating Factors

The Guidelines also recommend consideration of several general factors in determining the proper remedial sanction. *Id.* Several factors relevant to this case include whether the applicant acted recklessly; whether the applicant was a factor in investor losses; whether the applicant's misconduct resulted in the potential for his monetary gain; and whether the applicant accepted responsibility for his misconduct. *See id.* at 6-7. The NAC appropriately found that these factors served to aggravate Fillet's misconduct. (RP 1740-42.)

1. Fillet Acted Recklessly

The NAC found that Fillet's misconduct was reckless and serious. (RP 1740); *Guidelines*, at 7 (Principal Consideration No. 13). The Commission has emphasized that "[r]egistered representatives must not make repeated, reckless, and unfounded misstatements to their customers in connection with the sale of securities, and doing so warrants the imposition of meaningful sanctions." *Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *30 (Nov. 4, 2009). Fillet's misconduct included not only material misstatements, but Fillet also recklessly concealed what he knew about Sloan's criminal past.

The Commission found that Fillet was aware of the inaccuracies in the Term Sheet and was reckless in allowing the Term Sheet to be used to sell securities to Malkin. Fillet admittedly

---

[6] The NAC applied the 2011 version of the Guidelines when rendering its initial decision in October 2013 and again on remand in re-determining sanctions for Fillet's fraud. (RP 1461 & n.21, 1740 & n.5.) The cited sections of the Guidelines are attached as Appendix A.

drafted the Term Sheet and knew that CAC's and Sweet Shoppes' business descriptions that he included were inaccurate. (RP 719-20, 726-29, 906-09, 1669.) Fillet's role as Sloan's investment banker charged with conducting due diligence and orchestrating the CAC/Sweet Shoppes offering, coupled with his preparation of the Term Sheet, demonstrate that Fillet was aware when he drafted the Term Sheet that the issuers were neither operating companies nor national in scope. (RP 717, 719-20, 726-29, 858, 1667-68.) In addition, Fillet knew from his due diligence that the Term Sheet did not accurately represent the status of Sweet Shoppes' licensing agreement with FAO. (RP 726-27, 729, 1668.)

Fillet's recklessness is also evidenced by the fact that he did not mark the Term Sheet as "draft" or ensure that Sloan did not provide it to prospective investors. (RP 1669, 1740.) Fillet argues that it is relevant that Malkin received the Term Sheet from someone other than Fillet. (Br. at 4-5.) How Malkin ultimately received the Term Sheet has no bearing on the fact that its contents, which Fillet drafted, were inaccurate and Fillet knew this. Nonetheless, Fillet took no care to prevent its distribution to Malkin, or any other investors, to sell securities. (RP 1669, 1740.) Fillet was aware when he drafted the Term Sheet and when he met with Malkin that Sloan planned to use the Term Sheet to obtain investors to finance the offering. (RP 720-21, 723-24.) Fillet worked with Sloan to solicit Malkin's investment in the offering, including by drafting the inaccurate Term Sheet and releasing it to Sloan. As the Commission emphasized, Fillet acted "at least recklessly when he drafted and provided" the Term Sheet "to Sloan that [Fillet] knew contained inaccurate statements without taking adequate precautions against its possible dissemination to investors." (RP 1669.)

Fillet's recklessness is demonstrated further by his concealment of Sloan's criminal history. Fillet knew that Sloan was a felon convicted of theft of a rental car and concealed this

material fact from Malkin. (RP 609, 611, 722-23, 1671, 1740.) Fillet had multiple opportunities to disclose Sloan's criminal past to Malkin. *See, e.g., DWS Sec. Corp.*, 51 S.E.C. 814, 818 n.15 (1993) (finding knowing or reckless conduct when proper disclosures not made timely after discovery). The Commission found that Fillet, "[d]espite learning of Sloan's conviction for possession of stolen property before the offering commenced, he failed to disclose the information to [Malkin] at their January 16th meeting, in his telephone conversations with him, or in the Term Sheet." (RP 1671.) Fillet instead kept Sloan's conviction to himself and therefore increased the chance that his marketing of the offering would succeed in attracting investors. Indeed, the importance of this information to the offering's success is underscored by FAO's termination of its business relationship with Sloan once his criminal past was discovered. (RP 609, 1671.)

Fillet was also reckless when he unreasonably failed to discover and disclose the full extent of Sloan's wide-ranging criminal and civil history. (RP 1672, 1740.) Riderwood's due diligence on Sloan consisted of running a misspelled Pacer search of "Alan Sloan" and searching the SEC's website for "TriBakery Capital," which Fillet described as CAC's predecessor. (RP 718-19, 945-51.) Fillet also unreasonably relied upon Sloan and Sloan's attorney to provide him with information about Sloan's past. (RP 753-54, 952, 1673.) Fillet and Riderwood undertook no further independent research of Sloan's background. Had he conducted a reasonable investigation into Sloan's background, Fillet would have learned that Sloan had been disbarred from practicing law as a result of a 1987 felony conviction for offering a false affidavit to a New York court. (RP 779, 1162.) Prior to being disbarred, Sloan was disciplined for violating various New York attorney disciplinary rules related to converting client funds. (RP 1162.) Sloan also had hundreds of thousands of dollars in civil judgments and liens against him and had

filed for bankruptcy in 2003. (RP 955-95.) Sloan's malfeasance was unquestionably material to investors in the offering. (RP 1673 & n.44 (citing *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 770-71 (11th Cir. 2007) (determining that failures to disclose management's financial problems, including personal bankruptcy and previous cease-and-desist order, were material)).

Fillet recklessly disregarded his obligation to supply complete and accurate information to Malkin. Fillet's opacity prevented Malkin from accurately assessing whether an investment in CAC and Sweet Shoppes was best for him, which was relevant to the NAC's sanctions determination. (RP 1669, 1671-72, 1740.) Investors depend upon the reliability and honesty of their broker's communications. Indeed, FINRA has reminded brokers such as Fillet, who market and sell private placements of securities, that they are obligated to conduct a reasonable investigation of the issuer and the securities recommended in offerings. *See FINRA Regulatory Notice 10-22*, 2010 FINRA LEXIS 43, at *1 (Apr. 2010). As the Commission highlighted, Malkin viewed Fillet's involvement in the offering as adding credibility to Sloan, and through Fillet's involvement in the offering process, Malkin believed that the statements about the issuers were true. (RP 654, 1668.) Moreover, Malkin testified that had he known about Sloan's criminal history, Malkin never would have invested in the offering. (RP 655-57, 1671.)

The NAC correctly concluded that Fillet's recklessness served to aggravate his misconduct for purposes of sanctions.

2. Fillet's Fraud Was a Factor in Malkin's Losses

As the Commission already found, Fillet induced Malkin's investment in CAC/Sweet Shoppes by drafting the Term Sheet containing material misstatements and failing to disclose Sloan's criminal history. (RP 1670-71.) Fillet therefore played a leading role in Malkin losing

his $150,000 investment, which serves to aggravate sanctions. (RP 1670-71, 1741); *see Guidelines*, at 6 (Principal Considerations No. 11).

Fillet contends now that he knew "nothing about" Malkin's $150,000 investment "until well after the funds had been disbursed by Malkin." (Br. at 2.) Whether Fillet knew the moment that Malkin invested in the offering misses the point and is not dispositive to whether Fillet's misconduct was a factor that resulted in an investor losing money.

The facts further undermine Fillet's campaign of claiming ignorance and reveal the depths of Fillet's involvement in this fraudulent enterprise that led to Malkin's losses. Fillet met with Malkin on January 16, 2008, for the express purpose of determining whether Malkin would be interested in investing in the CAC/Sweet Shoppes offering. (RP 591-593, 652, 721.) Through his conversations with Fillet and Sloan, Malkin understood that CAC was already operating a food preparation business that would provide the food for the Sweet Shoppes and that there was a license agreement in place with FAO. (RP 595-97, 653, 661, 905.) As is well-established, none of this was true.

Soon after the January 2008 meeting, Malkin received the Term Sheet that Fillet drafted containing the material misstatements, subscription agreement, and accompanying promissory notes. (RP 597, 599, 600-02, 604, 863-90, 906-17, 1670.) Fillet was well aware that the Term Sheet contained untrue statements and that Sloan planned to use the Term Sheet to obtain investors to finance the offering. Fillet nonetheless did nothing to prevent Malkin from receiving the Term Sheet. (RP 720-21, 723-24, 1669, 1740.) Malkin thereafter issued a check payable to "Catering Acquisition Corp." for $150,000 for his investment in the offering. (RP 598, 918.) Months later, after he learned of Sloan's criminal history, Malkin subsequently requested reimbursement of his investment from Fillet and Sloan. (RP 607, 610-11.) Irrespective of

Fillet's deep involvement in securing Malkin's investment, Fillet has unwaveringly disclaimed responsibility to return the money, and Malkin never recovered any of his investment. (RP 607, 611-13, 1512, 1514, Br. at 2.) Malkin's financial loss stemming from Fillet's misconduct further supports the 12-month suspension and fine that the NAC imposed.[7]

3. Fillet's Fraud Resulted in the Potential for His Financial Gain

The NAC also determined that Fillet's fraudulent misconduct was exacerbated by his potential for pecuniary gain. (RP 1741-42.) The Guidelines direct adjudicators to consider whether a respondent's misconduct resulted in the potential for monetary or other gain. *Guidelines*, at 7 (Principal Considerations No. 17).

Indisputably, the Commission in its opinion already found that Fillet had a financial incentive to withhold information from Malkin and that Fillet "stood to gain financially from his fraudulent conduct." (RP 1672.) Fillet admitted that Riderwood received $20,000-$30,000 from Sloan pursuant to the engagement agreement. (RP 736; *see* Br. at 2.) Riderwood also had an expectation of additional compensation, including 5% of the outstanding and voting common shares of CAC within 10 days of the closing of the transaction and a percentage of the gross proceeds raised in the offering. (RP 858-59.) Fillet stood to realize financial rewards by marketing the CAC/Sweet Shoppes offering to investors, which potentially clouded his objectivity and encouraged his silence with respect to Sloan's background. An applicant's pecuniary interest is always an important factor to be considered under the Guidelines and, in this case, supports the likelihood that Fillet's objectivity toward the offering was significantly

---

[7] While the NAC determined that the record in this case did not support ordering Fillet to pay restitution, an investor's injury, either directly or indirectly resulting from a respondent's misconduct, aggravates sanctions under the Guidelines. (RP 1742 n.14); *Guidelines*, at 6 (Principal Considerations No. 11).

compromised. The Commission's findings reflect this concern. "Withholding damaging information about the issuers' CEO increased the likelihood that [Malkin] and others would invest in the offering and thereby Fillet's total compensation." (RP 1672.)

Fillet denies any financial incentive because Riderwood did not "receive any percentage of Malkin's" investment in the offering. (Br. at 2.) As the record shows, however, Fillet stood to gain if the offering was successful. The fact that Malkin did not pay Fillet or Riderwood directly or that Sloan may have withheld Malkin's entire investment from them is inconsequential to Fillet's responsibility for playing an instrumental role in orchestrating the fraudulent investment.

4. Fillet Has Not Acknowledged His Misconduct

Notwithstanding that the Commission found him liable for violating both FINRA's antifraud provisions and the Exchange Act, Fillet continues to disavow all responsibility for the misstatements and omissions. (RP 1726-27; Br. at 1-5.) He incredulously contends that because, in his view, he did not commit fraud, he should not be sanctioned. (RP 1750; Br. at 1, 5.) Instead, he urges the Commission to erase all traces of his wrongdoing through "dismissal and expungement."[8] (Br. at 5.) Fillet's refusal to acknowledge the Commission's findings of

---

[8] Fillet misunderstands the process for expunging a matter from the Central Registration Depository ("CRD"®) and the disclosure categories that may be expunged. FINRA Rule 2080 establishes the procedures for broker-dealers and associated persons to obtain expungement of customer dispute information. FINRA "[m]embers or associated persons seeking to expunge information from the CRD system arising from disputes with customers must obtain an order from a court of competent jurisdiction directing such expungement or confirming an arbitration award containing expungement relief." FINRA Rule 2080(a). The rule requires that one of three narrow grounds are found and documented before expungement occurs: (1) the claim, allegation, or information is factually impossible or clearly erroneous; (2) the registered representative was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or (3) the claim, allegation, or information is false. FINRA Rule 2080(b)(1). FINRA's investigation of Fillet and the regulatory findings of

[Footnote continued on next page]

fraudulent misconduct increases the concern about his potential to engage in similar misconduct in the future. *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2); (RP 1741); *see, e.g.*, *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *64 (Nov. 9, 2012) (finding that applicant's "persistent attempts to deflect blame onto others . . . suggests that he is likely to engage in similar misconduct in the future"); *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *75 (Jan. 30, 2009) ("We agree with FINRA that Epstein's demonstrated insouciance and indifference towards his responsibilities under NASD rules poses a serious risk to the investing public." (internal quotation marks omitted)), *aff'd*, 416 F. App'x 142 (3d Cir. 2010). Fillet's "continued refusal to acknowledge any wrongdoing" with respect to his role in defrauding Malkin "is a troubling indication that [he] either misunderstand[s his] regulatory obligations or hold[s] those obligations in contempt." *See Robert Conway*, Exchange Act Release No. 70833, 2013 SEC LEXIS 3527, at *41-42 (Nov. 7, 2013).

Fillet's avoidance of responsibility is further seen in how he blames others for FINRA's disciplinary action against him. (Br. at 1-5.) The most frequent target of Fillet's blame is Malkin, the victim of his fraud. Fillet callously and improperly attempts to fault Malkin for not investigating Sloan's background himself. (RP 1290.) Fillet, moreover, has argued that he is blameless because Malkin was a sophisticated investor with access to information as an attorney and broker and "an expert in these matters." (Br. at 2, 3; RP 1289-91, 1514, 1727.) For the purposes of sanctions, the NAC gave Fillet some credit for the fact that Malkin was a knowledgeable investor who had direct contact with FAO's then-CEO Schmults and that

---

[cont'd]

violations against him are not disclosure categories that may be expunged. Nor is proceeding before the Commission an available forum to seek expungement.

Schmults was the person who first made Malkin aware of the CAC/Sweet Shoppes offering. (RP 1741.) Undercutting this mitigation, however, was the fact Fillet, who was integral in obtaining Malkin's investment, elected not to provide Malkin with accurate and complete facts thereby inducing Malkin's investment through deception. (RP 606, 654, 1670, 1741); *see Lester Kuznetz*, 48 S.E.C. 551, 554 (1986) (stating that a customer's investment experience does not give a representative "license to make fraudulent representations"), *aff'd*, 828 F.2d 844 (D.C. Cir. 1987); *see also Conway*, 2013 SEC LEXIS 3527, at *41 (finding that applicants had not accepted responsibly for their misconduct when "[t]hey continue to blame others, including the mutual funds they deceived").

Now before the Commission Fillet adds to his blaming of Malkin by contending that Malkin should have aired his grievances in arbitration, rather than filing a complaint with FINRA. (Br. at 2.) Fillet has no authority to direct in what manner an aggrieved investor pursues redress. Investor complaints and regulatory tips are vital to FINRA's mission to protect investors. Often violations of FINRA rules and the federal securities laws come to light through the receipt and investigation of regulatory tips from members of the securities industry and investors and customer complaints. *See* http://www.finra.org/industry/file-tip. That was precisely what occurred in this case with respect to uncovering Fillet's fraud. (RP 574-75, 920-22.) The Commission should reject Fillet's ongoing efforts to undermine the victim of Fillet's fraud when none of Fillet's assertions relieved him of his obligation to disclose accurately and completely the materials facts that he knew. *See Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572, at *44 (Nov. 8, 2006) (finding aggravating for purposes of sanctions that applicant repeatedly blamed others for his violative conduct), *aff'd*, 304 F. App'x 883 (D.C. Cir. 2008).

Fillet also deflects his responsibly onto Sloan. (Br. at 4-5; RP 611, 722, 743, 781, 1290, 1511-14.) That Sloan likewise may have misrepresented and omitted material information to Malkin does not lessen Fillet's responsibility. *See Philip L. Spartis*, Exchange Act Release No. 64489, 2011 SEC LEXIS 1693, at *34 (May 13, 2011) ("[A] broker has responsibility for his own or her own actions and cannot blame others for [his or her] own failings." (internal quotation marks omitted)); *cf. Cent. Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (explaining that in "any complex securities fraud . . . there are likely to be multiple [primary] violators"), *superseded in part on other grounds by* 15 U.S.C. § 78t(f), (e). Fillet nevertheless protests that because he did not give Malkin the Term Sheet, any of his purported malfeasance is too attenuated. (Br. at 4-5; RP 1290, 1511, 1512, 1514.) As the Commission found, Fillet was responsible for his own misrepresentations and omissions to Malkin irrespective of Sloan's culpability. (RP 1669, 1673.)

Fillet persists in blaming Malkin and Sloan for a situation that was created by his own actions. Fillet has made clear that he views his role as tangential to the fraud. But Fillet cannot blame others for misconduct in which the NAC and the Commission have already concluded he played a leading role. Fillet made wholly irresponsible misstatements and omissions that amounted to an abdication of his basic responsibilities as a securities professional. As directed by the Guidelines, the NAC was charged with designing sanctions "that are significant enough to ensure effective deterrence"—to discourage Fillet from repeating this misconduct and others from engaging in similar misconduct—and to protect the investing public. *Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 1); *see also McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005) (stating that general deterrence is considered part of the overall inquiry into remedial sanctions).

The seriousness of Fillet's offenses favors affirming the sanctions that the NAC imposed. Because the securities industry relies heavily on the candor and truthful representations of its professionals, Fillet's decision to misrepresent several facets of the CAC/Sweet Shoppes offering and conceal Sloan's felony conviction demonstrates a threat to the public interest that necessitates a stiff fine and temporary removal from the securities industry to protect potential investors. "[T]he securities industry presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants." *Glodek*, 2009 SEC LEXIS 3936, at *30 (internal quotation marks omitted). Under the circumstances, the 12-month suspension and $10,000 fine imposed upon Fillet are needed to protect the investing public and to deter Fillet from engaging in similar fraudulent conduct in the future.[9]

C. Fillet Fails to Demonstrate Other Mitigating Factors

Fillet makes a variety of other unpersuasive arguments that do not amount to mitigating factors. Fillet claims that the NAC on remand affirmed "all of the charges and penalties against Fillet by tasking the lawyer who originally drafted the last appeal to the National Adjudicatory Council to review his own opinion . . . [i]nstead of recusing himself." (Br. at 5.) The record shows that Fillet was accorded the fair process demanded by the Exchange Act, and that the NAC, not a FINRA attorney, issued FINRA's decision on remand. *See* 15 U.S.C. § 78o-3(b)(8), (h)(1) (requiring that self-regulatory organizations provide fair procedures); *Sundra Escott-*

---

[9] The NAC ordered that Fillet serve the 12-month suspension for fraud consecutively with the two-year suspension for falsifying his firm's records, which the Commission sustained and is currently in place. (RP 1742.) The federal courts and the Commission have upheld the NAC's order of consecutive suspensions where the suspensions protect the public from two fundamentally different types of harms like the distinct harms in this case—fraudulently inducing an investment in securities and falsifying firm records and providing these to FINRA during the course of an examination. *See Siegel v. SEC*, 592 F.3d 147, 157-58 (D.C. Cir. 2010) (affirming consecutive suspensions).

Russell, 54 S.E.C. 867, 873-74 (2000) (finding requirements of the Exchange Act met when FINRA brought specific charges, the respondent had notice of such charges, the respondent had an opportunity to defend against such charges, and FINRA kept a record of the proceedings). The NAC's and the Commission's de novo reviews of this matter further assure that Fillet was given a fair proceeding. *See Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *38 (Jan. 9, 2015), *aff'd*, 2016 U.S. App. LEXIS 1702 (2d Cir. Feb. 2, 2016); *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *27-29 (Nov. 8, 2007), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

The appointment of the Subcommittee of the NAC who reviewed the case prior to the full NAC on remand was also consistent with FINRA rules. *See* FINRA Rule 9331. FINRA Rule 9331 provides that "[a] Subcommittee shall be composed of two or more persons who shall be current or former members of the National Adjudicatory Council or former Directors or Governors." Fillet and Enforcement were informed on June 23, 2015, that Alan Dye, a former member of the NAC, and Christopher Mahon, a then-current member of the NAC were appointed as the Subcommittee to consider the remand.[10] (RP 1657-58.) Fillet was afforded the opportunity to file a motion to object to a Subcommittee member's participation, but he failed to do so. He, accordingly, has waived any argument that he may have concerning a conflict of interest or makeup of the panel. FINRA rules provide that a party, having a "reasonable, good faith belief" that a conflict of interest or bias exists, may file a motion to disqualify a member of the Subcommittee no later than 15 days after the later of learning of the facts on which the claim is based or when the party was notified of the composition of the Subcommittee. FINRA Rule

[10] Alan Dye was also a member of the Subcommittee when the case was originally considered. (RP 1309.)

9332. Fillet, however, affirmatively chose to proceed before the Subcommittee without making any such motions and belatedly raised his muddled objection in this appeal.[11] In addition, Fillet's unsubstantiated assertions of conflict of interest "are an insufficient basis to invalidate" FINRA's proceedings. *See Dist. Bus. Conduct Comm. v. Guevara*, Complaint No. C9A970018, 1999 NASD Discip. LEXIS 1, at *39 n.16 (NASD NAC Jan. 28, 1999), *aff'd*, 54 S.E.C. 655 (2000), *aff'd*, 47 F. App'x 198 (3d Cir. 2000) (table).

Moreover, contrary to Fillet's incorrect assertion, the NAC did not impose identical sanctions on remand. (Br. at 5.) Instead, the NAC carefully accounted for the Commission's determination to vacate the findings that Fillet violated Exchange Act Rule 10(b)-5(b) and reassessed sanctions. (RP 1742.) In arriving at the 12-month suspension on remand, the NAC determined that a suspension around the midpoint of the Guidelines for serious but not egregious misconduct was an appropriate balance between the aggravating factors present and the dismissal of a portion of the findings of violations. (RP 1742.) FINRA rules make clear that the NAC "may affirm, modify, reverse, increase, or reduce any sanction . . . or impose any other fitting sanction." FINRA Rule 9348. "FINRA is not required to state why a lesser sanction would be insufficient in order to justify the sanction it imposed as being remedial." *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *118-19 (July 2, 2013). The NAC

---

[11] To the extent "the lawyer" who Fillet references in his brief is actually counsel for Enforcement, there is no evidence that counsel acted in any way that would warrant recusal. (Br. at 5.) The sole action taken by Enforcement was to file a brief on remand as directed by FINRA's counsel to the NAC. (RP 1657-58, 1716-19.)

acted properly. The Commission should reject Fillet's unsubstantiated assertions of conflict of interest or unfairness.[12]

V. CONCLUSION

Fillet acted deceptively when he placed his own self-interest ahead of the interests of investors in marketing a private placement of securities. In contravention of the antifraud provisions, Fillet ignored his unequivocal duty as a securities professional to represent accurately and completely material information about CAC/Sweet Shoppes and Sloan, the person central to the success of the offering. The NAC accordingly crafted sanctions reflective of these concerns

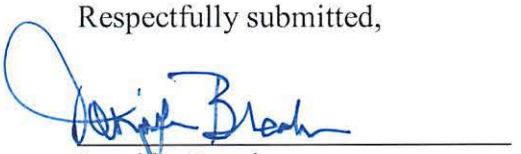
---

[12] Equally unsubstantiated is Fillet's statement he has been harmed by "FINRA's constant use of the Internet to damage Fillet's life through the utilization of a well-executed cyber bullying campaign." (Br. at 5.) It is unclear to what Fillet is referring. FINRA does not engage in cyber bullying, and Fillet has presented no evidence that FINRA engaged in such behavior against him. FINRA, does however, maintain the online BrokerCheck database, which is available through FINRA's website. *See Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 SEC LEXIS 464, at *4 n.2 (Feb. 8, 2016). FINRA established BrokerCheck in 1988 to provide the public with information on the professional background, business practices, and conduct of FINRA members and their associated persons. *See FINRA Regulatory Notice 09-66*, 2009 FINRA LEXIS 196, at *2 (Nov. 2009). BrokerCheck fulfills FINRA's statutory obligation under Section 15A(i) of the Exchange Act to provide registration information to the public. *See* Order Approving a Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure), 75 Fed. Reg. 41254, 41258 & n.65 (July 15, 2010).

FINRA Rule 8312 governs the information FINRA releases to the public through BrokerCheck, including information regarding current and former FINRA members, as well as their current and former associated persons. *See* FINRA Rule 8312(a)(1). Among other things, BrokerCheck provides public access to information about former associated persons, regardless of when they were associated with a FINRA member, if they have been the subject of a regulatory action that has been reported to CRD. *See* FINRA Rule 8312(c). In accordance with FINRA Rule 8312(c), FINRA released to the public information concerning FINRA's regulatory action against Fillet. *See* BrokerCheck by FINRA, search results for Mitchell H. Fillet, http://brokercheck.finra.org/Individual/Summary/207546 (last visited July 18, 2016). Pursuant to Practice Rule 323, FINRA requests that the Commission take official notice of Fillet's BrokerCheck page. *See* 17 C.F.R. §201.323; *see also Manzella*, 2016 SEC LEXIS 464, at *3 n.2 (taking official notice of information in BrokerCheck). FINRA acted properly when it provided the public with access to information about the regulatory action against Fillet. Fillet's attempt to malign FINRA should be rejected.

and commensurate with Fillet's misconduct. The $10,000 fine and 12-month suspension will discourage Fillet from again inducing an investment by means of fraudulent misstatements and omissions and will impress upon others the importance of the accuracy of the information when communicating with investors. The Commission therefore should affirm the NAC's sanctions and dismiss Fillet's application for review.

Respectfully submitted,



Jennifer Brooks
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8083

CERTIFICATE OF SERVICE

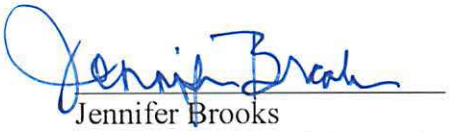
I, Jennifer Brooks, certify that on this 27th day of July 2016, caused a copy of the foregoing Brief of FINRA in Opposition to Application for Review, In the Matter of the Application of Mitchell H. Fillet, Administrative Proceeding File No. 3-15601r to be served by messenger on:

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549-1090

and via FedEx on:

Mitchell H. Fillet
[redacted]
New Haven, Connecticut [redacted]

Different methods of service were used because messenger service could not be provided to Mitchell H. Fillet.



Jennifer Brooks
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8083

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 FINRA's disciplinary process and FINRA'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 and crafting appropriate remedial sanctions, Adjudicators also should consider firm size[1] with a view toward ensuring that the sanctions imposed are not punitive but are sufficiently remedial to achieve deterrence.[2] (Also 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.

   Certain regulatory incidents are not relevant to the determination of sanctions. Arbitration proceedings, whether pending, settled or litigated to conclusion, are not "disciplinary" actions. Similarly, pending investigations or the existence of ongoing regulatory proceedings prior to a final decision are not relevant.

   In certain cases, particularly those involving quality-of-markets issues, these guidelines recommend increasingly severe monetary sanctions for second and subsequent disciplinary actions. This escalation is consistent with the concept that repeated acts of misconduct call for increasingly severe sanctions.

---

1 Factors to consider in connection with assessing firm size are: the firm's financial resources; the nature of the firm's business; the number of individuals associated with the firm; the level of trading activity at the firm; other entities that the firm controls, is controlled by, or is under common control with; and the firm's contractual relationships (such as introducing broker/clearing firm relationships). **This list is included for illustrative purposes and is not exhaustive. Other factors also may be considered in connection with assessing firm size.**

2 Adjudicators may consider firm size in connection with the imposition of sanctions with respect to rule violations involving negligence. With respect to violations involving fraudulent, willful and/or reckless misconduct, Adjudicators should consider whether, given the totality of the circumstances involved, it is appropriate to consider firm size and may determine that, given the egregious nature of the fraudulent activity, firm size will not be considered in connection with sanctions.

Principal Considerations in Determining Sanctions

The following list of factors should be considered in conjunction with the imposition of sanctions with respect to all violations. Individual guidelines may list additional violation-specific factors.

Although many of the general and violation-specific considerations, when they apply in the case at hand, have the potential to be either aggravating or mitigating, some considerations have the potential to be only aggravating or only mitigating. For instance, the presence of certain factors may be aggravating, but their absence does not draw an inference of mitigation.[1] The relevancy and characterization of a factor depends on the facts and circumstances of a case and the type of violation. This list is illustrative, not exhaustive; as appropriate, Adjudicators should consider case-specific factors in addition to those listed here and in the individual guidelines.

1. The respondent's relevant disciplinary history (see General Principle No. 2).
2. Whether an individual or member firm respondent accepted responsibility for and acknowledged the misconduct to his or her employer (in the case of an individual) or a regulator prior to detection and intervention by the firm (in the case of an individual) or a regulator.
3. Whether an individual or member firm respondent voluntarily employed subsequent corrective measures, prior to detection or intervention by the firm (in the case of an individual) or by a regulator, to revise general and/or specific procedures to avoid recurrence of misconduct.
4. Whether the respondent voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct.
5. Whether, at the time of the violation, the respondent member firm had developed reasonable supervisory, operational and/or technical procedures or controls that were properly implemented.
6. Whether, at the time of the violation, the respondent member firm had developed adequate training and educational initiatives.
7. Whether the respondent demonstrated reasonable reliance on competent legal or accounting advice.
8. Whether the respondent engaged in numerous acts and/or a pattern of misconduct.
9. Whether the respondent engaged in the misconduct over an extended period of time.
10. Whether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, deceive or intimidate a customer, regulatory authorities or, in the case of an individual respondent, the member firm with which he or she is/was associated.
11. With respect to other parties, including the investing public, the member firm with which an individual respondent is associated, and/or other market participants, (a) whether the respondent's misconduct resulted directly or indirectly in injury to such other parties, and (b) the nature and extent of the injury.

---

1 *See, e.g., Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006) (explaining that while the existence of a disciplinary history is an aggravating factor when determining the appropriate sanction, its absence is not mitigating).

12. Whether the respondent provided substantial assistance to FINRA in its examination and/or investigation of the underlying misconduct, or whether the respondent attempted to delay FINRA's investigation, to conceal information from FINRA, or to provide inaccurate or misleading testimony or documentary information to FINRA.

13. Whether the respondent's misconduct was the result of an intentional act, recklessness or negligence.

14. Whether the member firm with which an individual respondent is/was associated disciplined the respondent for the same misconduct at issue prior to regulatory detection. Adjudicators may also consider whether another regulator sanctioned a respondent for the same misconduct at issue and whether that sanction provided substantial remediation.

15. Whether the respondent engaged in the misconduct at issue notwithstanding prior warnings from FINRA, another regulator or a supervisor (in the case of an individual respondent) that the conduct violated FINRA rules or applicable securities laws or regulations.

16. Whether the respondent member firm can demonstrate that the misconduct at issue was aberrant or not otherwise reflective of the firm's historical compliance record.

17. Whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain.

18. The number, size and character of the transactions at issue.

19. The level of sophistication of the injured or affected customer.

Misrepresentations or Material Omissions of Fact

FINRA Rules 2010 and 2020[1]

Principal Considerations in Determining Sanctions	Monetary Sanction[2]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	*Negligent Misconduct* Fine of $2,500 to $50,000. *Intentional or Reckless Misconduct* Fine of $10,000 to $100,000.	*Negligent Misconduct* Suspend individual in any or all capacities and/or suspend firm with respect to any or all activities or functions for up to 30 business days. *Intentional or Reckless Misconduct* Suspend individual in any or all capacities and/or suspend firm with respect to any or all activities or functions for a period of 10 business days to two years. In egregious cases, consider barring the individual and/or expelling the firm.

1. This guideline also is appropriate for violations of MSRB Rule G-17.

2. In cases involving misrepresentations and/or omissions as to two or more customers, the Adjudicator may impose a set fine amount per investor rather than in the aggregate. As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

FINRA
Financial Industry Regulatory Authority

HARD COPY

Jennifer Brooks
Associate General Counsel

Direct: (202) 728-8083
Fax: (202) 728-8264

July 27, 2016

VIA MESSENGER

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549-1090

RE: In the Matter of the Application for Review of Mitchell H. Fillet
Administrative Proceeding No. 3-15601r

Dear Mr. Fields:

Enclosed please find the original and three (3) copies of FINRA's Brief in Opposition to Application for Review in the above-captioned matter.

Please contact me at (202) 728-8083 if you have any questions.

Very truly yours,

Jennifer Brooks

Enclosures

cc: Mitchell H. Fillet (via FedEx)